

SELECTED ARTICLE ON INTERNATIONAL HUMANITARIAN LAW

The protective scope of Common Article 3: more than meets the eye

Jelena Pejic*

Jelena Pejic is legal advisor in the Legal Division of the International Committee of the Red Cross.

Abstract

Non-international armed conflicts are not only prevalent today, but are also evolving in terms of the types that have been observed in practice. The article sets out a possible typology and argues that Common Article 3 to the Geneva Conventions may be given an expanded geographical reading as a matter of treaty law. It also suggests that there is a far wider range of rules – primarily of a binding nature, but also policy-based – that apply in Common Article 3 armed conflicts with regard to the treatment of persons in enemy hands and the conduct of hostilities.



It is almost a platitude to point out that non-international armed conflict (NIAC) is the prevalent type of armed conflict today and that NIACs often cause civilian suffering on a scale surpassing that in international armed conflicts (IACs). While there is, unfortunately, no novelty in these observations, it may be argued that there has been a development in the types of NIAC that have occurred over the last decade. Not surprisingly, the expansion of the different kinds of NIAC has been followed by doubts about the sufficiency of the existing legal framework to cover some of the situations that have arisen. Two arguments have been raised most

* This article was written in a personal capacity and does not necessarily reflect the views of the International Committee of the Red Cross (ICRC). The exception, of course, is where public ICRC positions are referred to in the text.

often: first, that international humanitarian law (IHL) governing NIACs can be reduced to the few provisions of Common Article 3 of the 1949 Geneva Conventions. According to this view, the only ‘really’ legally binding IHL provisions are those of Common Article 3, beyond which NIAC falls into an unregulated IHL space. The second argument posited is that Common Article 3 is of limited use because, as treaty law, it is only applicable to NIACs taking place within the territory of a single state.

The aim of this article is to attempt to address the challenges identified above and provide a consolidated reading of the IHL legal and policy framework applicable, in particular, to detention and the conduct of hostilities in non-international armed conflicts meeting the Common Article 3 threshold. The consolidated reading proposed below is based primarily on international humanitarian law. While there is no doubt that human rights law serves as a complementary source of legal protection in NIACs (and has been relied on in drawing up some of the policy standards outlined below), it is generally accepted that this body of rules does not bind non-state parties. Given that the existence of a non-state party is one of the prerequisites for the very existence of a NIAC, it would be of little use in this review to rely on rules that unquestionably bind only the state party to a NIAC. Armed conflicts meeting the Additional Protocol II standard¹ are not dealt with, both because they are much less frequent and because inadequacy of legal protection has not been claimed to the same degree when that treaty is applicable.

This article is divided into sections that examine:

- the definition of Common Article 3 armed conflicts;
- the typology of non-international armed conflicts;
- the binding force of Common Article 3;
- the territorial scope of application of Common Article 3; and
- the legal and policy framework applicable to detention and the conduct of hostilities in Common Article 3 armed conflicts.

1 Additional Protocol II to the Geneva Conventions has a higher threshold of applicability than Common Article 3, even though the ICRC had initially hoped, before and at the Diplomatic Conference of 1974–1977, that their scope of applicability would be the same. Concerns about the impact of the treaty on state sovereignty resulted in a text that offers more clarity but is also more restrictive than originally envisaged. The Protocol’s applicability is tied to an armed conflict in which the non-state party must ‘exercise such control over a part of the territory of a state party as to enable it ‘to carry out sustained and concerted military operations and to implement this Protocol’. Just as importantly, Additional Protocol II expressly applies only to armed conflicts between state armed forces and dissident armed forces or other organized armed groups, and not to conflicts between such groups themselves. The scope of application of Protocol II is thus narrower than that of Common Article 3, with Article 3 maintaining a separate legal significance even when Protocol II is also applicable. The relationship between the respective sets of rules is expressly provided for in Article 1(1) of Protocol II, pursuant to which the Protocol ‘develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application’.

The definition of non-international armed conflict under Common Article 3

Despite the lack of a legal definition, it is widely accepted that non-international armed conflicts governed by Common Article 3 are those waged between state armed forces and non-state armed groups or between such groups themselves. IHL treaty law allows a distinction to be made between NIACs within the meaning of Common Article 3 and those meeting the higher, Additional Protocol II, threshold.² It should, however, be recalled that the International Committee of the Red Cross (ICRC)'s 2005 *Study on Customary International Humanitarian Law*³ did not distinguish between the two categories of non-international armed conflict because it was found that states did not make such a distinction in practice.

The lack of a general legally binding IHL definition of a Common Article 3 conflict means that the facts of a given situation must be analysed based on criteria that have been developed in state practice,⁴ by international judicial bodies (see further below), and in the legal literature.⁵ At least two criteria are considered indispensable for classifying a situation of violence as a Common Article 3 armed conflict, thus distinguishing it from internal disturbances or tensions that remain below the threshold.

The first is the existence of parties to the conflict. Common Article 3 expressly refers to 'each Party to the conflict', thereby implying that a precondition for its application is the existence of at least two 'parties'. While it is usually not difficult to establish whether a state party exists, determining whether a non-state armed group may be said to constitute a 'party' for the purposes of Common Article 3 can be complicated, mainly because of lack of clarity as to the precise facts and, on occasion, because of the political unwillingness of governments to acknowledge that they are involved in a NIAC. Nevertheless, it is widely recognized that a non-state party to a NIAC means an armed group with a certain level of

2 See note 1 above.

3 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Volume I: Rules*, Cambridge University Press, Cambridge, 2005 (hereafter *Customary Law Study*).

4 By way of reminder, the ICRC Commentaries to Common Article 3 contain a summary of the criteria that were put forward by some states at the Diplomatic Conference but were eventually rejected. See, for example, J. Pictet (ed.), *Commentary to the Third Geneva Convention relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960, p. 23. The list, as has been rightly pointed out, sets a 'far higher threshold of application than is actually required by the Article itself'. See Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, p. 35.

5 Schindler provides a succinct outline of most of the factual criteria: 'Practice has set up the following criteria to delimit non-international armed conflicts from internal disturbances. In the first place, the hostilities have to be conducted by force of arms and exhibit such intensity that, as a rule, the government is compelled to employ its armed forces against the insurgents instead of mere police forces. Secondly, as to the insurgents, the hostilities are meant to be of a collective character, that is, they have to be carried out not only by single groups. In addition, the insurgents have to exhibit a minimum amount of organisation. Their armed forces should be under a responsible command and be capable of meeting minimal humanitarian requirements. Accordingly, the conflict must show certain similarities to a war, without fulfilling all conditions necessary for the recognition of belligerency'. Dietrich Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols, Recueil des cours*, Martinus Nijhof, Brill, 1979, Vol. 163/ii, p. 147.

organization that would essentially enable it to implement international humanitarian law.⁶ International jurisprudence has developed indicative factors on the basis of which the ‘organization’ criterion may be assessed. They include the existence of a command structure and disciplinary rules and mechanisms within the armed group; the existence of headquarters; the ability to procure, transport, and distribute arms; the group’s ability to plan, co-ordinate, and carry out military operations, including troop movements and logistics; its ability to negotiate and conclude agreements such as ceasefire or peace accords; and so forth.⁷ Put differently, even if the level of violence in a given situation is very high (in a situation of mass riots, for example), unless there is an organized armed group on the other side, one cannot speak of a non-international armed conflict.

The second criterion commonly used to determine the existence of a Common Article 3 armed conflict is the intensity of the violence involved. This is also a factual criterion, the assessment of which depends on an examination of events on the ground. Pursuant to international jurisprudence, indicative factors for assessment include:

the number, duration and intensity of individual confrontations, the type of weapons and other military equipment used, the number and calibre of munitions fired, the number of persons and types of forces partaking in the fighting, the number of casualties, the extent of material destruction, and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.⁸

The International Criminal Tribunal for the Former Yugoslavia (ICTY) has deemed there to be a NIAC in the sense of Common Article 3 ‘whenever there is ... *protracted* armed violence between governmental authorities and organized armed groups or between such groups within a State’.⁹ The Tribunal’s subsequent decisions have relied on this definition, explaining that the ‘protracted’ requirement is in effect part of the intensity criterion.

A similar definition is contained in the Statute of the International Criminal Court (ICC), which, in addition to proscribing as war crimes serious violations of Common Article 3, contains a list of other serious violations of the laws and customs applicable in armed conflicts not of an international character, namely 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’ (Article 8(2)(f)). There is some debate in the legal literature as to whether the ICC Statute in fact created three different types of NIAC

6 *Ibid.*, p. 36.

7 See Fatmir Limaj *et al.*, International Criminal Tribunal for the Former Yugoslavia (ICTY), Trial Chamber II, Judgment of 30 November 2005, Case No. IT-03-66-T, para. 90; Ramush Haradinaj *et al.*, ICTY, Trial Chamber I, Judgment of 3 April 2008, Case No. IT-04-84-T, para. 60.

8 R. Haradinaj *et al.*, above note 7, para. 49.

9 ICTY, *The Prosecutor v. Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 70, emphasis added.

as a result of the wording mentioned above;¹⁰ an ICC Pre-trial Chamber decision seemed to suggest that this was the case.¹¹ It is submitted that the better view is that the NIAC referred to in Article 8(2)(f) has the same threshold of applicability as Common Article 3, and that the Statute did not intend to infer a different trigger. Based on this reading, a 2008 public ICRC opinion paper on the definition of armed conflict under IHL defines non-international armed conflicts as

protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State (party to the Geneva Conventions). The armed confrontation must reach a *minimum level of intensity* and the parties involved in the conflict must show a *minimum of organization*.¹²

The typology of non-international armed conflicts

It may be observed that non-international armed conflicts falling within the Common Article 3 threshold have taken different forms over the past decade. Provided below is a brief typology of current or recent Common Article 3 NIACs. While the first five types of NIAC listed may be deemed uncontroversial, the last two continue to be the subject of legal debate. It should also be noted that some factual situations will fall into two categories at the same time.

