The 1949 Geneva Conventions

A Commentary

Edited by

ANDREW CLAPHAM
PAOLA GAETA
MARCO SASSÒLI

Assistant editors

IRIS VAN DER HEIJDEN
ILYA NUZOV
JULIA GRIGNON
ANNIE HYLTON
TOM HAECK

Geneva Academy of International Humanitarian Law and Human Rights
Académie de droit international humanitaire et de droits humains à Genève
Geneva Academy

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Chapter 1. The Concept of International Armed Conflict

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A. Introduction—War and Armed Conflict

1 Although war used to be considered an appropriate way to settle disputes between states, the United Nations (UN) Charter of 1945 made it clear that all inter-state disputes are now to be settled by peaceful means.[1] While armed force may be used by states in self-defence, or authorized by the UN Security Council, in other circumstances a declaration of war by one state against another state, or the use of armed force by a state against another state, will normally constitute a violation of the UN Charter and customary international law.

2 Hence, as declarations and recognition of war have become less relevant, it has become more usual to refer to the laws of war as the law of armed conflict, or as international humanitarian law (IHL). But the notion of war, and its attendant 'war crimes', 'prisoners of war', and 'war powers', remain omnipresent. References to the global 'war on terror' have reminded us how powerfully the notion of war plays on our emotions and imagination. Claiming to be at war can mobilize support, generate resistance, and shift the paradigm. Evocations of war still suggest to some that 'all's fair in love and war'.

3 On the contrary, as this Commentary will demonstrate, how people are treated in armed conflict is one of the most highly regulated areas of international relations, with international law reaching down to create obligations for multiple actors, including states, organized armed groups, and individuals. Wars and armed conflicts, far from creating lawless zones, trigger multiple binding obligations under international and national law. In some cases, violations of these obligations can result in prosecutions—in the form of war crimes trials.

4 Even if one no longer needs a declaration of war to apply the laws of war, or to claim neutrality,[2] there will be some armed conflicts that are also wars—as that term is understood in law. In some national legal orders, the fact of war, or the declaration of war, will trigger further rights and obligations. This could be related to trading with the enemy, or the simple fact that a contract is said not to apply in times of war. If one reads one's travel

[1] Art 2(3) and (4) UN Charter (1945).

[2] For the practice of Switzerland with regard to her neutrality during the 2003 conflict between the US-led coalition and Iraq, see 'Neutrality Under Scrutiny in the Iraq Conflict', Summary of Switzerland's neutrality policy during the Iraq conflict in response to the Reimann Postulate (03.3066) and to the Motion by the SVP Parliamentary Group (03.3050) (2 December 2005); see also P. Seger, 'The Law of Neutrality', in A. Clapham and P. Gaeta (eds), *Oxford Handbook of International Law in Armed Conflict* (Oxford: OUP, 2014) 348; a state which is not a party to an IAC may be considered neutral or non-belligerent for the purposes of the GCs, which, in various circumstances (especially Art 4(B)(2) GC III), provide for a role and obligations for such states; compare Ch 5, MN 20, of this volume.

insurance carefully, it usually excludes war zones. Whether a travel insurance company declares an area a war zone, however, has little to do with whether the Geneva Conventions apply; but a determination that there is a war may have more than rhetorical effect in the contractual world. The term *war* is now used so loosely that one would be very careless to think that because someone calls something a war, the laws of war apply.[3] Nevertheless, there will be situations where an official declaration of war will be technically necessary, not for the application of the Geneva Conventions, but arguably in order to be in compliance with the 1907 Hague Convention III (if these obligations remain relevant),[4] or in order to trigger certain national laws related to relations with the enemy and its nationals.[5]

B. The Applicability of the Geneva Conventions

I. The relevance of war and occupation

The drafters of the Geneva Conventions of 1949 were careful to ensure that the new Conventions, codifying and developing protections for the victims of war, applied to all armed conflicts, even where there is no declaration of war; and it is clear from the Conventions that states cannot avoid their obligations by refusing to recognize a state of war: 5

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall 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 the state of war is not recognized by one of them.[6]

Although one could read this last phrase to suggest that where *both* states deny there is a state of war, the Conventions would not apply, such an interpretation finds no support. Christopher Greenwood has simply stated that this phrase 'should be read as if it said: "even if the state of war is not recognized by one *or both* of them" '.[7] The Pictet Commentary captures the essence of this point when it states: 'It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests.'[8] 6

[3] F. Mégrét, ' "War"? Legal Semantics and the Move to Violence', 13 *EJIL* 2 (2002) 361.

[4] Compare Hague Convention III (1907), Art 1: 'The contracting Powers recognize that hostilities between themselves must not commence 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.' Art 2: 'The existence of a state of war must be notified to the neutral Powers without delay, and shall not take effect in regard to them until after the receipt of a notification, which may, however, be given by telegraph. Neutral Powers, nevertheless, cannot rely on the absence of notification if it is clearly established that they were in fact aware of the existence of a state of war.' See further Y. Dinstein, *War, Aggression and Self-Defence* (5th edn, Cambridge: CUP, 2012), at 3–33. Whether or not a state can claim belligerent rights by declaring war is a topic which is outside the scope of this Commentary; see further C. Greenwood, 'The Concept of War in Modern International Law', 36 *ICLQ* (1987) 283.

[5] A.D. McNair and A.D. Watts, *The Legal Effects of War* (Cambridge: CUP, 1966).

[6] Common Article (CA) 2 para 1.

[7] C. Greenwood, 'Scope of Application of Humanitarian Law', in D. Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflict* (2nd edn, Oxford: OUP, 2007) 45, at 47.

[8] Pictet Commentary GC IV, at 21. See also Pictet Commentary GC I, at 28–9: 'A State does not proclaim the principle of the protection due to wounded and sick combatants in the hope of saving a certain number of its own nationals. It does so out of respect for the human person as such. This being so, it is difficult to admit that this sentiment of respect has any connection with the concrete fact of recognition of a state of war. A wounded soldier is not more deserving, or less deserving, of medical treatment according to whether his Government does, or does not, recognize the existence of a state of war.'

7 As we shall see, international law is fairly clear on the concept of an international armed conflict (IAC) triggering the application of the Geneva Conventions. Nevertheless, there could be a situation where a state declares war on another state, even in the absence of an armed conflict. In such a case, the Geneva Conventions will apply. Even in the absence of fighting or occupation, the Geneva Conventions (especially Geneva Convention (GC) IV) could be relevant to and important for such an inter-state war, for example in the event of internment of enemy aliens.[9]

8 We should also note that Common Article 2 paragraph 2 states that each 'Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance'. Unless the occupied state consents to the presence of foreign troops, the Geneva Conventions will apply.

9 The UN Commission of Inquiry on Lebanon applied paragraph 2 in 2006:

> Insofar as it is relevant and having regard to common article 2, paragraph 2, of the Geneva Conventions of 1949, international humanitarian law applies even in a situation, where for example the armed forces of a State party temporarily occupy the territory of another State, without meeting any resistance from the latter. On the same legal basis, it has been stated that the Geneva Conventions apply even where a State temporarily occupies another State without an exchange of fire having taken place or in a situation where the Occupying State encounters no military opposition whatsoever.
>
> The Commission considers that both Lebanon and Israel were parties to the conflict. They remain bound by the Geneva Conventions of 1949, and customary international humanitarian law existing at the time of the conflict.[10]

10 The International Court of Justice (ICJ) has held that although paragraph 2 refers to 'the territory of a High Contracting Party', this does not limit occupation to such territory:[11]

> The object of the second paragraph of Article 2 is not to restrict the scope of application of the Convention, as defined by the first paragraph, by excluding therefrom territories not falling under the sovereignty of one of the contracting parties. It is directed simply to making it clear that, even if occupation effected during the conflict met no armed resistance, the Convention is still applicable.

After referring to the *travaux préparatoires*, the Court recalled that

> [t]he drafters of the second paragraph of Article 2 thus had no intention, when they inserted that paragraph into the Convention, of restricting the latter's scope of application. They were merely seeking to provide for cases of occupation without combat, such as the occupation of Bohemia and Moravia by Germany in 1939.[12]

In short, Common Article 2 means that the Geneva Conventions apply to inter-state armed conflicts, situations where a state has made a declaration of war on another state, and non-consensual occupation.

[9] C. Greenwood, 'International Humanitarian Law (Laws of War)', in F. Kalshoven (ed), *The Centennial of the First International Peace Conference* (The Hague: Kluwer Law International, 2000) 161, at 194–5.

[10] See UN Doc A/HRC/3/2, 23 November 2006, paras 59–60 (footnote omitted).

[11] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para 95. See also ICRC Commentary APs, para 65; Pictet Commentary GC IV, at 21–2.

