THE LAW OF ARMED CONFICT AND THE USE OF FORCE

The Max Planck Encyclopedia of Public International Law

PUBLISHED UNDER THE AUSPICES OF THE MAX PLANCK FOUNDATION FOR INTERNATIONAL PEACE AND THE RULE OF LAW

EDITED UNDER THE DIRECTION OF

FRAUKE LACHENMANN
RÜDIGER WOLFRUM

OXFORD

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THEMATIC SERIES VOLUME 2

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MAX-PLANCK-GESELLSCHAFT

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FOREWORD

This is the second volume in the MPEPIL Thematic Series, a series that is intended to make MPEPIL contents even more accessible to the specialized reader. The volume we are presenting here covers the area of *ius ad bellum, ius in bello* and *ius post bellum*; again, a vast field that would merit its own encyclopedia.

This volume brings together entries that were formerly published on www.mpepil.com, in addition to some new content. Many of the entries have been updated to reflect the most recent developments. In addition, the new content includes coverage of topical issues such as 'Autonomous Weapon Systems'; 'Hors de combat'; 'Precautions in Attack'; 'Proportionality and Collateral Damage'; 'Scorched Earth Policy'; and many more. We trust that the reader will find a wealth of up-to-date information and expert opinions in this volume.

Heidelberg, January 2016
Frauke Lachenmann
Rüdiger Wolfrum

CONTENTS

LIST OF ABBREVIATIONS

ABAJ	American Bar Association Journal
ACDI	Canadian Yearbook of International Law
ActScandJurisGent	Nordic Journal of International Law
AFDI	Annuaire Francais de Droit International
AFemLJ	Australian Feminist Law Journal
AFLRev	Air Force Law Review
AfrHumRtsLJ	African Human Rights Law Journal
AfrILPROC	African Society of International and Comparative Law Proceedings
AfrJIntl&CompL	African Journal of International and Comparative Law
AfrYIL	African Yearbook of International Law
AJIL	American Journal of International Law
AJIL Supp	American Journal of International Law Supplement
AlbLRev	Albany Law Review
All ER	All England Law Reports
ALRFed	American Law Reports, Federal
AltaLRev	Alberta Law Review
AmBankrLJ	American Bankruptcy Law Journal
AmJCompL	American Journal of Comparative Law
AmPolSciRev	American Political Science Review
AmRevIntlArb	American Review of International Arbitration
AmUIntlLRev	American University International Law Review
AmUJInt1L&Pol	American University Journal of International Law and Policy
AmULRev	American University Law Review
AnDrMer	Annuaire du Droit de la Mer
AnnAir&SpaceL	Annals of Air and Space Law
AnnDig	Annual Digest of Public International Law Cases
AnnDirInt	Annali di diritto internazionale
AnnIDI	Annuaire de l'Institut de Droit International
Annuaire Suisse	Schweizerisches Jahrbuch far Internationales Recht
ArbIntl	Arbitration International
ARIEL	Austrian Review of International and European Law
ArizJIntl&CompL	Arizona Journal of International and Comparative Law
Art.	Article
Arts	Articles
ASILPROC	American Society of International Law Proceedings
ASSP	Annuaire Suisse de Science Politique
ATS	Australian Treaty Series
Aust1LJ	Australian Law Journal
AustrianJPubIntlL	Austrian Journal of Public and International Law
AustYBIL	Australian Yearbook of International Law

BaltYIL	Baltic Yearbook of International Law
BayVBl	Bayrische Verwaltungsblätter
BCIntl&CompLRev	Boston College International and Comparative Law Review
BerkeleyJIntlL	Berkeley Journal of International Law
Bevans	CI Bevans (ed) *Treaties and Other International Agreements of the United States of America 1776–1949* (Department of State Washington 1968–76) 13 vols
BILC	British International Cases
BISD	General Agreement on Tariffs and Trade/Basic Instruments and Selected Documents
BolMexdeDerechoComp	Boletin Mexicano de Derecho Comparado
BostonUIntlLJ	Boston University International Law Journal
BrookJIntlL	Brooklyn Journal of International Law
BrookLRev	Brooklyn Law Review
BFSP	British and Foreign State Papers
BuffLRev	Buffalo Law Review
BullCE	European Communities Bulletin
BullHumRts	Bulletin of Human Rights
BULRev	Boston University Law Review
BYIL	British Yearbook of International Law
C	Command Papers
CalLRev	California Law Review
CalWIntlLJ	California Western International Law Journal
CanJL&Society	Canadian Journal of Law and Society
CaseWResJIntlL	Case Western Reserve Journal of International Law
CaseWResLRev	Case Western Reserve Law Review
CathULRev	Catholic University Law Review
Cd	Command Papers
CDIP	Conférence de la Haye de droit international privé/Actes et documents
CETS	European Treaty Series [Council of Europe] cf compare
ChiJIntlL	Chicago Journal of International Law
ChiKentLRev	Chicago-Kent Law Review
CILSA	Comparative and International Law Journal of Southern Africa
CJQ	Civil Justice Quarterly
CLJ	Cambridge Law Journal
CLP	Current Legal Problems
Clunet	Journal du droit international
CLWR	Common Law World Review
Cm	Command Papers
Cmd	Command Papers
CMLRev	Common Market Law Review
CNLR	Canadian Native Law Reporter
Col.	Column

ColoJIntlEnvtlL&Pol	Colorado Journal of International Environmental Law and Policy
Cols	Columns
ColumHumRtsLR	Columbia Human Rights Law Review
ColumJEurL	Columbia Journal of European Law
ColumJTransnatlL	Columbia Journal of Transnational Law
ColumLRev	Columbia Law Review
COM	Documents of the Commission of the European Communities
Comm No	Communication No
ConnecticutJIntlL	Connecticut Journal of International Law
Coop&Conflict	Cooperation and Conflict
CornellIntlLJ	Cornell International Law Journal
CornellLQ	Cornell Law Quarterly
CrimLF	Criminal Law Forum
CTIA	Consolidated Treaties & International Agreements
CTS	C Parry (ed) *Consolidated Treaty Series* 1648-1919 (Dobbs Ferry New York 1969-81) 231 vols
CUP	Cambridge University Press
CYELS	Cambridge Yearbook of European Legal Studies
DenvJInt1L8EPol	Denver Journal of International Law and Policy
DeptStBull	Department of State Bulletin
DickJIntlL	Dickinson Journal of International Law
DOV	Die Offentliche Verwaltung
DrMaritFr	Le droit maritime francais
DukeJComp&IntlL	Duke Journal of Comparative & International Law
DukeLJ	Duke Law Journal
DVB1	Deutsches Verwaltungsblatt
EAfrJPeace&HumRts	East African Journal of Peace and Human Rights
EECR	East European Constitutional Review
EHRLR	European Human Rights Law Review
EHRR	European Human Rights Reports
EJIL	European Journal of International Law
Elaw	Murdoch University Electronic Journal of Law
ELJ	European Law Journal
ELR	European Law Review
EmorylntlLRev	Emory International Law Review
EnvLiability	Environmental Liability
EnvtlPolyL	Environmental Policy and Law
EPIL	Encyclopedia of Public International Law (Bernhardt edn)
EPL	European Public Law
ERPL	European Review of Public Law = Revue europeenne de droit public = Europäische Zeitschrift des offentlichen Rechts = Rivista europea di diritto pubblico
EuConst	European Constitutional Law Review
EuGRZ	Europäische Grundrechtezeitschrift