First, there are ongoing traditional or ‘classical’ Common Article 3 NIACs, in which government armed forces are fighting against one or more organized armed groups within the territory of a single state. These armed conflicts are governed by Common Article 3, as well as by rules of customary international humanitarian law.

Second, an armed conflict that pits two or more organized armed groups against each other may be considered a subset of ‘classical’ NIAC when it takes place within the territory of a single state. Examples include both situations where there is no state authority to speak of (i.e. the ‘failed’ state scenario) and situations

10 For one view see Theodor Meron, ‘The humanization of humanitarian law’, in *American Journal of International Law*, Vol. 94, 2000, p. 260; Michael Bothe, ‘War crimes’, in A. Cassese, P. Gaeta, and J. W. D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, p. 423; Anthony Cullen, ‘The definition of non-international armed conflict in the Rome Statute of the International Criminal Court’, unpublished PhD thesis, Irish Centre for Human Rights, 2007, p. 22. For the opposing view, see A. Bouvier and M. Sassöli, (eds), *How Does Law Protect in War?*, ICRC, Geneva, Vol. 1, 2006, p. 110; René Provost, *International Human Rights and Humanitarian Law*, Cambridge University Press, Cambridge, 2002, p. 268; William Schabas, *An Introduction to the International Criminal Court*, 3rd edn, Cambridge University Press, Cambridge, 2007, p. 116. See also Eric David, who believes that para. 2(f) did not create a third category of NIAC but that this ‘expanded notion’ of armed conflict replaces that of Additional Protocol II by operation of the *lex posterior* principle (Eric David, *Principes de droit des conflits armés*, Bruylant, Brussels, 2002, p. 119).

11 *Affaire Lubanga Dyilo*, Chambre préliminaire I, Décision sur la confirmation des charges, 29 janvier 2007, paras. 229–237.

12 See *How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?* ICRC Opinion Paper, March 2008, available at: <http://www.icrc.org> (last visited 9 March 2011), emphasis in original.

where there is the parallel occurrence of a non-international armed conflict between two or more organized armed groups alongside an international armed conflict within the confines of a single state. Here, too, Common Article 3 and customary IHL are the relevant legal regime for the NIAC track.

Third, certain NIACs originating within the territory of a single state between government armed forces and one or more organized armed groups have also been known to ‘spill over’ into the territory of neighbouring states. Leaving aside other legal issues that may be raised by the incursion of foreign armed forces into neighbouring territory (violations of sovereignty and possible reactions of the armed forces of the adjacent state that could turn the fighting into an international armed conflict), it is submitted that the relations between parties whose conflict has spilled over remain at a minimum governed by Common Article 3 and customary IHL. This position is based on the understanding that the spill over of a non-international armed conflict into adjacent territory cannot have the effect of absolving the parties of their IHL obligations simply because an international border has been crossed. The ensuing legal vacuum would deprive of protection both civilians potentially affected by the fighting and persons who fall into enemy hands.

Fourth, the last decade, in particular, has seen the emergence of what may be called ‘multinational NIACs’. These are armed conflicts in which multinational armed forces are fighting alongside the armed forces of a ‘host’ state – in its territory – against one or more organized armed groups. As the armed conflict does not oppose two or more states (i.e. as all the state actors are on the same side), the conflict must be classified as non-international, regardless of the international component, which can at times be significant. A current example is the situation in Afghanistan (even though that armed conflict was initially international in nature¹³). The applicable legal framework is Common Article 3 and customary IHL.

Fifth, a subset of multinational NIACs is one in which UN forces, or forces under the aegis of a regional organization such as the African Union, are sent to help stabilize a ‘host’ government involved in hostilities against one or more organized armed groups in its territory. There are cases in which it may be argued that the international force has become a party to the non-international armed conflict. This scenario raises a range of legal issues, among which is the legal regime governing multinational force conduct¹⁴ and the applicability of the 1994 Convention on the Safety of UN Personnel.¹⁵ It is submitted that if and when UN

13 The international armed conflict in Afghanistan that started in October 2001 was re-classified by the ICRC as a NIAC in June 2002 when the present Afghan government was established. Since then, the US and NATO forces have been acting in support of the government against the Taliban and Al Qaeda. Similarly, the international armed conflict that started in Iraq in March 2003 ended in June 2004, after which foreign troops were acting in Iraq with the consent of the interim Iraqi government.

14 The UN as an entity is not bound by human rights treaties.

15 Convention on the Safety of United Nations and Associated Personnel, available at: <http://www.un.org/law/cod/safety.htm> (last visited 3 March 2011). The 1994 Convention does not envisage UN forces becoming a party to a non-international armed conflict and thus by implication grants them immunity from attack even when they do in fact take a direct part in hostilities in those circumstances.

or forces belonging to a regional organization become a party to a NIAC such forces are bound by the rules of IHL, that is, Common Article 3 and customary law.

Sixth, it may be argued that a 'cross border' non-international armed conflict exists when the forces of a state are engaged in hostilities with a non-state party operating from the territory of a neighbouring host state without that state's control or support. The 2006 war between Israel and Hezbollah presented a particularly challenging addition to the expanding typology of (non-international) armed conflicts. There was a range of opinion on the legal classification of the hostilities that occurred, which may be encapsulated in three broad positions: that the fighting was an international armed conflict, that it was a non-international armed conflict, or that there was a parallel armed conflict going on between the different parties at the same time: an IAC between Israel and Lebanon and a NIAC between Israel and Hezbollah. The aim of the 'double classification' approach was to take into account the reality on the ground, which was that the hostilities for the most part involved an organized armed group whose actions could not be attributed to the host state fighting across an international border with another state. Such a scenario was hardly imaginable when Common Article 3 was drafted and yet there is no doubt that this Article, as well as customary IHL, was the appropriate legal framework for that parallel track.

A final, seventh type of NIAC (this time 'transnational') believed by some – almost exclusively in the US – to currently exist is an armed conflict between 'Al Qaeda and its affiliates' and the United States.¹⁶ The Bush Administration had designated this conflict a 'global war on terror' and determined that it was neither an international armed conflict governed by the Geneva Conventions – because Al Qaeda was not a state party – nor a non-international armed conflict – because it exceeded the territory of one state.¹⁷ That view was domestically superseded by the US Supreme Court, which ruled in the 2006 *Hamdan* case that the armed conflict in question was at least governed by Common Article 3 as a matter of US treaty obligation,¹⁸ thereby implying that it was non-international in nature. It is not clear whether the Obama Administration considers the war with Al Qaeda and its affiliates to be global and/or non-international, although there are indications to that effect.¹⁹

16 While the designation 'global war on terror' has been retired by the Obama Administration, President Obama has nevertheless stated that the US remains 'at war with Al Qaeda and its affiliates'. See 'Remarks by the President on national security', National Archives, Washington DC, May 21, 2009, available at: http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/ (last visited 3 March 2011).

17 See White House Memorandum of February 7, 2002 on the 'Humane treatment of Taliban and Al Qaeda detainees', available at: http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf (last visited 10 March 2011).

18 See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (hereafter, the *Hamdan* case), pp. 628–631, available at <http://www.supremecourt.gov/opinions/boundvolumes/548bv.pdf> (last visited 3 March 2011).

19 See for example 'Report of the United States of America submitted to the U.N. High Commissioner for Human Rights in conjunction with the Universal Periodic Review', p. 21, available at: <http://www.state.gov/documents/organization/146379.pdf> (last visited 3 March 2011).

By way of reminder, the ICRC has publicly stated on numerous occasions that it does not believe that there was, or is, an armed conflict of global dimensions of any kind taking place.²⁰ Since the 11 September 2001 terrorist attack on the United States, the ICRC has spoken of a multifaceted ‘fight against terrorism’. This effort involves a variety of counter-terrorist activities on a spectrum that starts with purely peaceful/non-violent measures – such as intelligence gathering, financial sanctions, judicial co-operation, and others – at one end, and concludes with the use of force at the other. Regarding the latter, the ICRC has taken a case-by-case approach to legally analysing and classifying the various situations of violence that have occurred in the fight against terrorism. Some situations have been classified as an international armed conflict, other contexts have been deemed to be non-international armed conflicts, while various acts of terrorism taking place in the world have been assessed as being outside any armed conflict.

There is no doubt, for example, that the armed conflict in Afghanistan between October 2001 and June 2002 was an international armed conflict governed by the 1949 Geneva Conventions and rules of customary IHL. However, this conflict has been of a non-international character since June 2002 – when the new Afghan government was established and recognized by the international community – until the present day. (The ICRC’s legal reading of the armed conflict in Iraq followed a similar logic.) This is because, in the ongoing armed conflict, multinational forces are fighting with the consent of and in support of the Afghan government against the Taliban and other organized non-state armed groups, including Al Qaeda; there is thus no international armed conflict between two or more states. The relevant legal framework is Common Article 3, customary IHL, human rights law, and domestic law. There are other discrete situations of violence around the world that may be regarded as NIACs and are colloquially associated with the fight against terrorism (the fighting in Somalia, to name just one example). The point being made is that each situation of organized armed violence must be analysed on its own merits: where the threshold of armed conflict, based on the facts, is reached, the conflict is classified as international or non-international and IHL is considered to be the applicable legal framework.

The approach that has just been outlined raises the question of the legal classification of individual acts of terrorism that have been occurring around the world, in Mumbai, London, Madrid, Casablanca, Glasgow, or Bali, to name just a few places. Can they be attributed to one and the same party to an armed conflict within the IHL meaning of that term? Based on available facts, as submitted above, this would appear not to be the case. Can it furthermore be claimed that the level of violence reached in each of the respective countries amounts to an armed conflict

20 See, among others, ‘International humanitarian law and the challenges of contemporary armed conflicts’, ICRC Report presented at the 28th International Conference of the Red Cross and Red Crescent, 2–6 December 2003, 03/IC/09, ICRC, Geneva, p. 18; and ‘International humanitarian law and the challenges of contemporary armed conflicts’, ICRC Report presented at the 30th International Conference of the Red Cross and Red Crescent, 26–30 November 2007, 30IC/07/8.4, ICRC, Geneva, p. 7.

in their territories? Or that the governments in question responded to the attacks by resorting to law of war rules? This would also appear not to be the case.

