

Chapter 2

The Changing Legal Spectrum of Conflict

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2.1 Introduction

The law that applies to any situation in life depends on what the situation comprises. So stated, this may appear to be something of an obvious truism. However, it suggests why the legal spectrum of conflict is such a critical topic to any discussion of the law relating to conflict, namely because “[t]he relevant bodies of law—in particular, international humanitarian law, international human rights law and domestic law—differ according to the classification of the situation”.¹ Oppenheim devoted the second volume of his seminal treatise to, *inter alia*, war,² so we should start this discussion by considering what he meant by that notion.

¹ Wilmschurst 2012, p. 2.

² Oppenheim 1926.

Oppenheim described war as “the contention between two or more States, through their armed forces, for the purpose of overpowering each other, and imposing such conditions of peace as the victor pleases”. As he pointed out, “war is a fact recognised, and with regard to many points regulated, but not established by International Law”.³ The term ‘contention’ meant that there had to be a violent struggle through the application of armed force. To constitute a war, “two or more States must actually have their armed forces fighting against each other, although its commencement may date back to a declaration of war or some other unilateral initiative act”. Moreover,

[u]nilateral acts of force performed by one State against another without a previous declaration of war may be a cause of the outbreak of war, but are not war in themselves, so long as they are not answered by similar hostile acts by the other side, or at least by a declaration of the other side that it considers them to be acts of war. Thus it comes about that acts of force performed by one State against another by way of reprisal, or during a pacific blockade in the case of an intervention, are not necessarily acts initiating war. And even acts of war illegally performed by one State against another—for instance occupation of a part of its territory—are not acts of war so long as they are not met by acts of force from the other side, or at least by a declaration that it considers them to be acts of war.⁴

The reader may wonder whether there continue to be two mutually exclusive states of affairs, war and peace, with all political circumstances coming within one or the other category. After all, school students studying history will continue to learn the dates of past wars, with the associated inference that at all times outside those dates, peace prevailed.⁵

If those two mutually exclusive situations provided a satisfactory basis for Oppenheim’s writings,⁶ we have more recently seen the emergence of a more complex spectrum, ranging from what one might loosely describe as peace at one end of the scale to full-scale multi-state warfare in which the vital strategic

³ Oppenheim 1926, p. 115. For a more recent discussion of the concept of war, see Kritsiotis 2007, pp. 31–45.

⁴ Oppenheim 1926, p. 116. In a footnote to this part of his text, Oppenheim cites Louis XIV’s seizure in 1680 and 1681 of the then Free Town of Strasbourg and other parts of the German Empire without meeting armed resistance. “These acts of force, although doubtless illegal, were not acts of war.”

⁵ Recall the citation by Hugo Grotius of Cicero to the effect that “*inter bellum ac pacis nihil est medium*”, or, loosely translated, there is nothing in between war and peace; Grotius 1625, Book III, Chapter XX1, para 1 and consider Garraway 2012, p. 93.

⁶ To be fair, Oppenheim did recognize the existence of civil wars when “two opposing parties within a State have recourse to arms for the purpose of obtaining power in the State, or when a large portion of the population of a State rises in arms against the legitimate Government”. However, having recognized such states of affairs, Oppenheim took the view that “[a]s armed conflict is a contention between *States*, such a civil war need not be war from the beginning, nor become war at all, in the technical sense of the term”; Oppenheim 1926, p. 124 and see Green 2008, pp. 66–67. It would, Oppenheim pointed out, become war if belligerency of the insurgents were to be recognized. Colombia’s action in accordance with the ruling of the Constitutional Court of 1995 seems to have been an example of recognition of belligerency; Mikos-Skuza 2012, p. 19.

interests of a State, perhaps its very existence, are critically at stake at the other, but with a selection of differing natures and intensities of hostile operations in between. The purpose of this chapter is to consider how the currently applicable law defines the spectrum of conflict, to assess how those legal arrangements fit with the reality of modern conflicts and to consider how the spectrum of conflict might usefully develop in coming years.

If, however, we are sensibly to discuss possible future adjustments in the spectrum of conflict, we must start by trying to demonstrate that the spectrum is in fact susceptible to change. Without doubt, it is not a static phenomenon. Oppenheim wrote about war whereas, as we shall see, since 1949 the existence or otherwise of an ‘armed conflict’ has become the critical factor.

In the past, a formal declaration of war, or an ultimatum, was required in order to bring about a state of war, which in turn brought into effect such legal arrangements as then existed.⁷ Thus, Hague Convention III required that there should be no hostilities “without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war”.⁸

So, as we can see, during the period before 1949, the international law focus was on the existence or otherwise of a state of war, a state of affairs that could only arise between two or more States.⁹ As the next section will make clear, it was the early articles of the 1949 Geneva Conventions that introduced the notion of ‘armed conflict’ into the law,¹⁰ and that made the first international law provision in respect of armed conflicts that are not, or that have not by virtue of belligerency

⁷ For a discussion of the notion of war, see Greenwood 1983, pp. 133–147, and for the decreasing incidence of war declarations, see Greenwood 2008, pp. 49–50 and Kleffner 2013, p. 47.

⁸ Hague Convention III, 1907, Article 1. The UK Manual 2004, p. 28, note 2, observes that when Germany attacked Poland in 1939, she declared war simultaneously. Arguably, the declaration made by Great Britain in September 1939 was an example of the latter, conditional, declaration.

⁹ Consider for example Hague Declaration IV, 2 Concerning Asphyxiating Gases, The Hague, 29 July 1899, which stipulated “[t]he present Declaration is only binding on the contracting Powers in the case of a war between two or more of them. It shall cease to be binding from the time when, in a war between the contracting Powers, one of the belligerents shall be joined by a non-contracting Power”. Note that Leslie Green puts the relationship the other way around by observing that historically, international law is concerned only with relations between states with the result that the law of armed conflict developed in relation to inter-state conflicts and was not in any way concerned with conflicts occurring within the territory of a state or between an imperial power and a colonial territory; Green 2008, p. 66. As Frits Kalshoven and Liesbeth Zegveld observe, the contracting parties to the 1949 Conventions would not necessarily have regarded the rules they were establishing or recognizing as being unsuitable to a situation such as the American Civil War. “Rather, the idea that treaty rules could be laid down for such an internal situation simply had not yet entered their minds”; Kalshoven and Zegveld 2011, p. 30.

¹⁰ It is the fact that a state of armed conflict is in existence that is the vital issue since 1949; Akande 2012, p. 40 although “the qualification of a situation as an armed conflict in practice remains dependent on the parties’ perceived interests in applying their treaty obligations”; Kalshoven and Zegveld 2011, p. 31.

recognition been rendered, international in nature. For the purposes of this section, the important point is that rather significant changes in the legal spectrum of conflict took place in 1949 and, as we again shall see in the next section, a further change occurred in 1977.

It is therefore reasonable to ask whether the time is now ripe for a further adjustment in the legal spectrum in order to more accurately reflect the current experience.

2.2 The Legal Spectrum of Conflict in Current Law

Any observer of the conflicts that break out from time to time around the globe will readily accept that they do not all consist of total inter-state war of the sort referred to in the previous section. By the same token, such conflicts cannot properly be regarded as ‘peace’. A state of peace, on the other hand, is consistent with occasional criminal activity, which may well include violent acts involving the use of firearms by criminals and addressed sometimes also by violent activity by the police and security forces of the state in response. But situations do arise from time to time which do not easily fit into either of those categories, and this section will describe how international law, domestic law and human rights law currently divide these situations into categories to each of which they apply discrete legal arrangements.

2.2.1 *International Armed Conflict*

We shall start our legal spectrum of conflict with what used to be known as a state of war between states but which is now generally referred to as international armed conflict. This occurs when a state is involved in an armed conflict against another state. So instead of considering whether a state of war exists, the focus is now on whether the hostilities between the respective states amount to an armed conflict. This is because Article 2 common to the four Geneva Conventions of 1949 provides that those conventions apply to: “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if a state of war is not recognized by one of them”.¹¹

Accordingly, if war is declared a state of armed conflict will exist, Common Article 2 to the Geneva Conventions will apply and thus the provisions of the Conventions and of API must be applied whether or not actual hostilities have

¹¹ Article 2(1) common to the Geneva Conventions 1949. As to common Article 2 conflicts generally, see Solis 2011, pp. 150–152 and as to the transformation of a conflict from a common Article 3 conflict (discussed below) to a common Article 2 conflict and vice versa, see Solis 2011, pp. 154–155.

commenced.¹² The reference to ‘even if a state of war is not recognized by one of them’ makes the point that the body of law will apply on the basis of the factual situation that exists irrespective of whether either state involved in the hostilities decides to recognize that what is going on constitutes an armed conflict.¹³ Diplomatic or political statements as to the situation and the involvement of armed forces may be informative but are not determinative of the issue.¹⁴ Once events reach the armed conflict threshold, the obligations and rights of combatants, civilians and of all those affected by the hostilities will be determined by the law of armed conflict.

As Wolff Heintschel von Heinegg has commented, if a state pretends that an armed conflict is not in existence when manifestly it is, this may result in unnecessary and potentially damaging confusion in the armed forces, for example because uses of force that are permitted under the law of armed conflict may well be prohibited if no armed conflict is under way. It is therefore important that states correctly characterize situations to which they deploy their armed forces so that all involved fully and accurately understand the legal context in which they are to operate.¹⁵ There must also, however, be an *animus belligerendi*,¹⁶ which, as Françoise Hampson notes, suggests it is possible to have an alternative *animus*, for example extraterritorial law enforcement against persons engaging in criminal activity against the acting state and against whom the state where they are located is unable or unwilling to act.¹⁷

In the Geneva Convention Commentaries Jean Pictet opines: “any difference arising between States and leading to the intervention of members of the armed

¹² Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted in Geneva on 8 June 1977 (API); Greenwood 2008, p. 47.

¹³ It is now generally accepted that the final phrase in common Article 2 should be interpreted as meaning ‘even if the state of war is not recognized by one or both of them’; Greenwood 2008, p. 47.

¹⁴ An international armed conflict can be initiated by a declaration of war, by the declaration of an aerial or naval blockade and the law of international armed conflict will apply in any case of belligerent occupation; Tallinn Manual, commentary accompanying Rule 22, para 17. Note Elizabeth Wilmschurst’s observation that “[t]he recognition of the National Transitional Council as the government of Libya by some member States of the coalition did not, it is submitted, alter the classification of the conflict between those States and Gaddafi’s forces. In other words it is the facts rather than a subjective act of recognition alone which determines the category of armed violence”; Wilmschurst 2012, p. 483.

¹⁵ Heintschel von Heinegg 2011, pp. 5–7. Note the view of Mary Ellen O’Connell and Ania Kritvus that the available evidence tends to suggest that IHL is triggered for UN peacekeeping operations in the same situations as for states, and that the key factor is the intensity of the fighting; O’Connell and Kritvus 2012, p. 118.

¹⁶ Dinstein 2005, pp. 14–15.

¹⁷ Hampson 2008, pp. 553–554, citing as examples of such situations the Predator strike in Yemen if conducted without territorial state consent and Colombian army use of force against FARC personnel in Ecuador. Consider in this regard the Fisheries cases which were not treated as international armed conflicts although armed force was used; see Asada 2012, p. 51 at pp. 62–63.

forces is an armed conflict”.¹⁸ The Commentary goes on to point out that “[i]t makes no difference how long the conflict lasts, or how much slaughter takes place”.¹⁹

Christopher Greenwood refers to the case of the US pilot shot down and captured by Syrian forces over Lebanon in the 1980s, noting that the US maintained that the incident constituted an armed conflict entitling the captured pilot to prisoner of war treatment under Geneva Convention III. He comments, however, that it is not clear that States will always take such a broad view; “[i]t may well be, therefore, that only when fighting reaches a level of intensity which exceeds that of such isolated clashes will it be treated as an armed conflict to which the rules of international humanitarian law apply”.²⁰ However the ICRC takes the view that there should continue to be no intensity threshold for hostilities to constitute an international armed conflict because that helps to avoid political and legal controversies as to whether the threshold has been reached and because of protection considerations.²¹ Moreover, the API Commentary asserts that humanitarian law applies to “any dispute between two States involving the use of their armed forces. Neither the duration of the conflict, nor its intensity, play a role: the law must be applied to the fullest extent required by the situation of the persons and the objects protected by it.”²²

¹⁸ Pictet 1960, p. 23. As the AMW Manual puts it at para 1 on p. 39, what counts is that two or more States are engaged in hostilities with each other.

¹⁹ See for example, Pictet 1952, p. 32, but for the competing view that greater extent, duration, or intensity of hostilities is required to establish the existence of an international armed conflict, see Tallinn Manual, commentary accompanying Rule 22, para 12. The International Law Association, Use of Force Committee, in its Final Report on the Meaning of Armed Conflict in International Law (2010), 10–18, contends that a certain intensity of hostilities is required to constitute an international armed conflict. See criticism of this view in Corn et al. 2012, pp. 75–77.

²⁰ Greenwood 2008, p. 48 citing 82 Proceedings of the American Society of International Law (1988), pp. 602–603 and 609–611.

²¹ ICRC Report to the 31st Conference of the Red Cross and Red Crescent, International Humanitarian Law and the challenges of contemporary armed conflicts, October 2011, p. 7.

