

# Asymmetrical war and the notion of armed conflict – a tentative conceptualization

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## Abstract

*States across the globe are increasingly involved in violent conflicts with non-state groups both within and across borders. This new situation challenges the classic distinction in international humanitarian law between international and non-international armed conflicts. However, the changing face of warfare does not diminish the importance of IHL. The essence of this body of law – to protect civilians and persons hors de combat and to lessen unnecessary harm during armed conflict – remains the same. The applicability of IHL must therefore be determined according to objective criteria and must not be left to the discretion of the warring parties. This article seeks to conceptualize the notion of armed conflict and examines the extent to which the existing body of humanitarian law applies to the new asymmetrical conflicts. It finds that the definition given by the ICTY Appeals Chamber in its Tadić Decision on Jurisdiction, which was taken up by Article 8(2)(f) of the Rome Statute, is a useful starting point for an analysis of the ‘triggering mechanism’ of international humanitarian law in asymmetrical conflicts.*



One of the main purposes of the laws of war has been to tame the ‘dogs of war’ to ensure political control of the use of armed force. This was also the main purpose

behind Clausewitz's often misconstrued claim that war was 'the continuation of politics by other means'.<sup>1</sup> But does this logic also apply in non-international armed conflict or in 'asymmetrical' conflicts<sup>2</sup> between the armed forces of a state and non-state groups, or even terrorists? Are the mechanisms of the 'classic' law of war, and international humanitarian law (IHL) in particular, still suited to the current situation, where states often only go to war against each other through the 'proxy' of non-state groups, or are involved in battles with such groups within and across borders?

When the Chinese president visited his counterpart in the White House during the heyday of the Bush administration, he brought with him some gift-wrapped advice;<sup>3</sup> while Bush was fighting an increasingly ferocious insurgency in Iraq, it was reported that Hu Jintao presented him with a copy of Sun Tzu's *The Art of War*.<sup>4</sup> The point was subtle, but the allusion clear: while Bush had sent a conventional army to Iraq to topple Saddam Hussein, the insurgency was waging another kind of war. Thus Clausewitz was dethroned by Sun Tzu and conventional battle by insurgency tactics – a kind of warfare with which a classical army trained in the spirit of Clausewitz could not cope. Similarly, when Western critics chastised Israel for its conduct in the Lebanon war in 2006, the political scientist Herfried Münkler responded that Israel could not be expected to apply the rules of IHL to a conflict in which the other party violated IHL as a means of combating the superior forces of a regular army.<sup>5</sup> In the Gaza war of January 2009, the legal branch of the Israeli Defense Forces apparently condoned attacks on Hamas policemen because

- 1 Carl von Clausewitz, *On War*, trans. Michael Howard and Peter Paret, Princeton University Press, Princeton, 1976, p. 87; see also Hugh Smith, *On Clausewitz. A Study of Military and Political Ideas*, Palgrave, Basingstoke, 2004, pp. 104–10. Münkler regards the theory of war, but not the control by politics, as indicative for the future – see Herfried Münkler, *Clausewitz' Theorie des Krieges*, Nomos, Baden-Baden, 2003, pp. 25–6.
- 2 On asymmetrical conflicts see Herfried Münkler, 'The wars of the 21st century', *International Review of the Red Cross*, No. 849 (2003), pp. 7–22; Toni Pfanner, 'Asymmetrical warfare from the perspective of humanitarian law and humanitarian action', *International Review of the Red Cross*, No. 857 (2005), pp. 149–74; Robin Geiss, 'Asymmetric conflict structures', *International Review of the Red Cross*, No. 864 (2006), pp. 757–77; Kenneth Watkin, '21st century conflicts and international humanitarian law: status quo or change?', in Michael N. Schmitt and Jelena Pejić (eds.), *International Law and Armed Conflict: Exploring the Faultlines*, Koninklijke Brill BV, Leiden, 2007, pp. 265–96; Geoffrey S. Corn, 'Hamdan, Lebanon, and the regulation of hostilities: the need to recognize a hybrid category of armed conflict', *Vanderbilt Journal of Transnational Law*, Vol. 40 (2) (2007), pp. 295–355; Herfried Münkler, *Der Wandel des Krieges: Von der Symmetrie zur Asymmetrie*, Weilerwist, Velbrück Wissenschaft, 2006; Michael N. Schmitt, '21st century conflict: Can the law survive?', *Melbourne Journal of International Law*, Vol. 8 (2) (2007), pp. 443–76; Michael N. Schmitt, 'Asymmetrical warfare and international humanitarian law', *Air Force Law Review*, Vol. 62 (2008), pp. 1–42; Knut Ipsen, 'Humanitäres Völkerrecht und asymmetrische Konfliktparteien – ein Ausschlussbefund?', in Andreas Fischer-Lescano et al. (eds.), *Frieden in Freiheit: Festschrift für Michael Bothe zum 70. Geburtstag*, Nomos, Baden-Baden, 2008, pp. 445–63.
- 3 Peter Kammerer, 'The art of negotiation', *South China Morning Post*, 21 April 2006, p. 15; Bronwen Maddox, 'Ancient sage opens the way to peace of modern powers', *The Times*, 20 April 2006, p. 40.
- 4 Sun Tzu, *The Art of War*, Oxford University Press, Oxford, 1971.
- 5 At least this is the logical consequence of the argument by Herfried Münkler, 'Asymmetrie und Kriegsvölkerrecht: Die Lehren des Sommerkrieges 2006', *Friedens-Warte Journal of International Peace and Organization*, Vol. 81, No. 2 (2006), pp. 62–5.

Hamas was using the civilian infrastructure for attacks against Israeli civilians.<sup>6</sup> What can we expect from international humanitarian law in such situations? Is it, and should it be, applicable?

Indeed, one of the glaring gaps in international humanitarian law concerns its very foundation – namely the question of the definition of war, or rather ‘armed conflict’ in the more objective sense given to the term by Article 2 common to the four 1949 Geneva Conventions. IHL does not provide a clear definition of armed conflict.<sup>7</sup> This raises questions as to the threshold at which IHL comes into operation.<sup>8</sup> A single definition may not encompass all variants of contemporary armed conflict. On the other hand, a definition appears necessary in order to ensure an effective extension of basic humanitarian guarantees to new types of armed conflict.<sup>9</sup>

## The distinction between international and non-international armed conflicts

Do the conditions triggering the application of IHL differ for international (inter-state) and non-international (internal) armed conflicts? How should the threshold for the application of IHL be determined for new types of armed conflicts – in particular, asymmetrical wars involving non-state entities?

In earlier times, the existence of a ‘war’ in the legal sense was made dependent on an official declaration of war.<sup>10</sup> Since the Second World War, formal declarations of war have been virtually non-existent.<sup>11</sup> Instead, the 1949 Geneva

6 Yotam Feldman and Uri Blau, ‘Consent and advise’, *Haaretz*, 29 January 2009, available at [www.haaretz.com/hasen/spages/1059925.html](http://www.haaretz.com/hasen/spages/1059925.html) (last visited 10 March 2009).

7 For an outline of prevailing legal opinion, see International Committee of the Red Cross (ICRC), *How is the term “armed conflict” defined in international humanitarian law?*; Opinion Paper, March 2008, available at [www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/\\$file/Opinion-paper-armed-conflict.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/$file/Opinion-paper-armed-conflict.pdf) (last visited 7 May 2009). See also the International Law Association Committee on the Use of Force, ‘Initial report on the meaning of armed conflict in international law’, 2008, available at [www.ila-hq.org/en/committees/index.cfm/cid/1022](http://www.ila-hq.org/en/committees/index.cfm/cid/1022) (last visited 28 April 2009); Mary Ellen O’Connell, ‘Defining armed conflict’, *Journal of Conflict and Security Law*, Vol. 13 (2009), pp. 393–400.

8 Hilaire McCoubrey and Nigel D. White, *International Law and Armed Conflict*, Dartmouth Publishing Company Limited, Aldershot, 1992, p. 318: ‘[T]he “grey area” of categorization remains an issue of serious potential concern.’ For earlier assessments of the legal situation, see Dietrich Schindler, ‘The different types of armed conflicts according to the Geneva Conventions and Protocols’, *Recueil des Cours*, Vol. 163 (1979), p. 119.

9 James G. Stewart, ‘Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict’, *International Review of the Red Cross*, Vol. 85, No. 850, June 2003, pp. 313–50; but see Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, p. 32; Jelena Pejić, ‘Status of armed conflicts’, in Elizabeth Wilmshurst and Susan Breau (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2007, p. 85.

10 See Article 1 of Convention III relative to the Opening of Hostilities (Hague Convention III), 18 October 1907.

11 Christopher Greenwood, ‘The concept of war in modern international law’. *International and Comparative Law Quarterly*, Vol. 36 (1987), pp. 283–306; Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, Oxford University Press, Oxford, 2008, para. 203; Elihu Lauterpacht,

Conventions used the concept of ‘armed conflict’ to convey the idea that humanitarian law needed to apply whenever armed forces battled with each other, regardless of official classification.<sup>12</sup> The International Court of Justice has confirmed as much in its *Wall Advisory Opinion*.<sup>13</sup> Apparently, in cases of inter-state war the identification of an armed conflict did not create major problems; instead, the objective nature of the term ‘armed conflict’ guaranteed that lack of official recognition would not impede an application of international humanitarian law as long as at least two contracting states were involved. Pictet’s commentary emphasizes that even one wounded soldier may trigger the application of the Geneva Conventions in international armed conflicts.<sup>14</sup>

The situation was different, even in 1949, for non-international armed conflicts. While Common Article 3 took pains to specify that its application ‘shall not affect the legal status of the Parties to the conflict’, states were loath to recognize the existence of an internal armed conflict on their territory because this might be viewed as an acknowledgement of the government’s inability to prevent a civil war.<sup>15</sup> Thus practice suggests a higher threshold for the application of Common Article 3, in particular the requirement of the willingness and capacity of non-state groups, evidenced by their possession of some level of organization and an identifiable internal structure, to abide by Common Article 3.

In defining its sphere of application, 1977 Protocol II additional to the Geneva Conventions, unlike its sister protocol, further narrowed the scope of non-international armed conflict by stressing the requirements to be met by groups involved in it and by specifying that such a conflict did not include ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature’. This has led some scholars to conclude that a unified concept of armed conflict does not exist, and that, instead, international armed conflict and non-international armed conflict were fundamentally distinct.<sup>16</sup>

Conversely, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) proclaimed, in its very first judgment, that ‘[w]hat is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife’.<sup>17</sup> The most recent comprehensive

“The legal irrelevance of the “state of war””, *Proceedings of the American Society of International Law*, Vol. 62 (1968), p. 58.

12 See Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1952, p. 32; see also Greenwood, above note 11, p. 283.

13 International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136, para. 95.

14 Pictet, above note 12, p. 32. However, there are attempts to apply the intensity criterion restrictively and not to regard small-scale military confrontations between states as a triggering event for international armed conflicts. See O’Connell, above note 7, pp. 393–400.

15 *Ibid.*, p. 395.

16 Cf. Moir, above note 9, pp. 33–4. For an argument in favour of the application of the same rules, see Fleck, above note 11, para. 1201, p. 611 and *passim*.

17 ICTY, *Prosecutor v. Tadić*, Case No. IT-91-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber) (hereinafter Interlocutory Appeal on Jurisdiction), 2 October

effort to codify violations of international humanitarian law of a criminal nature, the Rome Statute of the International Criminal Court (ICC), follows this approach, at least partially, while maintaining the distinction in principle.<sup>18</sup> Article 8(2)(f) of the ICC Statute extends war crimes provisions to non-international armed conflicts, namely to ‘armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups’.