To sum up, each situation of violence needs to be examined in the specific context in which it takes place and should be legally classified as armed conflict, or not, based on the factual circumstances. The law of war was tailored for situations of armed conflict, from both a practical and a legal standpoint. It bears remembering that IHL rules on governing the taking of life or on detention for security reasons allow for more flexibility than the rules applicable outside of armed conflicts governed by other bodies of law, such as human rights law. In other words, it is both dangerous and unnecessary, in practical terms, to apply IHL to situations that do not amount to war, including a global war.

The binding force of Common Article 3

There is little doubt about the binding force of Common Article 3 as treaty law given that all states are today party to the Geneva Conventions.²¹ The very language used also makes clear that it binds the non-state party, as it lists obligations incumbent on 'each party to the conflict'. A variety of legal theories may be advanced to explain why non-state armed groups are bound by IHL. Some of them have aptly been summed up as follows:

Either there is a rule of customary international law according to which [non-state armed groups] are bound by obligations accepted by the government of the state where they fight, or the principle of effectiveness implies that any effective power in the territory of a state is bound by the state's obligations, or they are bound via the implementation or transformation of international rules into national legislation or by the direct applicability of self-executing international rules.²²

It is also widely accepted that, with the exception of the territorial clause discussed below, the substantive provisions of Common Article 3 reflect customary international humanitarian law. This has, *inter alia*, been confirmed by the ICTY. In a well-known 1995 pronouncement the ICTY stated that:

The emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and at that of treaty law. Two bodies of rules have thus crystallized, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have

21 194 states parties as of 1 September 2010. See ICRC IHL treaty database available at: [http://www.icrc.org/IHL.nsf/\(SPF\)/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf) (last visited 3 March 2011).

22 Marco Sassòli, 'Transnational armed groups and international humanitarian law', HPCR Occasional Paper Series, Winter 2006, No. 6, p. 12, available at: [http://www.reliefweb.int/rw/lib.nsf/db900sid/EVOD-6WQFE2/\\$file/OccasionalPaper6.pdf?openement](http://www.reliefweb.int/rw/lib.nsf/db900sid/EVOD-6WQFE2/$file/OccasionalPaper6.pdf?openement) (last visited 10 March 2011).

gradually become part of customary law. This holds true for Common Article 3 of the 1949 Geneva Conventions, as was authoritatively held by the International Court of Justice (Nicaragua Case, para. 218), but also applies to Article 19 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and, as we shall show below (para. 117), to the core of Additional Protocol II of 1977.²³

By way of reminder, the International Court of Justice affirmed in the *Nicaragua* case that:

Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity...'²⁴

The Court reiterated this position in relation to the dispute at hand by also stressing that:

Because the minimum rules applicable to international and to non-international conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of the rules which operate for the one or for the other category of conflict. The relevant principles are to be looked for in the provisions of Article 3 of each of the four Conventions of 12 August 1949, the text of which, identical in each Convention, expressly refers to conflicts not having an international character.²⁵

The International Criminal Tribunal for Rwanda has likewise affirmed the customary law nature of Common Article 3.²⁶ As will be seen below, the ICRC's *Customary Law Study* also confirmed that the substantive provisions of Common Article 3 are binding as customary law.

In sum, there is no doubt that the substantive provisions of Common Article 3 apply as a matter of customary law to all parties to an armed conflict, regardless of its formal classification or geographical reach.

23 ICTY, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 98. Similar formulations are to be found in subsequent ICTY cases as well. For example, the Tribunal reiterated that: 'It is ... well established that Common Article 3 has acquired the status of customary international law' in para. 228 of *The Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34-T (Trial Chamber), 31 March 2003.

24 International Court of Justice (ICJ), *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 27 June 1986, Judgment, para. 218.

25 *Ibid.*, para. 219.

26 See International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T (Trial Chamber), September 2, 1998, paras. 608–609.

The territorial scope of application of Common Article 3

The *chapeau* of Common Article 3 provides that it applies to conflicts ‘not of an international character occurring in the territory of one of the High Contracting Parties’. Based on this formulation, there is a body of commentary²⁷ and judicial opinion²⁸ that posits that the territorial reach of Common Article 3 is limited to an armed conflict taking place within the territory of a single state (whether between its armed forces and one or more organized non-state armed groups or between such groups themselves).

This limited reading of the territorial scope of Common Article 3 may be defended based on the plain language of the text. It is submitted, however, that the text can also be given a different interpretation and that, in any event, its provisions may nowadays be evolutively interpreted to apply to any situation of organized armed violence that has been classified as a non-international armed conflict based on the criteria of organization and intensity, therefore also to a NIAC that exceeds the boundaries of one state as described in the typology above (with the exception of the first two scenarios).²⁹ The reasons are set out in the following subsections.

Drafting history

There is nothing in the drafting history of Common Article 3 on the basis of which it may be concluded that the territorial clause was *deliberately* formulated to limit its geographical application to the territory of a single state. The draft text submitted by the ICRC to the XVII International Red Cross Conference in Stockholm and then to the Diplomatic Conference in Geneva read:

In all cases of armed conflict not of an international character, especially cases of civil war, colonial conflicts or wars of religion, *which may occur on the territory of one or more of the High Contracting Parties*, the implementing

27 A major source cited in support of this view is the ICRC’s Commentaries to the Geneva Conventions, in which Jean Pictet unequivocally states that the Article applies to a NIAC occurring within the territory of a single state. See, for example, J. Pictet (ed.), *Commentary to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War* (hereafter *GC IV Commentary*), ICRC, Geneva, 1958, p. 36: ‘Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities – conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country’.

28 For example, the ICTR has stated that a non-international armed conflict is one in which the ‘government of a single state (is) in conflict with one or more armed factions within its territory’. *Prosecutor v. Musema*, Case No. ICTR-96-13-A (Trial Chamber), January 27, 2000, paras. 247–248. It must be noted that this pronouncement is confusing given that the ICTR Statute clearly indicates in Article 1 that the Tribunal has jurisdiction over the spill-over aspects of the Rwandan conflict into neighboring states, as mentioned further below.

29 This position does not endorse a ‘global war’ (trans-national armed conflict) approach, as already explained above.

principles of the present Convention shall be obligatory on each of the adversaries.³⁰

This proposal was examined against the backdrop of discussions on the extent of regulation to which Common Article 3 non-international armed conflicts should be subject. One option was essentially to make a broader range of norms –that is, the totality of the Geneva Conventions – applicable to a limited number of NIACs, whereas the other was to codify a limited number of protections that would be applicable to all types of NIAC, even those that could not necessarily be deemed high-intensity civil wars. The second option was adopted essentially because states feared that the extension of Geneva Conventions protections to non-state adversaries would be perceived as a signal of legitimization and that they would be expected to grant prisoner-of-war treatment to captured rebels.³¹ The drafting history does not indicate that the current wording of Common Article 3 is to be attributed to the express willingness of states to limit its application to the territory of a single country.³² It only allows the conclusion that the existing text was the result of negotiations in which the focus of debate was elsewhere.³³

It has thus been argued, based on the *travaux préparatoires*, that because the applicability of Common Article 3, as opposed to Common Article 2, ‘does not require the involvement of a contracting state as a party to the conflict’ it is only logical that this criterion was replaced by the prerequisite of a territorial link to a contracting state:

The legislative novelty of Article 3 GC I to IV was that each contracting State established binding rules not only for its own conduct, but also for that of the involved non-State parties. The authority to do so derives from the contracting State’s domestic legislative sovereignty, wherefore a territorial requirement was incorporated in Article 3 GC I to IV. This is not say, however, that a conflict governed by Article 3 GC I to IV cannot take place on the territory of more than one contracting State. From the perspective of a newly drafted treaty text, it appears more appropriate to interpret the phrase in question simply as

30 *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B (Berne, Federal Political Department, 1950–1951), p. 122, italics in original, additional emphasis added.

31 *GC IV Commentary*, above note 27, p. 31.

32 For a detailed overview of the drafting history of Common Article 3, see Anthony Cullen, *The Concept of Non-international Armed Conflict in International Humanitarian Law*, Cambridge University Press, Cambridge, 2010.

33 The upshot of the adoption of the second option was that no specific features of a NIAC – as a precondition for the application of Common Article 3 – were included in the text of the Article itself. The conditions listed in the Commentaries to the Geneva Conventions – for example that the *de iure* government has recognized the insurgents as belligerents or that the insurgent civil authority exercises *de facto* authority over persons within a determinate portion of the national territory – are clearly stated to provide useful guidance, but no more than that. Pictet’s exhortation that the ‘the scope of the application of the Article must be as wide as possible’ has become part of international practice, and the provisions of Common Article 3 have been deemed binding in armed conflicts that do not meet the highly structured indicative requirements listed in the Commentaries. The criteria that have to be met, as explained above, are the existence of organized parties and a certain level of hostilities, without which there can be no non-international armed conflict in the first place.

emphasizing that Article 3 GC I to IV could apply only to conflicts taking place on the territory of States which had already become party to the new Conventions.³⁴

This interpretation is further supported by a comparison of the relevant provisions of Common Article 3 and Additional Protocol II. The first refers to a NIAC occurring in the territory of *one* of the High Contracting Parties, whereas – by contrast – the wording of Article 1 of Additional Protocol II refers to armed conflicts that ‘take place’ in the territory of *a* High Contracting Party between *its* armed forces and dissident armed forces or other organized armed groups. The territorial clause of Common Article 3 thus clearly allows a reading according to which it will apply so long as a non-international conflict originated in the territory of one of the High Contracting Parties. The same conclusion cannot be reached with respect to Additional Protocol II.