EuR	Europarecht
EurEnvtlLRev	European Environmental Law Review
EurJCrimeCrLCrJ	European Journal of Crime, Criminal Law and Criminal Justice
EurJPolRes	European Journal of Political Research
EurYB	European Yearbook
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
FinnishYBIL	Finnish Yearbook of International Law
FlaJIntlL	Florida Journal of International Law
FLRev	Federal Law Review
FordhamIntlLJ	Fordham International Law Journal
FordhamLR	Fordham Law Review
ForeignAffRep	Foreign Affairs Reports
FW	Die Friedens-Warte
GaJIntl&CompL	Georgia Journal of International and Comparative Law
GazPal	Gazette du palais
GeoIntlEnvtlLRev	Georgetown International Environmental Law Review
GeoLJ	Georgetown Law Journal
GWashIntlLRev	George Washington International Law Review
GWashJIntlL&Econ	George Washington Journal of International Law and Economics
GWashLRev	George Washington Law Review
GYIL	German Yearbook of International Law
HagueYIL	Hague Yearbook of International Law
HarvEnvtlLRev	Harvard Environmental Law Review
HarvHumRtsJ	Harvard Human Rights Journal
HarvIntlLJ	Harvard International Law Journal
HarvJL&PubPoly	Harvard Journal of Law and Public Policy
HarvLRev	Harvard Law Review
HastingsIntl&CompLRev	Hastings International and Comparative Law Review
HastingsLJ	Hastings Law Journal
HelsinkiMonit	Helsinki Monitor
HousJIntlL	Houston Journal of International Law
HowLJ	Howard Law Journal
HRLJ	Human Rights Law Journal
HRLRev	Human Rights Law Review
Hudson	MO Hudson (ed) *International Legislation: A Collection of the Text of Multipartite International Instruments of General Interest Beginning with the Covenant of the League of Nations* (Carnegie Endowment for International Peace Washington 1931–50) 9 vols
HumRtsQ	Human Rights Quarterly
IBull	Interights Bulletin
ICLQ	International and Comparative Law Quarterly

ICLR	International Community Law Review
ICON	International Journal of Constitutional Law
ICSID	Rev/FILJ ICSID Review/Foreign Investment Law Journal
IDI	Institut de Droit international
IHRR	International Human Rights Reports
IJCLP	International Journal of Communications Law and Policy
IJECL	International Journal of Estuarine and Coastal Law
IJHR	International Journal of Human Rights
IJIL	Indian Journal of International Law
IJLI	International Journal of Legal Information
IJMCL	International Journal of Marine and Coastal Law
IJRL	International Journal of Refugee Law
ILJ	Industrial Law Journal
IllinoisLRev	Illinois Law Review
ILM	International Legal Materials
ILQ	International Law Quarterly
ILR	International Law Reports
ILSAJInt1&CompL	ILSA Journal of International & Comparative Law
IndianYBlntlAff	Indian Yearbook of International Affairs
Indlntl&CompLRev	Indiana International & Comparative Law Review
IndJGlobalLegalStud	Indiana Journal of Global Legal Studies
IndLJ	Indiana Law Journal
INFCIRC	International Atomic Energy Agency Information Circular
IntALR	International Arbitration Law Review
Int1CLR	International Criminal Law Review
IntlJCultProp	International Journal of Cultural Property
IntULLib	International Journal of Law Libraries
IntlLabRev	International Labour Review
IntlLaw	International Lawyer
IntlOrgLRev	International Organization Law Review
Int1Pol	International Politics
IntlStud	International Studies
IntlTax&BusLaw	International Tax & Business Lawyer
Int1TLJ	International Trade Law Journal
IntTLR	International Trade Law & Regulation
IPRax	Praxis des Internationalen Privat- and Verfahrensrechts
IRRC	International Review of the Red Cross
IrStudlntAff	Irish Studies in International Affairs
IsLR	Israel Law Review
IsraelYBHumRts	Israel Yearbook on Human Rights
IsrSC	Piskei Din, Reports of Judgments of the Supreme Court of Israel
Issues&Stud	Issues and Studies
ItYBIL	Italian Yearbook of International Law
JAfrIntlL	Journal of African and International Law
JAfrL	Journal of African Law
JapanAnnlntlL	Japanese Annual of International Law

JB1	Juristische Blatter
JC&SL	Journal of Conflict and Security Law
JComMarSt	Journal of Common Market Studies
JCompLeg	Journal of Comparative Legislation and International Law
JContempHist	Journal of Contemporary History
JEL	Journal of Environmental Law
JherJb	Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts
JICL	Journal of International Commercial Law
JICJ	Journal of International Criminal Justice
JIEL	Journal of International Economic Law
JIntL&Prac	Journal of International Law and Practice
JIntlArb	Journal of International Arbitration
JIntlLIntlRel	Journal of International Law and International Relations
JMarL&Com	Journal of Maritime Law and Commerce
JMAS	Journal of Modern African Studies
JORF	Journal officiel de la République française: Lois et decrets
JPeaceRes	Journal of Peace Research
JSpaceL	Journal of Space Law
JTransnatLawPol	Journal of Transnational Law and Policy
JWT	Journal of World Trade
JWTL	Journal of World Trade Law
KJ	Kritische Justiz
KoreanJCompL	Korean Journal of Comparative Law
L&Soc'yRev	Law & Society Review
LatAmResRev	Latin American Research Review
Law&ContempProbs	Law and Contemporary Problems
LIEI	Legal Issues of European Integration
LJIL	Leiden Journal of International Law
LLR	London Law Review
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
LNTS	League of Nations Treaty Series
LoyLAIntl&CompLRev	Loyola of Los Angeles International & Comparative Law Review
LoyLRev	Loyola Law Review
LPICT	Law and Practice of International Courts and Tribunals
LQR	Law Quarterly Review
LSI	Laws of the State of Israel
MaineLRev	Maine Law Review
MarqLRev	Marquette Law Review
MaxPlanckUNYB	Max Planck Yearbook of United Nations Law
MaxPlanckYrbkUNL	Max Planck Yearbook of United Nations Law
McGillLJ	McGill Law Journal
MelbULRev	Melbourne University Law Review
MichJIntlL	Michigan Journal of International Law