[12] ICJ, *Wall Advisory Opinion*, above n 11, para 95. For a discussion on the beginning and end of occupation, see Chs 67 and 74 of this volume.

II. The disappearance of the 'general participation clause' (*si omnes* clause)

Some older treaties on the laws of war, such as the 1899 Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, specified that the treaties would not apply if a belligerent who was not a party to the treaty joined the war between two or more states parties to the treaty.[13] This gave rise to the theoretical possibility that the victims of war would lose their protection in the event that a third state, which had not ratified the relevant treaty, joined an ongoing conflict. In practice, states continued to apply the laws of war, even in the event that the treaty, strictly speaking, did not apply. In the context of the war crimes trials in Nuremberg and Tokyo, the International Military Tribunals held that the relevant rules were customary international law, and therefore the question of the applicability of the relevant treaties was not relevant.[14] The Geneva Conventions of 1929 on prisoners of war (POWs) and the sick and wounded, were clear that they would apply between states parties even where a non-party joined the conflict, but in order to clarify the matter for other regimes, all four Geneva Conventions of 1949 now contain a clause which precludes any suggestion that there is a need for general participation in order for the Convention to apply. Common Article 2 paragraph 3 contains the following sentence: 11

> Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations.

III. Application between a state party and a state which is not a party to the Geneva Conventions

All four Geneva Conventions contain a common clause which states that parties to the Convention are bound in relation to another belligerent state if that state 'accepts and applies' the provisions of the Convention.[15] This compromise provision sought to retain respect for the idea of reciprocity in the law of treaties, while extending the international protection of the victims of war beyond the logic of inter-state relations. The International Committee of the Red Cross (ICRC) Commentary explained: 12

> The spirit and character of the Conventions lead perforce to the conclusion that the Contracting Power must at least apply their provisions from the moment hostilities break out until such time as the adverse Party has had the time and an opportunity to state his intentions. That may not be a strictly legal interpretation; it does not altogether follow from the text itself; but it is in our opinion the only reasonable solution. It follows from the spirit of the Conventions, and is in accordance with their character. It is also in accordance with the moral interest of the Contracting Power, inasmuch as it invites the latter to honour a signature given before the world. It is finally to its advantage from a more practical point of view, because the fact of its beginning itself to apply the Convention will encourage the non-Contracting Party to declare its acceptance, whereas any postponement of the application of the Convention by the Contracting Party would give the non-Contracting Party a pretext for non-acceptance.[16]

[13] Art 11: 'The rules contained in the above articles are binding only on the Contracting Powers, in case of war between two or more of them. The said rules shall cease to be binding from the time when, in a war between the Contracting Powers, one of the belligerents is joined by a non-Contracting Power.'

[14] Discussed in H. Lauterpacht (ed), *Oppenheim's International Law: A Treatise (Disputes, War and Neutrality)* (7th edn, London: Longmans, 1952) vol II, at 234–6; Greenwood suggests that the remaining general participation clauses have become 'largely irrelevant' (above n 9, at 194).

[15] CA 2 para 2. [16] Pictet Commentary GC III, at 25.

13 Today, this question is largely moot, as nearly every state is a contracting party to the Geneva Conventions. In recent situations where a conflict has broken out between a state party and a non-state party, it has been assumed that the key rules in the Conventions apply to the parties due to their status as rules of customary international law.[17] Nevertheless, the issue of whether the provisions of the treaty apply *stricto sensu* may have to be resolved. For example, other treaties may be excluded where states parties to such treaties are bound by the Geneva Conventions,[18] or issues may arise under the terms of the settlement of an inter-state dispute whereby the dispute settlement mechanism is limited to the application of binding treaty obligations.

14 The issue arose for the Eritrea–Ethiopia Claims Commission, as Eritrea was not a party to the Geneva Conventions from the beginning of hostilities in 1998 until its accession to the Conventions on 14 August 2000. The Commission addressed the application of the clause in Common Article 2 paragraph 3 that binds a state party to the Convention if the other (non-contracting) belligerent state 'accepts and applies' the provisions of the Convention. The Commission found that

> prior to its accession, Eritrea had not accepted the Conventions. This non-acceptance was also demonstrated by Eritrea's refusal to allow the representatives of the ICRC to visit the POWs it held until after its accession to the Conventions.
>
> Consequently, the Commission holds that, with respect to matters prior to August 14, 2000, the law applicable to the armed conflict between Eritrea and Ethiopia is customary international law.[19]

15 The Commission held that one could assume that the Conventions represented customary international law, and determined that a party wishing to challenge the customary nature of a provision would bear the burden of proof:

> [T]he law applicable to this Claim is customary international law, including customary international humanitarian law, as exemplified by the relevant parts of the four Geneva Conventions of 1949. The frequent invocation of provisions of Geneva Convention III by both Parties in support of their claims and defenses is fully consistent with this holding. Whenever either Party asserts that a particular relevant provision of those Conventions should not be considered part of customary international law at the relevant time, the Commission will decide that question, and the burden of proof will be on the asserting Party.[20]

IV. International organizations and international armed conflict

16 A complex set of questions concerns the extent to which the UN, or any other intergovernmental organization, may be considered a party to an IAC. As none of these entities can become parties to the Geneva Conventions, they become bound by the relevant law of IAC to the extent that this law applies to them as a matter of customary international law,[21] or they may be bound by the fundamental rules and principles of humanitarian law

[17] See generally ICRC CIHL Study and E. Wilmshurst and S. Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge: CUP, 2007).

[18] E.g. International Convention against the Taking of Hostages (1979) Art 12, discussed in Chs 15 and 35 of this volume.

[19] EECC, *Prisoners of War—Eritrea's Claim 17*, paras 37–8, xxvi *Reports of International Arbitral Awards* (2009), at 39; see also Lauterpacht (ed), above n 14, at 236, who points out that although it would seem to be for the state party to determine whether the opposing party in fact applies the provisions, such a determination must 'take place in accordance with the principles of good faith'.

[20] EECC, *Prisoners of War*, above n 19, para 41.

[21] For some of the doctrinal debate concerning whether such conflicts constitute IACs or NIACs, see D. Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', in E. Wilmshurst (ed), *International*

as a result of their own internal regulations,[22] or through agreements entered into with host states.

The Convention on the Safety of United Nations and Associated Personnel foresees that the UN might become a party to an IAC, at which point that Convention would no longer apply (the context would have to be a UN enforcement operation authorized by the Security Council under Chapter VII).[23] It seems clear that a conflict between the UN and the armed forces of a state would be an IAC and that the relevant rules from the Geneva Conventions should apply. Dapo Akande explains that this is either because **17**

> there is a customary rule that broadens international armed conflicts to include conflicts involving international organizations and States or alternatively it could be said that the conflict is international because the States providing contingents remain bound by the treaties to which they are party since they have an obligation not only to respect them but also to 'ensure respect' for the conventions in circumstances where their troops act, even if for someone else.[24]

Opinion is divided on whether an armed conflict between the UN and a non-state armed group might be considered an IAC, where the UN is acting for neither side in any internal armed conflict yet nevertheless engages in an armed conflict with the non-state party to that conflict.[25] For the present author, it seems that it is not the international character of the UN that determines the classification of the conflict, but rather the non-state character of the opposing forces that means that the conflict is of a non-international character. It seems incongruous that one should begin to suggest that a non-state armed group should have the rights and duties of a state in an IAC when fighting the UN. **18**

Where states are authorized to use force by the Security Council, they remain bound by their obligations under the Geneva Conventions in the event of an armed conflict or **19**

Law and the Classification of Conflicts (Oxford: OUP, 2012) 32, at 64–70; B.K. Klappe, 'International Peace Operations', in D. Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflict* (2nd edn, Oxford: OUP, 2007) 635; C. Greenwood, 'International Humanitarian Law and United Nations Military Operations', 1 *YIHL* (1998) 3; L. Condorelli, A.-M. La Rosa, and S. Scherrer (eds), *Les Nations Unies et le droit international humanitaire: Actes du colloque international 19, 20, 21 octobre 1995* (Paris: Pedone, 1996).

[22] See the UN Secretary-General's Bulletin, *Observance by United Nations Forces of International Humanitarian Law*, UN Doc. ST/SGB, 6 August 1999; D. Shraga, 'The Secretary-General's Bulletin on the Observance by United Nations Forces on International Humanitarian Law: A Decade Later', 39 *Isr YBHR* (2009) 357.