Jurisprudence and doctrine

As underlined above, the International Court of Justice has opined that the substantive provisions of Common Article 3 reflect elementary considerations of humanity that are binding regardless of the character of an armed conflict (non-international or international). For the purposes of this discussion it must be stressed that the Court thereby implied that the application of Common Article 3 was not restricted to the territory of a single state.³⁵

Other international authorities have also classified hostilities as non-international even though they exceeded the territory of a single state. The Statute of the Rwanda Tribunal, adopted by the UN Security Council, explicitly acknowledges the spill-over nature of the 1994 Rwandan conflict by providing in Article 1 that the Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations ‘committed in the territory of neighbouring states between 1 January 1994 and 31 December 1994’.³⁶ The Statute expressly provided the Tribunal with jurisdiction over violations of Common Article 3 – and Additional Protocol II – to the Geneva Conventions,³⁷ thus accepting that they can have extraterritorial effect.

As briefly mentioned above, the United States Supreme Court determined in the 2006 *Hamdan* case that Common Article 3 is to be given extraterritorial effect as treaty law. While, as already submitted, there is not – nor has there been – a global (transnational) armed conflict since 9/11, the Supreme Court’s reasoning is worth mentioning because of the extraterritorial effect that it read into Common Article 3. The Court of Appeals and the US government had argued that

34 Nils Melzer, *Targeted Killing in International Law*, Oxford University Press, Oxford, 2008, p. 258.

35 See note 24 above.

36 ICTR Statute, Article 1, available at: <http://www.un.org/ictt/statute.html> (last visited 11 March 2011).

37 *Ibid.*, Article 4.

Common Article 3 did not apply to *Hamdan* because the conflict with Al Qaeda was international in scope (albeit not covered by the Geneva Conventions) and thus did not qualify as a ‘conflict not of an international character’. The Court stated that it did not need to decide the merits of this argument ‘because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not between signatories’³⁸ – that provision being Common Article 3. The Court specified that the term ‘conflict not of an international character’ is to be used ‘in contradistinction to a conflict between nations’, based on the ‘fundamental logic [of] the Convention’s provisions on its application’.³⁹ According to the Court, a Common Article 3 conflict ‘is distinguishable from the conflict described in Common Article 2 [of the Geneva Conventions] chiefly because it does not involve a clash between nations’. It concluded that the phrase “not of an international character” bears its literal meaning’.⁴⁰ The Court’s interpretation of the applicability of the Common Article 3 to the US’s conflict with Al Qaeda was thus based on the quality of the parties involved and not on its geographical reach.

Commentators, too, have recognized the need to provide a different interpretation of the territorial clause of Common Article 3. It has, for example, been said that:

There is no substantive reason why the norms that apply to an armed conflict between a state and an organized armed group within its territory should not also apply to an armed conflict with such a group that is not restricted to its territory. It therefore seems ... that to the extent that treaty provisions relating to non-international armed conflicts incorporate standards of customary international law these standards should apply to all armed conflicts between a state and non-state actors. This means that, at the very least, Common Article 3 will apply to such conflicts.⁴¹

Pursuant to a similar view, Common Article 3 not only governs ‘civil wars’ but can be viewed as ‘covering all conflicts not covered by the rest of the Geneva Conventions, that is, all those other than between states’.⁴²

Finally, it should be mentioned that the 2006 armed conflict between Israel and Hezbollah was deemed by some commentators and organizations to be purely non-international in nature, regardless of the fact that it was waged across an international border between the armed forces of a state and a non-state armed group based in another country’s territory.⁴³

38 *Hamdan* case, above note 18, p. 629.

39 *Ibid.*, p. 630.

40 *Ibid.*

41 David Kretzmer, ‘Targeted killings of suspected terrorists: extra-judicial executions or legitimate means of defense?’, in *European Journal of International Law*, Vol. 16, No. 2, 2005, p. 195.

42 Steven R. Ratner, ‘Predator and prey: seizing and killing suspected terrorists abroad’, in *Journal of Political Philosophy*, Vol. 15, No. 3, 2007, p. 261.

43 See Kenneth Anderson, ‘Is the Israel–Hezbollah conflict an international armed conflict?’ 14 July 2006, available at: <http://kennethandersonlawofwar.blogspot.com/2006/07/is-israel-hezbollah-conflict.html> (last visited 3 March 2011). See, also, Human Rights Watch, ‘Q and A on hostilities between Israel

Humanitarian considerations

It is almost unnecessary to point out that humanitarian considerations strongly militate in favour of an expanded geographical reading of the territorial clause of Common Article 3 as a matter of treaty law. Such an interpretation is required in order to dispel any doubt about the binding nature of the basic protections – the prohibitions, *inter alia*, of murder, torture and other ill-treatment, hostage-taking, and unfair trial – that parties to an armed conflict not of an international character are obliged to afford persons in their power. The notion that persons captured in a Common Article 3 NIAC could be deprived of the Article's safeguards because its application as treaty law must cease at a border is inconceivable from the perspective of ensuring the protection of victims of war. To claim that the substantive provisions of Common Article 3 are extraterritorially applicable as customary law but not as treaty law is to make an argument without practical effect and begs the question of why it is being made at all.

The gap theory

Despite the customary law nature of the substantive provisions of Common Article 3, its territorial clause has given rise to what may be called the 'gap theory'. According to proponents of this view, because there are no IHL *treaty* rules applicable to an armed conflict involving states and non-state armed groups with extraterritorial effect, such a conflict is either: governed only by customary law, including Common Article 3; or would require the development of a new legal framework.

The first position was outlined by a former government legal adviser as follows:

I must note ... that it was not always clear to our government that Common Article 3 applied as a treaty-law matter to a conflict between a state and non-state actors that transcended national boundaries. While the U.S. Supreme Court decision in *Hamdan v. Rumsfeld* held that the conflict with al Qaida, as one not between states, is a non-international conflict covered by Common Article 3, I think many international legal scholars would question that conclusion. Textually the provision is limited to armed conflict 'not of an international character' occurring 'in the territory of one of the High Contracting Parties', suggesting the scope of the provision is limited to conflicts occurring in the territory of a single state. Indeed, other states, such as Israel, have concluded that conflicts with terrorist organizations outside the state's borders are international armed conflicts not falling within the scope of Common Article 3. I make these points not to re-litigate the *Hamdan* case, or to disregard the view of many that Common Article 3 is customary international law, but

and Hezbollah', 1 August 2006, available at: <http://www.hrw.org/en/news/2006/08/01/questions-and-answers-hostilities-between-israel-and-hezbollah> (last visited 3 March 2011).

rather to note that in some cases, not even Common Article 3 may apply as a treaty-law matter to conflicts with transnational terrorist groups.⁴⁴

The second view posits that ‘extra-state hostilities’ with non-state actors are hostilities that take place, at least in part, outside the territory of a state and thus cannot or should not be placed in either of the two traditional categories of the laws of war (international or non-international armed conflicts).⁴⁵ It argues that this new category of armed conflict is governed by ‘specific rules that are derived from an interpretation of the general principles of international humanitarian law in the specific context of extra-state armed conflicts’.⁴⁶ The crux of the proposed legal framework is that the protection of non-combatants in an extra-state armed conflict should be in line with that afforded to non-combatants in international armed conflicts, while the protection of combatants in extra-state armed conflicts should be more in line with the protection afforded to them in intra-state armed conflicts (meaning, *inter alia*, no prisoner-of-war status upon capture). This view rejects the idea that an extra-territorial conflict between a state and a non-state armed group should be deemed non-international, explaining that ‘it is preferable to recognize that a gap exists in the Geneva Conventions and to focus academic discussions on what should be done about this gap’.⁴⁷

In relation to the first position it is submitted that to deny the applicability of Common Article 3 as *treaty* law based on the territorial clause but to accept its substantive application as customary law regardless of the type of conflict involved is basically a legal-technical argument with no practical consequences, as stated above. As regards the second view, to posit that a new legal regime for extra-territorial armed conflicts is necessary, but to propose substantive protections mostly identical to those that already exist under IHL treaty and customary law for NIACs, seems to suggest theoretical repackaging rather than the true identification of a major gap in IHL regulation of this type of conflict. While it cannot be claimed that Common Article 3 or customary law provide a detailed answer to all the legal and protection issues that arise in practice (a question that will be addressed below), it would appear that the creation of a new armed conflict classification for what are still NIACs – albeit with an expanded geographical scope – is superfluous.⁴⁸

It is submitted, in sum, that the *chapeau* of Common Article 3 may nowadays be evolutively interpreted as a matter of treaty law to apply not only to

44 See lecture of the former US State Department Legal Adviser John B. Bellinger III at the University of Oxford on 10 December 2007, available at: <http://insct.syr.edu/uploadedFiles/insct/uploadedfiles/PDFs/Bellinger%20Prisoners%20In%20War%20Contemporary%20Challenges%20to%20the%20Geneva%20Conventions.pdf> (last visited 3 March 2011).

45 See Roy S. Schondorf, ‘Extra-state armed conflicts: is there a need for a new legal regime?’, in *New York University Journal of International Law and Politics*, Vol. 37, No. 1, 2004.

46 *Ibid.*, p. 8.

47 *Ibid.*, p. 51 n. 131.

48 See also C. Kress, ‘Some reflections on the international legal framework governing transnational armed conflicts’, in *Journal of Conflict and Security Law*, 2010, p. 258, available at: <http://www.uni-koeln.de/jur-fak/kress/Materialien/Chef/HP882010/Final.pdf> (last visited 3 March 2011).

non-international armed conflicts occurring wholly within the territory of a state but also to armed conflicts involving state and non-state parties initially *arising* in the territory of a state. Due to the fact that all states today are parties to the Geneva Conventions, a NIAC will be governed by Common Article 3 as long as there is a 'hook' to a national territory. In practice this means that Common Article 3 may be considered the governing legal framework in all NIACs currently taking place around the world. The (still) hypothetical exception as treaty law would be hostilities occurring on the territory of a non-state party to the Conventions. In that case, Common Article 3 would apply as customary law.

While it cannot simultaneously be claimed that an expanded reading of the territorial clause of Common Article 3 may at this point in time be considered to reflect customary law, some of the developments outlined above seem to point in that direction.