²² Sandoz et al. 1987, para 62. Experienced commentators have observed that a number of conflicts between states have involved a denial by at least one state that a dispute such as would bring the conflict within Common Article 2 existed between them. The better view, however, is that ‘hostilities without dispute’ theories conflict with the plain meaning and widely understood interpretation of Common Article 2; Corn et al. 2012, pp. 83–84, discussing, *inter alia*, the 2006 Israeli Intervention in Lebanon and the 1989 US intervention in Panama. For other examples of incidents involving the use of armed forces in a state on state context but not treated as an armed conflict, see O’Connell et al. 2012, pp. 287 and 290. Note that the institution of a blockade constitutes a recognition of the belligerency of the blockaded party and thus internationalizes what may hitherto have been a non-international armed conflict; Scobbie 2012a, pp. 302–303. Wolff Heintschel von Heinegg draws attention to the blockade during the American Civil War as an important example, and discusses events during the Spanish Civil War, in Algeria, Sri Lanka, Gaza and Libya; Heintschel von Heinegg 2012, pp. 214–216. Yoram Dinstein points out, however, that recognition of belligerency will not change the character of the non-international armed conflict into an international one—rather, it has the effects that the law of neutrality will

Whether a particular intervention crosses the threshold so as to become an armed conflict will depend on all the surrounding circumstances. Replacing border police with members of the armed forces and accidental cross-border incursions by armed forces personnel would not in themselves rise to that level, “nor would the accidental bombing of another country”.²³ An invasion of another country would, of course be an armed conflict.²⁴ Once the threshold is reached, the legal duties the law imposes must be complied with.

While the requirement for the involvement of two or more states in the armed conflict is clear,²⁵ more complex is the position where individuals or groups that are not an organ of a state are fighting against the government of a state while deriving a degree of support from another state. Armed conflicts that began as non-

(Footnote 22 continued)

apply to the conflict and that captured non-State organized armed group fighters will have prisoner of war status; Dinstein 2012, pp. 408–409. As to the demise of the doctrine of belligerency as a mechanism for applying the law of war in a non-international armed conflict, see Corn et al. 2012, pp. 68–69 and Sivakumaran 2012, pp. 195–196.

²³ UK Manual 2004, para 3.3.1.

²⁴ For example, Mike Schmitt is clear, and he must be right, that the 2011 military action pursuant to UNSCR 1973 to enforce a no-fly zone over Libya was subject to the law of armed conflict. The military action “contemplates the use of military force by one state against another and therefore the law of armed conflict governs any military measures taken...”; Schmitt 2011, p. 50.

²⁵ Consider, however, the view of the UN Commission of Inquiry into the Conflict in Lebanon in 2006 that the fact that the Lebanese Armed Forces took no active part in the hostilities that primarily involved the Israeli Defence Force and Hezbollah did not deny the character of that conflict as “a legally cognizable international armed conflict, nor does it negate that Israel, Lebanon and Hezbollah were parties to it”; Human Rights Council 2006, paras 50–62. Iain Scobbie, however, having discussed and rejected Geoff Corn’s notion of transnational conflict as applying to Lebanon 2006, comes, after a careful analysis, to the conclusion that Lebanon 2006 should be seen as a cross-border non-international armed conflict; Scobbie 2012b, pp. 400–410. David Graham, however, sees in the ignoring in Hamdan of the traditional view that Common Article 3 conflicts are internal to a single state the birth of the, as he contends, misguided notion of transnational non-international armed conflicts; Graham 2012, p. 51. For Geoff Corn’s view that the dichotomy between international and internal armed conflicts was always under-inclusive because it failed to account for the possibility of extra-territorial armed conflicts between a State and non-State belligerents, and his view that the notion of transnational armed conflict evolved to respond to the gap, see Corn 2012, pp. 61–62. The US view seems, however, to be that it is involved in a non-international armed conflict with Al-Qaeda the transnational activities of which pre-suppose a transnational armed conflict that is internal to each country where it occurs; see for example Brennan 2011 available at www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an. Sandesh Sivakumaran concurs that, to the extent that it is an armed conflict at all, the US armed conflict with Al-Qaeda is of a non-international character, being fought between a state and a non-state armed group across international borders. “The cross-border element is, then, of a different degree of geographical proximity to the typical cross-border non-international armed conflict but it is not of a different type as to necessitate it being treated in an altogether different manner”; Sivakumaran 2012, p. 234. India has not used military force against Pakistan which it believes bears some responsibility for acts of terrorism, employing instead law enforcement and diplomacy. Egypt, Kenya, Tanzania, Spain, Indonesia and Germany have adopted a similar approach; O’Connell 2012, p. 7.

international in character may be internationalized should a state intervene in support of the insurgents or rebels either by undertaking military operations itself in support of the rebels or by exercising control of the actions of the rebels. The precise nature of the control that will internationalize an armed conflict in this way has been the subject of differing interpretations, respectively, in judgments of the International Court of Justice and of the International Criminal Tribunal for the Former Yugoslavia. In the Nicaragua Case, the International Court of Justice identified the need for effective control.²⁶ Such effective control would arise where there is a relationship of dependence and control. As the ICJ explained in the Genocide case,

persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in 'complete dependence' on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.²⁷

This complete dependence may not of course exist. If that is the case, under the ICJ jurisprudence specific acts of the persons, group or entity can be attributed to the state if they are carried out on its instructions or under its direction or effective control. It must be shown that this 'effective control' was actually exercised or that the state's instructions were given in respect of operations in which the alleged violations occurred. General instructions in respect of the overall actions taken by the persons or groups of persons that committed the violations would not usually suffice.²⁸

In the Appeals Chamber Judgment in the *Tadić* case, the International Criminal Tribunal for the Former Yugoslavia (ICTY) decided that,

[i]n order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should

²⁶ Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America, Merits*, Judgment of 27 June 1986, in ICJ Reports (1986) p. 14 at para 115.

²⁷ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*) ICJ Rep 2007 (*Genocide Case*) at para 392. Note the different criterion of 'overall control' adopted by the ICTY in *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, Judgment of the Appeals Chamber, 15 July 1999, referred to below, and see AMW Manual, para 4 and footnotes 69 and 70 at p. 40. If the group etc. is not characterized in domestic law as a state organ, it would be exceptional to so characterize it for the present purposes; Genocide Case, para 393.

²⁸ Genocide Case, paras 396–406. For an explanation of the distinction in approach between the ICJ and the ICTY, see Akande 2012, pp. 59–60 and Schmitt 2012a, p. 461.

also issue, either to the head or to the members of the group, instructions for the commission of specific acts contrary to international law.²⁹

The relevant support must, however, go beyond financial assistance, military training or provision of military equipment. The degree of control that is required varies. Where the question at issue is whether a single private individual or a group that is not militarily organized has acted as a *de facto* state organ when performing a specific act, it is necessary to ascertain whether specific instructions as to the performance of that particular act were issued by the state to the individual or group, or whether the unlawful act was publicly endorsed or approved by the state after the event. By contrast, control by a state over subordinate armed forces or militias or paramilitary units may be of an overall character and must comprise more than the mere provision of financial assistance or military equipment or training.³⁰ In the latter case, the issuing by the state of specific orders or direction by it of individual operations are not required; the necessary control exists if the state, or party to the conflict, has a role in organizing, coordinating or planning the military actions of the military group in addition to financing, training, equipping or giving operational support to the group.³¹

While not taking a formal position on the matter, the ICJ has acknowledged that, in so far as it is employed to determine whether an armed conflict is international in character, “it may well be that the [overall control] test is applicable and suitable”.³²

It should be noted that an armed conflict that is ‘internationalized’ by virtue of the intervention of another state to assist the rebels may, arguably, become a non-international armed conflict if the rebels take over the bulk of the territory of the state in conflict and if the rebels form a suitably independent government with such consent from the population as to transform the nature of the conflict.³³

To be ‘armed’ in nature, a conflict must include the conduct of hostilities.³⁴ If an international armed conflict exists, the Geneva Conventions of 1949, the 1899 and 1907 Conventions and Declarations of The Hague, the 1925 Geneva Gas Protocol and, for states party thereto, the 1976 UN Environmental Modification Convention, API³⁵ and other relevant subsequent treaties will apply to the inter-state hostilities and to the status of participants.³⁶

²⁹ *Prosecutor v. Tadić*, Appeal Chamber Judgment, paras 131, 145 and 162. See also the ICC case of *Prosecutor v. Thomas Lubanga Dyilo*, case number ICC-01/04-01/06 dated 14 March 2012, para 541.

³⁰ *Tadić*, Appeal Chamber Judgment, para 137.

³¹ *Tadić*, Appeal Chamber Judgment, para 137.

³² *ICJ Genocide Case* Judgment, para 404.

³³ See the discussion at Akande 2012, pp. 62–63.

³⁴ Tallinn Manual 2013, commentary accompanying Rule 22, para 11.

³⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted 8 June 1977 (API).

³⁶ In addition, the customary law of international armed conflict will apply. API supplements the Conventions of 1949 and applies “in the situations referred to in Article 2 common to those Conventions”; API, Article 1(3).

In international armed conflicts, the domestic law of the territory where the conflict is taking place will continue to apply, but when acting in accordance with the law of armed conflict in furtherance of the hostilities, a member of the armed forces will not breach that domestic law.³⁷ He or she will enjoy combatant immunity for those lawful hostile acts.

2.2.2 Conflicts Under Article 1(4) of API

Article 1(4) of API makes specific provision for a very particular class of armed conflict which it defines as conflicts:

in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations.

Such conflicts will, as a rule, be conducted within the national confines of a single state and in a strict sense are not international in character. Indeed, in 1949 they “were considered non-international armed conflicts and subject to Common Article 3 alone”.³⁸ They are, however, regulated under API for states that are party to that treaty because the situations provided for in Article 2 common to the Geneva Conventions, namely international armed conflicts discussed in the previous section, include Article 1(4) conflicts. So these Article 1(4) conflicts, or ‘conflicts of national liberation’ as we shall refer to them, are classified as international armed conflicts for the purposes of API and for the purposes of the 1949 Conventions for states party to API.³⁹

To come within Article 1(4), the relevant ‘people’ must be fighting against colonial domination, alien occupation or a racist regime. If their opponent cannot objectively be placed in any of these categories, the provision will not apply. They must also be pursuing the conflict in the exercise of a right to self-determination that they have.⁴⁰ As Frits Kalshoven and Liesbeth Zegveld point out, “the State concerned must be a party to the Protocol and the authority representing the people must undertake to apply the Conventions and the Protocol by means of a declaration addressed to the Depositary”.⁴¹

³⁷ Hague Regulations 1907, Article 1 and API, Article 43(2).

³⁸ Sivakumaran 2012, p. 213.

³⁹ As Andreas Zimmermann points out, however, certain states such as Israel are persistent objectors to this provision and the question arises what effect that may have on soldiers of such states facing criminal liability for acts that only constitute offences when committed in the context of an international armed conflict. He opines that a soldier in such a circumstance would only face liability for acts that are war crimes when committed in the context of a non-international armed conflict; Zimmermann 2007, pp. 218–219.

⁴⁰ Sandoz et al. 1987, para 107.

⁴¹ Kalshoven and Zegveld 2011, p. 85.

Pronouncements during the conflict by those leading the relevant ‘people’ in its struggle will not necessarily be determinative as to these aspects. In addition, the legitimacy of the liberation movement must be adequately recognized. The UK Manual refers to recognition by the appropriate regional inter-governmental organization as being a minimum.⁴² In addition to these requirements, the authority representing the people must undertake to apply API and the Geneva Conventions⁴³; however, such an undertaking has the effect of imposing on the state and the authority representing the people the rights and obligations in API and the Geneva Conventions,⁴⁴ including those relating to prisoner of war status. It should be noted that the UK made a statement on ratification of API that it would not be bound by a declaration of this sort unless UK expressly recognized it was made by an authority representing the people engaged in such an armed conflict.⁴⁵ As Marco Sassoli has noted,

[i]ndependently of whether a non-State actor such as a national liberation movement will ever be able to comply with such detailed and sophisticated rules of IHL of international armed conflicts as those governing the treatment of prisoners of war or occupied territories, only few situations will be recognized today by States as fulfilling these criteria – and, what is more important, none will be recognized by the territorial State as being national liberation wars.⁴⁶

If, however, API were to apply to such a conflict, this would be an armed conflict that is essentially internal in character but in which combatant status would be enjoyed by members of the armed forces on both sides and in which all captured combatants would have entitlement to prisoner of war status and to the resulting rights and privileges as set out in the Prisoner of War Convention and in API. The treaty-based targeting rules as expressed in Articles 48–67 of API will

⁴² UK Manual 2004, para 3.4.2b, p. 30.

⁴³ API, Article 96(3). Consider, for example, the statement made by the PKK to the United Nations on 24 January 1995 as follows: “In its conflict with the Turkish state forces, the PKK undertakes to respect the Geneva Conventions of 1949 and the First Protocol of 1977 regarding the conduct of hostilities and the protection of the victims of war and to treat those obligations as having the force of law within its own forces and the areas within its control.” Turkey was and is not party to API, www.icrc.org viewed on 22 September 2013.

⁴⁴ UK Manual 2004, para 3.4.2b.

⁴⁵ Statement (d) made by the UK on ratification of API on 28 January 1998. For an assessment of the UK position on Article 1(4), see Fleck 2013, pp. 583–584.

⁴⁶ Sassoli 2010, pp. 11–12. Sandesh Sivakumaran comes to similar conclusions, noting that not a single state has acknowledged, nor will they acknowledge, being involved in a war of national liberation; Sivakumaran 2012, p. 220. The combined effect of Article 96(2) and (3) of API seems to be that a state party to API will only be bound to recognise a conflict as coming within Article 1(4) if, in addition, the authority representing the people engaged in the conflict accepts and applies the provisions of the Protocol, presumably by means of an undertaking under para (3). For the view that Article 1(4) of API classifies the conflicts to which it refers by reference to motive and thus politicizes humanitarian law, see Corn et al. 2012, pp. 89–90 citing Ronald Reagan, Letter of Transmittal, The White House, 29 January 1987.

apply if the armed conflict takes place on the territory of a state party to API, as will the minimum fundamental guarantees set out in Article 75 of API.