If the triggering event for the applicability of *jus in bello* – that is, the existence of an international or non-international armed conflict – is not clearly defined, states can more easily claim that international humanitarian law is inapplicable, especially in conflicts involving non-state groups. Such a situation would be reminiscent of the obsolete notion of recognition of belligerency, which made the applicability of IHL dependent on recognition of rebels by the government.<sup>19</sup> The necessity of such recognition was contrary to the humanitarian purpose of contemporary IHL, which is therefore in need of a coherent concept of armed conflict.

## Transnational armed conflict

In its *Hamdan* decision, the US Supreme Court ruled that the minimum rules of Common Article 3 of the Geneva Conventions apply to a conflict with a transnational enemy of a non-state character.<sup>20</sup> In its *Tadić* jurisdiction decision, the ICTY Appeals Chamber proposed a comprehensive definition of armed conflict in both international and non-international armed conflicts, finding that ‘an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State’.<sup>21</sup> This test was subsequently endorsed by the International Committee of the Red Cross<sup>22</sup> and the Rome Statute of the International Criminal Court.<sup>23</sup> While assessing the legal status of violence on a case-by-case basis, the scale and intensity of the conflict as well as the identity and level of organization of the parties should be taken into consideration. These criteria

1995, para. 119. See also Steven R. Ratner, ‘The schizophrenias of international criminal law’, *Texas International Law Journal*, Vol. 33 (1998), pp. 237, 239, 240, 249.

18 See Article 8(2)(c)–(f) on war crimes in non-international armed conflicts.

19 On the history and decline of the recognition of belligerency, see Moir, above note 9, pp. 4–21.

20 US Supreme Court, *Hamdan v. Rumsfeld*, 548 U.S. 557, 633, 126 S.Ct. 2749, 2797 (2006). Cf. the implicit criticism in Michael N. Schmitt, Charles H. B. Garraway and Yoram Dinstein, *The Manual on the Law of Non-International Armed Conflict: With Commentary*, International Institute of Humanitarian Law, San Remo, 2006, p. 2, with the approval of Fleck, above note 11, p. 607, para. 1201(3)(b); Marco Sassòli, *Transnational Armed Groups and International Humanitarian Law*, Harvard University Program on Humanitarian Policy and Conflict Research, Occasional Paper Series, Winter 2006, No. 6, p. 8.

21 ICTY, *Prosecutor v. Tadić*, Interlocutory Appeal on Jurisdiction, above note 17, para. 70.

22 ICRC, above note 7, p. 5.

23 See Article 8(2)(f) of the Rome Statute of the International Criminal Court, 17 July 1998 (entered into force 1 July 2002).

should make it possible to ‘distinguish an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law’.<sup>24</sup> Though the definition makes it clear that armed groups may be parties to conflict, it does not specify the characteristics of such armed groups. It establishes situations that are to be characterized as armed conflict rather than as a merely internal riot without military connotations.

In this article we seek to conceptualize the notion of armed conflict, focusing on the question as to how far the existing body of humanitarian law applies to the new asymmetrical wars, and examine whether and how this conceptualization can serve to accommodate such conflicts within that body of law. The first section outlines the present regulation of ‘armed conflict’ in international humanitarian law, from Common Article 2 and Additional Protocol I in international armed conflict to Common Article 3 and Additional Protocol II relating to non-international armed conflicts. In the second section, we consider contemporary ‘asymmetrical’ conflicts and the applicability of international humanitarian law to them. We show that the traditional dichotomy between international and non-international (internal) armed conflict does not quite match the complexity of modern-day constellations, including, in particular, situations in which non-state groups operate transnationally or across the borders of occupied territories. Nevertheless, we show that IHL can deal with these cases convincingly. The purpose of this article is to clarify the scope of IHL and to defend its applicability to asymmetrical conflicts such as those in Gaza and in Afghanistan that involve not only a disparity of military capabilities<sup>25</sup> but also both state and non-state parties. We conclude that the scope of application of IHL would not be overstretched thereby. We thus reject the claim of the demise of IHL in the face of asymmetrical warfare.

## The concept of armed conflict in international humanitarian law

### The concept of international armed conflict

Common Article 2 of the Geneva Conventions defines the notion of inter-state armed conflict that extends to all cases of ‘declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them’. According to the ICRC Commentary on the Geneva Conventions,

Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of

24 ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgment (Trial Chamber II), 7 May 1997, para. 562.

25 For an analysis of such asymmetrical conflicts, see Geiss, above note 2, pp. 757–77; Münkler, ‘Wars of the 21st century’, above note 2, p. 7; Pfanner, above note 2, pp. 149–174.

Article 2 ... It makes no difference how long the conflict lasts, or how much slaughter takes place, or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4. Even if there has been no fighting, the fact that persons covered by the Convention are detained is sufficient for its application.<sup>26</sup>

Opinions on whether the present definition should be maintained diverge. Some authors argue that ‘in practice, it would seem that the absence of a precise definition of “international armed conflict” has not proven harmful, but has favoured a very flexible and liberal interpretation of the notion, and thereby ensured a wide application of humanitarian law’.<sup>27</sup> In the majority of cases the existence of an international armed conflict within the meaning of IHL can hardly be denied. Moreover, the threshold for violence to qualify as armed conflict is relatively low; even short-lived cross-border armed clashes may trigger the existence of an international armed conflict. However, recent state practice suggests that mere incidents, in particular an isolated confrontation of little impact between members of different armed forces, do not qualify as international armed conflict.<sup>28</sup>

Another relevant issue to be raised in this context is whether and from which level onwards foreign intervention may internationalize an internal armed conflict.<sup>29</sup> In general, an armed conflict may be internationalized when military support is rendered to armed groups in their fight against an effective government.<sup>30</sup> Military support offered to the government in question does not trigger the beginning of an international armed conflict as long as the government maintains control of the situation. Under certain circumstances, a war fought between proxies may also be seen as an international armed conflict.

26 Pictet, above note 12, p. 23.

27 Nils Melzer, *Targeted Killings in International Law*, Oxford University Press, Oxford, 2008, p. 252.

28 O’Connell, above note 7, p. 397.

29 Stewart, above note 9; Dietrich Schindler, ‘International humanitarian law and internationalized internal armed conflicts’, *International Review of the Red Cross*, No. 230 (1982), p. 255; Hans-Peter Gasser, ‘Internationalized non-international armed conflicts: case studies of Afghanistan, Kampuchea, and Lebanon’, *American University Law Review*, Vol. 33 (1983), p. 157; Christine Byron, ‘Armed conflicts: international or non-international?’, *Journal of Conflict and Security Law*, Vol. 6, No. 1 (2001), pp. 63–90.

30 Schmitt, Garraway and Dinstein, above note 20, p. 2. On the level of military support required to attribute an armed group’s conduct to a state (thus internationalizing the conflict), see ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986, para. 115 (where the state was required to have ‘effective control’ over the group – financing, organizing, training, supplying and equipping of the group, the selection of targets and planning of its operations were insufficient to constitute this). Cf. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, paras. 120, 145, where it was held that the standard was ‘overall control’ by the state, which does not require the issuance of specific instructions or orders. See, however, ICJ, *Application of the Genocide Convention (Bosnia-Herzegovina v. Yugoslavia)*, Judgment, ICJ Reports 2007, where the ICJ separated the issues of attributing internationally wrongful acts to a state and classifying a conflict. It held that for the former, the armed group must be in a relationship of ‘complete dependence’ on the state (para. 392), or else that the state must have had ‘effective control’ over the group and actually exercised this by giving instructions in respect of specific operations (para. 404). However, it held that for the separate issue of classifying a conflict, *Tadić’s* standard of ‘overall control’ may well be appropriate (para. 404).

According to Common Article 2, an international armed conflict has an inter-state character. Therefore a conflict between a state and a non-state group is only internationalized when the military action of such groups is clearly attributable to the respective (host or other) state. The Israeli Supreme Court, however, has maintained that

In today's reality, a terrorist organization is likely to have considerable military capabilities. At times they have military capabilities that exceed those of states. Confrontation with those dangers cannot be restricted within the state and its penal law. Confronting the dangers of terrorism constitutes a part of the international law dealing with armed conflicts of international character.<sup>31</sup>

However, the 'privileges' accorded to states in international conflicts are not due to the transboundary character of these conflicts, but to the conformity in principle of the state armed forces with internal laws. Terrorist activity, on the other hand, is inherently illegal under both international and domestic law. Of course, this debate also hinges on a generally acceptable definition of terrorism, something that has so far remained elusive.

## The concept of non-international armed conflict

Common Article 3 of the Geneva Conventions does not clarify the notion of 'an armed conflict not of an international character'. Some authors argue that 'no definition would be capable of capturing the factual situations that reality throws up and that a definition would thus risk undermining the protective ambit of humanitarian law'.<sup>32</sup> First of all, it is not clear what level of violence must be reached and how protracted the hostilities must be. On the one hand, internal situations with a very high level of violence are often regarded, mainly for political reasons, as banditry not reaching the threshold of armed conflict.<sup>33</sup> On the other hand, there are situations where a much lower level of violence that is not protracted is seen as armed conflict for the purposes of humanitarian law.<sup>34</sup> Moreover, it seems problematic to assess the ability of armed groups to implement international humanitarian law and whether this should be seen as a criterion for identifying these groups as parties to conflict at all.

While stretching Common Article 3 to include anti-terrorist measures may serve humanitarian purposes in some situations, its application to ordinary (even wide-spread) human rights violations would not be a desirable result,

31 Supreme Court of Israel, *Public Committee Against Torture v. Israel*, Judgment, HCJ 769/02, 13 Dec. 2006, para. 21.

32 Pejić, above note 9, p. 85.

33 See William Abresch, 'A human rights law of internal armed conflict: The European Court of Human Rights in Chechnya', *European Journal of International Law*, Vol. 16, 2005, p. 754, with further references.

34 Inter-American Commission on Human Rights, *Juan Carlos Abella v. Argentina*, Case 11.137, IACHR Report No. 55/97, 30 October 1997; see also Liesbeth Zegveld, 'The Inter-American Commission on Human Rights and international humanitarian law: A comment on the Tablada case', *International Review of the Red Cross*, No. 324, September 1998, pp. 505–511.



because human rights – which remain applicable – generally provide more protection and are better tailored to situations that do not amount to an armed conflict.

As a rule, states are hesitant to admit the existence of an armed conflict within their borders. The case of Chechnya demonstrates that states will deny that there is an armed conflict even in cases where its existence appears obvious.<sup>35</sup> It follows that an objective criterion is necessary to determine the applicability of IHL, thus providing a clear basis for assessing the norms applicable to the conflict in question, both for the participants involved and the international community in general.

### The concept of armed conflict, the 1977 Additional Protocols and the 1998 Rome Statute

The two 1977 Additional Protocols contain updates on the substantive law and the first comprehensive regulation of the conduct of hostilities in international armed conflict. While Protocol I extended the range of international armed conflicts to which it applies by including ‘armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist *régimes* in the exercise of their right to self-determination’,<sup>36</sup> Protocol II on non-international armed conflicts introduced stringent requirements for the applicability of its rules and a minimum threshold below which it should not apply. It also included wording in Article 1 clarifying the continued validity of Article 3 common to the Geneva Conventions.<sup>37</sup>

Recent developments have, however, somewhat reduced the significance of the triggering provisions of the 1977 Additional Protocols; while most of the countries involved in recent conflicts, such as India, Iraq, Israel and the United States, have not become party to Protocol I precisely because they were opposed to the inclusion of non-state entities and the loosening of requirements for armed forces,<sup>38</sup> Protocol II has seldom been applicable to recent internal conflicts because insurgent groups rarely, if ever, meet the requirements of its Article 1.<sup>39</sup> For a conflict to rise above the minimum threshold laid down in Article 1(2) of Protocol

35 Cf. Bakhtiyar Tuzmukhamedov, ‘The implementation of international humanitarian law in the Russian Federation’, *International Review of the Red Cross*, Vol. 85, No. 850 (2003), p. 395.