[23] Art 2(2): 'This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chr VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.' See M.-C. Bourloyannis-Vrailas, 'The Convention on the Safety of United Nations and Associated Personnel', 44 *ICLQ* (1995) 560. Note that it has been suggested by Bouvier that this provision should be interpreted to cover NIAC; he also suggests that 'the clause implies that in the event of clashes between United Nations forces and organized armed forces, international humanitarian law that relating [*sic*] to international armed conflicts and not to internal conflicts then applies': A. Bouvier, '"Convention on the Safety of United Nations and Associated Personnel": Presentation and Analysis', 35 *IRRC* 309 (1995) 638, at 662.

[24] See Akande, above n 21, at 69–70. Common Art 1 to the Geneva Conventions provides: 'The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.' See further Ch 6 of this volume. On the obligations of troop-contributing states, see further A. Nollkaemper, 'Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica', 9 *JICJ* (2011) 1143.

[25] See S. Vité, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations', 91 *IRRC* 873 (2009) 69, at 87–8; E. David, *Principes de droit des conflits armés* (4th edn, Bruylant: Brussels, 2008), at 179–83.

an occupation. It has been suggested that the Security Council may demand a departure from the application of the Geneva Conventions,[26] for example Greenwood suggests the Council adopted 'decisions requiring structural change within occupied territory' (for the situation in Iraq 2003–4).[27] It must be stressed, however, that it ought to be very hard, if not impossible, to show that a state party to the Geneva Conventions is relieved of its obligations, due to a competing obligation arising under Article 103 of the UN Charter. The Article reads:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

It has been argued that obligations under the Charter include binding decisions contained in Resolutions of the Security Council. The European Court of Human Rights rejected the idea that one can imply that the Security Council intends to impose obligations which run contrary to human rights obligations under the European Convention on Human Rights, and the reasoning would seem to apply *mutatis mutandis* to the protection offered by the Geneva Conventions:

> Respect for human rights was one of the paramount principles of the United Nations Charter and if the Security Council had intended to impose an obligation on British forces to act in breach of the United Kingdom's international human rights obligations, it would have used clear and unequivocal language. It followed that the rule of priority under Article 103 of the United Nations Charter did not come into effect.[28]

V. The threshold of violence for an inter-state armed conflict

20 The Conventions make a fundamental distinction between IACs and non-international armed conflicts (NIACs). Once we accept the likelihood that this fundamental distinction is here to stay,[29] we can carefully consider the implications of triggering the law of IAC as opposed to the law of internal armed conflict.[30]

21 Let us first look at the policy implications, which are nevertheless in the background for any 'objective' determination of what constitutes an armed conflict. Here we need to consider briefly the rationale and the consequences of the distinction between IACs

[26] As a separate issue, the Security Council may directly or indirectly infer that an armed conflict exists which triggers the application of the Geneva Conventions. E.g., the Security Council in recent years has often called for the parties to respect IHL: for a selection, see Resolutions 1193, 1213, 1214, 1216, 1471, 1479, 1509, 1528, 1746, 1890, 1973, and 1991. On the particular issue of the approach of the Security Council to children in armed conflict, see A. Constantinides, 'Human Rights Obligations and Accountability of Armed Opposition Groups: The Practice of the UN Security Council', 4 *Human Rights and International Legal Discourse* (2010) 89; for a detailed look of the role of the Security Council in this context, see M. Roscini, 'The United Nations Security Council and the Enforcement of International Humanitarian Law', 43 *Israel Law Review* (2010) 330, esp at 342–3.

[27] Greenwood, above n 7, at 53.

[28] ECtHR, *Al-Jedda v UK*, 7 July 2011, para 93.

[29] See further Wilmshurst (ed), above n 21; cf J.T. Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict', 85 *IRRC* (2003) 313; and T. Farer, 'Humanitarian Law and Armed Conflicts: Towards the Definition of "International Armed Conflict" ', 71 *Columbia Law Review* 1 (1971) 37; see also the discussion in Ch 2 of this volume.

[30] For a discussion of transnational, mixed, and NIACs, see Chs 2 and 19 of this volume.

and NIACs (sometimes known as internal armed conflicts or civil wars). In the past, the main concerns were probably that states saw international regulation of civil wars as an interference with their sovereignty, as a hindrance to putting down rebellion, and a sort of implied international recognition of the standing of the rebel forces with whom they were dealing. Today, for some states, these concerns might seem less pressing, and yet the distinction remains.

It is suggested that we need to admit that the distinction is more than a question of 22
the politics of sovereignty. The distinction triggers different regimes, which, in turn, lead to very different rights and obligations for the parties. Simply put, states are not ready to grant combatant immunity to those who take up arms from within. Those who take up arms against their own state are to be detained, tried, and punished, not treated as POWs and released at the end of the conflict. Such fighters are seen by the state authorities as criminals, seditious, treacherous, and sometimes labelled as terrorists. Hence, states see a need to preserve a category of internal (or non-international) armed conflict. On the other hand, when a state's troops venture abroad, that state would not countenance its troops being tried for murder. It would expect its personnel to enjoy a form of sovereign state immunity. The state would expect the members of its armed forces to be treated as POWs if captured by the enemy state, and not be tried for violations of the local law.

In other words, from a state's point of view, it makes sense that there is one rule for 23
an inter-state conflict and another for an internal armed conflict. The international law, which states have agreed to and generated, therefore continues to reflect this distinction, even if in some areas of IHL there has been some convergence in the degree of protection afforded to civilians and detainees.

What does this mean for the design of the thresholds of armed violence required for a 24
conflict to be considered international or non-international? First, if we can see the reason for two separate regimes, we can also admit that there may be good reasons why the threshold is arguably different in each regime. States will be quite keen to ensure that their personnel or civilians are protected in an IAC, even where the level of hostilities is relatively low and the duration of the fighting quite short. This enthusiasm for a low threshold will also be shared by those organizations (such as the ICRC) tasked with guaranteeing the protection of the victims of armed conflict. As we have seen, the wording of the Conventions reflects this, triggering their application even in the absence of resistance to an occupation.

On the other hand, with regard to a rebellion or an insurgency, states may be less keen 25
to see the threshold reached. Even though admitting the existence of an armed conflict would trigger additional international obligations for the organized armed groups they are fighting, the overriding impression will be that attacks on the armed forces of the state and its military objectives will somehow be legitimated if the rebels can claim their acts are in accordance with the laws of war. In turn, humanitarian organizations may be cautious about suggesting that the threshold has been reached, for fear of escalating the violence and implying that those on both sides are entitled to use lethal force against fighters from the other side. There is a fear that one would trigger a sort of a 'licence to kill', even though international law knows no such concept. On the one hand, those who are detained might benefit from some extra guarantees under the law of armed conflict, but on the other hand there is a risk that the IHL regime is said to supplant existing human rights obligations. In short, there may be very good political and 'humanitarian' reasons to refrain from arguing for a low level of violence to trigger the law of NIAC.

26 The ICRC Commentaries, and subsequent publications by the ICRC and its legal advisers, have argued that, for inter-state conflicts, the 'level of intensity required for a conflict to be subject to the law of international armed conflict is very low'.[31]

27 According to Hans-Peter Gasser (at the time Legal Adviser for the ICRC):

> When can an 'armed conflict' be said to obtain? The Conventions themselves are of no help to us here, since they contain no definition of the term. We must therefore look at State practice, according to which any use of armed force by one state against the territory of another triggers the applicability of the Geneva Conventions between the two States. Why force was used is of no consequence to international humanitarian law. It is therefore irrelevant whether there was any justification for taking up weapons, whether the use of arms was intended to restore law and order (in the sense of an international police action) or whether it constituted an act of naked aggression, etc. It is also of no concern whether or not the party attacked resists. From the point of view of international humanitarian law the question of the Conventions' applicability to a situation is easily answered: as soon as the armed forces of one State find themselves with wounded or surrendering members of the armed forces or civilians of another State on their hands, as soon as they detain prisoners or have actual control over a part of the territory of the enemy State, then they must comply with the relevant convention. The number of wounded or prisoners, the size of the territory occupied, are of no account, since the requirement of protection does not depend on quantitative considerations.[32]

28 The use of force or border incursion must be intentional rather than accidental,[33] but there is no longer support for the idea that one needs a belligerent intent to go to war. One cannot avoid the obligations of the Geneva Conventions by claiming that one is engaged in a law enforcement operation in another state rather than admitting an armed conflict with that state. The test should be an objective one. Nevertheless, individual incidents and limited exchanges of fire on the border have not always been treated as IACs.