There has, however, never been an armed conflict to which Article 1(4) was applied,⁴⁷ and there is the distinct possibility that the provision will become somewhat redundant.⁴⁸

2.2.3 Non-international Armed Conflicts to Which Additional Protocol II (APII) Applies

Non-international armed conflict occurs when there is protracted armed violence between governmental armed forces and the forces of one or more armed groups, or between the forces of such armed groups.⁴⁹ The armed activities of the rebels may for example take the form of insurrection, insurgency and guerilla, including urban guerilla, warfare.⁵⁰ The violence must reach a certain level of intensity and the parties to the conflict must have at least a certain minimum level of organization.⁵¹ Most modern armed conflicts are non-international in character involving a variety of kinds of armed groups.⁵²

However, non-international armed conflicts fall into two categories and, consistently with the overall framework of this chapter, we will start with such conflicts to which the more extensive body of treaty law applies, namely those which come within the second Protocol additional to the Geneva Conventions, APII. The Protocol develops and supplements Common Article 3 of the Geneva Conventions⁵³ (which we will discuss in the next section) without modifying its existing conditions of application⁵⁴ and relates to:

⁴⁷ Akande 2012, p. 49, but note that some groups have reportedly attempted to make Article 96(3) declarations; Sivakumaran 2012, p. 221. For a discussion of the Article 1(4) provisions, see Solis 2011, pp. 123–125.

⁴⁸ Consider Greenwood 1983, pp. 48–49.

⁴⁹ David Graham takes the view that this ‘protracted’ requirement, based on the *Tadic* judgment, para 70 and on Rome Statute 1998, Article 8(2)(f), does not require that the hostilities be continuous; Graham 2012, p. 48 and *Prosecutor v. Tadić*, Case Number IT-94-1-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 70.

⁵⁰ For a discussion of the doctrinal aspects of these terms see Haines 2012a, pp. 21 and 22.

⁵¹ Tallinn Manual, Rule 23.

⁵² Haines 2012a, p. 13 discussing the notion of ‘war among the peoples’ in Smith 2006. Note, however, the suggestion in the UK Ministry of Defence, DCDC, Future Maritime Operational Concept 2007, 13 November 2007, at para 109 that the transition from the unipolar strategic world to a multi-polar one may result in an increase in state on state conflict.

⁵³ 1977 Geneva Protocol 2 Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, (APII), Article 1(1).

⁵⁴ The applicability of Article 3 Common to the 1949 Geneva Conventions will be considered in the next section of this chapter.

all armed conflicts which are not covered by Article 1 of [API] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement th[e] Protocol.⁵⁵

This provision needs careful analysis. The opening reference to armed conflicts not covered by API makes it clear that international armed conflicts and those covered by Article 1(4) of API are excluded from the application of this Protocol. The armed conflict must take place within the territory of a state that is party to the Protocol.⁵⁶ ‘Territory’ for these purposes will include territorial sea and national airspace. The treaty only applies to armed conflicts between the armed forces of the state and dissident armed forces or other organized armed groups. The Protocol does not therefore apply to armed conflicts between different elements of dissident forces, nor to conflicts between dissident forces and organized armed groups nor to armed conflicts between organized armed groups.⁵⁷ There must be the national armed forces on one side⁵⁸ and either dissident armed forces or an organized armed group, or both, on the other side.

The term ‘armed forces’, for these purposes, will include all of the armed forces of the state including law enforcement and similar agencies.⁵⁹ However, the relevant force or agency must, of course, be ‘armed’.

Mike Schmitt notes that “the phrase ‘dissident armed forces’ is used in contradistinction to ‘other organized armed groups’” but observes that “there is no meaningful difference in the legal regimes governing the detention or targeting of the two categories”.⁶⁰ Meltzer comments that although members of dissident armed forces are no longer members of state armed forces, they do not become civilians merely because they have turned against their government, and so long as they remain organized under the structures of the state armed forces, those structures should continue to determine membership in the dissident force.⁶¹ As Mike Schmitt correctly states,

⁵⁵ APII, Article 1(1). See the explanation of such conflicts at Dinstein 2012, pp. 404–405.

⁵⁶ In Marco Sassoli’s view, the clear wording of Article 1(1) of APII excludes non-international armed conflicts abroad, Sassoli 2011, p. 55.

⁵⁷ Dapo Akande points out that the Protocol does not therefore apply to hostilities between an organized group and States intervening to assist the government: Akande 2012, p. 55.

⁵⁸ For a discussion of the status of governmental armed forces in a non-international armed conflict, see Watts 2012, pp. 145–66.

⁵⁹ Sandoz et al. 1987, para 446: “The term ‘armed forces’ of the High Contracting Party should be understood in the broadest sense..... including those not included in the definition of the army in the national legislation of some countries (national guard, customs, police forces or any other similar force).”

⁶⁰ Schmitt 2012c, p. 35.

⁶¹ Melzer 2009, p. 32.

merely having been members of the armed forces of a State does not suffice to qualify individuals as members of a dissident armed force [...]. Fighters who are former members of the armed forces, but have not remained with their units (such as deserters), are either members of other organized armed groups or civilians directly participating in hostilities.⁶²

There are then three essential requirements placed on the dissident force or organized armed group before APII will become applicable. First, they must be under responsible command, which the APII Commentary interprets as requiring an organization capable of planning and carrying out sustained and concerted military operations and of imposing discipline in the name of a *de facto* authority.⁶³ The APII Commentary makes it clear that it is the capability of the authority to do these things that is critical, whether or not such operations are actually undertaken and such discipline is actually maintained. However, the actual conduct of such operations and the factual maintenance of discipline will be relevant to the determination whether such responsible command exists.

Second, the rebels must control enough territory to achieve sustained and concerted military operations and to implement APII, for example by taking appropriate care of the wounded and sick and by according prisoners decent treatment. In some conflicts, the rebels never control territory for a sufficient period to enable APII obligations to be complied with. In others, substantial tracts of territory remain in the control of the rebels for extended periods of time so that the infrastructural requirements of APII can be met. Whether the treaty's rules are in fact complied with will be another matter, but if they are, this will be an important factor in determining the status of the conflict. The critical point is whether enough territory is controlled to enable sustained and concerted military operations to be undertaken and to enable the obligations in the Protocol to be implemented.⁶⁴

Third, there must be an armed conflict. The protocol explicitly excludes internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.⁶⁵ The conflict must be of a particular intensity to be

⁶² Schmitt 2012c, pp. 35–36.

⁶³ Sandoz 1987 at para 4463. Sandesh Sivakumaran points out that as the obligations imposed by the law increase, the degree of organization required of the armed groups increases. For a discussion of the organization and command requirements in relation to APII conflicts, see Sivakumaran 2012, pp. 184–185 and as to 'organisation', see Sassoli 2011, pp. 57–59.

⁶⁴ The focus should not be on the absolute amount of territory that is controlled, but on whether enough is controlled to enable the required sustenance of operations and the required implementation to take place; Sivakumaran 2012, pp. 185–192. Actual breaches of the rules for example as to the treatment of prisoners by the rebels are bound, however, to make it less likely that the conflict will be recognized as coming within APII. Consider in this regard, for example, Black 2012, available at www.theguardian.com/world/2012/sep/17/syrian-rebels-accused-war-crimes and in relation to apparently more recent events of the same dreadful nature, Chivers 2013, available at www.nytimes.com/2013/09/05/world/middleeast/brutality-of-syrian-rebels-poses-dilemma-in-west.html?pagewanted=all&_r=0.

⁶⁵ APII, Article 1(2). As Masahiko Asada points out, by so providing, Article 1(2) excludes from the scope of application of Protocol II those situations that are to be regarded as internal affairs of the state concerned; Asada 2012.

regarded as an armed conflict. This means that the severity of the violence, the extent to which it is sustained and the degree and nature of the military involvement in it are all among the factors to consider in deciding whether an armed conflict is taking place. Sandesh Sivakumaran identifies a number of indicia to assist in deciding whether the violence has reached the requisite level of intensity. These include the number of incidents, the level, length and duration of the violence, the geographical spread of the violence, the deaths, injuries and damage caused by the violence, the mobilization of individuals and the distribution of weapons to them, the weapons used by the parties, the conclusion of ceasefire and peace agreements, the involvement of third parties whether the UN Security Council or other outside entities, the prosecution of offences applicable only in armed conflicts and the granting of amnesties.⁶⁶

If military force is used within a state as a preventive measure to maintain respect for law and order this will not amount to an armed conflict.⁶⁷ Equally, the use of force by the state internal security authorities to deal with isolated riots or acts of terrorism and to maintain public order will also not constitute an armed conflict. This is because internal disturbances, sporadic acts of violence, certain terrorist activity and similar events are addressed by the domestic criminal law of the State where such events occur. The international law of armed conflict is only applicable when the state is no longer simply addressing criminal activity internally but, rather, is using armed force to prosecute an armed conflict that is under way within its borders.⁶⁸ In short, APII applies only to a full-scale civil war.⁶⁹ Leslie Green concludes that “[t]he definition of a non-international armed conflict in Protocol II has a threshold that is so high, in fact, that it would exclude most revolutions and rebellions, and would probably not operate in a civil war until the rebels were well established and had set up some form of *de facto* government”.⁷⁰

⁶⁶ Sivakumaran 2012, p. 168.

⁶⁷ Sandoz 1987, para 4477.

⁶⁸ Note, for example, the reluctance of states in 1977 to agree more comprehensive provision in relation to non-international armed conflict was based in part on “fear of interference with their internal affairs”; Epping 2006, p. 5.

⁶⁹ Greenwood 2008, p. 55; consider also George Aldrich’s complaint that Additional Protocol II is of little or no practical use in the sense that it is easy to deny its applicability; Aldrich 1984, pp. 135–136.

⁷⁰ Green 2008, p. 83 where it is noted that in none of the conflicts that occurred in the Soviet Union and in Yugoslavia prior to or during the dissolution of those states was there any suggestion that the situation was governed by Protocol II, whereas recognition accorded by some third states to Croatia, Slovenia and other Yugoslav republics indicated that the recognizing states considered international conflicts to be taking place. Leslie Green argues, however, that the Protocol II threshold is somewhat similar to that which prevailed during the Spanish Civil War when the Nationalist forces acquired recognition as a *de facto* administration with legal immunities similar to those enjoyed by the legitimate government. Guerilla or partisan movements would not therefore qualify, but would come within common Article 3; Green 2008, p. 349.

Certain states apply APII as a matter of policy to any non-international armed conflict coming within Common Article 3.⁷¹ They constitute, however, different classes of conflict within our legal spectrum.⁷²

2.2.4 Non-international Armed Conflicts Under Common Article 3

Article 3 appears in identical form in all four of the 1949 Geneva Conventions. Something of a mini-convention,⁷³ the article concerns itself with: “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties...”.

These are therefore armed conflicts that are internal to a state but which do not necessarily comply with the APII limitations. So the armed forces of the relevant state are not necessarily involved in the armed conflict, which may exclusively be between dissident armed forces factions, or between organized armed groups, or between dissident armed forces and organized armed groups.

Additionally, it is not necessary to show that the rebels exercise any particular degree of territorial control. In particular, the ability of the dissident forces or groups to undertake sustained operations need not be attributable to the degree of their territorial control, neither must the degree to which they exercise such territorial control be sufficient to enable them to implement legal obligations such as those set out in APII.

To be an armed conflict within Common Article 3 certain criteria must however be met. At least one organized armed group, which might consist of dissident forces, having the required degree of organization must be involved in the conflict⁷⁴ and the

⁷¹ Armed conflicts to which Common Article 3 to the Geneva Conventions applies are discussed in the next section.

⁷² Dieter Fleck makes the point that due to its high threshold of application, “the range of applicability of APII is extremely reduced in modern armed conflicts”; Fleck 2013, p. 587.

⁷³ UK Manual 2004, para 3.6.

⁷⁴ Tadic Jurisdiction Judgment, para 70; AMW Manual, commentary accompanying Rule 2(a), para 5. Interpreting the reference in Article 8(2)(f) of the Rome Statute to “protracted armed conflict” and to “organized armed groups”, the ICC Trial Chamber in the case of *Prosecutor v. Thomas Lubanga Dyilo* commented “this focuses on the need for the armed groups in question to have the ability to plan and carry out military operations for a prolonged period of time”; *Prosecutor v. Thomas Lubanga Dyilo*, Case ICC-01/04-01/06, Judgment dated 29 January 2007 at para 234. Note that the Commentary to the Geneva Conventions identifies the following criteria for determining the existence of a Common Article 3 armed conflict, namely: “(1) That the Party in revolt against the *de jure* government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention; (2) That the legal government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory; (3) (a) That the *de jure* government has recognized the insurgents as belligerents; or (b) That it has claimed for itself the rights of a belligerent; or (c)

hostilities must achieve a certain level of intensity.⁷⁵ The case of *Prosecutor v. Ramush Haradinaj* identifies certain indicators as to the ‘organization’ criterion, namely whether a command structure exists, whether there are disciplinary rules and mechanisms, the existence of a headquarters, control of certain territory, access to weapons, other military equipment, recruits and military training, the ability to plan, coordinate and execute military operations, the ability to define a unified military strategy and to use tactics, to speak with one voice and to negotiate agreements such as ceasefires.⁷⁶ Sandesh Sivakumaran identifies three main reasons for the requirement that the armed group be organized. These are that the requisite intensity

(Footnote 74 continued)

That it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or (d) That the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression; (4) (a) That the insurgents have an organization purporting to have the characteristics of a State; (b) That the insurgent civil authority exercises *de facto* authority over the population within a determinate portion of the national territory; (c) That the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war; (d) That the insurgent civil authority agrees to be bound by the provisions of the Convention;” Pictet 1960, p. 36.