36 Protocol I, Article 1(4).

37 For details of the drafting history see Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff, Geneva/The Hague, 1987, para. 4457.

38 On the US position at the time see ‘Letter of Transmittal from President Ronald Reagan, Protocol II Additional to the 1949 Geneva Conventions and Relating to the Protection of Victims of Noninternational Armed Conflicts’, S. Treaty Doc. No. 2, 100th Cong., 1st Sess., at III (1987), reprinted in *American Journal of International Law*, Vol. 81 (1987), p. 910. The Senate has since failed to act on this submission. See also George Aldrich, ‘Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions’, *American Journal of International Law*, Vol. 85 (1991), p. 1; Abraham D. Sofaer, ‘The Rationale for the United States Decision’, *American Journal of International Law*, Vol. 82 (1988), p. 784.

39 Similarly Fleck, above note 11, p. 610, para. 1201.

II, such armed groups need to have a responsible command, exercise sufficient control over territory to enable them to carry out sustained and concerted military operations and possess the ability to implement the Protocol. Some of these requirements are also part of the definition of non-international armed conflict as contained in Common Article 3, but not all – in particular, the control over territory requirement<sup>40</sup> would disregard humanitarian needs in conflicts in which insurgents vanish ‘like a fish in the water’ within the local population or in which control regularly switches from one day to the next. In these cases, as in ‘internal disturbances and tensions’, the protection laid down in Common Article 3 remains necessary. Moreover, states are reluctant to recognize that any use of armed force on their territory might go beyond mere ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature’ that Protocol II excluded from its scope of application.<sup>41</sup> While the provisions of Protocol I on the conduct of hostilities have nevertheless entered customary law to an extent well beyond the treaty’s scope of application,<sup>42</sup> Common Article 3 of the Geneva Conventions has remained the central focus of the law of non-international armed conflict.<sup>43</sup> In its own words, Protocol II ‘develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application’.<sup>44</sup>

From the beginning, the amendment to the ‘armed conflict’ provision in Article 1 of Protocol I was a departure from the underlying principle of the

40 International Criminal Court (ICC), *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Pre-Trial Chamber I), 29 January 2007, para. 233 (no connection to control of territory in Art. 8(2)(f) of the Rome Statute); ICC, *Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo (Pre-Trial Chamber II), 15 June 2009, para. 236; cf. ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecutor’s Application for a Warrant of Arrest (Pre-Trial Chamber I), 4 March 2009, para. 60 (control over territory as ‘key factor’ for ability to carry out military operations’); ICTY, *Prosecutor v. Milan Milutinović*, Case No. IT-05-87-T, Judgment (Trial Chamber), 26 February 2009, para. 791; ICTY, *Prosecutor v. Ramush Haradinaj*, Case No. IT-04-84-T, Judgment (Trial Chamber I), 3 Apr. 2008, paras. 37–60, with an extensive review of ICTY case-law, applying an intensity test regardless of territorial control; similarly, International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Trial Chamber I), 2 September 1998, paras. 619–620 (intensity and organization required). See, in particular, ICTY, *Prosecutor v. Tadić*, Interlocutory Appeal on Jurisdiction, above note 17, para. 70.

41 Fleck, above note 11, p. 613, para. 1202, adding that the distinction between combatants and civilians is particularly difficult in internal conflicts; but see Article 13(3) of Protocol II (applying the same rule as Article 51, Protocol I to civilians taking part in hostilities).

42 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1, ICRC/Cambridge University Press, Cambridge, 2005. The rules of Protocol I and II are listed under the headings of international and non-international conflicts, respectively, with not much difference regarding their contents. See also p. xxix for the assertion that many rules of IHL apply in both types of conflicts. For a practical example, see Supreme Court of Israel, *Public Committee Against Torture v. Israel*, above note 31, para. 11, applying Article 51 of Protocol I to targeted killings of alleged terrorists regardless of the classification of the conflict. See also Fleck, above note 11, p. 608, paras. 1201(3)(c), 1204 (reducing the difference between IHL of international and non-international armed conflicts to the status of the fighters).

43 Sandoz, Swinarski and Zimmermann (eds.), above note 37, para. 4461.

44 Protocol II, Article 1(1).

definition of 'armed conflict' in the Geneva Conventions, namely to distinguish between *jus ad bellum* and *jus in bello*. The rationale for introducing an 'objective' determination of the existence of an armed conflict lies in the purely factual nature of the analysis that eschews more ideological or politically sensitive questions and is intended to guarantee the equal application of IHL to all parties to the conflict. Alas, Article 1(4) of Protocol I appears to have brought issues of *jus ad bellum* back into the scope of applicability of IHL. In practice, the provision has provided arguments against ratifying Protocol I, thus hampering its universality. No party to any conflict will accept that the other party is 'fighting against colonial domination and alien occupation and against racist régimes in the exercise of [the] right to self-determination', as little as any party will admit to waging a war of aggression or to violating the prohibition on the use of force.<sup>45</sup> The best one can say is that the provision has remained mute because – with the possible exception of a declaration by the Palestine Liberation Organization (PLO) for Palestine<sup>46</sup> – declarations of acceptance by peoples under Article 96(3) of Protocol I have not been forthcoming, and have so far never been accepted by a state party to a conflict.<sup>47</sup>

The most disappointing aspect of the two Protocols, however, relates to the absence of clarifications as to the minimum threshold for the existence of an international armed conflict and, with regard to non-international armed conflicts, the complication due to the split applicability of the provisions of Protocol II and Common Article 3. The conclusion to be drawn from this shortcoming of the Additional Protocols is that the Geneva Conventions' definition of armed conflict remains in place,<sup>48</sup> but that for Protocol II to apply, internal armed conflicts need to fulfil the additional requirements of Article 1 thereof.

The Rome Statute of the ICC exacerbates the problem by introducing additional categories and maintaining a distinction between Common Article 3

45 One of the current authors has concluded that this argument counsels against efforts to bring the crime of aggression under the jurisdiction of the ICC. See Andreas L. Paulus, 'Peace through justice? The future of the crime of aggression in a time of crisis', *Wayne Law Review*, Vol. 50, No. 1 (2004), p. 1.

46 Letter of 21 June 1989 from the Permanent Observer of Palestine to the United Nations Office at Geneva, stating that 'the Executive Committee of the Palestine Liberation Organization, entrusted with the functions of the Government of the State of Palestine by decision of the Palestine National Council, decided, on 4 May 1989, to adhere to the Four Geneva Conventions of 12 August 1949 and the two Protocols additional thereto', available at [www.icrc.org/ihl.nsf/Pays?ReadForm&c=PS](http://www.icrc.org/ihl.nsf/Pays?ReadForm&c=PS) (last visited 10 March 2009). This declaration was, however, probably an attempt at an ordinary ratification rather than a declaration under Article 96(3).

47 Similarly, Christopher Greenwood, 'Customary law status of the 1977 Geneva Protocols', in Astrid J. M. Delissen and Gerard J. Tanja (eds.), *Humanitarian Law of Armed Conflict: Challenges Ahead – Essays in Honour of Frits Kalshoven*, Martinus Nijhoff, Dordrecht, 1991, p. 112; Christopher Greenwood, 'Scope of Application of Humanitarian Law', in Fleck (ed.), above note 11, para. 202, n. 4; but see Georges Abi-Saab, 'The 1977 Additional Protocols and general international law: some preliminary reflections', *ibid.*, p. 120; Georges Abi-Saab, 'Wars of national liberation in the Geneva Conventions and Protocols', *Recueil des Cours*, Vol. 165 (IV) (1979), pp. 371–2, referring to the principle of self-determination. For an example of an attempt to invoke Article 96(3), see National Democratic Front of the Philippines, Declaration of Undertaking to Apply the Geneva Conventions of 1949 and Protocol I of 1977, available at [www.hartford-hwp.com/archives/54a/036.html](http://www.hartford-hwp.com/archives/54a/036.html) (last visited 10 March 2009).

48 See Protocol II, Article 1(1), and Sandoz, Swinarski and Zimmermann, above note 37, para. 4359, 4453 and *passim*.

and other serious violations of IHL in armed conflicts not of an international character. In its definition of war crimes, Article 8(2)(c) of the Rome Statute criminalizes the violation of Common Article 3. However, in Article 8(2)(d) the minimum threshold of Protocol II is added to the Statute's requirements for the existence of an armed conflict.<sup>49</sup> It thus seems to confirm a development according to which the minimum threshold of Protocol II is of general applicability,<sup>50</sup> whereas the additional elements of its Article 1 cannot be transferred to the interpretation of Common Article 3.<sup>51</sup> For other serious violations of IHL, Article 8(2)(f) takes up the requirements of the *Tadić* definition, namely the existence of an 'armed conflict that takes place in the territory of a state when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups'.<sup>52</sup> It thus somewhat lowers the threshold for the existence of an armed conflict as compared with Article 1(1) of Protocol II.

Some criticism has been voiced against this definition, partly because of its apparent limitation of the scope of non-international armed conflict<sup>53</sup> and partly because the reference to the length of the conflict would exclude isolated warlike acts – hence the definition would, it is claimed, render early identification of an armed conflict impossible and thus endanger the protection of the victims.<sup>54</sup> However, addressing the first concern would lead to the inclusion of additional war crimes in the law of non-international armed conflict, a proposal that, as the Rome Statute shows, does not yet enjoy the support needed from states to become customary law. The second concern can be accommodated by a contextual interpretation of the 'protracted' character of an armed conflict that also takes the intensity of a conflict into account. By itself, the word 'protracted' refers only to length, not intensity,<sup>55</sup> but in the relevant paragraph of its *Tadić* jurisdiction decision, the ICTY also speaks of the 'intensity requirements applicable to both international and internal armed conflicts'<sup>56</sup> – the *Tadić* 'protracted armed violence' criterion has been interpreted in the subsequent ICTY decisions as referring to the intensity of the conflict rather than to its duration only.<sup>57</sup> The International Criminal Tribunal for Rwanda (ICTR) largely shared the definition of armed conflict given in the *Tadić*

49 In Article 8(2)(d), the inclusion of an 'or' instead of an 'and' seems to have been inadvertent; see Andreas Zimmermann 'Article 8: War Crimes' in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Beck, Munich, 2008, para. 299.

50 In line with Fleck, above note 11, p. 616, para. 1205.

51 Zimmermann, above note 49, para. 300. See also Fleck, above note 11, p. 610, para. 1201.

52 Cf. ICTY, *Prosecutor v. Tadić*, Interlocutory Appeal on Jurisdiction, above note 17, para. 70.

53 See in particular Fleck, above note 11, p. 611, para. 1201 (5)(c); see also Claus Kress, 'War crimes committed in non-international armed conflict and the emerging system of international criminal justice', *Israel Yearbook on Human Rights*, Vol. 30 (2000), pp. 117–20.

54 Jean-François Quéguiner, 'Dix ans après la création du Tribunal pénal international pour l'ex-Yougoslavie: évaluation de l'apport de sa jurisprudence au droit international humanitaire', *International Review of the Red Cross*, Vol. 85, No. 850, June 2003, pp. 278–81; Sassòli, above note 20, pp. 6–7.

55 Catherine Soanes and Angus Stevenson (eds.), *Oxford Dictionary of English*, Oxford University Press, Oxford, 2005, p. 1416, according to whom 'protracted' means 'lasting for a long time or longer than expected or usual'.