MichLRev	Michigan Law Review
MilLRev	Military Law Review
ModAsianStud	Modern Asian Studies
ModLRev	Modern Law Review
NatResourcesLaw	Natural Resources Lawyer
NavalLRev	Naval Law Review
NavalWarCollRev	Naval War College Review
NCLRev	North Carolina Law Review
NebLRev	Nebraska Law Review
NewEngLRev	New England Law Review
NILR	Nederlands Tijdschrift voor Internationaal Recht = Netherlands International Law Review
NJW	Neue Juristische Wochenschrift
NLB	Nuclear Law Bulletin
NordicJlL	Nordic Journal of International Law
NotreDameLRev	Notre Dame Law Review
NQHR	Netherlands Quarterly of Human Rights
NSAIL	Non-State Actors and International Law
NuR	Natur und Recht
NYIL	Netherlands Yearbook of International Law
NYLSchJHumRts	New York Law School Journal of Human Rights
NYLSchJIntl&CompL	New York Law School Journal of International and Comparative Law
NYUJInt1L&Pol	New York University Journal of International Law and Politics
NYULRev	New York University Law Review
Ocean&CoastalLJ	Ocean and Coastal Law Journal
OceanDev&IntlL	Ocean Development and International Law
OJ	Official Journal of the European Communities
OJLS	Oxford Journal of Legal Studies
OrLRev	Oregon Law Review
OSCEYbk	OSCE Yearbook
OsgoodeHallLJ	Osgoode Hall Law Journal
OUP	Oxford University Press
PaceYBIntlL	Pace Yearbook of International Law
Pa1YIL	Palestine Yearbook of International Law
Para.	Paragraph
Paras	Paragraphs
ParlDebHC	Parliamentary Debates House of Commons
PennStLRev	Pennsylvania State Law Review
PhilipLJ	Philippine Law Journal
PIQR	Personal Injuries and Quantum Reports
Pmbl.	Preamble
PolishYIL	Polish Yearbook of International Law
PolSciQ	Political Science Quarterly

PPLR	The Public Procurement Law Review
PublL	Public Law
QuestIntlL	Questions of International Law
RabelsZ	Rabels Zeitschrift far auslandisches und internationals Privatrecht
RBDI	Revue Belge de Droit International
RdC	Recueil des Cours de l'Academie de Droit International de la Haye
RDI	Revue de droit international, de sciences diplomatiques et politiques
RDIDC	Revue de droit international et de droit compare
Rec.	Recital
RecDal	Recueil le Dalloz
RECIEL	Review of European Community and International Environmental Law
Rees	Recitals
REDE	Revista Espanola de Derecho Europeo
REDI	Revista Espanola de Derecho Internacional
Reg.	Regulation
Regs	Regulations
RevDrMilDrGuerre	Revue de Droit Militaire et de Droit de la Guerre
RevEgyptDrint	Revue Egyptienne de Droit International
RevHellenDrintern	Revue Hellenique de Droit International
RevICR	Revue internationale de la Croix-Rouge
RevIIDH	Revista Instituto Interamericano de Derechos Humanos
RevintFilosDir	Rivista Internazionale di Filosofia del Diritto
RevIntlAff	Review of International Affairs
RevintlDroitComp	Revue internationale de droit compare
RevintlStud	Review of International Studies
RevInt1TheorieDroit	Revue internationale de la theorie du droit
RGB1	Reichsgesetzblatt
RGDIP	Revue Generale de Droit International Public
RIAA	Reports of International Arbitral Awards
RivDirEu	Rivista di Diritto Europeo
RivDirint	Rivista di Diritto Internazionale
RivStudPolitInt	Rivista di Studi Politici Internazionali
RPP	Revue Politique et Parlementaire
RSC	Revue de science criminelle et de droit penal compare
RTDE	Revue trimestrielle de droit europeen
RTDH	Revue trimestrielle des droits de l'homme
RUDH	Revue universelle des droits de l'homme
SACLR	South African Criminal Law Reports
SAfrYIL	South African Yearbook of International Law
SAJHR	South African Journal on Human Rights

SALJ	South African Law Journal
SanDiegoLRev	San Diego Law Review
SCa1LRev	Southern California Law Review
SCLRev	South Carolina Law Review
Sec.	Section
Secs	Sections
SpanYIL	Spanish Yearbook of International Law
StanJIntlL	Stanford Journal of International Law
StanLRev	Stanford Law Review
Stat	Statutes at Large of the United States of America
StellenboschLRev	Stellenbosch Law Review
StJohn'sLRev	St John's Law Review
StudDipl	Studia Diplomatica
SYBIL	Singapore Yearbook of International Law
SyracuseJIntlL&Com	Syracuse Journal of International Law and Commerce
SyracuseLRev	Syracuse Law Review
TemplelntlCompLJ	Temple International and Comparative Law Journal
TennLRev	Tennessee Law Review
TexIntlLJ	Texas International Law Journal
THRHR	Tydskrif vir hedendaagse Romeins-Hollands Reg
TLR	Times Law Reports
TransnatlL&ContempProbs	Transnational Law & Contemporary Problems
TulJIntl&CompL	Tulane Journal of International and Comparative Law
TulLRev	Tulane Law Review
TulMarLJ	Tulane Maritime Law Journal
TulsaLJ	Tulsa Law Journal
TWQ	Third World Quarterly
UBCLRev	University of British Columbia Law Review
UCalLALRev	University of California, Los Angeles Law Review
UChiLRev	University of Chicago Law Review
UFlaLRev	University of Florida Law Review
UMiamiInterAmLRev	University of Miami Inter-American Law Review
UMiamiLRev	University of Miami Law Review
UNBLJ	University of New Brunswick Law Journal
UNCITRALYB	Yearbook of the United Nations Commission on International Trade Law
UnifLRev	Uniform Law Review
UNTS	United Nations Treaty Series
UNYB	Yearbook of the United Nations
UNYBILC	Yearbook of the International Law Commission
UPaJIntEconL	University of Pennsylvania Journal of International Economic Law
UPaLRev	University of Pennsylvania Law Review
UPittLRev	University of Pittsburgh Law Review
USFedReg	United States Federal Register