⁷⁵ *Prosecutor v. Limaj*, IT-03-66-T, Trial Chamber Judgment, 30 November 2005 at para 90. See also the ICTR case of *Akayesu* which proposes an evaluation test in which the intensity of the conflict and the organization of the parties are considered; Case of *Akayesu*, Case No. 96-4-A, Appeal Chamber 1 June 2001 at para 91. Louise Arimatsu applies loss of human life and the scale of injury, level of destruction to social infrastructure and disruption to normal life as exemplified by displacement of populations as evidence as to the intensity of the violence when reaching the conclusion that the violence in Eastern Zaire in 1993 and from 1994 reached the threshold for Common Article 3 to apply; Arimatsu 2012, pp. 152–153. Consider the *Abella* case in which the Inter-American Commission on Human Rights considered the concerted nature of the hostilities, the direct involvement of members of the armed forces and the nature and level of the violence; Commission Report on *Juan Carlos Abella v. Argentina*, Case Number 11.137, 1997 Inter-American Yearbook on Human Rights, p. 684, para 155; the discussion as to intensity in Fleck 2013, pp. 593–595; the factors identified by Robert Chesney in Chesney 2010, p. 31; and Dinstein 2012, pp. 403–404.

⁷⁶ *Prosecutor v. Ramush Haradinaj*, Case No. IT-04-84-T, Judgment, 3 April 2008 para 60. The armed group itself may issue a declaration setting out the way in which it is organized; consider for example the Declaration made by the National Liberation Army that fought in the Former Yugoslav Republic of Macedonia in 2001, reproduced in Sivakumaran 2012, p. 171. As Sandesh Sivakumaran points out, however, while such a declaration may evidence the view of the armed group, it must be assessed in the light of the facts on the ground and, in the event of inconsistency, it will be the facts on the ground that will prove determinative; Sivakumaran 2012. However, the context in which the armed group is operating must be taken into account when assessing its degree of organization. Where, as will frequently be the case, it is operating in conditions of secrecy as an underground organization, this may be a relevant factor when considering the various indicia that have been suggested; Sivakumaran 2012, pp. 172–177. As to the difficulties involved in applying the ‘organization’ criterion to virtual organizations of individuals engaged in cyber activities, see Schmitt 2012a, pp. 462–464. See also ICRC Report to the 31st Conference of the Red Cross and Red Crescent, International Humanitarian Law and the challenges of contemporary armed conflicts, October 2011, p. 8.

of violence may depend on the armed group being organized; that organization suggests that the violence is of a collective nature rather than being carried out by random individuals and that organization enables the armed group to comply with the law of armed conflict. Of these reasons, he concludes that the final two are the most important and that it is the notion of ‘parties to a conflict’ with the associated responsibilities that differentiates armed conflicts from internal tensions.⁷⁷

The expression ‘armed conflict’ is not defined in the treaties. However, in *Prosecutor v. Tadić* it was suggested: “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups within a State”.⁷⁸ Jelena Pejic identifies 7 scenarios that, in the last 2 cases not without controversy, are included within the typology of non-international armed conflicts, namely and briefly, government forces fighting organized armed groups; organized armed groups fighting each other within a state; conflicts of the first type that spill over into a neighbouring state’s territory; multinational armed forces fighting alongside host state armed forces in its territory against organized armed group(s); UN or regional organization forces that become involved in similar situations to that previously described; a non-international armed conflict may exist alongside an international armed conflict when forces of a state are engaged in hostilities with a non-state party operating from a neighbouring state’s territory but without the latter’s control or support; and conflicts of the sort between Al-Qaeda and its affiliates and the United States.⁷⁹ Francoise Hampson explains that the reference to ‘protracted armed violence’ introduces a temporal notion into the definition of non-international armed conflict.⁸⁰

Common Article 3 binds all parties to the armed conflict, requiring that those taking no active part in the hostilities or who have been rendered hors de combat must be treated humanely and without discrimination on grounds set out in the Article. They must not be subjected to violence to life and person; mutilation; cruelty and torture; hostage-taking; outrages on personal dignity; passing of sentences and carrying out of executions without proper process and the wounded and sick must be collected and cared for.⁸¹ These are the minimal standards that must pertain in all non-international armed conflicts. Charles Garraway points out that the ICRC attempt in 1949 to apply the Conventions as a whole to non-international

⁷⁷ Sivakumaran 2012, p. 177. As to non-international armed conflicts within common Article 3, see Green 2008, pp. 72–75.

⁷⁸ *Prosecutor v. Tadić*, (1996) 105 ILR 419, 488.

⁷⁹ Pejic 2012, p. 82.

⁸⁰ Hampson 2008, p. 555, where the valid point is made that determining whether violence is sporadic and thus not non-international armed conflict under Common Article 3 or protracted, and thus non-international armed conflict by virtue of *Tadić* may not be straightforward. Ken Watkin agrees that determining when violence reaches the level of an armed conflict is both factually and legally difficult. Moreover, the determination will not, according to the International Criminal Tribunal for Rwanda, be left to the State; Watkin 2007, p. 289 and see *Prosecutor v. Akayesu*, Case No. ICT -96-4-T, Judgment, 2 September 1998 at para 603.

⁸¹ Common Article 3(1) to the Geneva Conventions, 1949.

armed conflicts failed because States were not prepared to go that far in allowing international supervision of their internal affairs.⁸² Consider, however, the determination by the Bush Administration that the Geneva Conventions did not apply to Taliban and Al-Qaeda detainees as they were ‘unlawful combatants’ with the result that they had no protection under either Geneva Convention III or Common Article 3, a blanket denial of protection that Francoise Hampson correctly characterizes as contrary to the Conventions.⁸³

If, however, an armed conflict meets the APII criteria and if that Protocol applies to it, the obligations in Common Article 3 must be complied with as well as those in the Protocol. Moreover, parties to an armed conflict regulated by Common Article 3 should endeavour to bring into force by means of special agreements all or parts of the other provisions of the Conventions.⁸⁴

However, conflict situations may in practice be somewhat more complex than the discussion so far might suggest.⁸⁵ Whether an international armed conflict existed in Bosnia-Herzegovina in May 1992 was considered by the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* case.⁸⁶ The Appeals Chamber held that the conflict or conflicts had both international and non-international characteristics.⁸⁷ Moreover, the reference in Common Article 3 to ‘the territory of one of the High Contracting Parties’ “does not prevent a non-international armed conflict from straddling more than one State”.⁸⁸ Marco Sassoli must be right when he opines that “even a conflict spreading across borders remains a non-international armed conflict”.⁸⁹ Consider also the 2006 hostilities involving Israel and Hezbollah in Lebanon. Iain Scobbie’s extensive analysis of the relevant events and of the status of the conflict leads to the conclusion that there are contradictory indicators as to whether an international or non-international armed conflict took place. He concludes that international and non-international armed conflicts took place in parallel and emphasizes that these were not moot issues. These classification issues profoundly affected the status of captured

⁸² Garraway 2012, p. 96. John Murphy describes the provision in Common Article 3 as ‘sparse’ and ‘inherently ambiguous’; Murphy 2012, p. 17.

⁸³ Hampson 2012, pp. 263 and 264.

⁸⁴ Common Article 3 to the Geneva Conventions, para 3.

⁸⁵ Dinstein 2010, pp. 26–27.

⁸⁶ Decision of 2 October 1995 in Case No. IT-94-1-AR72; 35 ILM (1996) 32.

⁸⁷ For a discussion of the implications of the decision in the *Tadić* case for the notions of international and non-international armed conflict, see Greenwood 1996, pp. 265–283.

⁸⁸ Akande 2012, p. 72. Note however the differing expert views as to the status of hostile activities taking place outside the territory in which the armed conflict is taking place. Kelisiana Thynne argues that to be regarded as linked with the non-international armed conflict, the hostile activities must have a direct impact on the conduct of hostilities in the country where the non-international armed conflict is centred, Thynne 2009, p. 174. Robert Chesney, on the other hand, contends that the central issue is whether the engagement, wherever in the world it occurs, is between the parties to the non-international armed conflict and if it is, then the law of non-international armed conflict applies to that engagement; Chesney 2010, p. 37.

⁸⁹ Sassoli 2011, p. 55.

Hezbollah fighters. “As the conflict was bifurcated, and the Israel-Hezbollah conflict was an extra-territorial non-international armed conflict, the question whether POW status should be accorded to Hezbollah fighters was irrelevant, and Israel dealt with them under its Detention of Unlawful Combatants law.”⁹⁰

Matters may become even more difficult if one of the entities involved in the conflict has the sort of nebulous, loosely associated composition typified by Al-Qaeda such that characterizing that entity as an organized armed group becomes problematic.⁹¹ If the group using force against the government does not fulfil the organization criterion, the hostilities, however intense, will not amount to a non-international armed conflict with the result that uses of force by the security forces will have to comply with applicable domestic and human rights law.

Noam Lubell rejects the consent of the territorial state as the criterion for determining whether cross-border armed conflicts are international or non-international, preferring to focus on the parties to the conflict partly because “the determination and classification of an armed conflict must remain separate from possible violations of the *jus ad bellum*”. The present author, however, disagrees. The violation of sovereignty is certainly an international wrong justifying certain action in accordance with the *jus ad bellum*. That dimension however does not alter the relevance that the lack of territorial state consent has for the characterization of the resulting hostilities. The use of armed force by one state in breach of another state’s sovereignty seems to the present author to constitute international armed conflict.⁹²

These are of course important contemporary issues and there is no doubt that the varied and often complex characteristics of modern warfare do not always easily fit into the established framework differentiating international and non-international armed conflicts.⁹³ Moreover, and irrespective of the legal technicalities discussed in this section, there remains the important question identified by Gary Solis, namely who decides whether a non-international armed conflict is in existence? “Often, the ruling government simply announces that the insurgents are merely bandits, to be dealt with by the Government’s paramilitary forces or

⁹⁰ Scobbie 2012b, pp. 417–419.

⁹¹ Lubell 2012, pp. 426–429, but note the March 2010 assertion by US State Department Legal Adviser Harold Koh that “as a matter of international law, the U.S. is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law”; Speech at the Annual Meeting of the American Society of International Law, p. 7, 25 March, 2010, available at www.state.gov/s/l/releases/remarks/139119.htm. For a critical appreciation of the Obama Administration’s position on the conflict, see Targeting Operations with Drone Technology: Humanitarian Law Implications, Background Note for the American Society of International Law Annual Meeting, 25 March 2011, pp. 4–8.

⁹² Lubell 2012, p. 433.

⁹³ Watkin 2007, pp. 272–273.

national police.”⁹⁴ Certainly, the Protocol has “seldom played a role in non-international armed conflicts”.⁹⁵

There is no combatant status, and therefore no combatant immunity, in non-international armed conflicts, so rebels who undertake hostile acts during such a conflict remain liable to prosecution under domestic law for, e.g. murder, criminal damage, wounding etc. whether those acts comply with or breach the law of armed conflict. Ken Watkin⁹⁶ contends, however, that there “is a strong argument supporting the existence of a customary norm of providing State security forces a form of ‘privilege’ in respect of the use of force in internal armed conflicts”.

2.2.5 Occupation

No discussion of the legal spectrum of conflict is complete without a reference to belligerent occupation. Occupation is classically defined in the 1907 Hague Regulations as follows: “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”⁹⁷

Common Article 2 to the Geneva Conventions continues the application of the Conventions during all cases of partial or total occupation of the territory of a High Contracting Party even if that occupation is not resisted.⁹⁸ Article 6 of Geneva Convention IV provides that some elements of that Convention no longer apply one year after the general close of military operations. However, where a state of occupation is maintained beyond that one-year period, the Occupying Power, if it exercises the role of government in the occupied territory, must afford particular rights and protections listed in the article. API is also stated to apply during a state of occupation⁹⁹ but that application is not subject to the one-year limitation. Where persons have been detained but the occupation ends while they remain in

⁹⁴ Solis 2011, pp. 102–103.

⁹⁵ Solis 2011, p. 131.

⁹⁶ Watkin 2012, p. 8.

⁹⁷ Hague Regulations, 1907, Article 42. Mike Schmitt explains that, in the context of the Iraq War, 2003, rear echelon troops not having arrived in sufficient numbers and composition to place Baghdad under Coalition authority, occupation only commences in such circumstances “when it is militarily feasible for the advancing forces to actually assume their occupation responsibilities”. He goes on to observe that occupation commencement may be difficult to fix, that the occupation may be rolling, expanding or contracting as the territory controlled by the adverse army increases or diminishes; Schmitt 2012b, p. 365. As to the rights and duties of the occupying power, see Green 2008, pp. 284–296, Kalshoven and Zegveld 2011, pp. 60–61 and 62–66, and Thürer 2011, pp. 148–151. For a rather general discussion of belligerent occupation, see Kolb and Hyde 2008, pp. 229–234. For a detailed discussion of the law of occupation, see Rogers 2012, pp. 238–294.

⁹⁸ Common Article 2(1) to the Geneva Conventions, 1949.

⁹⁹ API, Article 1(3).

detention, GCIV and API will continue to apply to them until their ultimate release, repatriation or re-establishment.¹⁰⁰

There are difficult legal issues as to the determination of what does or, respectively, does not amount to a termination of occupation; these issues and that determination are critical to the classification of an associated armed conflict as international or non-international. Iain Scobbie, taking the relevant factors into account, has reached the conclusion that notwithstanding the disengagement, Israel remains in occupation of Gaza.¹⁰¹ Whether a state of occupation exists may be unclear and/or disputed. Ultimately it will be a question of fact to be determined by reference to the factors referred to in Article 42 of the Hague Regulations, 1907.¹⁰²

2.2.6 Conflicts that are Not Armed Conflicts

Internal disturbances and tensions, riots, isolated and sporadic acts of violence and other acts of a similar nature to which Article 1(2) of APII refers are not armed conflicts and the law of armed conflict does not therefore apply to them. This may be the case simply because the intensity and/or the level of sustainment of the violence falls below that required to constitute an armed conflict or because the armed group opposing the government fails the ‘organization’ test. The law that governs the activities undertaken in pursuance of such ‘conflicts other than armed conflicts’ is the domestic law applying in the territory where the acts occur, the domestic law of any other state that may have jurisdiction based on the nature of the relevant act and any applicable human rights law.¹⁰³ The rioters and those who use violence or who undertake similar acts related to such situations are therefore in breach of the domestic criminal law and are liable to be subjected to the relevant criminal law procedures and punishments. Some may choose to describe such activities as terrorism, or as an insurgency, or other terms may be employed. The important legal point is that such situations fall outside the law of armed conflict and within the aegis of applicable domestic law.