56 ICTY, *Prosecutor v. Tadić*, Interlocutory Appeal on Jurisdiction, above note 17, para. 70.

57 ICTY, *Prosecutor v. Ramush Haradinaj*, above note 40, para. 49.

case: in *Akayesu*, its Appeals Chamber emphasized that there should be a test evaluating the intensity of the violence and the organization of the parties involved. Moreover, it stressed that the intensity criterion did not depend on the assessment of the conflicting parties and should be objective in character.<sup>58</sup> While the criterion of intensity may give a broader scope to IHL than mere temporal ‘protractedness’, it remains doubtful, however, whether it conforms to the *Tadić* decision.

While the inclusion of an additional element such as ‘protracted’ may warrant some criticism, the provision should rather be lauded for contributing to the definition of (non-international) armed conflicts.<sup>59</sup> By applying this definition only for the application of customary rules beyond Common Article 3, and thus preserving the latter’s character as a minimum rule for all conflicts,<sup>60</sup> the Rome Statute contributes to extending the customary international law of non-international armed conflict beyond the undue restrictions of Protocol II’s Article 1.<sup>61</sup> An understanding of ‘protracted’ in that article as being less than ‘sustained’, because it allows for temporary periods of calm,<sup>62</sup> further confirms that the ICTY definition taken up by the Rome Statute is not unnecessarily restrictive.

The ICRC made several attempts to derive a list of customary rules from the Additional Protocols that would be applicable to non-international armed conflicts.<sup>63</sup> The whole issue of the scope of application of IHL seems to be so controversial that the ICRC customary law study<sup>64</sup> presupposes the applicability of IHL in international and non-international armed conflict, but does not define the terms. However, the existence of minimum rules such as those in Common Article 3 and also Article 75 of Protocol I, which contains fundamental guarantees and lists certain acts ‘that are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents’, does not seem to be in doubt, at least in principle.<sup>65</sup> By maintaining the equal application of the most

58 ICTR, *Prosecutor v. Akayesu*, above note 40, para. 603: ‘It should be stressed that the ascertainment of the intensity of a non-international conflict does not depend on the subjective judgment of the parties to the conflict. It should be recalled that the four Geneva Conventions, as well as the two Protocols, were adopted primarily to protect the victims, as well as potential victims, of armed conflicts. If the application of international humanitarian law depended solely on the discretionary judgment of the parties to the conflict, in most cases there would be a tendency for the conflict to be minimized by the parties thereto. Thus, on the basis of objective criteria, both Common Article 3 and Additional Protocol II will apply once it has been established there exists an internal armed conflict which fulfils their respective pre-determined criteria’.

59 Cf. Zimmermann, above note 49, paras. 347–348.

60 As in the ICTY precedents; see Kress, above note 53, p. 118. However, we do not agree that this definition should be read into Article 8(2)(c) as well. Arguments from the drafting history appear unconvincing, owing to the different wording; see Article 32 entitled ‘Supplementary means of interpretation’ of the Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980).

61 Similarly, Kress, above note 53, p. 121.

62 Zimmermann, above note 49, para. 348.

63 See in particular Henckaerts and Doswald-Beck, above note 42. See also René Kosirnik, ‘The 1977 Protocols: A landmark in the development of international humanitarian law’, *International Review of the Red Cross*, No. 320 (1997), pp. 483–505; Greenwood, above note 47, pp. 93–144.

64 Henckaerts and Doswald-Beck, above note 42.

65 US Supreme Court, *Hamdan v. Rumsfeld*, 548 U.S. 557, 633, 126 S.Ct. 2749, 2797 (2006) (Stevens, J., plurality opinion); ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v.*

important rules for both kinds of conflicts, the ICRC study on custom, in line with the Rome Statute of the ICC, seems to submit that the main differences between international and non-international armed conflict relate to the status of the fighters, but not to the substance of the applicable rules of IHL.<sup>66</sup> In any event, when there is an uncertainty as to whether the armed conflict is internal or international in character, as was the case in the conflicts in the former Yugoslavia,<sup>67</sup> the ‘hard core’ of humanitarian law provisions will be applicable.<sup>68</sup>

## Asymmetrical conflicts and the concept of armed conflict

The so-called ‘global war on terror’<sup>69</sup> as well as the conflicts between Israel and non-state groups in the occupied territories and in Lebanon ( Hamas and Hezbollah), and the conflict between US-led coalitions and insurgent groups in Iraq and Afghanistan (Al Qaeda and the Taliban), have cast new light on the problem of the applicability of international humanitarian law.

The notion of asymmetrical conflict cannot be restricted to armed conflicts between states and non-state entities, for such a conflict may involve states in an international armed conflict within the meaning of IHL. However, most problematic legal questions do arise in armed conflicts between states and various non-state entities. Asymmetry becomes a problem for IHL when it does not merely refer to a factual difference of military capacity – which may exist in any armed conflict<sup>70</sup> – but when both parties to an armed conflict are unequal and differently

*Uganda*), Separate Opinion of Judge Simma, ICJ Reports 2005, paras. 26–28; Council of Europe, Venice Commission of the European Commission for Democracy through Law, Opinion No. 245/2003, at its 57th Plenary Session, Venice, 12–13 December 2003, Doc. No. CDL-AD (2003) 18, para. 38; UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford University Press, Oxford, 2004, para. 9.2 with further references; but see also the scepticism regarding Article 75 of Protocol I in US Supreme Court, *Hamdan v. Rumsfeld*, above note 20, p. 2809 (Kennedy, J. concurring; arguing that this was for the executive branch to decide). See also the 1990 Turku Declaration of Minimum Humanitarian Standards, in ‘Report of the Secretary-General prepared pursuant to Commission resolution 1995/29’, E/CN.4/1996/80 of 28 November 1995, Annex, to which only Mexico objected (p. 3); cf. Asbjørn Eide, Allan Rosas and Theodor Meron, ‘Combating lawlessness in gray zone conflicts through minimum humanitarian standards’, *American Journal of International Law*, Vol. 89 (1995), pp. 215–18.

66 See Fleck, above note 11, para. 1204, presenting the conclusion as a ‘trend’.

67 Theodor Meron, ‘The humanization of humanitarian law’, *American Journal of International Law*, Vol. 94 (2000), p. 261.

68 See Fleck, above note 11, at 611, para. 1201, n. 6.

69 ‘Global war on terror’ is the label attached by the Bush administration to the struggle against al Qaeda and other terrorist groups. See John B. Bellinger, ‘Prisoners in war: contemporary challenges to the Geneva Conventions’, lecture at the University of Oxford, 10 December 2007, available at [www.state.gov/s/l/rls/96687.htm](http://www.state.gov/s/l/rls/96687.htm) (last visited 10 March 2009). Recently the British Foreign Secretary distanced himself from the term – see David Miliband, ‘“War on terror” was wrong’, *Guardian*, 15 January 2009, available at [www.guardian.co.uk/commentisfree/2009/jan/15/david-miliband-war-terror](http://www.guardian.co.uk/commentisfree/2009/jan/15/david-miliband-war-terror) (last visited 25 May 2009). The Obama administration appears to use the term only sparingly, if at all – see Howard LaFranchi and Gordon Lubold, ‘Obama redefines war on terror’, *Christian Science Monitor*, 29 January 2009, available at [features.csmonitor.com/politics/2009/01/29/obama-redefines-war-on-terror/](http://features.csmonitor.com/politics/2009/01/29/obama-redefines-war-on-terror/) (last visited 25 May 2009).

70 See Pfanner, above note 2, pp. 149–74.

structured in a legal sense, in other words, when a state fights a non-state entity that does not fulfil the criteria of Article 1 of Protocol II, but instead consists of armed bands without any hierarchical command structure that ignore both domestic law and IHL altogether. In such a case one party to the conflict is fighting a conventional war and has a regular army at its disposal but is also setting the legal rules, whereas the other party, according to domestic law, is bound by the rules established by the state but recognizes neither those rules nor in most cases IHL. While the members of these groups are criminals according to domestic law, the main point is whether the minimum rules of IHL nevertheless apply to them. Some observers have even questioned the very existence of international legal rules in these cases, pointing to the lack of reciprocity between regular armed forces and insurgent groups that neither conduct their operations in accordance with international humanitarian law nor claim to do so.<sup>71</sup>

We clearly think otherwise. Reciprocity, especially in terms of the obligations involved,<sup>72</sup> has always been an important part of international humanitarian law.<sup>73</sup> However, the application of IHL is not predicated on reciprocity. On the contrary, the rules on minimum treatment as contained in Common Article 3 and Article 75 of Protocol I are applicable regardless of reciprocity. While the provisions of the Third Geneva Convention defining the personal scope of the Convention require membership of armed forces, or at least of militias fulfilling a similar set of criteria,<sup>74</sup> Common Article 3 is unconditional and applicable to all parties alike.<sup>75</sup> In the words of the Pictet *Commentary*: ‘What Government would dare to claim before the world, in a case of civil disturbances ... that, Article 3 not being applicable, it was entitled to leave the wounded uncared for, to torture and mutilate prisoners and take hostages?’<sup>76</sup> Alas, this appeal to the civilized nature of governments seems to have been forgotten after the fateful day of 11 September 2001.<sup>77</sup> In the words of the now infamous Bush statement of 7 February 2002 on the

71 See the description in Münkler, ‘The wars of the 21st century’, above note 2, p. 7; Schmitt, above note 2.

72 For the importance of such expectations of reciprocity in international law, see Fleck, above note 11, p. 607, para. 1201(3)(b); Bruno Simma, ‘Reciprocity’, in Rüdiger Wolfrum (ed.) *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2008, para. 8.

73 Jean de Preux, ‘The Geneva Conventions and reciprocity’, *International Review of the Red Cross*, No. 244 (1985), pp. 25–29.

74 Third Geneva Convention, Article 4(A)(2).

75 A clause requiring reciprocity was explicitly dropped in the course of the negotiations – see Pictet, above note 12, p. 37.

76 *Ibid.*, p. 36.

77 See Michael A. Fletcher, ‘Bush defends CIA’s clandestine prisons’, *Washington Post*, 8 November 2005, p. A15, a statement that has recently been contradicted by Susan Crawford, the head of the military tribunals at Guantánamo Bay – see Bob Woodward, ‘Detainee tortured, says US official’, *Washington Post*, 14 January 2009, p. A1. On the infamous ‘Torture memos’ justifying the use of ‘coercive methods’ on alleged terrorists, see Karen J. Greenberg and Joshua L. Dratel (eds.), *The Torture Papers: The Road to Abu Ghraib*, Cambridge University Press, Cambridge, 2005. For a collection of some unpublished memos, see Office of Legal Counsel Memoranda at [www.usdoj.gov/opa/documents/olc-memos.htm](http://www.usdoj.gov/opa/documents/olc-memos.htm) (last visited 10 March 2009). For the repudiation of these and other memos in the late days of the Bush administration, see Office of Legal Counsel, ‘Memorandum for the Files’, 15 January 2009, p. 3, available at [www.usdoj.gov/opa/documents/memostatusolcopinions01152009.pdf](http://www.usdoj.gov/opa/documents/memostatusolcopinions01152009.pdf) (last visited 10 March 2009). For the Executive Order by President Barack Obama prohibiting the use of torture generally, see

non-applicability of IHL to the Taliban fighters and Al Qaeda terrorists in Guantánamo and elsewhere: ‘As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.’<sup>78</sup> We have it all here: non-applicability of ‘humane treatment’ in law, but only ‘as a matter of policy’; consistency not with ‘Geneva’, but only with its ‘principles’; and, finally, only ‘to the extent appropriate and consistent with military necessity’.