The legal and policy framework applicable to Common Article 3 conflicts

The express wording of Common Article 3 states that each party to the conflict shall be bound to apply its provisions 'as a minimum'. The Article thus provides a set of basic guarantees that are absolutely fundamental in nature, but does not provide anywhere near sufficient guidance for the myriad legal and protection issues that arise in conflicts not of an international character. Moreover, the wording itself suggests that the parties will need to rely on additional norms if they are to meet more than the minimum obligations. Provided below is a consolidated account of IHL rules – in two key domains – believed to be applicable in NIACs governed by Common Article 3 (in addition to the provisions of that Article), based either on law or on law and policy combined. The protection of persons in enemy hands, which is what Common Article 3 deals with, is the focus of the consolidated reading (under 'Treatment of persons in enemy hands'). Also outlined are rules on the conduct of hostilities in non-international armed conflicts meeting the threshold of Common Article 3 (under 'Conduct of hostilities'). It is submitted that the proposed framework applies or should apply whenever there is in fact a non-international armed conflict, or when a state classifies an armed conflict as such.

Treatment of persons in enemy hands

Customary international humanitarian law

A legally binding source of additional rules applicable in non-international armed conflicts meeting the threshold of Common Article 3 is, of course, customary international humanitarian law. The ICRC's 2005 *Study* on customary IHL made a significant contribution to identifying the scope of protection in this type of armed conflict by concluding that 148 out of a total of 161 rules formulated are applicable

regardless of whether international or non-international conflict is involved.⁴⁹ Given the large number of rules that were found to be binding as a matter of customary law in non-international armed conflicts as such, the results of the *Study* dispel the notion that IHL protection in this type of situation is weak owing to the fairly small number of treaty rules. When both sources of law are combined – the treaty and customary law rules – a far stronger regime of obligations of the parties emerges. While it is not the purpose of this note to summarize the results of the *Customary Law Study*, a few reminders of its findings and structure are nevertheless useful in highlighting the expansion of legal protection achieved.

The *Customary Law Study* confirms – in a section entitled ‘Fundamental guarantees’ – that the substantive provisions of Common Article 3 do indeed reflect customary law. It reiterates that humane treatment is a cornerstone of IHL and that adverse distinction in its application is prohibited. The *Study* repeats and elaborates on the Common Article 3 prohibitions of violence to life, including murder, mutilation, cruel treatment, and torture, as well as on the prohibition of outrages upon personal dignity. The prohibition on the taking of hostages is likewise reiterated, as is the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court (phrased in the *Study* as the right to a fair trial). The ‘Fundamental guarantees’ section identifies numerous other rules binding on parties to armed conflicts. Among them are the prohibition of slavery and the slave trade, rape and other forms of sexual violence, enforced disappearance, collective punishment, retroactive application of penal law, arbitrary deprivation of liberty, and others.

The *Study*’s wider heading on the ‘Treatment of civilians and persons *hors de combat*’ also contains rules on the protection of the wounded, sick, and shipwrecked (thus reiterating a similar norm in Common Article 3), on missing persons, and on the dead, as well a series of norms additionally applicable to persons deprived of liberty (in which the ICRC’s right to offer its services to parties involved in a NIAC, contained in Common Article 3, is reiterated). There are likewise provisions on displaced persons, and on persons who enjoy specific protection, including women and children.

The *Study* collected a wide range of state and other practice regarding the treatment of persons in enemy hands. The norms of customary IHL thus identified form part of the consolidated reading of IHL applicable in NIACs fulfilling the Common Article 3 threshold.

Procedural safeguards in internment/administrative detention

As noted above, arbitrary deprivation of liberty is prohibited under customary international humanitarian law. This prohibition, like most other norms of

⁴⁹ As already mentioned, the *Customary Law Study* determined that states did not in practice make a clear distinction between the two types of NIAC that exist under treaty law: those reaching the threshold of Common Article 3 and those meeting the requirements of Additional Protocol II.

customary law, is necessarily general in nature and does not provide guidance that would allow an assessment of when a deprivation of liberty may be deemed 'arbitrary'. In practice, two types of detention related to a NIAC may occur: detention for security reasons (internment)⁵⁰ and detention in conjunction with a criminal process.

Internment is defined as the deprivation of liberty of a person that has been ordered by the executive branch – not the judiciary – without criminal charges being brought against the internee.⁵¹ Under IHL applicable in international armed conflict, internment (and assigned residence) is the most severe 'measure of control' that a detaining authority may take with respect to persons against whom no criminal proceedings are initiated.⁵²

The fact that Common Article 3 neither expressly mentions internment nor elaborates on permissible grounds or process has become a source of different positions on the legal basis for internment in NIAC. In this context, it must be recalled that Additional Protocol II refers explicitly to internment in Articles 5 and 6. In the ICRC's view, both treaty and customary IHL contain an inherent power to intern and may thus be said to provide a legal basis for internment in NIAC. However, a valid domestic and/or international legal source (depending on the type of NIAC involved), setting out the grounds and process for internment, must exist or be adopted in order to satisfy the principle of legality.

The paucity of clear IHL treaty rules in NIAC, as well as the fairly rudimentary nature of procedural safeguards in situations of international armed conflict, led the ICRC in 2005 to develop an institutional position⁵³ on the minimum procedural rules that should be applied in all situations of internment/administrative detention,⁵⁴ whether within or outside armed conflict. The rules are based primarily on IHL, but also on human rights law, as well as policy, and are meant to be implemented in a manner that takes into account the specific situation at hand. Non-state armed group adherence to the rules will necessarily be contextual given the practical and other circumstances in which they most often operate.

Provided below is a list of the rules that are formulated as 'general principles' and as specific 'procedural safeguards'.

50 Prisoner of war internment is subject to a different legal regime and is not the subject of this section.

51 See *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff Publishers, Geneva, 1987, Commentary on Additional Protocol I, Art. 75(3), para. 3063.

52 GC IV, Arts. 41(1) and 78(1).

53 The institutional position is set out in Jelena Pejić, 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence'. It was published as Annex 1 to the ICRC's Report on 'International humanitarian law and the challenges of contemporary armed conflicts' presented to the 30th International Conference of the Red Cross and Red Crescent held in Geneva in 2007. It is also published in *International Review of the Red Cross*, Vol. 87, No. 858, June 2005, pp. 375–391, available at: http://www.icrc.org/eng/assets/files/other/irrc_858_pejic.pdf (last visited 3 March 2011).

54 The terms 'internment' and 'administrative detention' are used interchangeably.

General principles applicable to internment/administrative detention:

- internment/administrative detention is an exceptional measure;
- internment/administrative detention is not an alternative to criminal proceedings;
- internment/administrative detention can only be ordered on an individual, case-by-case basis, without discrimination of any kind;
- internment/administrative detention must cease as soon as the reasons for it cease to exist;
- internment/administrative detention must conform to the principle of legality.

Procedural safeguards:

- right to information about the reasons for internment/administrative detention;
- right to be registered and held in a recognized place of internment/administrative detention;
- foreign nationals in internment/administrative detention have the right to consular access;
- a person subject to internment/administrative detention has the right to challenge, with the least possible delay, the lawfulness of his or her detention;
- review of the lawfulness of internment/administrative detention must be carried out by an independent and impartial body;
- an internee/administrative detainee should be allowed to have legal assistance;
- an internee/administrative detainee has the right to periodical review of the lawfulness of continued detention;
- an internee/administrative detainee and his or her legal representative should be able to attend the proceedings in person;
- an internee/administrative detainee must be allowed to have contacts with – to correspond with and be visited by – members of his or her family;
- an internee/administrative detainee has the right to the medical care and attention required by his or her condition;
- an internee/administrative detainee must be allowed to make submissions relating to his or her treatment and conditions of detention;
- access to persons interned/administratively detained must be allowed.

The lack of sufficient procedural rules in NIAC has become a legal and protection issue over the past several years in the different types of non-international conflicts described above. Certain issues have nevertheless emerged as common and are briefly outlined below.

Grounds for internment. As already mentioned, IHL applicable in NIAC does not specify permissible grounds for internment. The ICRC has relied on ‘imperative reasons of security’ as the minimum legal standard that should inform internment decisions in NIAC. This policy choice – drawn from the

identical language in the Fourth Geneva Convention⁵⁵ – was adopted because the wording was meant to emphasize the exceptional nature of internment. It is believed that the ‘imperative reasons of security’ standard strikes a workable balance between the need to protect personal liberty and the detaining authority’s need to protect against activity seriously prejudicial to its security.

The exact meaning of ‘imperative reasons of security’ has not been sufficiently elaborated in international or domestic law to enable a determination of the specific types of conduct that would meet that threshold. As noted in the *Commentary to the Fourth Geneva Convention*:

It did not seem possible to define the expression ‘security of the State’ in a more concrete fashion. It is thus left very largely to Governments to decide the measure of activity prejudicial to the internal or external security of the State which justifies internment or assigned residence.⁵⁶

The *Commentary* nevertheless adds that: ‘In any case such measures can only be ordered for real and imperative reasons of security; their exceptional character must be preserved.’⁵⁷

While states are therefore left a margin of appreciation in deciding on the specific activity deemed to represent a serious security threat, there are pointers in terms of what activity would or would not meet that standard. It is uncontroversial that direct participation in hostilities is an activity that would meet the imperative reasons of the security standard. The key issue, of course, is what direct participation in hostilities is, an issue that will be dealt with further in this text.

Conversely, internment cannot be resorted to for the sole purpose of interrogation or intelligence gathering, unless the person in question is deemed to represent a serious security threat based on his or her own activity. Similarly, internment cannot be resorted to either to punish a person for past activity or to act as a general deterrent to the future activity of another person. It is often observed in practice that internment is used to delay or prevent criminal proceedings, even though internment is not meant to serve as substitute for criminal process where such process is feasible under the circumstances.

The internment review process. The Fourth Geneva Convention provides a basic outline of the process of internment review in IAC. It stipulates that an internee has the right to request that an internment decision be reconsidered/appealed,⁵⁸ that such review may be carried out by a court or administrative board,⁵⁹ and that there must be automatic, periodic review of internment if the initial decision is maintained on appeal.⁶⁰

55 GC IV, Art. 78(1).

56 GC IV *Commentary*, above note 27, p. 257.

57 *Ibid.*, p. 368.