29 In the wake of the terrorist attacks of 11 September 2001, the subsequent armed conflicts in Afghanistan, and the wider so-called 'war on terror', there was concern that the existing framework of the international law of armed conflict was inadequate. This engendered not only discussion of new types of conflict, but also a new scrutiny of the thresholds. In this context, the aim of certain states has been to assume some of the rights of a belligerent in an armed conflict, while denying Al-Qaeda and others some of the benefits of the law of armed conflict. Others have been concerned that the armed conflict framework is being invoked too liberally, for what should be more properly considered as law-enforcement operations. The result has been increased attention to the threshold used for the application of the law of armed conflict.[34]

30 In 2005, the International Law Association (ILA) mandated a Committee to produce a report on 'the meaning of war or armed conflict in international law'. The final report was published in 2010, and it contains valuable information on how various conflicts

[31] Vité, above n 25, at 72; see also ICRC Opinion Paper March 2008, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?', at 5: 'International armed conflicts exist whenever there is resort to armed force between two or more States.'; Pictet Commentary GC I, at 32–3.

[32] H.-P. Gasser, 'International Humanitarian Law', in H. Haug (ed), *Humanity for All: The International Red Cross and Red Crescent Movement* (Geneva: Henry Dunant Institute, 1993) 491, at 510–11.

[33] See, e.g., A.P.V. Rogers, *Law on the Battlefield* (3rd edn, Manchester: Manchester University Press, 2012), 'an accidental border incursion by a military aircraft caused by navigational error would not amount to armed conflict' (at 3).

[34] For a discussion of how to qualify the conflict with Al-Qaeda, see N. Lubell, 'The War (?) Against Al-Qaeda', in Wilmshurst (ed), above n 21, at 421–54.

have been seen by states. Before looking at their findings, it is important to recall the background. Not only was the Committee addressing the claims by the United States (US) with regard to its operations against Al-Qaeda, but it was additionally interested in the fact that the existence of an armed conflict 'can also have a wide reaching impact on the international legal norms regulating relations between states including asylum obligations, HRL [human rights law], neutrality law, UN operations, and treaty practice'.[35]

The Committee considered that its mandate was to 'report on a general definition of armed conflict', rather than focus on the different categories of armed conflict.[36] Against this background, we should therefore not be surprised that it concluded that all armed conflict involves 'intense fighting among armed groups'. This conclusion is clearly at odds with the ICRC's approach (detailed above), which suggests a low threshold for an inter-state armed conflict. The Committee's conclusion is said to be based on the evidence, and yet one has to consider that if one is searching for a single definition of armed conflict, this leaves little room for finding two separate thresholds. Similarly, if one's concern is to preclude an over-inclusive resort to the law of armed conflict in the 'war on terror', one has to be careful to avoid minimal thresholds. **31**

The Committee's Report suggests that the line is to be drawn between violence and armed conflict, and so 'a distinction is made between [simple violence and] the violence that gives rise to the right of a state to claim the belligerent's privileges to kill without warning, detain without trial, or seize cargo on the high seas'.[37] The present author does not consider that a state is entitled to these rights in an international armed conflict. It is suggested that the concern related to a state claiming such belligerent rights in the 'war on terror' is better addressed by admitting that such rights apply only in an inter-state conflict, rather than pointing to a higher threshold for an all-encompassing notion of armed conflict. **32**

Nevertheless, the Report is based on the evidence examined by the Committee, and it does contain useful data on which inter-state clashes have been considered as IACs. The following paragraph of the Report lists such conflicts over the first 35-year period: **33**

> State practice during [the period 1945–80] indicates that states generally drew a distinction between on the one hand, hostilities involving the use of force that they treated as 'incidents', 'border clashes' or 'skirmishes' and, on the other hand, situations that they treated as armed conflicts. The following armed conflicts of the period have been classified as 'wars' or invasions: India–Pakistan (1947–48), the Korean War (1950–53), the 1956 Suez Invasion, many wars of national liberation (e.g., Algeria, Indonesia, Tunisia, Morocco, Angola), the Vietnam War (1961–1975), the 1967 Arab–Israeli Conflict, the Biafran War (1967–70), El Salvador-Honduras (the 'Soccer War' 1969), the 1973 Arab–Israeli Conflict (the 'Yom Kippur War'), and the Turkish Invasion of Cyprus (1974).[38]

The Report lists a number of later acknowledged inter-state armed conflicts for the period between 1980 to 2000: the Iran–Iraq War (1980–8); the Falklands (Malvinas) Conflict (1982); the Persian Gulf War (1990–1); Bosnia-Herzegovina (1992–4); Ecuador–Peru (1995). The first decade of the twenty-first century has also seen a number of conflicts that were, generally, acknowledged to be inter-state armed conflicts, including the Afghanistan War (2001–2), the Iraq War (2003–4), the Israel–Lebanon War (2006), and the War between Russia and Georgia (2008). The presence of Russian troops in Ukraine (Crimea) in February 2014 **34**

[35] ILA Committee, *Final Report on the Meaning of Armed Conflict in International Law* (2010), at 4.
[36] Ibid, at 3, fn 7. [37] Ibid, at 2.
[38] Ibid, at 13 (footnotes omitted).

presented a borderline case: as long as no one was shot at or taken prisoner, some saw this as falling short of an armed conflict.[39] The official Russian justification relied on an invitation from the deposed Ukrainian President, therefore precluding the idea of a violation of the UN Charter or occupation. On the other hand, political statements from the US (among others) referred unambiguously to an 'invasion and occupation'.[40] The leaders of the G7 states, joined by the Presidents of the European Council and Commission, condemned a 'clear violation of the sovereignty and territorial integrity of Ukraine' in contravention of the UN Charter.[41] Any theory concerning reliance on an invitation in order to deny an occupation would have to show that the authority issuing the invitation was the effective government of the state concerned.[42]

35 The Report nevertheless highlights those cases which apparently did not qualify as armed conflicts. The extensive excerpts which follow provide a flavour of the sorts of incidents that the Committee considered as evidence that a higher threshold is being applied due to the absence of states' explicitly invoking the laws of war:

> By contrast, the following armed clashes during the period involved the engagement of armed forces of two or more sovereign states but on too limited a basis to have been treated as armed conflicts. They are described rather as 'limited uses of force': Saudi–Arabia–Muscat and Oman (1952, 1955), United Kingdom–Yemen (1957), Egypt–Sudan (1958), Afghanistan–Pakistan (1961), and Israel–Uganda (1976) […]
>
> In one minor incident, namely the 1988 shooting down and capture of a U.S. pilot by Syrian forces over Lebanon, U.S. officials at first said the pilot was entitled to be treated as a prisoner of war under the Third Geneva Convention. President Reagan called that into question when he said, 'I don't know how you have a prisoner of war when there is no declared war between nations. I don't think that makes you eligible for the Geneva Accords'.
>
> Other minor incidents, in terms of duration and casualties, were not classified as armed conflicts even though they involved a clash between forces of two states. For example, in 1981 and 1982 incidents involving Soviet submarines in Swedish waters, including the use of depth charges by the Swedish Navy, were classified by scholars as incidents not armed conflict. Also in 1981, U.S. fighter jets engaged in a fire fight with Libyan aircraft above the Gulf of Sidra, shooting them down. Scholars have classified this case as an incident, not an armed conflict.
>
> In 2002, a 21-minute exchange of fire between North and South Korea resulted in a patrol boat being sunk and four South Korean sailors being killed. It was referred to as an 'incident', 'armed provocation', 'border incursion', 'clash' and the like, but not an armed conflict.

[39] A. Riva, 'Russia's Use of Unmarked Troops in Simferopol, Crimea: Shady, But Not Illegal', *International Business Times*, 4 March 2014, quoting G. Solis: ' "So far the law of armed conflict does not apply at all, insofar as there hasn't been a shot fired", Solis said. "I assume sooner or later there will be shooting, but as long as the civilians are distinguishable from the combatants the laws of armed conflict are complied with." ' See also, on the need for two states to *intend* to engage in an armed conflict, G.D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (New York: CUP, 2010), at 149–85.

[40] John Kerry, US Secretary of State, 'The United States condemns the Russian Federation's invasion and occupation of Ukrainian territory, and its violation of Ukrainian sovereignty and territorial integrity in full contravention of Russia's obligations under the UN Charter', Press Statement 1 March 2014, available at <http://www.state.gov/secretary/remarks/2014/03/222720.htm>.

[41] G-7 Leaders Statement, 2 March 2014, available at <http://europa.eu/rapid/press-release_STATEMENT-14-41_en.htm>.

[42] Akande, above n 21, at 63, says that in order to determine whether a new government giving its consent 'is indeed the government, one should look at the degree of effectiveness of its control over the territory of the State and also at whether it has achieved a general international recognition'. See, for more detail, G. Nolte, 'Intervention by Invitation' in MPEPIL; M. Shaw, *International Law* (6th edn, Cambridge: CUP, 2008), at 1151–2; and Ch 67, MN 28–35, of this volume.