With the Orders of the new President, Barack Obama, to dissolve Guantánamo and to end US practices of torture, which he signed two days after his inauguration, the United States has repudiated this particular Bush legacy.<sup>79</sup> However, a recent filing to the US District Court for the District of Columbia suggests that the Obama administration maintains that the conflict with the Al Qaeda terrorist organization is of an international nature and bases its authority to detain alleged terrorists on the international ‘laws of war’.<sup>80</sup>

Nevertheless, there is little doubt that the applicability of IHL to non-state groups creates a considerable number of problems, and that classic IHL appears ill-prepared at times for today’s armed conflicts. While IHL provides two sets of rules, there are three potential combinations of warring parties and territory: a conflict may be a classic international armed conflict between states, a non-international conflict between a state and one or more non-state groups and, lastly, a ‘transnational’ conflict between a state and a non-state group (or between non-state groups) on the territory of more than one state.

Common Article 3, however, does not provide for this last possibility, as its territorial scope is limited to conflicts taking place ‘on the territory of a State party’ – that is, on one territory only. In 1949 this omission may have been due to the relative obscurity of such conflicts. But since 11 September 2001 at the latest, they are at the forefront of international debate. In the presidential statement cited above, the Bush administration seemed to imply that transnational conflicts could

Executive Order No. 13491 – Ensuring Lawful Interrogations, 22 January 2009, 74 FR 4893. For an overview of the ICRC report on the treatment of fourteen ‘high value detainees’ in CIA custody, which certainly fits the designation of ‘torture’ under any terminology, see Mark Danner ‘US torture: voices from the black site’, *New York Review of Books*, Vol. 56 (6) (2009), available at [www.nybooks.com/articles/22530](http://www.nybooks.com/articles/22530) (last visited 11 May 2009).

78 George W. Bush, ‘Humane treatment of Taliban and al Qaeda detainees’, 7 February 2002, available at [www.pegc.us/archive/White\\_House/bush\\_memo\\_20020207\\_ed.pdf](http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf) (last visited 10 March 2009).

79 Executive Order 13492 (2009) – Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities, 74 FR 4897; see also Executive Order No. 13491 – Ensuring Lawful Interrogations, above note 77.

80 See *In re: Guantánamo Detainee Litigation*, Respondent’s Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantánamo Bay, Misc. No. 08–442 (TFH), 13 March 2009, available at [www.usdoj.gov/opa/documents/memo-re-det-auth.pdf](http://www.usdoj.gov/opa/documents/memo-re-det-auth.pdf) (last visited 16 March 2009), pp. 1, 3, 6. See also D.C. District Court, *Gherebi v. Obama*, Civil Action No. 04–1164, 2009 WL 1068955, 22 April 2009, p. 21, available at [www.unhcr.org/refworld/docid/4a0bcd162.html](http://www.unhcr.org/refworld/docid/4a0bcd162.html) (last visited 25 May 2009), endorsing the administration’s position, but correctly basing the authority for detention on domestic law rather than IHL – ‘The Geneva Conventions restrict the conduct of the President in armed conflicts; they do not enable it’ (p. 38).



amount to armed conflicts, but that IHL was not applicable to them.<sup>81</sup> Others deny that transnational conflicts are armed conflicts at all, and thus conclude that only international human rights law applies to the use of lethal force against suspected terrorists, to the effect that force is permissible only when ‘absolutely necessary’ for the purposes of the right to life as enshrined in international and regional human rights instruments.<sup>82</sup>

We shall now analyse and show how IHL applies to some of the ‘hybrid’ conflicts of the first decade of the twenty-first century – that is, conflicts that do not clearly fit into the traditional pattern of either inter-state or internal conflict. In many of these situations there are various defensible conclusions as to the applicability of international or non-international rules of IHL; but the implication is that in every case involving the use of military means, IHL should be applicable. This seems to suggest the necessity for a set of minimum rules applicable to every armed conflict.

### International armed conflict and non-state groups (Hezbollah)

The need for the application of IHL to conflicts between states and non-state entities beyond their borders is demonstrated by the 2006 Lebanon war, in which Israel destroyed considerable areas of southern and central Lebanon by military means to ward off rocket attacks by the Shia Lebanon-based political and paramilitary organization, Hezbollah. It is also demonstrated by the 2009 conflict in Gaza, in which Israel launched an air and ground offensive against Hamas, the Palestinian militant Islamist organisation. Less obvious is the characterization of Georgia’s conflict(s) with its breakaway provinces of South Ossetia and Abkhazia before the Georgian attack on Tskhinvali on 7 August 2008 and the intervention of Russian forces, or of the conflict in Kosovo before the NATO intervention on 24 March 1999. But in all these cases it would be impossible – and unacceptable – from a certain point onwards to deny the existence of an armed conflict, whether internal or international in character.

Israel’s military operation against Hezbollah in summer 2006 was an asymmetrical armed conflict not only *de facto* but also *de jure*, as it involved state and non-state entities. However, Common Article 2 extends the notion of international armed conflict only to the ‘High Contracting Parties’ – that is, states. The relevant treaty law is not directly applicable to non-state entities.

If military operations undertaken by armed groups are clearly attributable to a state, this entails the applicability of the law of international armed conflict, and any structural asymmetry would be less problematic from an IHL point of view. The legal situation is otherwise much more complicated: when there is no indication that the actions of a non-state armed group can be attributed to the

81 Bush, above note 78.

82 For an example of how international human rights law applies, see European Court of Human Rights (ECHR), *McCann and Others v. United Kingdom*, Judgment, 27 September 1995, Series A, No. 324, para. 148.

respective state, the question arises whether the concept of international armed conflict under customary international law might cover non-state entities. However, there is no consistent state practice or *opinio juris* to support such an assertion. With regard to the Israeli war against Hezbollah in Lebanon, it was very doubtful whether Hezbollah's military operations were attributable to Lebanon or to any other state.<sup>83</sup> If the Lebanese government had consented to Israel's intervention on its territory, the conflict would have constituted a non-international armed conflict between the state of Israel and Hezbollah. However, the Israeli military intervention occurred without Lebanon's consent and resulted in large-scale destruction of the Lebanese infrastructure. Arguably, armed conflicts between a state's armed forces and transnational armed groups operating in the territory of another state without the latter's consent could be treated as international armed conflict because of the cross-border component. In this case, the law of international armed conflict, with its detailed humanitarian guarantees, would be applicable.

It nonetheless appears more appropriate to qualify a transnational armed conflict involving non-state parties not linked to another state as armed conflicts of a non-international character. In a conflict between states, the armed forces of both sides have the combatant's privilege, namely the right to kill enemy combatants (going along with the enemy's concomitant right to target and kill them if they are not *hors de combat*). Such rights are not accorded to non-state armed groups. Yet the geographical element should not determine whether a conflict is qualified as international: 'Internal conflicts are distinguished from international armed conflicts by the parties involved rather than by the territorial scope of the conflict.'<sup>84</sup> There is no reason why a state's cross-border conflict with a non-state group should not trigger the application of humanitarian law. The law of non-international armed conflict – at least Common Article 3 – and applicable customary law should therefore cover the conduct of hostilities in these conflicts.<sup>85</sup>

Thus contrary to an 'internationalized' armed conflict, in which the actions of all participants can ultimately be measured against traditional humanitarian law applicable in international armed conflicts, a non-international armed conflict is much more difficult to handle because of the rudimentary legal regulation of such conflicts in Common Article 3 and also in Additional Protocol II. We shall return to this subject later.

83 Kirchner even argues that Hezbollah's attacks against Israel are attributable not only to Lebanon but also to Iran and Syria – see Stefan Kirchner, 'Third-party liability for Hezbollah attacks against Israel', *German Law Journal*, Vol. 7 (9) (2006), pp. 777–84. However, Kirchner seems to have confused attribution and complicity. On the conditions of attribution, see ICJ, *Application of the Genocide Convention (Bosnia-Herzegovina v. Yugoslavia)*, above note 30, paras. 396–412. For the application of these criteria to the Lebanon conflict with the (in our view correct) conclusion that attribution fails, see Andreas Zimmermann, 'The second Lebanon war: *jus ad bellum*, *jus in bello* and the issue of proportionality', *Max Planck Yearbook of United Nations Law*, Vol. 11 (2007), pp. 112–15.

84 Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, p. 136.

85 See, to the same effect, United States Supreme Court, *Hamdan v. Rumsfeld*, above note 20.

## Occupation and armed conflict with non-state groups (Gaza, targeted killings)

First, however, we shall consider another case in which the law of international armed conflicts applies, namely situations of occupation, with particular reference to the Palestinian territories occupied by Israel since 1967 and the ongoing Palestinian resistance, especially in Gaza.

It is controversial whether the occupation of Gaza has continued since the Israeli withdrawal of 2005. If so, the international nature of the conflict is established, as Common Article 2 of the Geneva Conventions also covers occupation after an international armed conflict. But if the occupation has ended, the situation would be similar to the war in Lebanon between Israel and Hezbollah. Problems of applicability may arise when the occupying state takes military action against non-state opponents as part of the existing armed conflict (occupation) – in which case there is an ‘armed conflict within an armed conflict’.<sup>86</sup> Should the rules of international armed conflict apply? Or the rules governing non-international armed conflict – that is, between a state and a non-state entity? Or both?

The occupation in the West Bank and Gaza was the consequence of a classic inter-state armed conflict between Israel and its neighbouring states. But the occupied territories themselves had never been fully integrated into Jordan and Egypt respectively. However, as the ICJ has observed, this does not prevent the applicability of the law of international armed conflict, and therefore of the Fourth Geneva Convention, to the occupied territories.<sup>87</sup> Israel has concluded peace treaties with the former administrators of the West Bank and the Gaza Strip, namely Egypt and Jordan.<sup>88</sup> Nevertheless, as both the ICJ<sup>89</sup> and the Israeli Supreme Court<sup>90</sup> have pointed out, the occupation goes on, at least as far as the West Bank is concerned. Conversely, the Supreme Court has maintained that the occupation of Gaza ended with the Israeli withdrawal on 12 September 2005,<sup>91</sup> whereas its critics<sup>92</sup> are of the view that Israel retains sufficient control of the air space and borders, and of the humanitarian supplies, for the occupation to be deemed to go on.

86 Cf. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, paras. 84, 86ff. (separate analysis of different parts of the conflict).

87 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, above note 13, paras. 90–101.

88 Treaty of Peace between the Arab Republic of Egypt and the Government of the State of Israel, 26 March 1979, entry into force 25 April 1979, 1136 UNTS 115; Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan, 26 October 1994, 2042 UNTS 351, entry into force 10 Nov. 1994.

89 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, above note 13, para. 90, 93, 101.

90 Supreme Court of Israel, *Mara'abe v. Prime Minister*, HCJ 7957/04, Judgment, 15 September 2005, para. 14 (leaving open the question of *de jure* or *de facto* applicability of Fourth Geneva Convention).

91 Supreme Court of Israel, *Jaber Al-Bassiouni v. Prime Minister*, HCJ 9132/07, Judgment, 30 January 2008, para. 12; Yuval Shany, *The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v. Prime Minister of Israel*, Hebrew University International Law Research Paper, No. 13–09, 2009, pp. 6–8, available at <http://ssrn.com/abstract=1350307> (last visited 25 May 2009).

92 Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, pp. 276–79, paras. 664–670.

But this does not necessarily indicate which law applies to the continuing insurgency in the occupied territories. One suggestion would be to apply only the law of occupation, in particular Article 5 of the Fourth Geneva Convention that allows some restriction of the rights of persons in occupied territory who are ‘definitely suspected of or engaged in activities hostile to the security of the State’. But this provision is intended for ‘individuals’ – that is, a limited number of persons.<sup>93</sup> As the Pictet *Commentary* points out, ‘[t]he suspicion must not rest on a whole class of people; collective measures cannot be taken under this Article; there must be grounds justifying action in each individual case.’<sup>94</sup> Therefore Article 5 cannot be used for active hostilities between the occupying power and organized armed groups of the occupied territory. For such conflicts we need different rules.