UST	United States Treaties and Other International Agreements
UTasLRev	University of Tasmania Law Review
UTorontoFacLRev	University of Toronto Faculty of Law Review
VaEnvtlLJ	Virginia Environmental Law Journal
VaJIntlL	Virginia Journal of International Law
VaLRev	Virginia Law Review
VandJTransnatlL	Vanderbilt Journal of Transnational Law
Verw	Die Verwaltung
VN	Vereinte Nationen
WashLRev	Washington Law Review
WILJ	West Indian Law Journal
WIPO	World Intellectual Property Organization
WIR	West Indian Reports
WisIntlLJ	Wisconsin International Law Journal
WldAff	World Affairs
WLR	The Weekly Law Reports
YaleHumRts&DevLJ	Yale Human Rights and Development Law Journal
YaleJIntlL	Yale Journal of International Law
YaleJL&Human	Yale Journal of Law and the Humanities
YaleJWorldPubOrd	Yale Journal of World Public Order
YaleLJ	Yale Law Journal
YaleStudWorldPubOrd	Yale Studies in World Public Order
YBCA	Yearbook Commercial Arbitration
YBWA	Yearbook of World Affairs
YECommHR	Yearbook of the European Convention of Human Rights
YIntlEnvL	Yearbook of International Environmental Law
YIntlHL	Yearbook of International Humanitarian Law
ZaöRV/HJIL	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht = Heidelberg Journal of International Law
ZAR	Zeitschrift für Ausländerrecht und Ausländerpolitik
ZLuftR	Zeitschrift für Luft- und Weltraumrecht
ZVR	Zeitschrift für Verkehrsrecht

NOTES TO THE READER

The authors speak in their personal capacity only. Any views they express or information they provide cannot be attributed to the institutions with which they are currently, or have previously been, affiliated.

Cross-references in this volume are to: Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (OUP Oxford 2008 –), available at http://opil.ouplaw.com/home/EPIL.

Aggression

Yoram Dinstein

This article was last updated September 2015

A. Introduction

1 Aggression is an old concept in international law meaning, in essence, State conduct that either initiates war against another State or brings about a situation in which the victim is (or may be) driven to war. It has never been settled whether aggression of itself must consist of use of force, or whether it could manifest itself through lesser acts, such as the threat of force, or even acts unrelated to the use of force, eg the diversion of the waters of an international river. Charges of aggression have been levelled by States against one another for centuries, even prior to the general renunciation of war as an instrument of national policy in the → Kellogg-Briand Pact (1928) (General Treaty for Renunciation of War as an Instrument of National Policy [signed 27 August 1928, entered into force 25 July 1929] 94 LNTS 57).

2 In the period before the Kellogg-Briand Pact, States often concluded, either bilaterally or multilaterally, non-aggression treaties in which they committed themselves not to engage in any act of aggression against each other (→ Non-Aggression Pacts). In Art. 10 Covenant of the League of Nations ([signed 28 June 1919, entered into force 10 January 1920] [1919] 225 CTS 195; 'League Covenant'), Members of the League of Nations pledged 'to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League'.

3 Under Art. 6 (a) Charter of the Nuremberg International Military Tribunal ('IMT'), annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ([signed and entered into force 8 August 1945] 82 UNTS 279), the 'planning, preparation, initiation, or waging of a war of aggression' were defined as crimes against peace. On that basis, in the Nuremberg Judgment of 1946, the IMT proclaimed: 'To initiate a war of aggression … is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole' (IMT at 186; → International Military Tribunals). This was in many respects an innovation at the time. It may therefore be added that the sole Nuremberg defendant convicted exclusively of crimes against peace was Hess, who was sentenced to life imprisonment. Eleven other defendants were also convicted of crimes against peace—Göring, Ribbentrop, Keitel, Rosenberg, Frick, Funk, Dönitz, Raeder, Jodl, Seyss-Inquart, and Neurath—yet, they were all found guilty also of traditional → war crimes, so that arguably they would have paid the price of capital punishment or imprisonment regardless.

4 The Nuremberg criminalization of a war of aggression was upheld, in 1948, by the International Military Tribunal for the Far East ('IMTFE') at Tokyo. For its part, the IMTFE convicted no fewer than 23 defendants (headed by Tojo) of crimes against peace. The Nuremberg precedent was also followed in other trials against criminals of World War II ('WWII'), most conspicuously by an American Military Tribunal in the *Ministries Case* of 1949, part of the 'Subsequent Proceedings' at Nuremberg.

5 It is clear from the WWII case-law that individual liability for crimes against peace can only be incurred by high-ranking persons: leaders and policymakers, whether military or civilian. This is not to say that penal responsibility for crimes against peace is reduced, even in a dictatorship, to one or two individuals at the pinnacle of power. As an American Military Tribunal in the Subsequent Proceedings *High Command Case* phrased it: 'No matter how absolute his authority, Hitler alone could not formulate a policy of aggressive war and alone implement that policy by preparing, planning and waging such a war' (at 486). The tribunal declined to fix a distinct line, somewhere between the Private soldier and the Commander-in-Chief, where liability for crimes against peace begins. But it is clear from the judgment that criminality is contingent

on the actual power of an individual 'to shape or influence' the policy of his or her country (*High Command Case* 488; → Command Responsibility). Those acting as instruments of the policymakers 'cannot be punished for the crimes of others' (*High Command Case* 489). The limitation of individual accountability for the crime of aggression to leaders or organizers is also embedded in the 1996 text of Art. 16 Draft Code of Crimes against the Peace and Security of Mankind (UN ILC [1996] GAOR 51st Session Supp 10, 9).

6 No indictment for crimes against peace has followed the multiple armed conflicts of the post-WWII era. The idea of charging Saddam Hussein with the crime of waging a war of aggression against Kuwait was advanced by scholars in the early 1990s (→ Iraq-Kuwait War [1990–1]). However, after his apprehension in the final phase of the Gulf War, Saddam Hussein was tried and convicted by Iraqi courts for other crimes. Crimes against peace do not come within the jurisdiction of the *ad hoc* International Criminal Tribunals for the Former Yugoslavia and Rwanda. Only in 1998, upon the conclusion of the Statute of the International Criminal Court ('Rome Statute'), did the crime of aggression truly come back into the international legal arena (see below). Nevertheless, as pronounced by the UK House of Lords in the *R v Jones* case of 2006, the 'core elements' of the crime of aggression have not lost their punch since Nuremberg: 'it is unhistorical to suppose that the elements of the crime were clear in 1945 but have since become in any way obscure' (Lord Bingham, para. 12).