58 GC IV, Arts. 43(1) and 78(2).

59 GC IV, Art. 43(1).

60 GC IV, Arts. 43(1) and 78(2).

The fact that IHL applicable in NIAC does not provide details on the internment review process was an additional reason that prompted the ICRC to publish the institutional position on procedural safeguards for internment mentioned above. The document provides, *inter alia*, that a person subject to internment has the right to challenge, with the least possible delay, the lawfulness of his or her detention (by way of reminder, in international armed conflicts the Fourth Geneva Convention provides for a detainee's ability to request 'reconsideration' or to 'appeal' the internment decision). The purpose of the challenge is to enable the review body to determine whether the person was deprived of liberty for valid reasons and to order his or her release if that was not the case. Mounting an effective challenge presupposes the fulfilment of several procedural and practical steps, including: i) providing the internee with sufficient information about the reasons for detention, as mentioned above; ii) providing the internee with evidence supporting the allegations against him or her so as to enable him or her to rebut them; iii) ensuring that procedures are in place to enable a detainee to seek and obtain evidence on his or her behalf, with such procedures being explained; and iv) making the internment review process and its various stages known and understood.

Automatic, periodic review of internment is a further safeguard identified in the position on procedural safeguards.⁶¹ Periodic review obliges the detaining authority to ascertain whether the detainee continues to pose an imperative threat to security and to order release if that is not the case. The safeguards that apply to initial review are also to be applied at periodic review. Internees should also benefit from appropriate legal assistance in the internment review process.

Internment review must be carried out by an independent and impartial review body (which must be distinct from the authority that initially deprived the person involved of liberty, if the challenge is to be effective). Where internment review is administrative rather than judicial in nature, ensuring the requisite independence and impartiality of the review board represents a particular challenge. Elements relevant to safeguarding independence and impartiality include: i) the composition of the review board, including the process of selection and appointment of its members; ii) board members' qualifications and training; iii) the terms and tenure of their function; iv) their insulation from outside influence; and v) their final decision-making authority.

End of internment. No body of international law permits indefinite internment as such. The general IHL rule governing the duration of internment is that internment must end as soon as the reasons justifying it cease to exist. In view of the rapid progression of events in armed conflict, a person considered to be a threat at the time of capture might not pose the same threat after a change of circumstances on the ground. Thus, the longer the internment lasts, the greater the burden on the detaining authority to show that the concerned person remains an

61 Periodic review is provided for in GC IV with respect to internees in a state's own territory and in occupied territory. See Articles 43(1) and 78(2), respectively.

imperative threat to security. As regards the outer temporal limit of internment, the general IHL rule is that internment must cease at the end or close of active hostilities in the armed conflict in relation to which a person was interned. The close of hostilities is a factual matter that is determined on a case-by-case basis.

Judicial guarantees

Judicial guarantees are a set of internationally recognized norms aimed at ensuring the proper administration of justice. Also known as fair trial rights, they can be said to make up the ‘package’ of safeguards that must be afforded to a person suspected or accused of having committed a criminal offence, particularly when deprived of liberty.

International law provides for judicial guarantees because of, *inter alia*, the extremely serious consequences that a finding of guilt for a criminal offence may have. Depending on the gravity of the crime involved, a determination of guilt may lead to the deprivation of a fundamental human right: that of personal liberty. Where domestic law provides for the death penalty, a finding of guilt may also lead to the deprivation of the most basic human right: the right to life. Judicial guarantees aim to ensure: i) that an innocent person is not subject to criminal sanctions; ii) that the process by which someone’s innocence or guilt is determined is basically fair; and iii) that a person’s other rights, such as the right to be free from torture or other forms of ill-treatment, are also respected in the administration of justice. Judicial guarantees thus comprise a ‘safety net’ that must be respected in order to ensure that any deprivation of liberty as the result of criminal proceedings is lawful and non-arbitrary.

The right to a fair trial is a basic norm of both treaty and customary international humanitarian law. Common Article 3(1)(d) prohibits ‘The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples’. The ICRC’s *Customary Law Study* also identifies the right to a fair trial as a norm of customary law: ‘No one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees’.⁶² However, it should be noted that neither the text of Common Article 3 nor customary IHL elaborates a list of what may be considered essential judicial guarantees.

The provisions of Common Article 3(1)(d) were further elaborated in Article 6 of Additional Protocol II with respect to non-international armed conflicts meeting the requisite threshold and are considered to reflect customary law. Meanwhile, Article 75 of Additional Protocol I contains a separate list of fair

62 *Customary Law Study*, Rule 100.

trials rights for any person detained by the adversary in relation to an international armed conflict. It was drafted as a ‘safety net’⁶³ covering individuals ‘who are in the power of a Party to the conflict and who do not benefit from more favorable treatment under the Geneva Conventions or this Protocol’.⁶⁴ The list is referred to here because it is widely considered to reflect customary IHL regardless of the type of conflict involved. The fact that Article 75 represents a minimum benchmark of protection in international armed conflict is confirmed by the last clause of the Article, pursuant to which: ‘No provision of this Article may be construed as limiting or infringing any other more favorable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1’.⁶⁵ The applicable rules of international law include human rights law.

The right to a fair trial is a fundamental guarantee of human rights law of both a binding and a non-binding nature (‘soft law’). Fair trial rights are, *inter alia*, provided for in Articles 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR). A state party may derogate from (modify) its obligations under those provisions of the treaty under very strict conditions, one of which is the existence of a public emergency threatening the life of the nation.⁶⁶ While armed conflict is an example of such a public emergency, it is important to note that measures derogating from states’ obligations under the ICCPR may ‘not (be) inconsistent with their other obligations under international law’.⁶⁷ Simply put, this means that states parties to the ICCPR may not derogate from the right to a fair trial in situations of armed conflict, as this would be ‘inconsistent’ with their obligation to respect judicial guarantees under humanitarian law treaties and customary international humanitarian law.

A compelling argument may be made that it makes little sense that judicial guarantees must be observed in the exceptional circumstances of armed conflict and yet may be suspended in peacetime. It is therefore submitted that right to a fair trial under Articles 9 and 14 of the Covenant, even though textually derogable, must be considered *de facto* non-derogable even outside armed conflict.⁶⁸

63 In international armed conflicts, the judicial guarantees of prisoners of war and civilians are provided for in the Third and Fourth Geneva Conventions, respectively.

64 AP I, Art. 75(1).

65 AP I, Art. 75(8).

66 ICCPR, Art. 4.

67 *Ibid.*

68 The UN Human Rights Committee has stated: ‘As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party’s decision to derogate from the Covenant’. UN Human Rights Committee General Comment No. 29: States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 16.

Regional human rights treaties such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, and the African Charter on Human and People's Rights also provide for the right to a fair trial.

It may be concluded that the right to a fair trial is a fundamental guarantee provided for in both IHL and human rights law, which are, in this area, undoubtedly complementary.⁶⁹ Just as important, a closer examination of the respective provisions – particularly of Article 75 of Additional Protocol I and of Article 14 of the ICCPR – demonstrates that the specific guarantees listed are nearly identical. Based on the overlapping nature of the fair trial standards applicable both in situations of armed conflict and in peacetime and the common aim of the respective provisions, it is possible to identify a list of judicial guarantees that are binding in armed conflict (as well as outside it). Given that Common Article 3 lacks an elaboration of specific judicial guarantees, the list provided below may serve to fill the gap.

The list is divided into three parts. Part A contains judicial guarantees of general application that must underlie the totality of any criminal process; part B provides judicial guarantees applicable to the pre-trial phase of criminal proceedings; and part C lists judicial guarantees applicable in the trial phase proper of a criminal process. It must be remembered, however, that any division of judicial guarantees according to the pre-trial or trial phase is inherently arbitrary, as the guarantees themselves overlap and most must be observed throughout criminal proceedings, until a final judgment is rendered on appeal.

69 The complementary relationship between humanitarian and human rights law has been confirmed by the International Court of Justice. In a July 2004 Advisory Opinion, the Court stated that humanitarian and human rights law are not mutually exclusive. According to the Court, some rights are only protected by human rights law, some are protected only by humanitarian law, and 'yet others may be matters of both these branches of international law'. (ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 106.) The rights of persons suspected of having committed a criminal offence – whether detained in IAC or NIAC – may be said to fall into the category of rights that, pursuant to the ICJ's wording, are 'matters' of both branches of law. Reliance on human rights law as a legal regime that is complementary to humanitarian law is also explicitly recognized in both Additional Protocols to the Geneva Conventions. According to Article 72 of Additional Protocol I: 'The provisions of this Section [Treatment of Persons in the Power of a Party to the Conflict] are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Convention, particularly parts I and III thereof, as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict' (emphasis added). This article therefore permits resort to human rights law as an additional frame of reference in regulating the judicial guarantees of criminal suspects who belong to 'persons in the power of a party to the conflict'. (See AP I Commentary, above note 51, paras. 2927–2935.) Preambular paragraph 2 of the Second Additional Protocol establishes the link between that Protocol and human rights law by providing that 'international instruments relating to human rights offer a basic protection to the human person'. The Commentary to the Protocol specifies that the reference to international instruments includes treaties adopted by the UN, such as the ICCPR, as well as regional human rights treaties. See *Commentary on the Additional Protocols*, above note 51, Commentary on Additional Protocol II, paras. 4427–4428.

A. Rules of general application

- Individual criminal responsibility;
- Presumption of innocence;
- Right not to be compelled to testify against oneself or confess guilt.

B. Pre-trial rights

- Right to liberty and prohibition of arbitrary arrest and detention;
- Right to information;
- Right to legal counsel before trial;
- Right to contacts with the exterior;
- Right to judicial or equivalent supervision of detention;
- Right to trial within a reasonable time.

C. Rights at trial

- Right to a fair and public trial by a regularly constituted, independent, and impartial tribunal;
- Right to be informed of the charge(s);
- Right to adequate time and facilities for the preparation of defence;
- Right to be tried without undue delay;
- Right to be tried in one's presence;
- Right to defend oneself in person or through counsel;
- Right to call and examine witnesses;
- Right to the free assistance of an interpreter;
- Right to a public judgment;
- Right to appeal;
- Right not to be re-tried for the same offence;
- Prohibition of retroactive application of criminal laws.