Let us first look at the terrorist activity against the Israeli population and at Israel’s ‘targeted killings’ in response. We are not concerned here with a definitive answer to the question whether such killings are admissible under IHL and human rights law.<sup>95</sup> Rather, we shall limit our analysis to the applicability of international humanitarian law. On the one hand, most of these killings concern individuals ‘definitely suspected or engaged in activities hostile to the security of the State’, which would render Article 5 of the Fourth Geneva Convention applicable to them; accordingly, such persons ‘shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State’. On the other hand, Israel claims to be engaged in a ‘hot’ armed conflict with armed groups in the occupied territories, such as Fatah or Hamas. The Israeli Supreme Court has based its judgment of 11 December 2005 on the premise that a situation of continuous armed conflict existed between Israel and ‘the various terrorist organizations active in Judea, Samaria, and the Gaza Strip’.<sup>96</sup> Among the various possible qualifications of the armed conflict with terrorist groups, the Court opted to characterize it as international, but added that ‘even those who are of the opinion that the armed conflict between Israel and the terrorist organizations is not of international character, think that international humanitarian or international human rights law applies to it’. The Court also referred to the case law of the ICTY<sup>97</sup> and of the US Supreme Court to the effect that minimum rules apply to both categories of conflict alike.<sup>98</sup>

93 For details of the drafting history, see Pictet, above note 12, p. 54.

94 *Ibid.*, p. 55.

95 For a detailed analysis, see in particular Antonio Cassese, ‘On some merits of the Israeli judgment on targeted killings’, *Journal of International Criminal Justice*, Vol. 5, No. 2 (2007), p. 339; Antonio Cassese, *International Law*, Oxford University Press, Oxford, 2005, pp. 420–3; David Kretzmer, ‘Targeted killing of suspected terrorists: extra-judicial executions or legitimate means of defence?’ *European Journal of International Law*, Vol. 16 (2000), p. 171; Melzer, above note 28.

96 Supreme Court of Israel, *Public Committee Against Torture v. Israel*, above note 31, para. 16, with further references to previous case law of the Supreme Court.

97 ICTY, *Prosecutor v. Tadić*, Interlocutory Appeal on Jurisdiction, above note 17, para. 127 (development of customary rules for internal conflict).

98 US Supreme Court, *Hamdan v. Rumsfeld*, above note 20, para. 2795 (minimum rules contained in Common Article 3 for international and non-international conflicts, including transnational armed conflicts).

The classification of the conflict with insurgent groups in the occupied territories as international allows for two possible readings: one would emphasize the inherently cross-border nature of transnational conflicts, thus likening them to international armed conflicts. In the case of occupied territories, every armed conflict between the occupier and local forces could be deemed international as a consequence of the applicability of occupation law.<sup>99</sup> According to a second reading, the application of the law of non-international armed conflict to a situation of armed conflict within occupied territories may be appropriate where none of the armed groups in question is an occupier. For example, the law of non-international armed conflict may apply to an armed conflict between Hamas and the Palestinian Authority or Fatah; or to the conflict between Bosnian Muslims and Croats during the Bosnian conflict between Muslims and Serbs. But when the occupier itself is involved, as arguably in the Gaza situation, the law of international armed conflict should apply. Thus we would have a situation where the rules on international armed conflict and Common Article 3 apply to the same conflict concurrently, but each to a different set of actors. The same would be true for the situation in Lebanon in 2006 (with Common Article 3 applying to Israel/Hezbollah as far as the Hezbollah military actions are not attributable to Lebanon, and the rules on international armed conflict applying to Israel/Lebanon).

However, the Israeli occupation in the Palestinian territories is a special case. It seems as important to determine what happens in purely transnational conflicts when only one party is a state and the other is a non-state group that operates in another state. We shall now examine the applicability of international humanitarian law to transnational conflicts with non-state groups where there is no occupation or attribution of their conduct to a state.

### International armed conflict with non-state groups ('war on terror')?

Terrorism as such cannot be a party to a conflict, but clearly identifiable terrorist groups can. However, many states, while launching military operations against such groups and organizations, are not ready to accept the existence of armed conflict within their boundaries. If they admit that there is an armed conflict, they tend to argue that the so-called war on terrorism constitutes a new type of armed conflict to which international humanitarian law does not apply.

However, on 29 June 2006 the US Supreme Court held Common Article 3 applicable to a 'conflict not of an international character between the United States and al-Qaida': it concluded that the term 'conflict not of an international character' in Article 3 is used in contradistinction to a conflict between states. The Court thus rejected the US government's reasoning that the conflict with Al Qaeda, being 'international in scope', does not qualify as a 'conflict not of an international

<sup>99</sup> Cassese, *International Law*, above note 95, p. 420: 'An armed conflict which takes place between an Occupying Power and rebel or insurgent groups ... in occupied territory, amounts to an international armed conflict.'

character'. According to this ruling, the concept of armed conflict is wide enough to include sustained armed violence between a state and a transnational non-state entity.

To identify the applicable law, objective criteria are necessary. Despite the rather careless use of the term 'war on terror' by the Bush administration, agreement on the concept of an armed conflict with a terrorist organization remains elusive. States cannot even agree on a definition of terrorism itself,<sup>100</sup> let alone on the legal regime applicable to it. On the contrary, the rules of international armed conflict are tailored to conflicts involving armed forces who have the combatant's 'privilege' of being allowed to kill the combatants of the other side, but can also be killed by them on the same basis. It is debatable whether non-state groups should have combatant status, except for those who may fall under Article I(4) of Protocol I. Hence only the rules of non-international armed conflict and applicable provisions of human rights law appear to be appropriate candidates for the regulation of anti-terrorist warfare by states.

In any case, certain objective criteria are needed to limit the government's discretionary power. What should the minimum conditions be for a situation to qualify as armed conflict? The use of armed forces by states to combat terrorism may be seen as one important indication of the existence of an armed conflict. The intensity and the degree of organization of the parties involved in hostilities should also be taken into account. However, the fact that some terrorist networks are not operating in an organized manner and lack the capacity to ensure respect for humanitarian law obligations during hostilities should not relieve the respective states (and their armed forces) of their international responsibility to respect minimum humanitarian guarantees. Otherwise a cycle of 'negative reciprocity' could ensue,<sup>101</sup> which would deprive IHL of all its constraining effects. The principle of reciprocity therefore does not constitute a basis for the application of IHL.<sup>102</sup>

A confrontation between a state and transnational non-state entities qualifies as armed conflict only when it clears the required threshold; in other words there must at least be an armed conflict between two organized groups. We would therefore suggest applying the *Tadić* criteria also to transnational armed conflicts. Whether or not an armed conflict transgresses international borders, the same minimum rules should apply. The growing (structural) asymmetries on the battlefield mean that inter-state armed conflict, with the fully developed body of IHL applicable to it, is likely to be the exception rather than the rule, whereas the

100 For the most comprehensive recent attempt, see the Draft Comprehensive Convention on International Terrorism, UN Doc. A/59/894, 12 August 2005, Appendix I. The most problematic issue to be resolved is the applicability of the Convention. See also Mahmoud Hmoud, 'Negotiating the Draft Comprehensive Convention on International Terrorism', *Journal of International Criminal Justice*, Vol. 4, No. 5 (2006), p. 1031; P. Klein, 'Le droit international à l'épreuve du terrorisme', *Recueil des Cours* 321 (2006), pp. 203, at pp. 231 ff. and pp. 305 ff.; Gilbert Guillaume, 'Terrorism and international law', *International & Comparative Law Quarterly*, Vol. 53 (2004), pp. 537, 541.

101 Geiss, above note 2, pp. 757–77.

102 See, however, Schmitt, above note 2, pp. 1–42.

minimum rules of Common Article 3, Article 75 of Protocol I and customary law should apply in any circumstances, including those of transnational armed conflicts. Moreover, in view of the recognition by the ICJ that the provisions of Article 3 emanate from general principles of law, namely ‘elementary considerations of humanity’, the territorial requirement of Article 3 can be regarded as obsolete.<sup>103</sup>

Beyond these minimum rules, however, the main criterion for the applicability of the whole body of IHL relating to non-international armed conflicts, and in particular the conduct of hostilities, still needs to be determined, namely the characteristics of the groups involved in such a conflict. Article 1 of Protocol II lays down strict requirements, namely that non-state entities should be objectively identifiable, and sufficiently organized to carry out military operations reaching the threshold of intensity required for an armed conflict. Thus control of territory plays a special role in identifying the ability of non-state entities to perform their obligations for the purposes of Protocol II. Certain terrorist armed groups may, however, be loosely organized and internationally dispersed. More importantly, the whole point of the exercise is not to clarify matters for the non-state groups, but for the state fighting them – non-state groups using terrorist methods will hardly care whether or not IHL would in principle apply to them, even if this may play a part in the possible qualification of their acts as war crimes. In line with the ICTY case law, the parties to an armed conflict should therefore possess a ‘minimal degree of organization’ to ensure implementation of the basic humanitarian protections guaranteed by Common Article 3.<sup>104</sup> In the absence of any clearly identifiable agreement to the contrary, the *Tadić* criteria should also apply to transnational conflicts between states and non-state entities rather than the higher standard of Protocol II. Accordingly, to ensure the applicability of IHL to each use of armed force, the degree of organization required to engage in ‘protracted violence’ should be lower than the degree of organization required to carry out ‘sustained and concerted military operations’. As shown above, recent developments in the case law and also the text of the Rome Statute all point in this direction.

Thus an armed conflict would be deemed to exist when the requirements for a certain intensity of armed violence<sup>105</sup> and some level of organization<sup>106</sup> of the

103 The temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities: in international armed conflict to the whole territory of the state in question, in non-international armed conflict at least to the area in which the conflict takes place – see ICTY, *Prosecutor v. Tadić*, Interlocutory Appeal on Jurisdiction, above note 17, paras. 67 and 70; see also ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Separate Opinion of Judge Simma, above note 65, para. 23.

104 ICTY, *Prosecutor v. Ljube Bošković and Johan Tarculovski*, Case No. IT-04-82-T, Judgment (Trial Chamber), 10 July 2008, para. 197.

105 To assess the intensity of a conflict, the following factors have been taken into consideration: ‘the seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilization and distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and, whether any resolutions on the matter have been passed’. See ICTY, *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-T, Judgment (Trial Chamber), 30 November 2005, para. 90.

106 See ICTY, *Prosecutor v. Ljube Bošković, Johan Tarculovski*, above note 104, para. 197.

non-state participants are fulfilled. The criterion of organization has been interpreted as referring to the existence of headquarters, designated zones of operations, the ability to procure, transport and distribute arms,<sup>107</sup> the existence of a command structure, disciplinary rules and mechanisms, control of territory, the existence of recruits, military training, military strategy and tactics, and the ability of the armed group to speak with one voice.<sup>108</sup>

US practice after the terrorist attacks on the United States on 11 September 2001 has been to liken the military intensity of attacks to the existence of an armed conflict<sup>109</sup> – the more intense a conflict is, the less should be demanded of its length. Nevertheless, a single act, even an attack as ferocious as those of 9/11, should not trigger a shift from a human rights regime to a humanitarian law regime and render the whole body of the laws of armed conflict applicable. The US approach with regard to the military commission in Guantánamo should give us pause, because it mainly serves to introduce military rather than civilian court jurisdiction over terrorist acts. It should be remembered that the minimum standard is applicable independently of the existence of an armed conflict, and that human rights law applies in situations of armed conflicts and peace alike. Contrary to the ‘armed attack’ in Article 51 of the Charter of the United Nations,<sup>110</sup> the term ‘armed conflict’ in the *Tadić* definition refers to a continuing situation, and thus has a temporal element. However, by lessening the requirement of ‘sustained’ military operations (from Protocol II, Art. 1) to ‘protracted’ military operations (maintained in Rome Statute, Art. 8(2)(f)), the *Tadić* definition allows for certain interruptions in a conflict and thus leads to an earlier applicability of IHL.