The term ‘conflicts other than armed conflicts’ may, to some, seem inaccurate because the terrorists, insurgents or criminals may well employ arms and

¹⁰⁰ See further for example Dinstein 2009; Gasser 2008, pp. 270–311; Greenwood 1992, pp. 241–266.

¹⁰¹ Scobbie 2012a, p. 296.

¹⁰² Consider the situation that arose following Israel’s disengagement from Gaza from 2005 and the differing views of Israel, Hamas and of the international community discussed in Scobbie 2012a, pp. 290–294. For a good description of the practical application of occupation law in Iraq, see Schmitt 2012b, pp. 361–367.

¹⁰³ Pejic 2012, p. 85. For a discussion of what he describes as ‘below the threshold situations’, see Dinstein 2012, pp. 402–403. Consider Pictet 1960, pp. 35–36.

explosives to further their ends. Nevertheless, ‘conflicts other than armed conflicts’ is the term that will be employed in the present discussion.¹⁰⁴

The term ‘law enforcement’ is often and accurately used to describe the activities of the police and security forces in such situations. The United Nations General Assembly adopted a Resolution in 1979 incorporating a Code of Conduct for Law Enforcement Officials which notes that, in performing their duties, law enforcement officials must respect and protect human dignity, and must maintain and uphold the human rights of all persons. Force may only be used by them when absolutely necessary and to the extent required for the performance of their duty.¹⁰⁵

The civil police force, or such other state security services as the law of the state may provide, is likely to have the prime responsibility in the state to maintain order on the streets, to detect and investigate criminal behaviour, to bring those responsible to the criminal courts and generally to maintain internal security. The courts have the task of hearing the evidence concerning alleged criminal activities, of deciding whether persons accused of such activities are guilty and of inflicting punishment as provided by the law of the state. Domestic law, as interpreted in the light of applicable human rights law, will determine the rights an individual has to challenge his detention, whether it be in connection with the investigation of criminal matters or for the maintenance of state security.

Yuval Shany draws attention to revision of what he describes as the ‘law and order paradigm’ in response to the challenges posed by terrorism, with the effect that a new balance is struck between security interests and individual freedoms. He points to targeted sanctions introduced by the UN Security Council against members and supporters of the Taliban (UNSCR 1267/1999) for which there is no judicial review; legislation introducing more flexible standards of investigation, detention and prosecution of terror suspects; the application of executive measures against terrorists outside the criminal law process; the authorization and regulation of coercive interrogation of terror suspects by Israel and the United States and Israel’s policy of punitive house demolitions. He concludes that the common feature is the erosion of the human rights of terror suspects and the weakening of

¹⁰⁴ Note that the ‘troubles’ in Northern Ireland from 1968 to 1998 were not treated as an armed conflict but that informed commentators have opined that from 1971 to 1974 the events occurring there reached the threshold of a Common Article 3 conflict; Haines 2012b, p. 143. Christine Gray notes the difficulty in getting governments to accept that a situation, rather than mere unrest, is a non-international armed conflict to which Common Article 3 or APII applies, but notes that “if the regimes for domestic unrest and internal armed conflict converge through the acceptance of fundamental humanitarian standards then the line between internal unrest and internal armed conflict will be less important”; Gray 2012, p. 95.

¹⁰⁵ United Nations Code of Conduct for Law Enforcement Officials, UN General Assembly Resolution 34/169 dated 17 December 1979, Articles 2 and 3. See also Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, September 1990. As to Rule of Engagement issues in a situation that falls below classification as a non-international armed conflict, see McLaughlin 2012, pp. 308–309.

the judicial controls that support those rights.¹⁰⁶ It is therefore noteworthy that judicial proceedings, for example before the European Court of Justice, the US Supreme Court, the UK House of Lords and the Israeli Supreme Court have addressed such measures.¹⁰⁷

There is an inherent fluidity in many conflict situations. What starts as an internal security situation falling short of armed conflict may develop into an insurgency in which sustained hostilities take place of such intensity as to amount to a non-international armed conflict. A state may become engaged in active support of the insurgents such as to internationalize the armed conflict. The assisting state might exercise belligerent occupation over territory that its armed forces have conquered and occupied during the hostilities. After the conclusion of the hostilities and the termination of the occupation, dissatisfied members of the defeated side to the conflict may then resume criminal activities including riots and isolated terrorist acts. The vital point is that the law that applies at any particular moment and/or location will depend on the factual state of affairs at that time and place. Controlling the activities of armed forces in compliance with what may be a rapidly evolving and diverse security situation is always likely to prove challenging.

This group of sections seems to suggest that certain identifiable criteria may indicate where in the current legal spectrum of conflict a particular situation can properly be placed. The criteria that seem most relevant are:

- whether states are involved in the conflict as parties thereto and, if so, how many and whether they are on opposing sides,
- whether acts of individuals or groups in connection with the conflict can be attributed to a state,
- the intensity, frequency and degree of sustainment of the hostile acts,
- whether and, if so, to what extent armed forces are involved,
- whether an organized armed group is involved in the hostilities,
- whether sufficient land is controlled by rebels in a non-international armed conflict for the purposes referred to earlier and
- whether one of the parties is seeking to exercise a right of self-determination in circumstances referred to in Article 1(4) of API.

¹⁰⁶ Shany 2011, pp. 17–19.

¹⁰⁷ See, respectively, Joined Cases C-402/05 and C-415/05, *P Kadi and Al Barakaat International Foundation v. Council and Commission*, Judgment of 3 September 2008; *Hamdan v. Rumsfeld*, 548 US 557 (2006) and *Boumediene v. Bush*, 128 S Ct 2229 (2008); *R v. Secretary of State for the Home Department* [2004] UKHL 56 and *Secretary of State for the Home Department v. JJ* [2007] UKHL 45; and *Mar'ab v. Commander of IDF Forces in Judea and Samaria*, HCJ 3239/02, PD57(2) 349, all discussed in Shany 2011, pp. 20–22.

2.3 The Changing Conduct of Conflict

The past one hundred years have seen radical changes in the ways in which armed conflicts are fought. At the beginning of that period wars were fought between states and were conducted primarily in two environments, namely on land and at sea.¹⁰⁸ Since 1990, the number of major armed conflicts has been declining and the number of inter-state conflicts as a proportion of the total has also been falling.¹⁰⁹ In the twenty first century, armed conflict may also occur in the air, in outer space and in cyberspace. While conflicts employing traditional means and methods continue to take place, modern military doctrine contemplates more mobile forms of expeditionary warfare, warfare employing remote attack methods and the employment of other, modern technologies.

Wars of the 21st century are often fought in densely populated areas, where combatants and civilians are in close proximity. “The fighting seldom takes place at close quarters; and the possibility of a decisive battle that would break the will of one of the warring parties, and bring an end to hostilities, does not exist”; indeed “neither side may be interested in peace” and “the chances that such a conflict will end decisively are rather slim” with the result that “the international law of war has become as irrelevant as national military rules of conduct”.¹¹⁰ A persistent feature of such modern wars is the degree of suffering that the fighting imposes on the civilian population. Acknowledged experts point out that “civilian suffering from the effects of armed conflict is greater today than at any time in history”, noting that civilians are killed or wounded in almost every armed conflict in far greater numbers than combatants, with the disparity in casualty rates increasing to the point of reversing the proportions seen a hundred years ago, such that in modern conflicts ten civilians are killed for every one soldier. While one could debate whether all of the casualties described as civilian truly relate to persons taking no direct part in the hostilities, there is no doubt that the misery inflicted on civilians is far greater today than ever was the case in the past, as illustrated by the catastrophic numbers of refugees and of displaced persons fleeing the increasingly savage fighting in the Syrian Civil War.¹¹¹ It is therefore plain that

¹⁰⁸ The first treaty relating to the conduct of hostilities from the air was adopted in 1899 before the potential methods for conducting warfare from the air had been fully appreciated. It was not until shortly after 1913 that the potential offered by air warfare started to emerge and to be realized.

¹⁰⁹ Paul Vennesson observes that from 1990 to 2005, for example, “four of the 57 active conflicts were fought between states, Eritrea-Ethiopia (1998-2000), India-Pakistan (1990-1992 and 1996-2003), Iraq-Kuwait (1991) and Iraq versus the United States and its allies (2003)”. One could, of course, add Afghanistan to this list. The number of civil wars rose from 2 in 1946 to 25 in 1991, then it dropped but has risen slowly since 2006; Vennesson 2011, p. 250.

¹¹⁰ Thürer 2011, p. 247 drawing on Kellenberger and Münkler.

¹¹¹ Corn et al. 2012, pp. 279–280 and note 5 citing Foulkes 2009 and see Cumming-Bruce 2013, available at www.nytimes.com/2013/09/03/world/middleeast/flow-of-refugees-out-of-syria-passes-two-million.html?_r=0.

those whom the law seeks to protect are suffering in greater numbers despite that protection, which clearly demonstrates the importance of the enhanced compliance with and enforcement of the law advocated in [Chap. 12](#).

Whether one accepts that there is something fundamentally new about so-called ‘new’ wars, or whether, as the present author does, one sees a continuous process of technological and doctrinal evolution at work is an issue that is largely peripheral to the central focus of this book, concerned as we are rather with the law that applies and how the new features of war that we observe affect, and are affected by, the law. More importantly, the author rejects Daniel Thürer’s contention that international law has become irrelevant. It may be that the participants in some conflicts choose to break its rules, but continuing to strive for compliance with those rules is vital if we are to prevent the descent into wholesale slaughter, chaos and enduring conflict.

If the means of warfare, and the methods by which it is conducted, are evolving as discussed, respectively, in [Chaps. 5](#) and [6](#), so too have there been developments in the characteristics of the participants. These changes are discussed in [Chap. 7](#). They have potential impact, however, on the legal spectrum of conflict. Thus, if violent acts undertaken in a state that would ordinarily constitute breaches of the criminal law occur with the specified level of severity and frequency and involve participation in the conflict by organized armed groups, a non-international armed conflict may exist. While the motivation for the violent activities of the participants may well often be political, the question arises whether violent activities that otherwise satisfy the intensity, frequency and organization criteria but which are entirely motivated by private criminal gain can nevertheless also constitute non-international armed conflicts.¹¹² Mike Schmitt notes the traditional view that non-international armed conflict only applies to politically motivated challenge but comments that classifying high intensity events as non-international armed conflicts would empower a state to use military force and would make practical sense.¹¹³ Organization and intensity requirements still apply, however, and ‘organization’ involves the capability to plan and carry out sustained military operations and impose discipline in the name of a *de facto* authority.¹¹⁴

¹¹² Elizabeth Wilmschurst has drawn attention to war’s increasingly criminal element and the resulting blurring of the distinction between war and organized crime; Wilmschurst [2012](#), p. 1. For a discussion of the motives giving rise to what he describes as ‘criminal warfare’, see Haines [2012a](#), pp. 24–25. John Mueller characterizes as ‘criminal warfare’ violent conflicts dominated by criminals, bullies, hooligans, toughs, goons and thugs and in which combatants, evidently meaning the participants, are induced to wreak violence primarily for the fun and material profit they derive from the experience. He notes that such participants tend to be disobedient and mutinous and can be disinclined to fight when things become dangerous. As a result, disciplined warfare has emerged in which violence is inflicted because indoctrination and training instil a need to follow orders, “to observe a carefully contrived and tendentious code of honor, to seek glory and reputation in combat, to love, honor or fear their officers, to believe in a cause, to fear the shame, humiliation, or costs of surrender, or, in particular, to be loyal to and to deserve the loyalty of their fellow combatants”; Mueller [2012](#), pp. 141–143.

¹¹³ Schmitt [2012d](#), pp. 122–123.

¹¹⁴ Sandoz [1987](#), para 4663.

Logic suggests that if politically motivated criminal activity can transition to armed conflict so also ought it to be possible for non-politically motivated criminal activity to do likewise. However, states did not take that view when the Geneva Conventions of 1949 were being negotiated and seem unlikely to have changed their view.¹¹⁵ ‘War’ between States as conceived before 1949 was an essentially public activity that was to a degree regulated within the overall aegis of public international law. Criminal activity in which the participants, whether comprising individual adventurers or groups that are armed, seek purely private criminal gain or gratification, really remains criminal in nature irrespective of the intensity and sustainment of the activity or the organization of those involved.¹¹⁶

However, the author acknowledges that differentiating such large scale, organized crime from the activities of armed rebel groups whose members are usually characterized by the challenged state as brigands, rebels or terrorists is always going to be most difficult and risks producing an unsatisfactory outcome. Such differentiation is likely to be made even more difficult if, as may well be the case, some members of the group take the opportunity to engage in ordinary crime for self-enrichment purposes, or use criminal activity to raise funds for the group.

It is, nevertheless, tempting to argue that an organized armed group that undertakes armed activities that reach the violence threshold required by common Article 3 but which are inspired by purely criminal motives, for example related to the drug trade, is involved in something other than non-international armed conflict. However, drawing such a distinction seems, on reflection, to be potentially challenging, partly because all use of violence in a non-international context is by definition criminal in nature¹¹⁷ and partly because participation in an armed conflict may be motivated by a multiplicity of considerations,¹¹⁸ the criminal

¹¹⁵ Pictet 1952, pp. 44 and 49.

¹¹⁶ Noëlle Quénivet and Shilan Shah-Davis consider that these ‘newest armed conflicts’ are low-intensity, privatized or informal conflicts which may occasion more deaths than conflicts legally acknowledged as ‘armed conflicts’. They note the violence is directly related to informal criminal economic activities such as drugs and the arms trade, undertaken “by individuals and street gangs who do not aim to replace the state, but rather, to secure control over their business and sometimes work *in lieu* of the state”; Quénivet and Shah-Davis 2010, pp. 7–8. Note the ICRC view as expressed in the ICRC Report to the 31st Conference of the Red Cross and Red Crescent, International Humanitarian Law and the challenges of contemporary armed conflicts, October 2011, at p. 6. Perhaps the point here is the organization requirement for an armed group to qualify as a party to a NIAC. Criminal gangs will tend to lack the command structure that seems to be an essential element in such ‘organization’; Quénivet and S Shah-Davis 2010, p. 9. For a discussion of the ‘organization’ requirement, see Schmitt 2012d, pp. 128–131.