B. The Charter of the United Nations

7 The 1945 Charter of the United Nations adverts to aggression in two places. The most significant reference is in Art. 39 UN Charter (opening Chapter VII), which sets forth: 'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken … to maintain or restore international peace and security'. The other place where the term aggression appears in the UN Charter is in Art. 1 (1), enumerating the Purposes of the United Nations, including the taking of 'effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace'. There is also a reference to 'regional arrangements directed against renewal of aggressive policy' on the part of enemy States of WWII in Art. 53 (1) UN Charter, but this is a technicality and in any event, by now, an anachronism. Conspicuously, in Art. 51 UN Charter—recognizing the right of → self-defence—the focus is on response to an 'armed attack', not aggression, although, in the French authentic text, the expression 'armed attack' is rendered as armed aggression 'agression armée' (→ Armed Attack).

8 Thus, in the only two places where aggression is mentioned in the UN Charter, this is done jointly with threat to the peace and breach of the peace (→ Peace, Breach of; → Peace, Threat to). The place of aggression in the triple scheme is not entirely clear. From the phraseology of Art. 1 (1) UN Charter ('acts of aggression or other breaches of the peace') it follows that aggression is linked to breach of the peace, rather than threat to the peace. There is a view that the order of the three terms in Art. 39 ('threat to the peace, breach of the peace, or act of aggression') is progressive, and thus aggression is the most egregious act. But, if so, it is not easy to explain the difference in the French (authentic) text between 'agression' in Art. 39 UN Charter and 'agression armée' in Art. 51 UN Charter.

9 A determination of the existence of 'any threat to the peace, breach of the peace, or act of aggression' by the UN Security Council may carry far-reaching consequences, including binding decisions leading to mandatory or authorized enforcement action against a State. Nevertheless, over a period of more than 60 years—while the UN Security Council has determined in a host of instances, especially since the end of the Cold War, the existence of a threat to the peace, and in a handful of instances a breach of the peace—the UN Security Council has never made a formal finding that aggression in the sense of Art. 39 UN Charter has occurred. In the past, the phrase 'acts of aggression' appeared descriptively in several texts of UN Security Council resolutions. Most repeatedly, this happened in the case of South African incursions into → Angola in the 1980s: UNSC Resolution 475 (1980) of 27 June 1980 (SCOR 35th Year 21), UNSC Resolution 546 (1984) of 6 January 1984 (SCOR 39th Year 1), UNSC Resolution 567 (1985) of 20 June 1985 (SCOR 40th Year 16) etc. But, typically, in UNSC Resolution 602 (1987) of 25 November 1987 (SCOR

42nd Year 12), it was stated that 'the pursuance of these acts of aggression against Angola constitutes a serious threat to international peace and security'. In any event, there is little use of similar terminology in more recent decisions.

10 The UN General Assembly has used the term aggression more often in its resolutions. However, the UN General Assembly has no Chapter VII UN Charter powers, and it cannot fulfil the tasks of the UN Security Council, even when the latter is paralysed by dint of the use, actual or potential, of the → veto power of the Permanent Members. When the UN General Assembly tries to encroach upon the competence of the UN Security Council, as it does sporadically, this usually meets with protests by Permanent Members, and it cannot be deemed to be in conformity with the UN Charter.

11 The UN Security Council is vested by the UN Charter with virtually unlimited discretion to determine in what exact circumstances 'any threat to the peace, breach of the peace, or act of aggression' has occurred. The powers conferred on the UN Security Council pursuant to Chapter VII UN Charter—as to the choice of measures that it wishes to take—are vast, and they include enforcement measures. What has to be emphasized here is that these powers are identical, regardless of whether they are triggered by aggression, breach of the peace, or threat to the peace. Given the UN Security Council's free hand, and the irrelevance of the choice between the three alternative phrases, there is no imperative need for the UN Security Council to determine specifically that aggression has been perpetrated. No matter what the exact classification of State activities examined by the UN Security Council is—as long as they can be categorized as either aggression or a breach of the peace, or indeed a threat to the peace—the UN Security Council is authorized to set in motion exactly the same measures.

12 Aggression was defined neither by the framers of the League Covenant, nor by those of the UN Charter. Some definitions of aggression were adopted in bilateral treaties, pre-eminently in the London Conventions for the Definition of Aggression concluded by the USSR with neighbouring countries in 1933 (Convention for the Definition of Aggression [signed 3 July 1933, entered into force 16 October 1933] 147 LNTS 67). But, for decades, attempts to adopt a general definition of aggression were frustrated, both in the days of the League of Nations and in the UN era. Finally, in 1974, the UN General Assembly adopted a Definition of Aggression in a consensus resolution (UNGA Res 3314 [XXIX] [14 December 1974]; 'Definition of Aggression').

C. The General Assembly Definition of Aggression

1. The Thrust of the Definition

13 Art. 5 (2) of the consensus Definition of Aggression differentiates between aggression, which 'gives rise to international responsibility', and war of aggression, which is 'a crime against international peace'. The drafters of the Definition of Aggression thereby signalled clearly that not every act of aggression constitutes a crime against peace: only war of aggression does. That is to say, an act of aggression short of war—as distinct from a war of aggression—would not result in individual criminal responsibility, although it would bring about the application of general rules of → State responsibility.

14 While Art. 5 (2) Definition of Aggression pronounces war of aggression to be a crime against international peace, the definition as a whole is not focused on criminal accountability. UNGA Resolution 3314 (XXIX) of 14 December 1974, to which the Definition of Aggression is annexed, makes it plain that the primary intention was to recommend the text as a guide to the UN Security Council—an intention that, as will be seen below, missed its mark). The perspective was thus non-criminal.

2. Aggression in General

15 The UN General Assembly utilized the technique of a composite definition, combining general and specified elements: the Definition of Aggression starts with an abstract statement of what aggression means, and then adds a non-exhaustive list of illustrations. The general part of the Definition of Aggression is embodied in Art. 1:

> Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.

In an explanatory note, the framers of the Definition of Aggression commented that the term 'State' includes non-UN members, embraces a group of States, and is used without prejudice to questions of → recognition.