In addition, a non-international armed conflict needs to take place ‘in the territory of a State’. To avoid gaps in humanitarian law, Marco Sassòli has maintained that ‘[a]ccording to the aim and purpose of IHL, this provision must be understood as simply recalling that treaties apply only to their state parties.’<sup>111</sup> In view of the recognition by the ICJ of the provisions of Common Article 3 as an emanation of general principles of law, namely ‘elementary considerations of humanity’, the territorial requirement of Article 3 can indeed be regarded today as

107 ICTY, *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, above note 105, para. 90.

108 ICTY, *Prosecutor v. Ramush Haradinaj*, above note 40, paras. 63–88.

109 Section 5(c) of Military Commission Instruction No. 2, Crimes and Elements for Trials by Military Commission, April 30, 2003, available at [www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf](http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf) (last visited 10 March 2009), approvingly cited by Sassòli, above note 20, p. 8. Cf. preambles to Security Council Resolutions 1368 and 1373 (2001), justifying self-defence against the perpetrators regardless of their origin. For the same confusion of *jus ad bellum* and *jus in bello*, see the Memorandum by the Obama administration regarding detention authority, above note 79, pp. 4–5.

110 Cf. *Definition of Aggression*, Res. 3314 (XXIX), 14 Dec. 1974, UN GAOR, 29th Sess., Supp. No. 31, at 142, UN Doc. A/9631 (1974), Annex, Art. 3; Albrecht Randelzhofer, ‘Article 51’, in Bruno Simma (ed.), *The Charter of the United Nations: A Commentary*, Oxford University Press, Oxford/New York, 2002, Art. 51 MN 17–20. For the second Lebanon war, see Zimmermann, above note 83, pp. 107–9; for the mining of a naval vessel, see *Oil Platforms (Iran v. United States of America)*, Judgement, ICJ Reports 2003, p.161, para. 72 (one attack may be sufficient to constitute an armed attack triggering the right of self-defence, but not in the absence of the requisite evidence).

111 Sassòli, above note 20, p. 8.



less relevant for the applicability of the minimum rules of IHL.<sup>112</sup> Here, humanitarian law and human rights law come together. Beyond that, however, it appears insufficient to identify a single, globally operating non-state movement as a transnational group to render the IHL of non-international armed conflict applicable. For that, a geographically defined group with a quasi-military organization would be required, not a loose ‘terrorism franchise’. Thus Al Qaeda in Pakistan or the Taliban in Afghanistan may qualify, but Al Qaeda’s broad network does not. In the event of a protracted use of military force by and against concrete group, humanitarian law governing non-international armed conflict appears applicable. However, this threshold should not be applied too lightly.

As a result, the so-called ‘war on terror’ is not an armed conflict as such, independently of time and space.<sup>113</sup> Conversely, a concrete transnational armed conflict that takes place between a state and a terrorist organization and meets the *Tadić* criteria can be accommodated within the existing body of IHL.

### Internal armed conflicts and human rights

In internal armed conflict, the law of non-international armed conflict is not the only body of law that applies to the situation on the ground. In addition to IHL, domestic law and human rights standards apply. However, international humanitarian law does not offer a detailed legal regulation of such conflicts. The provisions of Common Article 3 contain minimum rules. In addition, there is an evolving body of customary law. Protocol II introduced a very high threshold of applicability and cannot easily be invoked in every conceivable scenario of internal armed conflict. Moreover, many non-state entities would not be capable of meeting the criteria. So the existing provisions of Protocol II are not very helpful in the majority of internal asymmetrical conflicts. All doubts with regard to threshold issues must be resolved for the sake of ensuring better humanitarian protection – in accordance with the rationale and underlying philosophy of IHL. Common Article 3 should therefore be applied as widely as possible.<sup>114</sup>

Whereas in international armed conflict many human rights norms will be subject to IHL, international human rights law will apply in non-international armed conflict, subject only to permissible derogations and exceptions. In other words, while the IHL of non-international armed conflicts does not confer any

112 Common Article 3; Protocol I, Article 75; and customary law – see Henckaerts and Doswald-Beck, above note 42, as well as the Turku Declaration, above note 65.

113 Similarly, Noëlle Quénivet, ‘The applicability of international humanitarian law to situations of a (counter-)terrorist nature’, in Roberta Arnold and Pierre-Antoine Hildbrand (eds.), *International Humanitarian Law and the 21st Century’s Conflicts: Changes and Challenges*, Edis, Lausanne/Berne/Lugano, 2005, p. 27: ‘As international humanitarian law does not know of the legal category “terrorism”, one needs to assess, on a case-by-case basis, whether such situations of a terrorist nature can be considered as an armed conflict’; Roberta Arnold, ‘Terrorism and IHL: A common denominator?’, *ibid.*, p. 22.

114 ICTY, *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgement (Trial Chamber), 25 June 1999, para. 49.

privilege upon non-state fighters, they remain protected by human rights norms. Below the threshold for the application of IHL, human rights are their only protection, but are fully applicable. As the *McCann* ruling by the European Court of Human Rights shows,<sup>115</sup> such protection goes beyond that provided by IHL. In particular, whereas most protections of IHL are not applicable to persons participating in hostilities (e.g. Protocol I, Art. 51(3); Protocol II, Art. 13(3)), terrorists in peacetime are protected by the right to life and thus by a proportionality standard.

There is a rising chorus of human rights scholars who want to do away with IHL altogether, at least in non-international conflicts, and merge IHL with human rights law.<sup>116</sup> In its decisions on the internal conflict in Chechnya, the European Court of Human Rights has moreover managed to deal with a particularly egregious use of armed force against civilians without even mentioning IHL in the operative parts of its judgment, applying a general standard of proportionality instead.<sup>117</sup> Indeed, if human rights standards were stricter than IHL, such a merger would be beneficial to the victims of non-international armed conflict.

Alas, this solution is far too easy. The main disadvantage of the applicability of human rights norms is their lack of precision regarding the conduct of hostilities, as well as their reliance on the indeterminate standard of proportionality.

Proportionality in IHL and in international human rights refers to two different concepts with different scopes of application. It appears questionable whether the principle of proportionality as applied in human rights law<sup>118</sup> will have the same constraining effects on armed forces during hostilities. Although there are certain criteria for determining proportionality in human rights law<sup>119</sup> that are applicable to armed forces while carrying out law enforcement duties, most human rights rules are not as specific as respective IHL provisions created for armed conflict. A chaos of different standards must be prevented that would work to the detriment rather than to the benefit of the victims of armed conflict.

115 ECHR, *McCann v. United Kingdom*, above note 82.

116 See Francisco Forrest Martin, 'Using international human rights law for establishing a unified use of force rule in the law of armed conflict', *Saskatchewan Law Review*, 2001, Vol. 64, No. 2, p. 347; Roberta Arnold and Noëlle Quéniwet (eds.), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law*, Martinus Nijhoff, Leiden/Boston, 2008.

117 See ECHR, *Isayeva v. Russia*, Application No. 57950/00, Judgment (Chamber), 24 February 2005 (final 6 July 2005); ECHR, *Isayeva, Yusupova and Bazayeva v. Russia*, Applications Nos. 57947/00, 57948/00, 57949/00, Judgment (Chamber), 24 Feb. 2005 (final 6 July 2005). For criticism see Andreas Paulus, 'The protection of human rights in internal armed conflict in Europe: Remarks on the *Isayeva* decisions of the European Court of Human Rights', *Uppsala Yearbook of East European Law*, 2006, p. 61; William Abresch, 'A human rights law of internal armed conflict: The European Court of Human Rights in Chechnya', *European Journal of International Law*, Vol. 16 (2005), p. 741.

118 Human Rights Committee, *Guerrero v. Colombia*, Communication No. R.11/45, 31 March 1982, paras. 13.2–13.3.

119 According to the Principle 9 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, force can only be used 'in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives.' Adopted by the UN General Assembly in Resolution 45/166, 18 December 1999.

Therefore IHL in internal conflicts cannot be simply substituted by human rights; rather, the existence of a protracted armed conflict between groups of a military nature and at a military scale require the application of IHL. Complementary to IHL, international human rights standards remain applicable.<sup>120</sup>

## Reciprocity

Finally, some political circles seem to have regarded the essential requirements of IHL as a luxury inapplicable at a time of existential threats stemming from terrorists who may acquire weapons of mass destruction sooner rather than later.<sup>121</sup> They argue that IHL is technically inapplicable to situations of ‘asymmetrical warfare’ in which only one party to the conflict is willing to uphold the laws of war, on condition of reciprocity – a condition that is absent in ‘anti-terrorist’ warfare.<sup>122</sup>

However, reciprocity in IHL was never meant to suspend the application of specific rules contained in it because of non-observance by the other side,<sup>123</sup> but was intended to guarantee the equal applicability of IHL to all parties to a conflict. This ‘general’ reciprocity has remained in place, under Common Article 2(3) of the Geneva Conventions, ever since that same article repudiated the general participation clause of the 1899/1907 Hague Convention IV, which had led to the technical inapplicability of the Hague Conventions in both world wars.<sup>124</sup> With regard to peoples exercising their right to self-determination pursuant to its Article 1(4), Protocol I insists on the same reciprocity by requiring from them, in Article 96(3), an explicit acceptance and application of IHL.

In non-international armed conflict, on the contrary, Common Article 3 does not contain such a requirement of reciprocity. As its Article 1 shows, however, Protocol II appears to regard some reciprocity between the armed forces involved as a precondition for the applicability of the Protocol. Certainly, both Protocol II and Common Article 3 are equally applicable to all parties to such a conflict.<sup>125</sup> But

120 See Louise Doswald-Beck, ‘The right to life in armed conflict: does international humanitarian law provide all the answers?’, *International Review of the Red Cross*, Vol. 88, No. 864 (2006), pp. 881–904.

121 For one of the most egregious examples see Alberto Gonzales (White House Legal Counsel and later US Attorney-General), Memorandum for the President, Draft, 25 Jan. 2002, in Karen J. Greenberg and Joshua L. Dratel (eds.), *The Torture Papers: The Road to Abu Ghraib*, Cambridge University Press, Cambridge, 2005, pp. 118–19: ‘[T]his new paradigm [the war against terrorism] renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions.’

122 See in particular the claim by the Bush administration that the ‘war on terror’ was a transnational armed conflict to which the laws of war applied, in the sense that ordinary law was suspended, but did not protect ‘illegal enemy combatants’, aka terrorists, from any abuse such as waterboarding – see in particular Bellinger, above note 69. For a general analysis of asymmetry in modern armed conflict, see Schmitt, above note 2, pp. 13–15, 41–2.

123 See in particular Sandoz, Swinarski and Zimmermann, above note 37, paras. 49–51, who even speak of an ‘absolute’ ‘prohibition against invoking reciprocity in order to shirk the obligations of humanitarian law’. See also Article 60(5) of the Vienna Convention on the Law of Treaties, excluding treaties of a humanitarian character from the application of reciprocity in the event of a breach of those treaties.