In 2007, Iran detained the crew of a small British naval vessel claiming that the vessel was in Iranian waters. The British claimed they were in Iraqi waters. This case, again, involved the intervention of the armed forces of two states. It was not apparently considered an armed conflict. Britain complained when its troops were shown on television, and a spokesperson for the Prime Minister said doing so was a violation of the Third Geneva Convention. The U.K. did not take an official position, however, as to whether the Convention applied. It was certainly consistent with the spokesperson's statement that the U.K. hoped the higher standard regarding protection from public displays found in the Geneva Convention would be honoured (Third Geneva Convention, Article 13) even if Iran were not obligated to apply it. No similar protection appears to exist in peacetime HRL [human rights law]. Iran, however, treated the matter as one of illegal entry and indicated it might put the crew on trial. Iran made no reference to the Geneva Conventions that was reported in the English-language press.

Colombia's 2008 armed incursion into Ecuador was determined by the Organization of American States to have violated the principle of non-intervention and to have posed a threat of armed conflict, without having reached the level of actual armed conflict. Also in 2008, Thailand and Cambodia clashed over a boundary dispute in the vicinity of the Temple of Preah Vihear. Soldiers from the two states exchanged rifle and rocket fire for about an hour leaving two Cambodian soldiers dead and seven Thai soldiers and two Cambodian soldiers wounded. There was a further five minute clash in April 2009, leaving two Thai soldiers dead and ten injured. Two Cambodian soldiers were also injured as well as nine 'others'. Neither state has referred to the clashes as an armed conflict.[43]

The evidence has been taken as suggesting that low intensity engagement is not considered an armed conflict.[44] But perhaps we should return to the ICRC Commentary to the First Geneva Convention on the sick and wounded, for a better appreciation of the dynamics in play: **36**

Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to human personality is not measured by the number of victims. Nor, incidentally, does the application of the Convention necessarily involve the intervention of cumbrous machinery. It all depends on circumstances. If there is only a single wounded person as a result of the conflict, the Convention will have been applied as soon as he has been collected and tended, the provisions of Article 12 observed in his case, and his identity notified to the Power on which he depends. All that can be done by anyone: it is merely a case of taking the trouble to save a human life![45]

It is suggested that two key points arise. First, there is the notion of a 'difference' between two states. Therefore, where someone accidently strays into enemy territory, even if that person is detained, this does not mean that there is an armed conflict between states. Secondly, the Commentary highlights how the Convention is triggered by a single individual falling into the hands of the enemy as a result of the conflict. It is suggested here that many of the incidents that were not qualified as armed conflicts involved no such situation leading to the application of the rules on the protection of the victims of war. **37**

[43] ILA Committee, above n 35, at 14–27.

[44] See, however, M. Asada, 'The Concept of "Armed Conflict" in International Armed Conflict', in M.E. O'Connell (ed), *What Is War?* (Leiden: Brill, 2012) 51, at 66, where he suggests that the existence of such examples where one state claims the application of IAC to conflicts of 'very low intensity (and short duration) means we should hesitate before dismissing the idea that IHL applies to such low intensity conflicts between states'.

[45] Pictet Commentary GC I, at 32–3 (footnote omitted).

Had individuals been shipwrecked, wounded, or interned in the hands of the enemy, there could have been a good case for the application of the Geneva Conventions.

38 Despite the finding of the ILA Committee that *all* armed conflicts require 'intense' fighting, we see no need to depart from the more conventional conclusion that low-level hostilities are sufficient where, in the words of the International Criminal Tribunal for the former Yugoslavia (ICTY), 'there is a resort to armed force between States'.[46] This conclusion seems to be shared by various scholars,[47] and is in line with the definition of 'armed conflict' used by the International Law Commission in the context of its work on the effect of armed conflicts on treaties.[48] For such low-level hostilities between states to trigger the application of the Geneva Conventions, one might take into account factors such as whether the use of force was undertaken by the military and targeted at the other state's military, or is harmful to the state or to those under its jurisdiction, the extent of the damage or casualties, the location of the incident (an attack on the territory of the state carrying particular significance), the level of control exercised over any non-state groups involved in the hostilities, and the significance of any target. This does not represent a scientific formula, but we can see that, for example, a deliberate and attributed attack on a single warship, even with no casualties, could trigger the application of the law of IAC, while a cross-border skirmish involving some over-excited customs officers may not. While the subjective approach of the two states concerned is not determinative, in many situations the admission that the incursion or damage was a mistake may resolve dubious cases. As suggested above, the problem becomes more complex when prisoners are involved: here we can assume that there must be a presumption that the protective regime will apply to those individuals caught up in the conflict. One might even imagine situations where the use of force in another state is deliberate but there is no engagement between the armed forces of the two states. So, for example, a state, reacting to an attack by terrorists on its embassy, may mount a rescue mission involving the use of force but not trigger an armed conflict with the other host state.

39 While the low threshold remains for inter-state conflicts, doubts have been expressed as to whether this is workable where the UN engages in the use of force with a state in the course of a mandate to protect humanitarian assistance or civilians. As we saw above, this question is directly related to the applicability of the Convention for the Protection of UN and Associated Personnel. As Greenwood points out, the drafters of that Convention did

[46] ICTY, *The Prosecutor v Duško Tadić*, Appeals Chamber (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT-94-1-AR72, Decision of 2 October 1995, para 70.

[47] See M.N. Schmitt, 'Classification in Future Conflict', in Wilmshurst (ed), above n 21, 455, at 459–60; R. Kolb and R. Hyde, *An Introduction to the International Law of Armed Conflicts* (Oxford: Hart Publishing, 2008) at 76; Rogers, above n 33, at 3: 'A situation of armed conflict is likely to arise when elements of opposing forces are engaged in military operations against each other, when targets in the territory or territorial waters of another state are attacked or when the troops of one state invade another.' For a detailed examination of this threshold see K. Huszti Orban, *The Concept of Armed Conflict under International Law*, PhD thesis, Graduate Institute of International and Development Studies (2013) and D. Carron, *L'acte déclencheur d'un conflit armé international*, PhD thesis, Université de Genève (2015).

[48] The Draft Articles on the effects of armed conflicts on treaties (2011) include the following definition (for the purposes of the Draft Articles), '"armed conflict" means a situation in which there is resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups'. It is worth noting that the Commentary states that 'it was desirable to include situations involving a state of armed conflict in the absence of armed actions between the parties'. The Commentary goes on to give as examples occupation which meets with no resistance and blockade (paras 6 and 7 of the Commentary to Draft Article 2). Both texts are reproduced in *Yearbook of the International Law Commission*, 2011, II, Part Two (forthcoming).

not intend for UN forces to lose their protection in Bosnia and Herzegovina as a result of the use of force in self-defence.[49] We may have to accept that the threshold and criteria for triggering an IAC may be different when a UN operation engages with the armed forces of a state in the course of such mandated operations. Greenwood predicts that 'A degree of violence which, in the past, would certainly have been regarded as sufficient to constitute an international armed conflict will come to be regarded as something of a lesser nature if it involves UN forces.'[50]

VI. Converting an internal armed conflict into an international armed conflict and the separate issues of state responsibility and armed attack

As we have seen, an IAC usually involves the use of force between two states. However, armed conflicts can be, and often are, fought at arm's length through proxy armed groups. In some circumstances, these conflicts have been considered *international* armed conflicts. 40

According to the ICTY, where a second state is in 'overall control' of an organized armed group fighting an internal armed conflict against its own government's armed forces, the conflict must nonetheless be considered international. The Geneva Conventions will therefore apply in their entirety.[51] 41

Although the ICJ has emphasized separate 'complete dependence' and 'effective control' tests for the purposes of attribution of the acts of the armed group to the controlling second state in order to apply the international rules on state responsibility,[52] that Court has neither adopted, nor rejected the 'overall control' test as relevant for the determination of an IAC rather than a NIAC.[53] 42

If the overall control test is satisfied, the implication is that there is an IAC, and so not only will that specific war crimes regime apply, but the Geneva Conventions should also create rights and obligations for the two states concerned. But complex questions can arise when we consider whether the armed group as such is henceforth bound to apply all the 43

[49] C. Greenwood, 'Protection of Peacekeepers: The Legal Regime', 7 *Duke Journal of Comparative and International Law* (1996) 185, at 202.

[50] Ibid.

[51] '[C]ontrol 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). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.' ICTY, *The Prosecutor v Duško Tadić*, Appeals Chamber Judgment (Interlocutory Appeal on Jurisdiction), IT-94-1-A, 15 July 1999, para 137; see also para 84. See further the discussion in Ch 2 of this volume.

[52] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment of 26 February 2007, paras 392–402.