¹¹⁷ See the discussion of the characterization of armed groups in Sivakumaran and the related issue of implicit recognition, Sivakumaran 2012, pp. 204–209.

¹¹⁸ William Reno notes that interrelated war and crime have become an integral element of global policy and cites the indictment of Charles Taylor, who was accused of conducting a criminal conspiracy, a common plan to gain access to the mineral wealth of Sierra Leone, in particular diamonds, to destabilize the government of Sierra Leone, to facilitate access to the mineral wealth and to install a government that would be well disposed to his interests and objectives in Liberia and in the region; Reno 2011, p. 220 citing Special Court for Sierra Leone,

nature of some or all of which is unlikely to be acknowledged by the party concerned. Distinguishing between criminal motivation based on financial greed and criminal motivation based on a thirst for power is likely to involve perceived differences that lack substance and which may sometimes lead to unattractive conclusions. Mats Berdal makes the point that “in war-torn societies characterized by extreme levels of socio-economic dislocation, persistent insecurity, and the collapse of entitlements, what would in normal circumstances be classified as criminal activities may well be impossible to distinguish from coping strategies and daily struggles for survival”. He draws attention to the interpenetration of the legitimate and the illegitimate in many weak states and conflict-ridden areas, and observes that key assumptions on which the definition of organized crime is based may become problematic.¹¹⁹ As Reno concludes, the “distinctions [between crime and war] are highly political and are apt to change from one context to another and among actors within a single context”.¹²⁰ This would not, therefore, seem to be a safe basis on which to draw a distinction between applicable legal regimes.

However, these criminal matters will, it is submitted, continue to be regarded by states as within the exclusive competence of their internal security and police forces. The fact that such activities may be undertaken across borders and on a large scale seems unlikely to alter that qualitative appreciation. The large scale of the criminal behaviour, its violent character, the large number of deaths and injuries that are caused do not change the fact that crime for personal gain or gratification on whatever scale is also, and will be seen by states as, a matter for investigation, detection, prosecution and punishment by the national police and court systems. Moreover, if concerted violent activity that meets all of the criteria associated with an armed conflict is undertaken for political motives, states would seem to be somewhat more likely to recognize that an armed conflict exists and that the relevant provisions of the law of armed conflict will apply.¹²¹

The violent, politically motivated acts undertaken for example by an organized armed rebel group in pursuance of a non-international armed conflict that breach the criminal law of the place where they are committed will render their perpetrators liable to trial and punishment. Ken Watkin points out that

(Footnote 118 continued)

The Prosecutor against Charles Ghankay Taylor, Case No. SCSL-2003-01-1 (amended indictment), 16 March 2006.

¹¹⁹ Berdal 2011, p. 109 at p. 127. Consider for example, Final Report of the UN Commission of Experts established pursuant to UN Security Council Resolution 780 (1992), May 1994, para 80, discussing the reliance of warring factions in Bosnia on looting, theft, ransoms and trafficking in contraband.

¹²⁰ Reno 2011, p. 235.

¹²¹ Indeed, there will be circumstances in which drawing such a distinction will be difficult; consider for example the period following the second Congo War when much of the violence involved control over natural resources for financial gain. In discussing the matter, Louise Arimatsu notes the indifference of international humanitarian law as to the actor's motivation; Arimatsu 2012, p. 197.

[t]oday a non-state actor can attain such a level of organization and sophistication that it poses a threat comparable to that presented by military forces acting for or on behalf of a state. [...] The scale and effects of these attacks and their potential to be repeated or continued call for a response other than one focused exclusively on law enforcement.¹²²

So while states in general will probably prefer to regard gang-based, organized crime as a matter to be dealt with exclusively employing law enforcement mechanisms, it is foreseeable that some states confronted by the greatest of such threats may prefer to treat the situation as a non-international armed conflict, particularly if the relevant criteria are met. The law relating to non-international armed conflict would then apply, including the provisions as to war crimes, the customary and treaty law rules relating to the conduct of the hostilities and the specific and general protections afforded to certain categories of individual and object, such as medical personnel, religious personnel, civilians, the wounded and sick and so on.¹²³

2.4 The Emerging Legal Spectrum of Conflict

Having described the spectrum of conflict provided for in the current law, we shall now discuss how that spectrum might evolve in the foreseeable future.

There seems to be no basis for doubting the continuing relevance of the law of international armed conflict as the basis for the proper regulation of hostilities between states. However, it is appropriate to question whether the classification of ‘wars of national liberation’ under Article 1(4) of API as having the status of international armed conflicts remains appropriate. So far as is known, no conflict has yet been classified as coming within that provision, and, for the reasons mentioned earlier in this chapter, it seems unlikely that this will occur in the foreseeable future. API includes provision for the amendment of the treaty, specifically Article 97, and it would be for states party to decide whether such action is appropriate, for example on the basis that the sorts of colonial and anti-racist wars in contemplation when it was negotiated are no longer regarded by the international community as relevant. The more likely outcome is that the provision will simply be regarded as increasingly redundant¹²⁴ and will be ignored. It

¹²² Watkin 2004, p. 14. The phenomenon of failed or failing states, taken together with the proliferation of technologically sophisticated methods of delivering violence including weapons of mass destruction, generate the dangerous prospect of private actors operating outside the framework of state-based security; Watkin 2004, p. 14.

¹²³ Consider for example Schmitt 2012a, pp. 472–473.

¹²⁴ Examples of such treaty redundancy include the 400 gramme limit in the St Petersburg Declaration, 1868 and the provisions of Hague Declaration IV(1) of 1899 and Hague Declaration XIV of 1907 on the dropping of explosives from balloons.

certainly seems that Article 1(4) is unlikely to have future practical relevance in the legal spectrum of conflict that this chapter seeks to discuss.¹²⁵

As has been often observed, the differences in the law applying, respectively, in international and non-international armed conflict are narrowing.¹²⁶ Christine Gray notes a growing perception that the existence of different regimes governing international and non-international armed conflicts is unsatisfactory given the humanitarian concerns common to both. While convergence will lessen the significance of the difference, the same commentator notes an increasingly accepted view that there should be one set of rules for all armed conflicts.¹²⁷

The single most significant impediment in achieving such a single set of rules is the view of states that combatant status must remain exclusively applicable to international armed conflict and there are other fundamental distinctions between the situations governed by the two legal regimes. Marco Sassoli points out, for example, that the addressees of the law differ, in that the law of non-international armed conflict binds not only states but also armed groups, and that armed group commanders may not have the legal capacity to punish members who have committed violations of the law.¹²⁸ He questions whether it is possible to convince parties to comply with rules not binding on their enemy, citing for example the effect on the practical ability of armed groups to detain government soldiers of the suggestion that in non-international armed conflicts there is an obligation to provide to a person deprived of his liberty the opportunity to challenge the lawfulness of his detention.¹²⁹

It is nevertheless worth noting that the legal rules that apply in the two classes of conflict are tending to converge specifically in relation to weapons law and targeting law. This convergence in relation to weapons law is discussed in [Chap. 5](#),

¹²⁵ It is understood that the United States does not accept the Article 1(4) provision. The US preference would be to treat Article 1(4) conflicts as non-international armed conflicts to which APII applies; Murphy 2012, p. 26. The UK accepted Article 1(4) by virtue of its ratification of API on 28 January 1998 subject to a relevant statement of interpretation which, in relation to Article 1(4) and Article 96(3), states: “It is the understanding of the UK that the term ‘armed conflict’ of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation. The UK will not, in relation to any situation in which it is itself involved, consider itself bound in consequence of any declaration purporting to be made under para 3 of Article 96 unless the UK shall have expressly recognised that it has been made by a body which is genuinely an authority representing a people engaged in an armed conflict of the type to which Article 1, para 4, applies.”

¹²⁶ As Daniel Thürer notes, this is a favourable and reasonable development. “Human beings deserve the same protection, regardless of whether they are affected by a battle taking place within one country or across borders”; Thürer 2011, p. 52.

¹²⁷ Gray 2012, pp. 94–95.

¹²⁸ Sassoli 2010, p. 16. For a critique of the bifurcation of international humanitarian law between international and non-international armed conflict, consider Jensen 2010, pp. 702–706.

¹²⁹ Sassoli 2010, p. 17.

where it is concluded that for the law of weaponry applicable respectively in international and non-international armed conflict completely to converge, all states party to the Conventional Weapons Convention would have to ratify the 2001 scope extension, the Environmental Modification Convention would need to be applied to both classes of conflict, the limited exemption from the war crime associated with the prohibition on expanding bullets would have to be made applicable to international and well as non-international armed conflicts and the rules in Articles 35(3) and 55 of API would have to be extended to both classes of conflict. This seems to be the extent of the difference in the law of weaponry as it applies to each class of conflict. The differences in the law of targeting are addressed in the following section.

2.5 Differences in the Law of Targeting as it Applies in International and Non-international Armed Conflict

It is not intended in this short section to seek to address all aspects in which the law of targeting differs in its application to international and non-international armed conflicts.¹³⁰ Rather, we shall look at certain particular issues to get a general impression of the differences in its application to the two classes of conflict.

Lying at the root of many of these differences, the absence of combatant status in non-international armed conflict has numerous consequences. In the law of international armed conflict, civilians are defined in negative terms by reference to combatants.¹³¹ In non-international armed conflict there therefore can be, and is, no such definition of civilians, and yet the term is used in texts reporting the law relating to non-international armed conflict, for example by the ICRC in Henckaerts and Doswald-Beck,¹³² in APII¹³³ and by the authors of the NIAC Manual.¹³⁴ This immediately poses a challenge. While there is no doubt that the

¹³⁰ For a detailed discussion of the law relating to targeting during non-international armed conflicts, see Sivakumaran 2012, pp. 337–386.

¹³¹ API, Article 50(1).

¹³² See for example Henckaerts and Doswald-Beck 2005, Rule 1 and pp. 5–8 of the associated Commentary.

¹³³ APII, Article 13(1) and (2), refers to the civilian population and individual civilians enjoying general protection against the dangers arising from military operations, to a prohibition on making civilians the object of attack and to a prohibition of acts or threats of violence whose primary purpose is to terrorize the civilian population. Article 13(3) states civilians enjoy the protections in the relevant part of the treaty “unless and for such time as they take a direct part in hostilities”.

¹³⁴ NIAC Manual 2006, para 1.1.3: “Civilians are all those who are not fighters.” The associated commentary states that “[f]or the purposes of this Manual, civilians who actively (directly) participate in hostilities are treated as fighters”; NIAC Manual 2006, p. 5. The problem with this approach is, of course, its conceptual illogicality. If civilians are those who are not fighters and persons who participate directly in the hostilities are fighters, then they cannot be civilians in the

principle of distinction applies in non-international armed conflict, the challenge lies in articulating the principle, particularly in its application to persons. The NIAC Manual refers to fighters as distinct from civilians. While the terminology might be problematic, however, some vital concepts with which we are familiar in relation to international armed conflict are transposed into the law of non-international armed conflict.¹³⁵ So, for example, the law of non-international armed conflict recognizes that civilians must not be made the object of attack except during such time as they take a direct part in hostilities. The concept of direct participation in hostilities and its implications for modern warfare will be discussed in more detail in [Chap. 7](#) and will not therefore be further addressed here.

Where objects are concerned, APII contains no definition of military objectives and does not specifically oblige States to refrain from directing attacks at civilian objects, omissions which the ICRC Study contends are rectified by customary law.¹³⁶ Similarly, APII does not include rules on the precautions that the Parties to the conflict must take. Again, the ICRC Study finds that customary law provision is similar as between the two classes of conflict both in respect of the precautions that attackers are obliged to take¹³⁷ and in respect of the precautions that Parties to the conflict must take against the effects of attacks.¹³⁸

However, while customary law in these respects may have some similarities as between international and non-international armed conflict, there are evident differences in the treaty law rules. Quite simply, the granularity of the targeting rules in Articles 48–67 of API is not reproduced in APII. So, while APII does make

(Footnote 134 continued)

first place. Perhaps, to a degree, the problem could be resolved by providing that persons who would otherwise be civilians but who directly participate shall be fighters. Perhaps that idea is what the ‘are treated as’ language seeks to, but does not quite succeed in, conveying.

¹³⁵ For example the principle of distinction itself and the rule relating to direct participation by civilians; see APII, Article 13(3).

¹³⁶ Henckaerts and Doswald-Beck 2005, Rule 7 and the associated Commentary, pp. 26–29. As the ICRC pertinently observes, Article 3(7) of Amended Protocol II to the Conventional Weapons Convention prohibits directing mines, booby-traps or other devices against civilian objects, and the war crime set out in Article 8(2)(e)(xxii) of the Rome Statute, 1998, is capable of being interpreted as supportive of the contended for customary rule. The fact remains, however, that there is no explicit generally applicable prohibition in treaty law to match that relating to international armed conflict in Article 52(1) of API.

¹³⁷ Henckaerts and Doswald-Beck 2005, Rules 15 to 21. Note, however, that while the ICRC asserts the applicability of the first six rules in both international and non-international armed conflict, it considers that the seventh only arguably applies in the latter. The seventh rule states that where a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected must be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects; Rule 21.