In this context, it should be recalled that the administration of justice is a state function par excellence. Therefore, most of the guarantees listed above will in the majority of cases be applicable to states, as only they will have the capacity to implement them in practice. Humanitarian law nevertheless obliges organized armed groups to respect certain judicial guarantees in situations of non-international armed conflict. Even though the political and policy challenges involved in getting armed groups to implement judicial guarantees are outside the scope of this article, it has to be noted that armed groups' factual compliance with most of the guarantees outlined will be highly contextual.

Treatment and conditions of detention

The obligation of humane treatment expressly enunciated in Common Article 3, and confirmed by the ICRC's *Customary Law Study*, underlies all international humanitarian law rules governing the protection of persons in enemy hands. It is

an overarching concept that, like other cardinal concepts of international law, defies a neat legal definition. This is probably just as well, given that its meaning has evolved and will continue to further develop over time.

Common Article 3 gives specific expression to the obligation of humane treatment in, *inter alia*, provisions prohibiting ‘violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture’, as well as ‘outrages upon personal dignity, in particular humiliating and degrading treatment’ (the prohibition of trial without essential judicial guarantees has been discussed above). It is beyond the scope of this article to elaborate on the precise legal definitions ascribed to these terms in international humanitarian law. Suffice it to say that conduct in contravention of the respective norms may constitute a serious violation of the laws and customs of war, or a grave breach of the Geneva Conventions in international armed conflicts, as the case may be.

It must be stressed that, when applied to conditions of detention – which Common Article 3 does not address – the concept of humane treatment should not be understood as being limited to the preservation of physical or mental health. It is a broader notion that incorporates the preservation of the dignity of detained persons as human beings, in addition to the protection of their physical and mental integrity. While the concept of dignity is also difficult to define, it essentially means that a human being has an innate right to respect and to ethical treatment; it is a value linked to the inalienable humanity of all human beings. Persons deprived of liberty are vulnerable to violations of their dignity and integrity because they are no longer in a position to make autonomous decisions affecting many aspects of their lives. They may be said to be (and in many cases, unfortunately, are) at the mercy of their captors and of the captors’ willingness to treat them humanely and with respect.

It is not possible to translate the obligation to respect the dignity of detained persons into a definitive list of concrete measures and safeguards that must be implemented in a detention setting, given that human dignity means different things to different people and that its constituent elements are dependent, among other things, on a person’s cultural and religious background. At a minimum, humane treatment means that the detaining authorities must provide a response to both detainees’ physical needs (accommodation, food, health, hygiene, etc.) and their psychological needs (contacts with the outside world, relations with the captors and with other inmates, etc.).

Whenever possible, the parties to a NIAC should try to hold themselves and each other to higher standards than those contained in Common Article 3. As respect for IHL is not dependent on reciprocity, each party should strive to provide the best detention conditions and treatment that it can. The inability of some organized non-state armed groups to ensure conditions of detention comparable to those that may be afforded by states cannot serve as an excuse for the latter to lower detention standards.

Provided below are a number of basic rules that are sufficiently general to be applicable – it is believed – in situations of armed conflict. The list is drawn

from rules of customary IHL, from specific provisions of IHL treaties, and from existing soft law human rights standards on detention.⁷⁰ It also includes best practice standards. The rules are by no means exhaustive and do not purport to define the parameters of humane treatment in detention as stipulated in Common Article 3. They must be read in conjunction with Common Article 3, not in lieu of it.

Physical and mental integrity

- Torture or other cruel, inhuman, or degrading treatment or punishment of detainees is prohibited in all circumstances. Violations of this prohibition must be investigated and, if appropriate, prosecuted and punished.
- Enforced disappearance is prohibited.
- Extra-judicial killings are prohibited.

Dignity, respect

- Detention regimes for particular detainee populations should take due account of the customs and social relations of the communities to which the detainees belong.
- Detention regimes and conditions of detention must be adapted to a detainee's age, sex, and health status.

Safety

- No detainee may at any time be sent to, or detained in areas where he or she may be exposed to the dangers of the combat zone, nor may his or her presence be used to render certain points or areas immune from military operations. Detainees must benefit from all available protective systems, such as shelters against aerial bombardment.
- Detainees are under the protection of the detaining authority. Detainees must be protected from other inmates or from external attacks that may be directed against them.

Food, drinking water

- Detainees must be provided with adequate food and drinking water; consideration shall also be given to the detainees' customary diet, with expectant and nursing mothers and children being given additional food.

⁷⁰ E.g. 'Standard minimum rules for the treatment of prisoners', and the 'Body of principles for the protection of all persons under any form of detention or imprisonment'.

Hygiene, clothing

- Detainees must be provided with adequate clothing to preserve their dignity and be protected from the adverse effects of the climate and/or be allowed to keep their own clothing. They shall be provided with the means to maintain personal hygiene, as well as to wash and dry their clothes.
- Access to sanitary facilities must be available to detainees at all times and organized in a way that ensures respect for dignity.

Personal belongings

- Pillage of the personal belongings of detainees is prohibited.

Accommodation

- Detainees must be provided with adequate accommodation: sleeping and living accommodation shall meet all the requirements of health, with due regard being paid to climatic conditions.

Medical care

- Detainees must be provided with adequate medical care, in keeping with recognized medical ethics and principles; patients should be provided with all relevant information concerning their condition, the course of their treatment, and the medication prescribed for them. Every patient is free to refuse treatment or any other intervention.

Humanitarian relief

- Detainees must be allowed to receive individual or collective relief.

Religion

- The personal convictions and religious practices of detainees must be respected.

Open air and exercise

- Detainees must have sufficient access to the open air daily in order to practice suitable exercise if they so wish.

Women

- Women must be held in quarters separate from those of men, except where families are accommodated as family units. Women must be under the immediate supervision of women and benefit from treatment and facilities appropriate to their specific needs.

Minors

- Children under 18 must be held in quarters separate from those of adults, except where families are accommodated as family units.

Work, recruitment

- No detainee shall be forced/requested to take part in military operations, directly or indirectly, or to contribute through his/her work to the war effort.
- Detainees must, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.

Family contact

- Detainees must, subject to reasonable conditions, be allowed to be in contact with their family, through correspondence, visits, or other means of communication available.

Discipline, punishment

- Disciplinary proceedings must be clearly established for defined disciplinary offences and be limited in time. No more restriction than is necessary to maintain order and security in the place of detention shall be applied. In no circumstances may disciplinary measures be inhuman, degrading, or harmful to the mental and physical health and integrity of the detainees. Account must be taken of, *inter alia*, a detainee's age, sex, and state of health.
- Punishment may be imposed only on detainees personally responsible for disciplinary offence(s) and be limited in time.
- Solitary confinement is an exceptional and temporary disciplinary measure of last resort that must never be applied for periods exceeding thirty days.
- Instruments of restraint such as shackles, chains, and handcuffs may be used only in exceptional circumstances and may never be applied as punishment.

Transfer

- No detainee may be transferred or handed over to another detaining authority if there is a risk of arbitrary deprivation of life, torture, or other forms of ill-treatment or persecution upon transfer or handover.

Records

- The personal details of detainees must be properly recorded.

Public curiosity

- Detainees may not be exposed deliberately or through negligence to public curiosity or to insults, or condemnation on the part of the public.

Death

- In case of death, the family of the deceased detainee must be informed of the circumstances and causes of death. Deceased detainees must be handed over to their next of kin as soon as practicable.
- Where handover to family is not practicable, the body is to be temporarily interred according to the rites and traditions of the community to which the deceased belonged; the grave must be respected, and marked in such a way that it can always be recognized.

Complaint mechanism

- A complaint process must be clearly established. Detainees must be allowed to present to the detaining authority any complaint on treatment or conditions of detention or express any specific needs they may have.

Release

- Detainees must be released as soon as the reasons for the deprivation of their liberty cease to exist or at the end of penal proceedings against them, which includes the expiration of any sentence that may have been imposed.
- If it is decided to release persons deprived of their liberty, necessary measures to ensure their safety must be taken by those so deciding.

Foreigners

- Foreign nationals must be allowed to inform the diplomatic and consular representatives of the state to which they belong of their detention. Such information may also be conveyed through intermediaries such as the ICRC.

Oversight

- Independent monitoring bodies, such as the ICRC, must be given access to all detainees in order to monitor treatment and conditions of detention and perform other tasks of a purely humanitarian nature.

Conduct of hostilities

Common Article 3 provides rules on the protection of persons in enemy hands but does not include specific rules on the conduct of hostilities. It is in this area, too, that the results of the ICRC's *Study on Customary International Humanitarian Law* are important, for they confirm that a number of conduct of hostilities rules apply

in any type of armed conflict, including those meeting the Common Article 3 threshold.⁷¹

While an exhaustive overview of the *Customary Law Study*'s rules on the conduct of hostilities is outside the purview of this article, the main ones bear repeating because they constitute minimum legally binding norms on both state and non-state parties. Pursuant to the *Study*, the parties to a conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants and must not be directed against civilians. Acts or threats of violence whose primary purpose is to spread terror among the civilian population are prohibited. The *Study* clarifies that civilians are persons who are not members of the armed forces and that the civilian population comprises all persons who are civilians. It determines that civilians are protected against attack, unless and for such time as they take a direct part in hostilities, an issue that will be examined further below.