16 Art. 1 Definition of Aggression repeats the core of the wording of Art. 2 (4) UN Charter, which promulgates: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'. But a comparison between the two texts shows that there are a number of variations: (i) the mere threat of force is excluded; (ii) the adjective 'armed' is interposed before the noun 'force'; (iii) 'sovereignty' is mentioned together with the territorial integrity and the political independence of the victim State; (iv) the victim is described as 'another' rather than 'any' State; (v) the use of force is forbidden whenever it is inconsistent with the UN Charter as a whole, and not only with the Purposes of the UN; (vi) a linkage is created with the rest of the Definition of Aggression. Some of these points are of peripheral significance, others are of greater consequence. The cardinal divergence from Art. 2 (4) UN Charter is the first point: the threat of force per se does not qualify as aggression, since an actual use of armed force is absolutely required.

17 Art. 5 (1) Definition of Aggression states that '[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression'. This clause underscores that the motive does not count: even a good motive does not detract from an act constituting aggression.

18 There is no allusion in the Definition of Aggression to any necessary aggressive intent on the part of the aggressor State. The intent is usually inferred from the action taken by the State, rather than the reverse. Moreover, there are complex situations in which a minor incident between States flares up into a full-fledged war—as a result of escalation and counter-escalation—in circumstances that defy any attempt to ascribe an intent to the country that, upon close examination of the facts, is branded as the aggressor.

19 Art. 6 Definition of Aggression adds a proviso that '[n]othing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful'. It goes without saying that, in any instance of divergence between the two, the UN Charter trumps the Definition of Aggression. But this is a useful reminder that no aggression can take place if, and as long as, a State is acting in lawful self-defence under Art. 51 UN Charter, or pursuant to a binding decision of the UN Security Council.

20 The most controversial stipulation in the Definition of Aggression is that of Art. 7, whereby the text is without prejudice to the right to → self-determination and the right of 'peoples under colonial and racist regimes or other forms of alien domination' not only 'to struggle to that end', but also 'to seek and receive support in accordance with the principles of the Charter'. Yet, the specific reference to the UN Charter, in addition to the general caveat in Art. 6 Definition of Aggression and to the fact that all UN General Assembly resolutions must be consistent with the UN Charter, is a clear indication that the right to receive—and presumably to give—support from the outside for a war of 'national liberation' is subordinated to the UN Charter. The UN Charter does not permit the use of inter-State force, except in the exercise of self-defence or pursuant to a binding decision of the UN Security Council. An interpretation of Art. 7 Definition of Aggression as a licence for one State to use force against another, in support of the right of a people to self-determination but in circumstances exceeding the bounds of self-defence or enforcement action decided by the UN Security Council, is irreconcilable with the UN Charter.

21 Art. 2 Definition of Aggression sets forth: 'The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression', but the UN Security Council may determine otherwise 'in the light of other relevant circumstances'. The possibility of appraising these other relevant circumstances leaves a broad margin of appreciation of the factual background. When all the circumstances are fully evaluated, it may turn out that the prima facie evidence is of little consequence. A case in point, consistent with Art. 3 (e) Definition of Aggression, see below, would be the extended presence of foreign troops within the territory of a State beyond the temporal limit of consent to such presence. If the foreign troops are not pulled out when consent is terminated, and fire is opened on them with a view to compelling their withdrawal from the

local territory, these first shots will not constitute aggression.

22 The 'other relevant circumstances' referred to in Art. 2 Definition of Aggression also include 'the fact that the acts concerned or their consequences are not of sufficient gravity'. This is an apposite *de minimis* clause, which cautions against any attempt to use a trifling incident as an excuse for a major armed conflict. A few stray bullets fired across a border, not causing injury to human beings or damage to property, cannot be invoked as an act of aggression.

3. The Specifics of Aggression

23 The linchpin of the Definition of Aggression is Art. 3, which enumerates specific acts of aggression. Under Art. 3 Definition of Aggression, the following acts amount to aggression 'regardless of a declaration of war':

a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
c) The blockade of the ports or coasts of a State by the armed forces of another State;
d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

24 Art. 3 (g) was pronounced by the International Court of Justice (ICJ) in the → Military and Paramilitary Activities in and against Nicaragua Case (*Nicaragua v United States of America*) (Merits) ('*Nicaragua Case*') of 1986 to be declaratory of customary international law (at para. 195). But here is a prime example of a definition, which on the face of it is detailed, requiring further amplification. The ICJ, while actually addressing the issue of an armed attack, did 'not believe' that 'assistance to rebels in the form of the provision of weapons or logistical or other support' qualified (ibid.). This is a rather sweeping statement. In his Dissenting Opinion, Judge Jennings expressed the view that, whereas 'the mere provision of arms cannot be said to amount to an armed attack', it may qualify as such when coupled with 'logistical or other support' (*Nicaragua Case [Dissenting Opinion of Judge Jennings]* at 543). In another dissent, Judge Schwebel stressed the words 'substantial involvement therein' (appearing in Art. 3 (g) Definition of Aggression), which are incompatible with the language used by the majority (*Nicaragua Case [Dissenting Opinion of Judge Schwebel]* para. 176).

25 Whereas Art. 3 (g) Definition of Aggression alone has been held by the ICJ to be an embodiment of customary international law, other portions of Art. 3 Definition of Aggression may equally be subsumed under the heading of true codification. Thus, irrefutably, an outright invasion covered by Art. 3 (a) Definition of Aggression constitutes an act of aggression in keeping with customary law. This is strongly supported by the Separate Opinion of Judge Simma in the *Armed Activities on the Territory of the Congo Case ([Separate Opinion of Judge Simma]* para. 3).

26 Whatever the legal status of its sundry paragraphs, Art. 3 Definition of Aggression was not intended to cover the entire spectrum of aggression. According to Art. 4 Definition of Aggression, the acts inscribed in Art. 3 Definition of Aggression do not exhaust the definition of that term, and the UN Security Council may determine what other acts are tantamount to aggression. This open-ended nature of the Definition of Aggression—leaving a lot of latitude to the UN Security Council—was actually a key to the adoption of the text by consensus.

27 There is no doubt that the specifics of the Definition of Aggression do not encompass every possible angle of aggression. Thus, the interaction between aggression and self-defence is not fully examined in the Definition of Aggression. The issue arises, in particular, because under Art. 51 UN Charter the right of self-defence can be exercised 'collectively', ie by third States (→ Self-Defence, Collective). Surely, State C is allowed to come to the assistance of State B, the victim of armed attack, but not to that of State A, the aggressor. Assistance to State A may itself qualify as an armed attack against State B. By the same token, if State C sends troops into the territory of State B without being asked to do so, State C itself may be branded as an aggressor. All the same, the commission of an act of aggression by State C vis-à-vis State B does not diminish from the previous act of aggression by State A against State B. Hence, State C may simultaneously be acting as the aggressor towards State B, and the protagonist of collective self-defence against State A. There are other plausible scenarios along similar lines.