[53] 'Insofar as the "overall control" test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable; the Court does not however think it appropriate to take a position on the point in the present case, as there is no need to resolve it for purposes of the present Judgment.' Ibid, para 404; but see the alternatives proposed by Akande, above n 21, at 57 ff. For a discussion of the 'overall control' test in the context of the relationship between Russia and the forces in South Ossetia and Abkhazia, see the *Report of the Independent International Fact-Finding Mission on the Conflict in Georgia* (2009), vol II, at 301–12.

obligations, and acquire all the rights, of a belligerent in an IAC.[54] In practice, the issue may turn on whether the armed group is able to comply with all the obligations stemming from the law of IAC, and on whether the states involved are ready to consider that the members of the armed group are fighting an IAC. It is suggested that the best way to understand this situation is to separate out the classification of the conflict from the status of the individuals concerned.

44 Even if there is an IAC involving armed groups under the overall control of a second state, the fighters from the armed group can enjoy POW status only if they fulfil the criteria set out in Article 4(A)(1) GC III as part of the armed forces of the state, or under Article 4(A)(2) as 'belonging' to the state party to the conflict.[55] In practice, states may baulk at the idea of granting POW status to their own nationals captured in what they may consider an illegal insurrection. At this point everything may turn on whether the second state recognizes that these fighters belong to it. The Pictet Commentary to GC III suggests that no official recognition is necessary and that tacit agreement would be enough. In such cases it will be for the ICRC or other actors in the international community to argue that the captured fighters are entitled to POW status under the Geneva Conventions due to the internationalization of the conflict.

45 An international tribunal concerned with issues either of international criminal responsibility or state responsibility will have to determine first whether or not the relevant conflict was international or non-international, and then under which regime the relevant individual is protected. So, assuming that the tribunal finds convincing evidence of overall control by a state over the armed group, it would then have to determine whether the individual was part of a group which 'belonged' to the controlling state for the purposes of GC III. If the fighters do not so belong, they would seem to be civilians entitled to protection under the customary rules reflected in Article 75 of Additional Protocol (AP) I (but strictly speaking not enjoying protected person status under GC IV where they have the nationality of the detaining state). Furthermore, despite being captured as a fighter in an IAC, those fighters that are not part of the armed forces of the other state would not enjoy combatant immunity, and therefore could be prosecuted for having taken up arms against the state. With such a separation between classification of the conflict and the classification of the individual, the idea of members of an armed group fighting in an IAC can begin to make sense.

46 The two states will be responsible for ensuring that all the laws of IAC are respected. They will also have positive obligations to ensure that these fighters respect the full range of obligations triggered by an inter-state armed conflict. Even where the acts of the fighters are not attributable to the state in question, due to there being no dependency or effective control,[56] the state remains responsible for any failure to prevent violations of the Geneva Conventions which could reasonably have been prevented, as well as for ensuring respect for the Geneva Conventions through the exercise of its overall control over the organized armed group.

47 It should be borne in mind that the fact that a state supports a rebel group fighting another state, is not necessarily enough to show that the supporting state has subjected

[54] See Stewart, above n 29.

[55] K. Del Mar, 'The Requirement of "Belonging" under International Humanitarian Law', 21 *JICJ* (2010) 105.

[56] See MN 64 for more detail.

the other state to an 'armed attack', entitling the victim state to act in self-defence under the UN Charter. This support may be considered an illegal use of force or a violation of the sovereignty of another state, but so far the ICJ has held that where such support merely constitutes 'assistance to rebels in the form of the provision of weapons or logistical or other support', this falls short of constituting an armed attack, and so there is no right to self-defence.[57] While these questions are strictly speaking separate from the determination of the existence of an armed conflict, they remain connected because, while an overriding concern has always been to keep war at bay by fixing a high threshold for the right to self-defence, we are equally concerned to keep a low threshold for the application of the laws of war. This seeming contradiction is resolved once we admit that the threshold for triggering an IAC through proxy groups may not be the same as the test for triggering the right to defence in response to an attack by a proxy armed group.

In short, we may have four separate tests: **48**

— one for the application of the Geneva Conventions between states (resort to armed force between states requiring only low intensity engagement);
— a second test for the application of the laws of IAC when an armed group fighting a state (overall control of the group by a second state);
— a third test for attributing the acts of an armed group fighting against its own state to a second state (complete dependence or effective control); and
— a separate test requiring that one state actually sends its armed groups abroad to engage in an attack, or be substantially involved in such an attack, in order for the attacked state to claim self-defence as if the state had been attacked by a state acting alone.[58]

VII. National liberation movements and self-determination struggles

Lastly, we should mention a separate type of IAC, wars of national liberation. In theory, **49** the law applicable to IAC will apply where certain armed non-state actors, known as national liberation movements, make a declaration through their authority under the terms of AP I, undertaking to apply the Protocol and the Geneva Conventions to that particular conflict with a state party to that Protocol.[59] Alternatively, the same type of actor may make a declaration under the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW).[60] Such a declaration can bring into force not only the Weapons Convention and its Protocols, but also the 1949 Geneva Conventions, even where the state against which the liberation movement is fighting is not a party to

[57] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)*, Judgment, 27 June 1986, para 195.

[58] Ibid, para 195; but see the dissenting opinions on this point by Judges Jennings and Schwebel. It is feasible that overall control could be assimilated to the test for state involvement in a non-state actor armed attack, but so far these two tests have been seen as rather different.

[59] For a detailed discussion, see G. Abi-Saab, 'Wars of National Liberation in the Geneva Conventions and Protocols', 165 *RCADI* IV (1979) 353; H.A. Wilson, *International Law and the Use of Force by National Liberation Movements* (Oxford: OUP, 1988); A. Cassese, 'Wars of National Liberation', in Mélanges Pictet 314.

[60] 10 October 1980; see Art 7(4) CCW, set out in MN 50.

AP I.[61] One such declaration was successfully made under AP I in 2015 by the Polisario Front in the context of Western Sahara.[62]

50 Although these formal procedures have not been applied until recently, they may exert some influence on thinking about the internationalization of internal armed conflicts. One might wonder as to the significance of the relatively recent practice of recognizing armed groups in the armed conflicts in Libya (2011) and Syria (2011–ongoing at the time of writing) as the legitimate representatives of the people of those states. The actual wording of Article 7(4) CCW provides:

> This Convention, and the annexed Protocols by which a High Contracting Party is bound, shall apply with respect to an armed conflict against that High Contracting Party of the type referred to in Article 1, paragraph 4, of Additional Protocol I to the Geneva Conventions of 12 August 1949 for the Protection of War Victims: (a) where the High Contracting Party is also a party to Additional Protocol I and an authority referred to in Article 96, paragraph 3, of that Protocol has undertaken to apply the Geneva Conventions and Additional Protocol I in accordance with Article 96, paragraph 3, of the said Protocol, and undertakes to apply this Convention and the relevant annexed Protocols in relation to that conflict; or (b) where the High Contracting Party is not a party to Additional Protocol I and an authority of the type referred to in subparagraph (a) above accepts and applies the obligations of the Geneva Conventions and of this Convention and the relevant annexed Protocols in relation to that conflict. Such an acceptance and application shall have in relation to that conflict the following effects:
>
> (i) the Geneva Conventions and this Convention and its relevant annexed Protocols are brought into force for the parties to the conflict with immediate effect;
>
> (ii) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Geneva Conventions, this Convention and its relevant annexed Protocols; and
>
> (iii) the Geneva Conventions, this Convention and its relevant annexed Protocols are equally binding upon all parties to the conflict.

51 The 'authority' referred to here is therefore an authority representing a people engaged in an armed conflict of the type

> in which peoples are fighting against colonial domination and alien occupation and against racist régimes 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.[63]

52 Should such an authority accept and apply the relevant Conventions, the Geneva Conventions will therefore enter into force for the parties to the conflict (assuming that the state involved is a party to the CCW and that there are no valid reservations).[64]

53 The question arises whether self-determination struggles that do not fit the triptych of struggles against colonial domination, alien occupation, or racist regimes (so-called 'CAR conflicts') could qualify for this type of internationalization of their conflicts? It is probably fair to say that when these internationalized national liberation conflicts were being conceived in the 1970s, few states had in mind that they would apply to a group seeking internal self-determination beyond the context of racist regimes in Southern Africa.

[61] Art 7(4)(b) CCW.

[62] Although certain other declarations have been sent to the ICRC, the procedure demands a communication with the Swiss Federal authorities. Switzerland circulated the Polisario declaration on 26 June 2015.

[63] Arts 1(4) and 96(3) AP I.

[64] Consider, e.g., the reservations and declarations made by the US, Israel, the UK, and France.

Nevertheless, one could foresee a rebel group claiming to represent a whole people seeking to trigger the full application of the Geneva Conventions. In the face of resistance by the relevant state to the internationalization of such a conflict, the issue would turn on whether such an entity could be considered a national liberation authority.