124 For details, see Pictet, above note 12, Vol. 1, pp. 34–7, and Vol. 4, pp. 22–5.

125 Sylvie Junod, ‘Scope of this protocol’, in Sandoz, Swinarski and Zimmermann, above note 37, para. 4442–4444.

whereas Article 1(1) of Protocol II ensures that the forces of the non-state parties in question are similar to an army by requiring them to have a command structure and control a certain amount of territory, Common Article 3 does not contain any requirement of this sort. The guarantees contained therein are much more similar to those in Article 75 of Protocol I, in that the said articles contain minimum guarantees, regardless of reciprocity, for any person in the power of a party to conflict.<sup>126</sup> The ICJ has confirmed this interpretation in its *Nicaragua* judgment by deeming these rules to derive from ‘elementary considerations of humanity’, independently of any element of reciprocity.<sup>127</sup> Thus most rules of IHL – in particular those relating to non-international armed conflicts – are applicable regardless of reciprocity. Asymmetrical conflict consequently does not entail the non-applicability of the minimum requirements of IHL.

## Conclusion

While the rise of transnational conflicts between states and non-state groups has created numerous problems for the identification of armed conflicts, evidence suggests that the situations to which IHL applies have become easier to identify thanks to the recent development of that body of law. Since the *Hamdan* and *Boumediene* rulings by the US Supreme Court, it seems universally accepted that armed conflicts with non-state groups do not constitute a ‘law-free zone’ or a ‘legal black hole’, but are subject to IHL or to human rights provided by international and/or domestic law.<sup>128</sup>

As argued by some writers, the applicability in practice of the norms of non-international armed conflict depended on its identification as such by a state.<sup>129</sup> However, it was precisely that self-declaratory nature of the applicability of the laws of war that led the drafters of the Geneva Conventions towards an objective criterion for the existence of an international armed conflict. The deference to states to determine the existence of armed conflict should have its limits. Unlike some parts of the laws of war, such as the law of neutrality, the task of international humanitarian law is to protect those who do not, or no longer, take part in hostilities and to avoid unnecessary casualties. Such protection cannot depend on auto-interpretation by those whom IHL attempts to restrain.

126 On their customary nature see note 65 above.

127 ICJ, *Military and Paramilitary Activities in and against Nicaragua*, above note 30, para. 218. For the ‘elementary considerations of humanity’ as a source of international law, see ICJ, *Corfu Channel Case (United Kingdom v. Albania)*, Judgment (Merits), ICJ Reports 1949, p. 22.

128 On the attempt to create such a zone at Guantánamo Bay, see, famously, Johan Steyn, ‘Guantánamo Bay: the legal black hole’, *International & Comparative Law Quarterly*, Vol. 53 (2004), p. 1. The recent judgment of the US Supreme Court in *Boumediene* has apparently definitively laid this attempt to rest – see *Boumediene v. Bush*, 128 SCt 2229 (2008), reprinted in 47 ILM 650 (2008). On his second day in office, President Obama vowed to close Guantánamo – see LaFranchi and Lubold, above note 69.

129 See Lindsay Moir, ‘Towards the unification of international humanitarian law’, in Richard Burchill, Nigel D. White and Justin Morris (eds.), *International Conflict and Security Law: Essays in Memory of Hilaire McCouberty*, Cambridge University Press, Cambridge, 2005, pp. 108, 126; Pejić, above note 9.

In this article we have identified at least three reasons for optimism as to the development of a coherent framework of IHL for both international and non-international armed conflict. First, the recognition of a substantial amount of customary international law applicable to both international and non-international armed conflict<sup>130</sup> has somewhat reduced the significance of the differentiation between them, although even supporters of this development agree that the difference remains important with regard to the status of the parties to conflict and details of the applicable rules. Second, the apparent endorsement of the *Tadić* definition of armed conflict by Article 8(2)(f) of the Rome Statute, while formally applicable only under international criminal law, has somewhat lessened the requirements set for non-international armed conflicts by Article 1(1) of Protocol II. We would suggest a similar extension of the scope of applicability of the customary rules reflected in Protocol II. Finally, the recognition in the US Supreme Court's *Hamdan* judgment that Common Article 3 provides minimum rules for all armed conflicts, and the plurality opinion that Article 75 of Protocol I also applies,<sup>131</sup> has reinforced earlier views to the same effect.<sup>132</sup> To our mind, it does not matter much whether this solution is regarded as an innovative reading of the Geneva Conventions as a 'living document', or as a development of customary law in the direction of minimum humanitarian rules applicable in any situation, as already put forward by the Turku Declaration of 1990.<sup>133</sup>

However, important divergences persist, in particular concerning the definition of 'armed conflict', which is of central importance as a clear and unequivocal 'trigger' for the application of IHL. While the *Tadić* definition has helped to find a common threshold for non-international armed conflicts, it remains unclear whether the definition of an international armed conflict should not be extended to each and every confrontation of armed forces.<sup>134</sup> In the meantime, Common Article 3 has developed into a minimum yardstick for any armed conflict. The separate treatment of Common Article 3 in Article 8(2)(c) and (d) of the Rome Statute suggests as much.

With this framework in mind, this article has attempted to show that the conflicts of the early twenty-first century can indeed be categorized more or less convincingly. We are faced not with a single confrontation with 'terrorism' as such, but with a range of warlike conflicts between states and non-state entities, some of them international (Afghanistan 2001–2, Iraq 2003–4 and Lebanon 2006 after the

130 See in particular ICTY, *Prosecutor v. Tadić*, Interlocutory Appeal on Jurisdiction, above note 17, paras. 96, 97, 119; on the details see Henckaerts and Doswald-Beck, above note 42.

131 US Supreme Court, *Hamdan v. Rumsfeld*, above note 20, paras. 2795 (majority opinion) and 2797 (Justice Stevens, plurality opinion).

132 ICJ, *Armed Activities on the Territory of the Congo*, Separate Opinion of Judge Simma, above note 65, paras. 26–28; Opinion of the European Commission for Democracy through Law (Venice Commission), adopted at its 57th Plenary Session, Venice, 12–13 December 2003, Opinion No. 245/2003, Council of Europe Doc. No. CDL-AD (2003) 18, para. 38.

133 Turku Declaration, above note 65.

134 Pictet, above note 12, pp. 20–1. See also Quéguiner, above note 54, p. 275: '[L]es critères de durée ou d'intensité des combats sont indifférents à la qualification d'un conflit armé international.'

attacks on government and public facilities), others non-international (US–Taliban and Al Qaeda in Afghanistan/Pakistan since 2002,<sup>135</sup> Gaza 2008–9), while others were probably not an armed conflict at all (Yemen 2002<sup>136</sup>). It is particularly important to maintain the equal application of IHL despite the categorization of the parties to such a conflict according to *jus ad bellum* or domestic law. This is why Article 1(4) of Protocol I has turned out to be so problematic. Non-state groups continue to be unable to claim the ‘combatant’s privilege’ as lawful belligerents and hence a legal ‘right’ to use armed force against anybody. The applicability of IHL thus does not depend on ‘reciprocity’, but only on the binding nature of IHL for all parties to a conflict.

There is no legal notion of a general or global ‘war on terror’.<sup>137</sup> The struggle against terrorist groups does not constitute a new kind of war. Terrorist acts on any scale may occur outside situations of armed conflict. In the absence of activities amounting to an armed conflict, human rights law and domestic law apply to terrorist activity. The law of armed conflict provides a legal framework only if terrorism occurs within an armed conflict<sup>138</sup> or when terrorist groups have achieved a sufficient capacity to wage a protracted armed conflict. The threat of terrorism by a limited number of persons who do not constitute a distinct armed group able to fight a ‘protracted armed conflict’ should, when it occurs within the context of an existing armed conflict or occupation, be dealt with in accordance with Article 5 of the Fourth Geneva Convention.

As a matter of course IHL prohibits, in both international and non-international armed conflict, any act which could be classified as terrorist, especially attacks against civilians, indiscriminate attacks and the spreading of terror among the civilian population. As the independent expert of the UN Commission on Human Rights, Robert Goldman, has pointed out, ‘although humanitarian law proscribes terrorism, the fact that such acts are committed during an armed conflict does not alter either the legal status of the hostilities or of the parties involved or the duty of the parties to observe humanitarian law.’<sup>139</sup> But it is also unequivocally stated that ‘[t]here is no circumstance in which any person, however classified, can legally be placed beyond the protection of international

135 Mohammad-Mahmoud Ould Mohamedou, *Non-linearity of Engagement: Transnational Armed Groups, International Law, and the Conflict between Al Qaeda and the United States*, Harvard University Program on Humanitarian Policy and Conflict Research, July 2005, available at [www.hpcr.org/pdfs/Non-Linearity\\_of\\_Engagement.pdf](http://www.hpcr.org/pdfs/Non-Linearity_of_Engagement.pdf) (last visited 8 March 2009).

136 See Mary Ellen O’Connell, ‘Ad hoc war’, in Horst Fischer, Ulrike Froissart and Wolff Heintschel von Heinegg (eds.), *Krisensicherung und Humanitärer Schutz – Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck*, BWV, Berlin, 2004, pp. 415–16; Quéniévet, above note 112, p. 49.

137 Hans-Peter Gasser, ‘Acts of terror, “terrorism” and international humanitarian law’, *International Review of the Red Cross*, Vol. 84, No. 847 (2002), p. 556; Jelena Pejić, ‘Terrorist acts and groups: a role for international law?’, *British Yearbook of International Law*, Vol. 75 (2004), pp. 85–8, argues that beyond the case of the 2001–2 conflict in Afghanistan, the contemporary ‘war on terror’ is no armed conflict at all.

138 Gasser, above note 137, pp. 547–70.

139 *Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, E/CN.4/2005/103, para. 18.

humanitarian law in *any* armed conflict. It has been ... rightly emphasized that new legal rules are not needed, but better respect for, and strict compliance with, existing law'.<sup>140</sup>

So we may be quite a long way from a 'unification of international humanitarian law',<sup>141</sup> but the all too fashionable fear of a 'fragmentation'<sup>142</sup> of IHL is not justified either. Of course, the separation between international and non-international armed conflict may not always be satisfactory – why, for instance, should the international nature of the armed conflict in the Gaza Strip depend on whether or not the Israeli occupation had ended? Indeed, the very distinction between international and non-international conflict is unsatisfactory from a humanitarian standpoint, as the ICTY has convincingly pointed out in *Tadić*.<sup>143</sup> Rather, the distinction is a concession to states so that non-state groups will not take advantage of the applicability of IHL to engage in armed conflict in the first place.

But the humanitarian mission of IHL, namely the protection of the civilian population and all persons *hors de combat* and the avoidance of unnecessary suffering, remains as vital to alleviate the effects of armed conflict in the twenty-first century as it was in the battles that led to its inception in the nineteenth century. To carry out this mission, IHL continues to need a triggering mechanism that can be neutrally applied, irrespective of the deeper reasons and justifications for the armed conflict. By combining a criterion for the existence of a 'protracted armed conflict' with the assertion that certain humanitarian principles are applicable in any conflict, regardless of any 'trigger', such a mechanism is provided. At times, international humanitarian law may have to face the challenge of taming the last war. Whatever lies ahead, the observance of that law remains a precondition for ultimate success, in other words, peace. In Sun Tzu's words, 'those skilled in war cultivate the Tao and preserve the laws and are therefore able to formulate victorious policies.'<sup>144</sup>

140 International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*, International Commission of Jurists, Geneva, 2009, p. 65.

141 Moir, above note 129, pp. 108–28.

142 On the 'fragmentation' of international law see Martti Koskeniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, 2006 (with an extensive bibliography).

143 See ICTY, *Prosecutor v. Tadić*, Interlocutory Appeal on Jurisdiction, above note 17, para. 119.

144 Sun Tzu, above note 4, p. 88, para. 15. The comment by Tu Mu explains: 'The *Tao* is the way of humanity and justice; "laws" are regulations and institutions.'