28 A question of increasing practical importance in recent years—not addressed in the Definition of Aggression—is whether a State can be regarded as an aggressor when it assists paramilitaries in actions against another State that do not come within the purview of Art. 3 (g) Definition of Aggression. The issue has not yet been thoroughly explored in the case-law, although some illuminating remarks have been made by Judge Kooijmans in *Armed Activities on the Territory of the Congo Case ([Separate Opinion of Judge Kooijmans]* paras 29–35).

29 An issue that did arise in the *Nicaragua Case* was the 'degree of dependence on the one side and control on the other' that would equate hostile paramilitary groups with organs of the foreign State (para. 109). The ICJ held that what is required is 'effective control' of the operation by that State (para. 115). The Appeals Chamber of the ICTY, in the → Tadić Case of 1999, sharply contested the *Nicaragua Case* test of 'effective control', maintaining that it is inconsonant with logic and with law (paras 115–45). The ICTY Appeals Chamber thought that the degree of control may vary according to circumstances, and that acts performed by members of a paramilitary group organized by a foreign State may be considered 'acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts' (para. 137). The ICTY focused on the subordination of the group to overall control by the foreign State: that State does not have to issue specific instructions for the direction of every individual operation, nor does it have to select concrete targets (ibid.). Paramilitaries can thus act quite autonomously and still remain *de facto* organs of the controlling State, which can be stigmatized as the aggressor.

30 The ICJ came back to the subject at some length in the *Genocide Case* of 2007, where the previous (*Nicaragua*) position was basically endorsed and the *Tadić* criticism rejected, although the Court conceded that the *Tadić* approach might be apposite in some contexts (paras 402–6). The International Law Commission relied on the *Nicaragua* 'effective control' test in Art. 8 of the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, even though it too noted that the *Nicaragua* high threshold for the test of control is not required in every instance. It is doubtful, however, that the matter may be viewed as settled.

31 Can acts of aggression be perpetrated by non-State actors operating on their own, there being no complicity by any State? The possibility is not raised in the Definition of Aggression. However, it is noteworthy that in UNSC Resolution 419 (1977) of 24 November 1977 (SCOR 32nd Year 18)—one of those old resolutions in which the coinage acts of aggression were employed—the UN Security Council referred to these acts as committed by → mercenaries against the State of Benin, without any suggestion that any other State was involved. Since the outrage of 11 September 2001, it has become evident that an armed attack can be mounted by a terrorist organization. The UN Security Council recognized the right of self-defence in this context (UNSC Res 1368 [2001] [12 September 2001] SCOR [1 January 2001–31 July 2002] 290; UNSC Res 1373 [2001] [28 September 2001] SCOR [1 January 2001–31 July 2002] 291). There is admittedly a dictum in the 2004 → Israeli Wall Advisory Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory) that throws some doubt on the issue. But this has been vigorously criticized by several of the Judges, as well as many scholars. It is today quite obvious that aggression can

be committed by non-State actors, regardless of the involvement of any foreign State.

4. The Usefulness of the Definition

32 The reality is that the UN Security Council—for whose benefit the UN General Assembly Definition of Aggression was crafted—has ignored it altogether. At least in part, the reason is that the UN Security Council does not feel that it needs to be told what legal standards or criteria it should follow in assessing acts of aggression. But the issue is more profound. The UN Security Council is a political, not a judicial, body. For a resolution to be adopted by the UN Security Council, especially a Chapter VII UN Charter resolution, it is necessary to surmount political hurdles in forging the required majority chiefly, but not exclusively, by eliminating the prospect of a veto by a Permanent Member. The UN Security Council may have to hammer out a compromise, or decline to take action, regardless of legal dimensions of the issue. The availability of a definition of aggression is not the leading consideration in behind-the-scenes political negotiations.

33 In fact, a paradox is latent in the UN General Assembly's Definition of Aggression. Inasmuch as the UN Security Council does not rely on it, its usefulness is not apparent where aggression is concerned. But, since the Definition of Aggression is confined to armed aggression—which is the equivalent of an armed attack (see above)—in practice the specific acts listed in Art. 3 Definition of Aggression are treated as manifestations of an armed attack. Consequently, the context in which the Definition of Aggression is largely cited in State practice, in the case-law, and in the legal literature is not the Chapter VII UN Charter setting for which it was designed but the sphere of self-defence permitted under Art. 51 UN Charter only in response to an armed attack (see above). It is no accident that the *Nicaragua Case*, in which the ICJ gave its imprimatur to Art. 3 (g) Definition of Aggression as a reflection of customary law, dealt with the Definition of Aggression in the context of self-defence. The question as to what amounts to aggression in the Chapter VII UN Charter, as distinct from the Art. 51 UN Charter sense—and whether aggression in that sense is conceivable in circumstances not amounting to an armed attack—has not yet received an authoritative answer.

D. The Rome Statute of the International Criminal Court and the Kampala Amendments

34 The most practical use of the General Assembly's Definition of Aggression, so far, has been in the sphere of international criminal law, notwithstanding the fact that the original perspective of the framers of the text was non-criminal (see above).

35 Art. 5 Rome Statute confers on the ICC subject-matter jurisdiction with respect to → genocide, → crimes against humanity, war crimes, and the crime of aggression. However, unlike genocide, crimes against humanity, and war crimes, the crime of aggression was not defined in the original Rome Statute. Art. 5 (2) Rome Statute deferred action to a future time:

> The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

36 Arts 121 and 123 Rome Statute pertain to amendment and review procedures commencing seven years after the entry into force of the Rome Statute. In accordance with Art. 121 (5) Rome Statute, once an amendment to Art. 5 Rome Statute has been adopted, any State Party may refuse to accept the amendment, in which case 'the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory'. The proviso also applies to the review procedure under Art. 123 (3) Rome Statute. This safeguard was added in order to allay misgivings of contracting parties about possible future trends relating to the configuration of the crime of aggression.

37 The Rome Statute entered into force in 2002, and the Review Conference took place in Kampala in 2010. Art. 5 (2) Rome Statute was deleted and a new Art. 8 *bis*—defining the crime of aggression—was inserted in the Statute. The substance of the definition of 'acts of aggression' reiterates word-for-word the text (quoted above) appearing in Art. 3 of the General Assembly's Definition of Aggression.