Akande has reflected on the legal significance of the 2012 recognition of the Syrian Revolutionary and Opposition Forces (NCS) as the 'sole legitimate representative of the Syrian People'. Considering that an argument might be made that military aid may be given to groups struggling for self-determination, he concludes that 'support ought only to be given to those groups that are collectively recognized by the international community as legitimate representatives of peoples fighting for self-determination. Such recognition should ideally be done by the UN General Assembly.'[65] The present author considers that, similarly, for a group to demand that it enjoys all the rights applicable in an IAC under the Geneva Conventions, there needs to be clear international recognition that such a group has achieved the kind of international status envisaged in the CCW and Article 1(4) AP I.[66] Of course there is nothing to prevent any armed group, engaged in a conflict with a state, from taking on any or all of the obligations in the Geneva Conventions that apply in an IAC. This can be done unilaterally or through special agreements.[67] 54

VIII. Unrecognized governments and recognized belligerents

The Geneva Conventions make special reference to unrecognized governments. A state cannot deny the applicability of the Geneva Conventions in an inter-state conflict by pointing to the fact that it does not recognize the government of the state with which it is in conflict. Geneva Conventions I, II, and III all state that they apply to '[m]embers of regular armed forces who profess allegiance to a Government or an authority not recognized by the Detaining Power'.[68] Recognition of a government changes nothing with regard to the protection afforded to those members of the armed forces who fall into the hands of the detaining state party which has refused to recognize the other state's government.[69] 55

On the other hand, if a state chooses to recognize the group it is fighting against as a *belligerent* under international law, this will internationalize the conflict and trigger the full application of all the rights and obligations applicable in an IAC. The Geneva Conventions will apply to both parties to the extent that they reflect customary international law. Such 56

[65] <http://www.ejiltalk.org/self-determination-and-the-syrian-conflict-recognition-of-syrian-opposition-as-sole-legitimate-representative-of-the-syrian-people-what-does-this-mean-and-what-implications-does-it-have/> and <http://www.ejiltalk.org/would-it-be-lawful-for-european-or-other-states-to-provide-arms-to-the-syrian-opposition/#more-7410>.

[66] For background see Abi-Saab, above n 59; Cassese, above n 59; Wilson, above n 59.

[67] See Chs 7 and 25 of this volume.

[68] Art 13(3) GC I and GC II; Art 4(A)(3) GC III. With regard to the interpretation of 'regular armed forces' and the debate over the status of Taliban forces engaged against the US in 2001, see Ch 45 MN 9 and 60–70.

[69] A separate question can arise when a state intervenes in an internal armed conflict on the side of the rebels and the intervening state considers that the rebels are the government of a state (albeit a state unrecognized by the state fighting the rebels). If the rebels do indeed represent the government of a state recognized under international law, this will affect the legality of the intervention should that state be acting in self-defence, and it will mean that the rebel forces are in fact the armed forces of a state and their state will indeed be a party to an IAC. The issue nevertheless turns on whether a new state has emerged in international law, rather than the attitude of the two established states. See further J. Crawford, *The Creation of States in International Law* (2nd edn, Oxford: OUP, 2006); Dinstein, above n 4, at 7, suggests that where such a breakaway entity emerges as a state whose existence is contested, 'there may be a transition from a "civil war" to an inter-State war which is hard to pinpoint in time'.

recognition has not been granted since the 1949 adoption of the Geneva Conventions,[70] and yet it seems premature to consider that such recognitions could no longer trigger the application of the laws of IAC.[71] The recognition of belligerency by a second state cannot change the nature of the conflict between the armed group and the state it is fighting against.

IX. Cyber warfare

57 There seems to be little doubt that a cyber attack by a state on another state, resulting in deaths or damage to property, would trigger the laws of IAC and the Geneva Conventions. The problems start when the cyber attacks have a sort of impact different from that of traditional armed conflicts, and where the source of the attack is not obviously attributable to a state. Let us take each of these issues in turn.

58 Harold Hongju Koh, speaking as the Legal Advisor to the US Department of State, has outlined what would constitute a use of force in the context of cyber activities. To the extent that the resort to force by one state against another triggers an armed conflict, these examples of the use of force would also trigger the application of the law of IAC and the application of the Geneva Conventions.[72]

> In assessing whether an event constituted a use of force in or through cyberspace, we must evaluate factors: including the context of the event, the actor perpetrating the action (recognizing challenging issues of attribution in cyberspace), the target and location, effects and intent, among other possible issues. Commonly cited examples of cyber activity that would constitute a use of force include, for example: (1) operations that trigger a nuclear plant meltdown; (2) operations that open a dam above a populated area causing destruction; or (3) operations that disable air traffic control resulting in airplane crashes. Only a moment's reflection makes you realize that this is common sense: if the physical consequences of a cyber attack work the kind of physical damage that dropping a bomb or firing a missile would, that cyber attack should equally be considered a use of force.[73]

59 Michael Schmitt, having referred to the 'low threshold' needed to trigger the application of the Geneva Conventions in an IAC, considers that if there is a cyber operation attributable to a state that results in 'damage or destruction of object or injury or to death of individuals of another State, an international armed conflict undoubtedly occurs'.[74] He nevertheless highlights that some cyber operations 'may merely cause the target State inconvenience or irritation. Others could involve taking control of its national cyber systems or causing severe disruption to the economy, transportation systems or other critical infrastructure.'[75] He continues, '[o]bviously, not every cyber operation by one State against another should amount to an armed conflict.'[76] But Schmitt seems more worried about under-inclusion than over-inclusion when faced with non-destructive 'computer network exploitation, espionage, denial of service attacks'.[77] He considers that a state

[70] See Kolb and Hyde, above n 47, at 65–6 and 81.

[71] See further Akande, above n 21, at 59: states may wish formally to recognize an armed group as insurgents and specify that only a certain number of rules of the law of IAC will apply (in addition to the rules that apply in any event to an internal armed conflict); by contrast, recognition of belligerency triggers the full gamut of the laws of IAC, and the law of internal armed conflict becomes irrelevant.

[72] Issues related to whether the cyber attacks have a nexus to the armed conflict are outside the scope of this chapter; see further and for more detail on cyber warfare, *Tallinn Manual on the International Law Applicable to Cyber Warfare*, M.N. Schmitt (gen ed) (Cambridge: CUP, 2013).

[73] Harold Hongju Koh, 'International Law in Cyberspace', USCYBERCOM Inter-Agency Legal Conference, Ft Meade, MD, 18 September 2012, <http://www.state.gov/s/l/releases/remarks/197924.htm>.

[74] Schmitt, above n 47, at 460. [75] Ibid. [76] Ibid. [77] Ibid.

would probably characterize the attack as the initiation of armed conflict, and concludes that even if a clear threshold for a purely cyber attack has not yet been agreed, it is possible that a new type of armed conflict may emerge, 'which lowers the bar by articulating a standard of significant non-destructive harm to the target State'.[78]

But such concern for under-inclusion runs headlong into competing concerns that we may be lowering the threshold for what constitutes an armed attack, thus entitling states to use force in self-defence. As we saw above (MN 40–48), it is quite possible to construct separate thresholds and keep these two issues separate. But we should admit that it will be difficult for governments to imagine that they are engaged in an armed conflict and obliged to apply the laws of war, yet are unable to respond with force in self-defence. **60**

Of course, any force used in self-defence will need to be necessary and proportionate, be reported to the Security Council, and be used only in conformity with the laws of armed conflict and human rights; but in essence, there is here a danger of weakening the bulwark which prevents self-defence being invoked in response to interventions that fall short of armed attacks.[79] This is all more delicate in light of the cyber warfare dimensions of the problems associated with attribution and overall control. **61**

Attributing the acts of non-state armed groups to states, as we have seen, is a complex question. The case law of the ICJ covers 'complete dependency' of persons acting under the 'effective control' of the third state, or situations where 'instructions were given, in respect of *each operation* in which the alleged violations occurred'.[80] The ICJ explains further that attribution will occur in these last two cases, 'where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed'.[81] Already, tribunals and fact-finding missions have had difficulty applying this law to the facts. In any one conflict, a non-state armed group may or may not be receiving instructions for a particular operation. A series of cyber attacks is even harder to attribute. The relevant viruses, Trojan horses, or computer worms could be routed through various computers and countries, making the originators and their controllers almost impossible to identify with much certainty. This may be an area where specialized rules emerge to determine not only whether a state is responsible for the acts of non-state actors, including hackers and 'hacktivists', but also the extent to which such activity triggers the law of IAC. **62**

The *Tallinn Manual on the International Law Applicable to Cyber Warfare* takes as its starting point Common Article 2 to the Geneva Conventions as the threshold for the application of the law of IAC. The *Tallinn* commentary then explains how the overall control test might apply to internationalize a cyber attack so that the law of IAC would apply:[82] **63**

> Applying the test, if State A exercises overall control over an organized group of computer hackers that penetrate State B's cyber infrastructure and cause significant physical damage, the armed conflict qualifies as 'international' in nature. State A need not have instructed the group to attack

[78] Ibid, at 461. See also the *Tallinn Manual*, above n 72.