¹³⁸ Henckaerts and Doswald-Beck 2005, Rules 22–24, although the last two rules are only considered ‘arguably’ to apply in non-international armed conflict. These latter Rules require that each party to the conflict must, to the extent feasible, avoid locating military objectives within or near densely populated areas and remove civilian persons and objects under its control from the vicinity of military objectives.

particular provision, for example as to works and installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations,¹³⁹ as to cultural objects and places of worship¹⁴⁰ and as to objects indispensable to the survival of the civilian population,¹⁴¹ the detail of the legal provision in APII is inferior to that in API to such a degree as to be inadequate.¹⁴² So, for example, the non-international armed conflict treaty rule as to works and installations containing dangerous forces, unlike its API counterpart, contains no specific rule dealing with the attack of military objectives located in the vicinity of such facilities and lacks the detailed provisions on when the special protection ceases.¹⁴³

In Chap. 5, we discuss differences in the protection of the environment as between international and non-international armed conflict.

Where cultural objects are concerned, Article 53 of API by definition applies only in international armed conflict. The much more comprehensive protections in the Hague Convention 1954 apply fully during international armed conflict and during periods of belligerent occupation.¹⁴⁴ During non-international armed conflict, however, the Convention only obliges states party to apply “as a minimum, the provisions [...] which relate to respect for Cultural Property”.¹⁴⁵ The Second Protocol of 1999 applies during international armed conflict and belligerent occupation¹⁴⁶ but not during non-international armed conflict, which constitutes an additional and significant difference in the legal arrangements associated with the two classes of conflict.

Another, more general, difference between international and non-international armed conflicts is that, while all parties to the former, being states, have the right to be involved in formulating the law that regulates such conflicts, armed groups involved in non-international armed conflicts have no involvement in formulating the law that binds them. Marco Sassoli poses the question why should non-state actors be bound by the same rules as states. After considering, *inter alia*, practice and *opinio juris* of such groups and a possible customary principle that the obligations accepted by the government of the territorial state apply to groups fighting there, he notes that while there is no controversy that such groups are bound by certain IHL rules, there is controversy as to why this is so.¹⁴⁷

¹³⁹ APII, Article 15.

¹⁴⁰ APII, Article 16.

¹⁴¹ APII, Article 14.

¹⁴² Solis 2011, p. 129 citing Roberts and Guelff 2000, p. 482.

¹⁴³ There is, for example, no equivalent in APII to the detailed provision in the second sentence of Article 56(1) of API and in Article 56(2).

¹⁴⁴ Hague Cultural Property Convention, 1954, Article 18(1) and (2).

¹⁴⁵ Hague Cultural Property Convention, 1954, Article 19(1). The obligation to respect cultural property is set out in Article 4. The distinct obligation to respect cultural property is reflected in Articles 2, 8 and 9 and the additional obligation to safeguard cultural property is provided for in Article 3.

¹⁴⁶ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999.

¹⁴⁷ Sassoli 2010, pp. 13–14.

So there are highly significant differences in the treaty arrangements for the two classes of conflict. It must be recalled that when treaty and customary law contain similar rules on a particular subject, the two rules are nevertheless distinct. Self-evidently, to the extent that customary law contains similar rules in relation to international and non-international armed conflict, this will tend to close the gap in effective legal provision. However, the degree to which customary law actually fills that gap is debatable.¹⁴⁸ While the ICRC Study, as we have seen, argues that in a number of important respects it does, not all commentators agree¹⁴⁹ and the United States has expressed its serious reservations as to certain conclusions reached in the ICRC Study.¹⁵⁰

We can, it seems, conclude from this and the previous section that there are, and are likely to remain, substantial and important differences in the law applying to international and non-international armed conflict for as long as states view the two kinds of conflict as fundamentally distinct.¹⁵¹ The tendency towards convergence of the two elements of law was enhanced by the Rome Statute's articulation of war crimes applicable in non-international armed conflict. That said, the war crimes enumerated in Article 8(2)(b) of that Statute differ in significant respects from those listed in Article 8(2)(c) and (e). The convergence process has its limits. If international and non-international armed conflicts must remain distinct features of our legal spectrum of conflict, the next question that arises is whether non-international armed conflicts should continue to be divided between those to which CA3 alone applies and those that are also regulated by APII.

2.6 The Legal Distinctions Between CA3 and APII Conflicts

As we saw in Sect. 2.2.4, Common Article 3 applies to all non-international armed conflicts whereas APII applies only to those non-international armed conflicts that satisfy the fairly stringent criteria set out in Article 1 of that treaty. Common

¹⁴⁸ Moreover, as Dapo Akande points out, whenever states have been presented with the opportunity to abolish the distinction between international and non-international armed conflict, they have been reluctant to do so and undeniably the rules as to status of fighters and as to detention of combatants and civilians differ; Akande 2012, p. 37.

¹⁴⁹ See, for example, Wilmschurst and Breau 2007.

¹⁵⁰ Initial Response of U.S. to ICRC Study on Customary International Humanitarian Law with Illustrative Comments, letter from US Department of State Legal Adviser and the US Department of Defense General Counsel to Dr J Kellenberger, President of the ICRC, dated 3 November 2006 available at www.state.gov/l/2006/98860.htm.

¹⁵¹ States are concerned that "equating non-international and international armed conflicts would undermine State sovereignty and, in particular, national unity and security"; there are also the risks that secessionist movements would be encouraged, that the hand of the state would be restrained thereby when seeking to put down a rebellion and that acts they regard as treasonous would no longer be criminal; Akande 2012, p. 37 and Bugnion 2003, p. 168.

Article 3 contains some basic protective provisions, and APII, while its provisions are somewhat more extensive, is markedly less comprehensive than the legal arrangements in API and elsewhere that regulate the conduct of hostilities in international armed conflict. The majority of modern armed conflicts are non-international in character,¹⁵² and there is as we have seen controversy as to the extent to which customary rules that apply to international armed conflict extend to non-international armed conflict. The resulting uncertainties surrounding the law of non-international armed conflict and any associated gaps in its provision are unfortunate and there are suggestions, discussed in [Chaps. 9 and 10](#), that the law of human rights in some way fills those gaps.

Given that states have not as yet made more extensive treaty provision, for example in relation to non-international armed conflict, it is perhaps unsurprising that for this and other reasons we have in recent years seen a number of initiatives for the preparation of international manuals in an apparent effort to clarify the law on particular topics relating to armed conflict. While this effort, and the motives that generate it, are to be applauded, the preferred course of action in an ideal world would be for states to address any deficiencies in the law by negotiating and adopting modern treaty rules that deal with the conduct of hostilities in non-international armed conflict in a thorough way. However, lack of global consensus on these matters may mean such a negotiation is not yet feasible and there is always the danger that a fresh negotiation will produce less satisfactory arrangements than the less than adequate provision we currently have.

The question nevertheless arises whether any new law should maintain the distinction between common Article 3 and APII conflicts, i.e. a distinction based on whether the dissident armed forces or organized armed groups under responsible command exercise control over such territory as to enable them to conduct sustained and concerted military operations and to implement the Protocol. There is no doubt that, as Marco Sassoli has clearly demonstrated, legislating exclusively for non-international armed conflicts exclusively by reference to the capacities of states to act is liable to produce law some of which armed groups will be unable to implement. The territorial control criterion in APII reflects this reality by seeking to limit the application of more prescriptive rules to circumstances in which both parties to the non-international armed conflict are, by virtue of territorial control, able to comply. A division in the legal arrangements on that sort of basis is therefore inevitable if the more prescriptive rules are to be practically applicable by both sides in such conflicts.

One could sensibly discuss whether all of the limitations in Article 1(1) of APII are necessary. As Sandesh Sivakumaran points out most reasonably, if the Protocol can be applied by an armed group that is fighting against a state there would seem to be no reason why it cannot be applied by an armed group that is fighting against

¹⁵² See for example ICRC Report to the 31st Conference of the Red Cross and Red Crescent, International Humanitarian Law and the challenges of contemporary armed conflicts, October 2011, p. 5.

another armed group.¹⁵³ Responsible command and such territorial control as enables the organized armed group to apply the Protocol would seem to be essential requirements for the applicability of the more prescriptive legal rules. Whether the territorial control should continue to be linked to the ability to carry out sustained and concerted military operations is debatable. The important point from the perspective of the current discussion is that there is continued utility in the bifurcation of non-international armed conflicts into those to which more prescriptive rules, such as those in APII, do and, respectively, do not apply. Thought might, however, be usefully given to whether the APII applicability criteria would benefit from minor adjustment.¹⁵⁴

If the absence of combatant immunity applies to all non-international armed conflicts, and if the rebels therefore by definition breach criminal law, there will always be limits to the degree to which protections that apply to those who participate as combatants in international armed conflicts can be extended to those who participate against the government forces in non-international armed conflicts. We should, however, consider the position in relation to combatant immunity a little further. While states seem to be fundamentally opposed to the grant of combatant immunity to rebels in non-international armed conflicts, somewhat lesser arrangements are sometimes made and may provide a useful basis for a way ahead. Article 6(5) of APII requires the authorities in power at the end of the hostilities to endeavor to grant “the broadest possible amnesty” to persons who participated in the armed conflict or who were deprived of their liberty for reasons related to the armed conflict. Sandesh Sivakumaran explains, however, that the reference to ‘the broadest possible amnesty’ should not be misinterpreted as including violations of international humanitarian law.¹⁵⁵ It has, however, been observed that providing amnesty to members of armed groups for taking part in hostilities may incentivize compliance with the law of armed conflict.¹⁵⁶ Sandesh Sivakumaran points out that pursuant to agreements at the conclusion of the American Civil War between Generals Grant and Lee and Sherman and Johnson in April 1865 Confederate officers and fighters were not subjected to criminal prosecutions, that a declaration was made by France during the Algerian War in 1958 to the effect that bringing prisoners before courts would be systematically avoided subject to certain exceptions, that at the conclusion of a war in Nigeria from 1967 to 1970, the Federal Government did not prosecute rebel force members

¹⁵³ Sivakumaran 2012, p. 184.

¹⁵⁴ Marco Sassoli argues that the higher threshold for Protocol II may be realistic. He speculates that a sliding scale may be needed, with increasing obligations for armed groups according to their degree of organization, and the intensity of the violence in which they are involved although this, he acknowledges, would involve complications and controversies. It would imply lower standards for government forces involved in lower intensity conflicts, subject to over-riding human rights standards; Sassoli 2010, p. 20.

¹⁵⁵ Sivakumaran 2012, p. 507.

¹⁵⁶ Report of the Secretary General on the Protection of Civilians in Armed Conflict, S/2009/277, 29 May 2009, para 44.

and that an agreement was reached in 1992 between various conflicting parties in the former Yugoslavia that all prisoners not accused of or sentenced for grave breaches of International Humanitarian Law would be unilaterally and unconditionally released.¹⁵⁷ He argues convincingly that a way of approaching the issue of lack of combatant status for rebels is to “encourage non-prosecution for taking part in hostilities”. While acknowledging that amnesties exist after the fact and are thus readily to be distinguished from combatant immunity, he observes that pursuant to Article 6(5) the relevant authorities must, arguably, actively consider amnesties, and that such an approach may enable a middle course to be navigated between the extremes of combatant immunity and criminal prosecution.¹⁵⁸

Where the treatment of fighters during the period of their detention is concerned, reference should be made to the discussion in [Chap. 8](#). Perhaps an announcement by the Government authorities during an armed conflict between its forces and rebels to the effect that captured rebels who cannot be shown to have breached International Humanitarian Law will be treated, as a matter of policy, as if the Third Geneva Convention applied to them would, again, incentivize compliance with that body of law by the armed rebel group.

2.7 How Do Crime and Transnational Terror Fit?

As we have seen, the distinction between non-international armed conflicts and conflicts to which the law of armed conflict does not apply is achieved in Article 1(2) of APII by excluding from the Protocol’s application “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts”. Article 8(2)(d) of the Rome Statute excludes the same events from the war crimes listed in Article 8(2)(c), crimes that reflect breaches of Common Article 3. Similarly, Article 8(2)(f) excludes the same events from the war crimes in Article 8(2)(e) associated with armed conflicts to which APII applies.

The question that legitimately arises is whether more intensive, organized and violent criminal activity than that reflected in the cited language can properly be regarded as an armed conflict.¹⁵⁹ In an earlier section of this chapter, we discussed the distinction between politically motivated violence and violent or other activities exclusively motivated by personal enrichment or other criminal purposes.¹⁶⁰

¹⁵⁷ Sivakumaran [2012](#), pp. 515–517. Consider the correspondence between Lord Roberts and the President of the Boer Republic during the Boer War to the effect that captured fighters were not ordinary criminals and were not to be treated as such; Spaight [1911](#), pp. 280–281.

¹⁵⁸ Sivakumaran [2012](#), pp. 518–520.

¹⁵⁹ Consider for example piracy which is certainly criminal in nature but the countering of which may well require the deployment of military platforms and military personnel of more than one State, particularly when undertaken on a sufficient scale.

¹⁶⁰ It has, earlier in the present chapter, been noted that the activities of rebels in a non-international armed conflict may be expected to breach applicable criminal law. That appreciation

The point was made that the distinction between concerted violent crime, particularly when undertaken by an organized armed group, and non-international armed conflict is tending to blur. The tendency in modern times for violent acts of terror to be committed on a repeated, frequent and organized basis causes one to question whether the distinction between matters that remain the exclusively internal concern of a state and those which attract the application of the law of armed conflict remains valid.¹⁶¹ It can however be powerfully argued that keeping disturbances, tensions, riots and isolated and sporadic violence outside the notion of armed conflict is the correct basis for the distinction, one which is as valid today as it was when states negotiated the matter in 1977 and in 1998. Repeated, frequent and organized violent acts are not 'isolated and sporadic'; they properly take the conflict into a category that differs from occasional, periodic crimes that can properly be handled by the police force.

Put that way, however, the difficulty becomes immediately plain. Terrorism is increasingly recognized as a major threat to the nation¹⁶² and terrorism that transcends national borders poses particular challenges to the recognized legal spectrum of conflict.¹⁶³ Indeed, other transnational issues are also liable to form the basis for future conflict.¹⁶⁴ While some may regard confronting the dangers of

(Footnote 160 continued)

lies behind the use of the word 'exclusively' in the present sentence. Human rights law will of course apply to the activities that are undertaken to counter such criminal behaviour and to the handling of suspects including the conduct of any proceedings against them.