It is a norm of customary IHL that the parties to a conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives and must not be directed against civilian objects. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose partial or total destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage. Civilian objects encompass all objects that are not military objectives. They are protected against attack, unless and for such time as they are military objectives. The *Study* confirms that indiscriminate attacks are prohibited, and defines such attacks.⁷²

Very importantly, the *Study* determines that the principle of proportionality must be observed in the conduct of hostilities in non-international armed conflict,⁷³ and that the parties must also adhere to IHL rules governing precautions

71 The absence of conduct of hostilities rules in Common Article 3 does not mean that there are no relevant international treaties whose coverage includes NIACs; the majority, however, are in the area of weapons. (See for example the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996 (CCW Amended Protocol II).) Similarly, the ICC Statute provides a list of war crimes that may be committed in the conduct of hostilities in NIAC, albeit not one as comprehensive as could have been wished. It should also be remembered that, under the terms of Common Article 3, the parties are encouraged to conclude special agreements extending the application of the Geneva Conventions (which in fact means IHL rules in general), as a way of mutually agreeing on rules regulating the conduct of hostilities. Unfortunately, such agreements have not been utilized as often or as efficiently as may have been anticipated.

72 Pursuant to Rule 12 of the *Customary Law Study*, 'indiscriminate attacks are those: (a) which are not directed at a specific military objective; (b) which employ a method or means of combat which cannot be directed at a specific military objective; or (c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction'.

73 Pursuant to Rule 14 of the *Customary Law Study*, 'Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited'.

in attack or against the effects of attacks.⁷⁴ It contains a section on specifically protected persons and objects, including i) medical and religious personnel, ii) humanitarian relief personnel and objects, iii) personnel and objects involved in a peace-keeping mission, iv) journalists, v) protected zones, vi) cultural property, vii) works and installations containing dangerous forces, and viii) the natural environment.⁷⁵ In addition, the *Study* prescribes rules on specific methods of warfare⁷⁶ and on weapons.⁷⁷

The *Customary Law Study* also revealed a number of areas where practice is not clear. For example, it showed that in NIACs practice was ambiguous as to whether, for the purposes of the conduct of hostilities, members of armed opposition groups are considered members of armed forces (combatants) or civilians. A related area of uncertainty identified – in both IACs and NIACs – was the absence of a precise definition of the term ‘direct participation in hostilities’.

While only combatants are explicitly granted the right to participate directly in hostilities in international armed conflicts – with the relatively rare exception of the *levée en masse*⁷⁸ – it is a reality that civilians often take a direct part in hostilities in both international and non-international armed conflicts, in which case they are colloquially referred to as ‘unlawful combatants’ or ‘unprivileged combatants/belligerents’. The general IHL rule that civilians are entitled to protection against the dangers arising from military operations⁷⁹ and that they may not be made the object of attack⁸⁰ is thus modified if they directly participate in hostilities. IHL expressly provides that civilians are protected from direct attack – meaning that they may not be targeted – ‘unless and for such time as they take a direct part in hostilities’.⁸¹

As opposed to combatants who may not be prosecuted by a capturing state for direct participation in hostilities (combatant’s privilege), civilians who take a direct part in hostilities may be prosecuted for having taken up arms and for all acts of violence committed during such participation by the detaining state, as well as, of course, for any war crimes or other crimes under international law committed. This rule is the same in both IACs and NIACs. It is important to note, however, that civilian direct participation may be prosecuted under domestic law but does not constitute a violation of IHL and is not a war crime *per se* under treaty or customary IHL.⁸²

74 *Customary Law Study*, Rules 15–24.

75 *Ibid.*, Rules 25–45.

76 *Ibid.*, Rules 46–69.

77 *Ibid.*, Rules 70–86.

78 See GC III, Art. 4(6), which provides that prisoner of war status in an international armed conflict shall also be granted to: ‘Inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war’. See also Article 2 of the 1907 Hague Regulations.

79 AP I, Art. 51(1).

80 AP I, Art. 51(2).

81 AP I, Art. 51(3); and AP II, Art. 13(3).

82 See, for example, the list of war crimes under Article 8 of the ICC Statute; and the *Customary Law Study*.

Given that civilians who directly participate in hostilities may be targeted by the adversary, the key question is how the notion of direct participation is to be interpreted for the purpose of the conduct of hostilities. It was with a view to clarifying the law that, in 2003, the ICRC initiated an expert process devoted to examining the notion of ‘Direct participation in hostilities under IHL’. In June 2009 the ICRC published an Interpretive Guidance on the subject,⁸³ enunciating the organization’s recommendations.

The Guidance addressed three questions:

(i) Who is considered a civilian for the purposes of the principle of distinction?

The answer to this question determines the scope of persons protected against direct attack unless and for such time as they directly participate in hostilities. For the purpose of the conduct of hostilities it is important to distinguish members of organized armed forces or groups (whose continuous function is to conduct hostilities on behalf of a party to an armed conflict) from civilians (who do not directly participate in hostilities, or who do so on a merely spontaneous, sporadic, or unorganized basis). For the purposes of the principle of distinction under IHL, only the latter qualify as civilians.

In international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. Members of irregular armed forces (e.g. militia, volunteer corps, etc.) whose conduct is attributable to a state party to a conflict are considered part of its armed forces. They are not deemed civilians for the purposes of the conduct of hostilities even if they fail to fulfil the criteria required by IHL for combatant privilege and prisoner of war status. Membership in irregular armed forces belonging to a party to the conflict is to be determined based on the same functional criteria that apply to organized armed groups in non-international armed conflict.

In non-international armed conflict, all persons who are not members of state armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In NIAC, organized armed groups constitute the armed forces of a non-state party to the conflict and consist only of individuals whose continuous function it is directly to participate in hostilities. The decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving

83 See ‘ICRC interpretive guidance on the notion of direct participation in hostilities under IHL’, in *International Review of the Red Cross*, Vol. 90, No. 872, December 2008, pp. 991–1047, available at: <http://www.icrc.org/web/eng/siteeng0.nsf/html/review-872-p991> (last visited 3 March 2011).

his or her direct participation in hostilities ('continuous combat function'). Continuous combat function does not imply *de jure* entitlement to combatant privilege, which in any case is absent in NIAC. Rather, it distinguishes members of the organized fighting forces of a non-state party from civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative, or other non-combat functions.

Armed violence that does not meet the requisite degree of intensity and organization to qualify as an armed conflict remains an issue of law and order – that is, it is governed by international standards and domestic law applying to law enforcement operations. This is the case even when the violence takes place during an armed conflict, whether international or non-international, if it is unrelated to the armed conflict.

(ii) What conduct amounts to direct participation in hostilities?

The answer to this question determines the individual conduct that leads to the suspension of a civilian's protection against direct attack. The notion of direct participation in hostilities refers to specific hostile acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict. It should be interpreted synonymously in situations of international and non-international armed conflict.

In order to qualify as direct participation in hostilities, a specific act must fulfil the following cumulative criteria:

1. The act must be likely to affect adversely the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (*threshold of harm*); and
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a co-ordinated military operation of which that act constitutes an integral part (*direct causation*); and
3. the act must be specifically designed directly to cause the required threshold of harm in support of a party to the conflict and to the detriment of another (*belligerent nexus*).

Applied in conjunction, the three requirements of *threshold of harm*, *direct causation*, and *belligerent nexus* permit a reliable distinction between activities amounting to direct participation in hostilities and activities that, although occurring in the context of an armed conflict, are not part of the conduct of hostilities and, therefore, do not entail loss of protection against direct attack.

In addition, measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act.

(iii) What modalities govern the loss of protection against direct attack?

The answer to this question deals with the following issues: a) duration of loss of protection against direct attack, b) the precautions and presumptions in situations of doubt, c) the rules and principles governing the use of force against legitimate military targets, and d) the consequences of regaining protection against direct attack.

- a) Regarding the temporal scope of loss of protection, civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized armed groups belonging to a non-state party to an armed conflict cease to be civilians (see ‘Who is considered a civilian?’ above) and lose protection against direct attack for as long as they assume their continuous combat function.
- b) In practice, direct civilian participation in hostilities is likely to entail significant confusion and uncertainty in the implementation of the principle of distinction. In order to avoid the erroneous or arbitrary targeting of civilians entitled to protection against direct attack, it is therefore of particular importance that all feasible precautions be taken in determining whether a person is a civilian and, if so, whether he or she is directly participating in hostilities. In case of doubt, the person in question must be presumed to be protected against direct attack.
- c) Loss of protection against direct attack, whether due to direct participation in hostilities (civilians) or to continuous combat function (members of organized armed groups), does not mean that no further legal restrictions apply. It is a fundamental principle of customary and treaty IHL that ‘[t]he right of belligerents to adopt means of injuring the enemy is not unlimited’.⁸⁴ Even direct attacks against legitimate military targets are subject to legal constraints, whether based on specific provisions of IHL, on the principles underlying IHL as a whole, or on other applicable branches of international law.
Thus, in addition to the restraints imposed by IHL on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force that is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.
- d) Finally, as has been mentioned above, IHL neither prohibits nor privileges direct civilian participation in hostilities. When civilians cease to participate directly in hostilities, or when members of organized armed groups belonging to a non-state party to an armed conflict cease to assume their continuous combat function, they regain full civilian protection against direct attack; but

⁸⁴ See Article 22 of the Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention No. IV of 1907. See also Article 35 of Additional Protocol I: ‘In any armed conflict, the right of the Parties to the conflict to choose methods and means of warfare is not unlimited’.

they are not exempted from prosecution for violations of domestic and international law that might have been committed.

Conclusion

Non-international armed conflicts covered by Common Article 3 are not only the prevalent kinds of conflict today but are also evolving in terms of typology. While 'classical' civil wars waged on the territory of a single state between government forces and organized non-state armed groups used to be the norm, there have recently been a number of armed conflicts that are non-international in nature even though they do not fit that mould. This article has argued that Common Article 3 may today be given a different geographical reading as a matter of treaty law and that it applies to all situations of violence that can be classified as non-international armed conflicts, based on the quality of the parties involved.

It may also be observed that the adequacy of the existing international humanitarian law framework to deal with the variety of contemporary NIACs has been called into question, based both on the paucity of treaty provisions and on their content. It has been submitted that there is a far wider range of rules – primarily of a binding nature but also policy-based – that apply in Common Article 3 armed conflicts covering the treatment of persons in enemy hands and the conduct of hostilities. Given the fundamental nature of the standards proposed, it is believed that they apply or should apply to contemporary non-international armed conflicts and would offer important protections to persons affected by hostilities or detained as a result.