[79] This issue has divided the experts responsible for the Tallinn Manual, on which see M.N. Schmitt, 'International Law in Cyberspace: The Koh Speech and Tallinn Manual Juxtaposed', 54 *Harvard International Law Journal* (2012) 14 (online version).

[80] ICJ, *Bosnia and Herzegovina v Serbia and Montenegro*, above n 52, para 400 (emphasis added).

[81] Ibid, para 406.

[82] See further the *Tallinn Manual*, above n 72, Rule 22, at 80–1.

particular aspects of the infrastructure, but, instead, only needs to have exerted sufficient control over the group to instruct it to mount a campaign against infrastructure cyber targets.

64 The *Tallinn Manual* is careful to recall that the 'overall control' test, derived from the case law of the ICTY, is only applicable to organized groups and not to individuals. In order to reach the threshold for an IAC, the individuals or 'insufficiently organized group' would have to satisfy the tests for attribution under state responsibility. That means they 'must receive specific instructions (or subsequent public approval) from a State before their conduct can be attributed to that State for the purpose of determining the existence of an international armed conflict'.[83]

C. The Boundary between International and Non-International Armed Conflicts

65 The concept of IAC is bounded on either side by two other concepts: no armed conflict, and NIAC. Although the dividing line between IAC and NIAC will be explored in Chapter 2 of this volume, we can state here that the distinction remains important for the application of the Geneva Conventions, because under treaty law, as opposed to customary international law, only Common Article 3 applies to NIACs. While there may be a trend towards adopting wider protection beyond Common Article 3, most notably through customary IHL and AP II of 1977, the distinction in the 1949 Geneva Conventions remains, and may have concrete consequences as follows.

66 First, some national law will incorporate IHL in accordance with the terms of the 1949 Geneva Conventions rather than by reference to custom or a wider list of applicable obligations in NIAC. In such situations, determining whether one is in the presence of an IAC or a NIAC will dramatically affect the scope of the applicable obligations. Secondly, as will be seen in the discussion in Chapters 31 and 36 of this volume on the relationship with international criminal law, the grave breaches regime of the Geneva Conventions is specifically addressed to IACs rather than NIACs. This dichotomy is reproduced in the Statute of the International Criminal Court (ICC Statute) and elsewhere, so that some courts will have jurisdiction over certain acts only when committed in the context of an IAC rather than a NIAC.[84] The dividing line which separates IACs from NIACs can then become not just a tangle for academics to unpick, but rather the battle-line between a prosecutor and defence counsel seeking to determine whether a prosecution for war crimes may proceed.

D. Legal Consequences of a Violation

67 This chapter has been concerned to delineate a number of separate concepts: intervention, use of force, NIAC, overall control over armed groups, effective control over armed

[83] Ibid, at 81–2.

[84] See Chs 31 and 36 of this volume; Art 8 ICC Statute; note also the Arms Trade Treaty (2013), which refers in Art 6(3) to 'grave breaches of the Geneva Conventions of 1949' and 'other war crimes as defined by international agreements to which it is a Party', and in Art 7(3) to 'a serious violation of international humanitarian law'—for further detail, see S. Casey-Maslen et al, *A Commentary to the Arms Trade Treaty* (Oxford: OUP, forthcoming 2016); and see Ch 35 of this volume on the relationship between the GCs and human rights law, which highlights how some human rights treaties may not apply where the law of IAC is applicable under the GCs.

groups, IAC, and armed attack. We have seen that how one classifies a conflict is relevant for the determination of the applicable rights and obligations, not only of states and armed groups, but also of the individual concerned. In several cases—POW status, protected civilian status, combatant immunity, victim of a grave breach, and so on—the associated obligations and enforcement mechanisms that relate to the relevant rules will be dependent on a preliminary finding that there is an IAC as opposed to an internal armed conflict. The distinction between armed conflicts and situations that do not constitute armed conflicts is even more important because war crimes do not exist outside armed conflicts and occupation. In turn this means that the accompanying regimes for penal repression of breaches of the relevant law are obviously part of the context, which determines how and why the concepts are delineated.

E. Critical Assessment

68 The humanitarian imperative pulls us towards adopting a low threshold of violence for ensuring the humanitarian protection of the Geneva Conventions. But there is a risk that this low threshold gets misapplied to determine the existence of a right to use force in self-defence, or the application of the wider law of armed conflict, thus escalating the violence and putting even more people at risk.

69 In addition, even from a humanitarian point of view, it may be preferable to be protected by the law of human rights rather than by the law of armed conflict. This is particularly so when the law of armed conflict is said to permit killings and forms of detention without trial. It is suggested here that one cannot square this circle with a 'one size fits all' definition of armed conflict. The preoccupation has been to bring war criminals within the wider range of offences applicable in IAC, but internationalizing a conflict in this way risks oversimplifying the issues and reducing certain forms of protection (even while it may make prosecution for war crimes easier).

70 Of course, troops on the ground need simple directives and should be clear on which rules they are expected to apply, but the contemporary context is complicated. State forces fighting rebels 'controlled' by another state may be considered by international criminal tribunals to be fighting an IAC, but on the ground the state authorities will be loath to grant such fighters POW status or combatant immunity. Of course we can insist that classification of a conflict is to be separated from the different exercise of determining the status of a captured fighter, but we need to be alert to the temptation of conflating IAC with the mistaken idea of a 'right to fight', or even a 'licence to kill'.

71 Similarly, members of the government armed forces captured by these rebels are unlikely to enjoy the full rights and privileges of POWs, in a prisoner-of-war camp fulfilling all the criteria set out in GC III (due to the incapacity of an armed group to fulfil such state-like obligations and the probable lack of enthusiasm from their controlling state as regards fulfilling them). We could complicate the situation further by recollecting that different factions of the armed group may or may not be controlled by the outside state in various conflict zones. We then have the spectre of an armed group fighting an IAC on a Monday in one town, and an internal armed conflict in the next town on the Tuesday.

72 The better solution seems to be that when states are fighting non-state armed groups who are the proxies of another state, the law of NIAC applies between the state and the non-state armed group; while the law of IAC, including the Geneva Conventions, applies to the conflict between the two states. The fighter from the non-state armed group would

be detained with the guarantees, inter alia, of Common Article 3,[85] while members of the armed forces from the other state would be considered POWs protected by GC III. In short, it is suggested here that in most situations, whether one applies the law of IAC or NIAC depends on whom one is fighting, rather than on the control exercised by outside states. This, however, does not seem to be the conventional way of looking at this.

73 This chapter opened by reminding the reader that the application of the Geneva Conventions is not dependent on a declaration of war, or even on recognition of a state of war. Whether the Geneva Conventions apply remains an objective question, sometimes determined by a tribunal after the fact, but clarity from the outset would go a long way to educating combatants, fighters, and civilians. It is suggested that the best way forward is for states and armed groups to state clearly their commitment to respecting the relevant international law, and to clarify which regime they are applying.

74 Where appropriate, the parties can specify which additional provisions of the Geneva Conventions they are committed to respecting. Here, there need not be a stark choice between the full range of obligations applicable to inter-state conflict and the 'Convention in miniature' found in Common Article 3 applicable to NIACs.[86] The present author sees no reason why one side might not offer more humanitarian protection under the Geneva Conventions than the other side. Reciprocity and equality of application are not ends in themselves. Maximum protection for the victims of war should be an end in itself. The scope of the obligations related to the Geneva Conventions that the parties can take on in this way will be partly determined by their capacities.

75 In conclusion, on the one hand the threshold of violence for triggering the application of the Geneva Conventions in an inter-state armed conflict can be considered relatively low; indeed, we have seen that one does not need any violence at all—a declaration of war or a non-consensual occupation will suffice. The purpose of the Geneva Conventions is that in times of armed conflict, individuals should enjoy protection as soon they fall into the power of the enemy. On the other hand, we have seen that the threshold for an international armed conflict involving control over a proxy group or violence by UN forces is more complex: for this reason it is the subject of further examination in Chapter 2 of this volume, entitled 'The Applicability of the Conventions to "Transnational" and "Mixed" Conflicts'.

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[85] Unless of course he or she 'belongs' to the armed forces of the controlling state in accordance with Art 4(A)(2) GC III. One should also mention that the detainees would also enjoy the customary rights reflected in AP I Art 75.

[86] Pictet Commentary GC I, at 48.