¹⁶¹ Consider UN Charter, Article 2(4) and (7).

¹⁶² DCDC, Global Trends at p. 59 and UK National Security Strategy at p. 11. Mike Schmitt summarizes the position succinctly: "there will be more terrorists, they will employ a wider array of techniques, they will be harder to identify and State sponsorship is likely to grow"; Schmitt 2012a, p. 464. Azar Gat identifies the implications of such developments in these terms: "A virulent, laboratory-cultivated strain of bacteria or virus, let alone a specially engineered 'super-bug' against which no immunization and medication exist, might bring the lethality of biological weapons within the range of nuclear attacks and result in anything between thousands and many millions of fatalities, while being far more easily accessible to terrorists than nuclear weapons"; Gat 2011, pp. 40–41.

¹⁶³ Consider for example Report of the Commission of Inquiry on Lebanon, pursuant to Human Rights Council Resolution S-2/1, UN Doc. A/HRC/3/2, 23 November 2006, paras 8–9 and 57 where the view is expressed that the Israel/Hezbollah conflict of 2006 amounted to a *sui generis* international armed conflict. By contrast, the United States Supreme Court in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) 66–69 regarded the armed conflict against Al-Qaeda to be covered by Common Article 3, and thus a non-international armed conflict.

¹⁶⁴ See, for example, UK Ministry of Defence, DCDC, Future Maritime Operational Concept 2007, 13 November 2007, para 109 which refers to transnational issues such as terrorism, climate change, demographic shifts, religious and ethnic tensions and increased competition for resources of all kinds as providing the potential for crisis, confrontation and conflict. The UK Ministry of Defence, DCDC, Future Land Operating Concept, JCN 2/12 dated May 2012 talks of renewed regional low-level conflicts, proxy wars, increased proliferation and resource competition; para 101.

terrorism as constituting part of international law dealing with conflicts of an international character,¹⁶⁵ as Mike Schmitt has pointed out, that leaves open what level of violence must be reached for the armed conflict threshold to be reached, the level applicable to international armed conflict or that applicable to non-international armed conflicts.¹⁶⁶ He notes the alternative, more restrictive interpretation of international armed conflict that would classify transnational terrorism as non-international armed conflict,¹⁶⁷ wonders whether the threshold must be achieved in a single state or can be achieved by amalgamating the violence across a number of states and recognizes that transnational terrorism might be legitimately classified by reference to the *lex scripta* as “simply egregious international criminality”.¹⁶⁸ These are, of course, not academic issues. The debate has at its core the vital question as to which body of law applies to the violent events and what status is to be accorded to the participants.¹⁶⁹

Frits Kalshoven and Liesbeth Zegveld also discuss which body of international law should be applied to extraterritorial operations of a state engaging in armed conflict with a non-state armed group on another state’s territory. If the first state directs its military operations against the territorial state as well, the situation is an international armed conflict. “For all other situations, the main consideration should be one of law of war policy; any significant fighting on another state’s territory requires the most complete, most solidly established set of principles and rules, that is, the law of international armed conflict.”¹⁷⁰ The author would agree with this policy-based approach, subject to the thought that certain rules may be inapplicable in the particular circumstances or may not be capable of implementation by the armed groups involved.

Generally speaking, transnational terrorism will amount to criminal conduct that breaches the domestic law of the territory where it is committed, and to which

¹⁶⁵ *Public Committee against Torture in Israel et al v. Government of Israel et al*, High Court of Justice, Israel, HCJ 769/02, 13 December 2006 at para 21.

¹⁶⁶ The logic favouring the latter notes that activities falling below the prescribed level would be classed as crime.

¹⁶⁷ Schmitt 2012a, p. 466 citing *Hamdan v. Rumsfeld*, 548 US 557, 631 (2006).

¹⁶⁸ Schmitt 2012a, pp. 465–468.

¹⁶⁹ Consider for example the hostilities between Turkey and the *Partiya Karkeran Kurdistan* (PKK) in Iraq; e.g. New York Times, ‘Turkey says its planes raided guerrilla bases in Iraq’, 5 March 1987; Al Jazeera, ‘Clashes between “Turkish forces and PKK”’, 20 October 2012; BBC, ‘Iraq condemns Turkish “shelling”’, 9 June 2007; CNN, ‘Iraq condemns Turkish attacks’, 18 December 2007 and consider the reports that these operations were undertaken without the consent of the territorial state, namely Iraq; Reuters, ‘Iraq tells Turkey to stop pursuing Kurdish rebels over border’, 2 October 2012; Reuters, ‘Iraq warns Turkey against violating airspace of Kurdistan’, 17 July 2012; and note, generally, Human Rights Watch, ‘Iran/Turkey: Recent Attacks on Civilians in Iraqi Kurdistan’, 20 December 2011.

¹⁷⁰ Kalshoven and Zegveld 2011, p. 221, where it is suggested that the sole exception might be a case of small scale military operations joining in the efforts of local government forces in an ongoing internal armed conflict, a situation that might, it is suggested, involve respect for locally applicable human rights norms.

states will usually apply law enforcement procedures. If the intensity and frequency of the violence, and the organized nature of the armed group involved, reach the armed conflict threshold in a particular state, then a non-international armed conflict may arise in that state. The existence of a non-international armed conflict in one state does not necessitate the classification of violent acts by the same organized armed group in another state as a non-international armed conflict. Similarly, the involvement of State A in a non-international armed conflict against an organized armed group in host State B does not necessarily imply that military operations by State A against the same organized armed group in and with the consent of State C will constitute a non-international armed conflict in State C. In short, the violence cannot be aggregated across borders in order to determine the existence of a non-international armed conflict. It is the situation in the particular state that will determine whether a non-international armed conflict is occurring within that state.

An important issue is how a state can lawfully undertake cross-border operations if, indeed, the notion of cross-border response to terrorist attack is considered lawful. If that is the case, Gary Solis suggests, and he must be right in arguing, that “before exercising self-defence in the form of a non-consensual violation of a terrorist-host state’s sovereignty, an attacked state must allow the host state a reasonable opportunity to take action against the terrorist group”.¹⁷¹

There can be no doubt that the phenomenon of transnational terrorism has challenged the previous broad acceptance of the distinctions that lie at the root of our legal spectrum of conflict. It is increasingly argued that the resulting conflicts in Afghanistan, Pakistan and possibly Yemen constitute non-international armed conflicts, a conclusion which assumes that the foreign forces involved in these conflicts are operating in support of or with the consent of the government of the relevant country. So the ‘global war’ is in reality a collection of individual wars. Each such war is ‘on’ the organized armed groups in that country that are perpetrating acts of violence including acts of terrorism. The foreign forces are constrained by any conditions associated with the consent of the relevant government, and if the foreign forces were to undertake violent acts against the forces of the relevant government, as opposed to with its consent, or otherwise in breach of the sovereignty of the territorial state, this might convert the conflict into an international armed conflict.

¹⁷¹ Solis 2011, pp. 162–163 where it is noted that care must be taken that only objects connected to the terrorists are targeted, but that if the terrorist group is a surrogate acting for the state harbouring it or if the host state is capable of acting against the terrorist group but refuses to do so, then the host state itself may be open to attack; Solis 2011, p. 163 citing Crawford 2002, p. 110. For an assessment of the US response to transnational terrorism, see Solis, 2011, pp. 164–167. For the view that the “distinction between terrorism and disciplined war is essentially quantitative”, see Mueller 2012, p. 143. Central to the terrorist enterprise is provoking over-reaction by the security forces; Mueller, 2012, p. 145 and pp. 149–153, and Mueller concludes that policing crime and terrorism in order to reduce their frequency and destructiveness may be sensible policy, but that seeking to eradicate them entirely is illusory; Mueller 2012, p. 158.

Nevertheless, a state confronted with a terrorist threat remains entitled if it so chooses to treat the matter as an internal security situation to which it applies the criminal law paradigm. That was the position taken by the United Kingdom throughout the Northern Ireland ‘troubles’.¹⁷² By taking such a line, the national authorities limit their legitimate scope of action, of course, but that is within a state’s sovereign discretion. Moreover, there is no reason why the position should change when the terrorist activity has transnational characteristics. It remains within the discretion of a particular state to deal with the elements of the transnational matter that affect it as criminality, with some of the activities being matters for its exclusive criminal jurisdiction while other terrorist acts may attract jurisdiction that is shared with other states. To be explicit, the fact that one state chooses to characterize acts of terrorism that affect it as armed conflict, whether international or non-international, does not preclude another state affected by terrorist acts of the same group or association of individuals from characterizing those acts as exclusively criminal in nature.

In trying to resolve these difficult issues we should consider carefully Yoram Dinstein’s view that “the idea that a [non-international armed conflict] can be global in nature is oxymoronic; an armed conflict can be a [non-international armed conflict] and it can be global, but it cannot be both. Cross-border action against terrorists [...] may be carried out as an ‘extra-territorial law enforcement’ operation.”¹⁷³

In summary, transnational violence by an organized armed group operating in more than one state either against other such groups within those states or against their respective governments must be assessed by reference to the nature and degree of violence that takes place in each state and by reference to the manner in which the violence is characterized by the government of each state. Accordingly, if the violence in a state involves an organized armed group, reaches the Common Article 3 threshold and if the government of the state characterizes the relevant events as amounting to a non-international armed conflict, the law of non-international armed conflict will apply. This is so despite the fact that activities of the same transnational terrorist organization in another state are countered by the authorities of that other state exclusively by application of law enforcement mechanisms. To interpret matters otherwise would deprive a state’s authorities of the practical possibility to decide the status of the internal security activities in which it is engaged and would thus be likely to be interpreted as an unacceptable limitation on that state’s sovereign rights.

¹⁷² Haines 2012b, pp. 130–131.

¹⁷³ Dinstein 2012, p. 400. Yoram Dinstein then expresses his view that military operations in Afghanistan directed against Al-Qaeda terrorists blend into an ongoing international armed conflict in that country against the Taliban; Dinstein 2012.

2.8 Conclusion: An Emergent Legal Spectrum of Conflict

It is by no means clear that states will agree new treaty arrangements to adjust the spectrum of conflict in the manner mentioned in this chapter or for that matter in any other manner. The topic seems to arouse sensitivities and states seem to prefer to leave it well alone. If, as the author therefore assumes, there is unlikely to be specific conventional law provision on the matter during the foreseeable future, one might wonder whether any other way will be found to make appropriate adjustments in a formal way.

The answer is likely to be no. Article 1(4) of API will remain as a provision of conventional law so long as states do not amend the provision in accordance with Article 97 of API. We have identified good policy reasons why the distinction between Common Article 3 and APIII non-international armed conflicts, or a distinction along similar lines, should remain. Any adjustment of the treaty criteria associated with that distinction would involve opening issues that states regard as sensitive, so the better policy approach would seem to be to allow those matters to remain as they are for the time being.

The distinction between armed conflicts, whether international or non-international, and events that fall short of armed conflicts seems to be grounded on a rational distinction that reflects the threshold of activities that states regard as legitimately matters for their exclusive, domestic jurisdictions. States seem unlikely to be willing to alter that distinction as currently understood and there seems to be no pressing need for them to do so.

The process of convergence of the law as it applies, respectively, in international and non-international armed conflict also seems set to continue, but is most unlikely to lead to identical legal provision.¹⁷⁴ Combatant status will remain a vital sticking point. The growing relevance of human rights law in relation to matters more traditionally viewed as the exclusive province of the law of armed conflict is, however, another factor relevant to the future legal spectrum of conflict. Human rights law may be expected to become of increasing importance in future years, particularly if the law of armed conflict is perceived to be underdeveloped, for example in relation to non-international armed conflict. Whether this would eventually have the effect of eroding the distinctions between the classes of conflict to which we have referred is to be doubted. Whether it causes states to update the law of armed conflict provisions by means of new treaty law remains to be seen.

It seems clear that the future will see a continuation of the trend for armed conflict to be complex, sometimes comprising different classes of conflict within

¹⁷⁴ Dieter Fleck concludes that “[t]here is an important trend in the law towards expanding the scope of application of the rules related to the conduct of hostilities originally contained only in the law of international armed conflict to situations of non-international armed conflict, while, at the same time, respecting the distinction which continues to exist in these two types of conflicts on matters of status of the fighters”; Fleck 2013, p. 592.

the territory of a single state. These complex situations will continue to pose challenges for Commanders and their legal advisers who will be concerned to prevail in the situation that confronts them while ensuring that action taken by deployed troops complies with whatever legal rules apply in the place and at the time in question.¹⁷⁵

If formal, treaty adjustment to the spectrum of conflict seems unlikely, the obvious question to pose is whether it is likely, or indeed desirable, for some other approach to be undertaken with a view to addressing some of the matters discussed in this chapter. While it is of course open to states to declare individual national positions on these, and indeed on other, matters relating to international law, they are unlikely to do so in the present context, as even unilateral declarations may have the effect of opening up this sensitive issue to unwanted attention. Perhaps the better approach is to allow state practice, *opinion juris* and the decisions of international courts to adjust understanding of the legal spectrum to the extent necessary to meet modern requirements.

Finally, it is sensible to ponder whether the current appreciation will continue to apply, namely that the law of armed conflict has *lex specialis* status in relation to all events associated with an armed conflict to which that body of law is capable of being applied. To put the question another way, what will be the *lex specialis* in relation to each element in any new spectrum of conflict. Much will depend on the status of the conflict in question and on the nature of the particular activity to which the law is to be applied. While armed conflicts will generally provide the norms to be applied during an armed conflict, human rights law will certainly apply to certain activities undertaken in an armed conflict context. The relationship between human rights law and the law of armed conflict is, however, discussed in greater detail in Chaps. 9 and 10.

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¹⁷⁵ Consider for example the conflicts in Afghanistan from 2001 to 2013; see Hampson 2012, pp. 256–257.

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