38 Two new clauses were inserted into the Rome Statute in Kampala: Art. 15 *bis* (dealing with referral of cases to the Court by a State or *proprio motu*

investigations initiated by the Prosecutor) and Art. 15 *ter* (relating to referral by the Security Council) impose a number of extremely important caveats on the exercise of jurisdiction by the Court. Most significantly, Common Paragraph 3 of Arts 15 *bis* and 15 *ter* defers the Court's exercise of jurisdiction over the crime of aggression until another decision is taken—by two-thirds of the States Parties—subsequent to 1 January 2017.

39 Common Paragraph 2 of Arts 15 *bis* and 15 *ter* proclaims that '[t]he Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties'. Thus, a minimum number of ratifications or acceptances is set as a condition precedent to the activation of the Court's jurisdiction over the crime of aggression. But this does not indicate that, once the prescribed number of ratifications is arrived at, the jurisdiction of the Court may be exercised over non-ratifying States Parties. Such an expansive interpretation of Common Paragraph 2 would be incompatible with Art. 121 (5), whereby any amendment to Art. 5 would only enter into force for those States Parties that have ratified or accepted it. In any event, under para. 4 of Art. 15 *bis*, there is an opt-out mechanism enabling any State Party to declare that it does not accept the Court's jurisdiction over the crime of aggression. Additionally, in conformity with para. 5 of Art. 15 *bis*, the Court shall not exercise its jurisdiction over the crime of aggression when committed on the territory—or by nationals—of a State that is not a Party to the Statute.

40 Pursuant to para. 6 of Art. 15 *bis*, before the Prosecutor proceeds with an investigation in respect of the crime of aggression, it is necessary to ascertain whether the Security Council has determined that an act of aggression by the State concerned has been committed. If no such determination has been made, the Security Council may always—in accordance with a procedure established in Art. 16 of the original Rome Statute—bring about a deferral of the investigation for a year, and the deferral may be renewed.

41 The Kampala decision to postpone the exercise of the Court's jurisdiction over the crime of aggression (see above)—just like the original inability at Rome to define the crime (see above)—reflects practical discords that have not yet been put to rest. However, it is beyond dispute (especially after Kampala) that, in principle, the international community considers aggression to be a crime under existing international law.

42 Although the Kampala text follows faithfully in the footsteps of the text of the UN General Assembly Definition of Aggression in setting out a list of acts of aggression, it adds in Art. 8 *bis*, para. 1, important qualifying words where crimes of aggression are concerned:

> For the purpose of this Statute, 'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

43 Three observations are called for in this context:

(a) The crime of aggression (by an individual) is linked to an act of aggression (committed by a State). Thus, a non-State actor—acting on his own or on behalf of an organized armed group—cannot commit the crime of aggression under the revised Statute.

(b) Clearly, as defined, the crime of aggression is a leadership crime.

(c) Although, on the face of it, there is a difference between a 'crime of aggression' (the Rome term and the subject of the Kampala amendments) and a 'war of aggression' (the subject of the Nuremberg trial), in reality the required conditions of 'character, gravity and scale' (which are conjunctive)—and the reference to 'a manifest violation of the Charter of the United Nations'—ensure that only a full-fledged aggressive war (as distinct from an act of aggression short of war) is caught in the criminal net.

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Air Defence Identification Zones

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A. Concept and Definitions

1 An Air Defence Identification Zone ('ADIZ') is a defined area of → airspace within which civil aircraft are required to identify themselves. These zones are established above the → exclusive economic zone ('EEZ') or → high seas adjacent to the coast, and over the → territorial sea, → internal waters, and land territory. The legal basis for such zones is the right of States, under the Convention on International Civil Aviation of 1944 (→ Chicago Convention [1944]), to establish conditions and procedures for entry into their national airspace, ie, the airspace over their territory, territorial sea, and in the case of an archipelagic → State, over its → archipelagic waters (see para. 13 below). A declaration of an ADIZ does not constitute a claim of sovereign rights (→ Sovereignty). Accordingly, an aircraft approaching national airspace can be required to identify itself while seaward thereof in international airspace as a condition of entry approval.

2 An ADIZ is separate from a Flight Information Region ('FIR'). A FIR is a specified region of airspace in which a flight information service and an alerting service ('ALRS') are provided. The → International Civil Aviation Organization (ICAO) has divided the world into zones ('Air Navigation Regions') for the purpose of assisting and controlling civil aircraft to ensure safety of navigation. Each zone is subdivided into both FIRs and areas of 'controlled airspace'. FIRs may embrace both national and international airspace. FIRs are delimited by Regional Air Navigation Agreements which are subject to the approval of the ICAO Council. These agreements are concluded in the framework of the Regional Conferences on Air Navigation. The Chicago Convention, its Annexes, and FIRs do not apply to State, including military, aircraft (Art. 3 Chicago Convention).

B. Historical Evolution of Legal Rules

3 Arts 1 and 2 Convention on the Territorial Sea and the Contiguous Zone ([done 29 April 1958, entered into force 10 September 1964] 516 UNTS 205) provide that the sovereignty of a coastal State extends beyond its land territory and internal waters, to an adjacent belt of sea described as the territorial sea, and that this sovereignty extends to the air space over the territorial sea. Art. 2 UN Convention on the Law of the Sea (→ Law of the Sea) confirms this rule and extends it, in the case of an archipelagic State, to its archipelagic waters. Under both treaties, aircraft do not enjoy the right of → innocent passage over the territorial sea. Art. 2 (4) Convention on the High Seas ([done 29 April 1958, entered into force 30 September 1962] 450 UNTS 11) provides that all States have the 'freedom to fly over the high seas'. Art. 87 (1) (b) UN Convention on the Law of the Sea confirms that all States, both coastal and land-locked (→ Land-Locked States), as part of the freedom of the high seas, have freedom of → overflight of the high seas. Both treaties provide that these freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas. Art. 58 (1) UN Convention on the Law of the Sea provides that all States have freedom of overflight over the EEZ. Art. 58 (3) UN Convention on the Law of the Sea imposes a similar due regard obligation on them.

4 Art. 12 Chicago Convention provides in part that for aircraft flying over the high seas, the rules in force shall be those established under the Chicago Convention. Individual States have taken unilateral action with substantial practical effect on aircraft flying over the high seas (→ Unilateral Acts of States in

International Law): temporary restrictions on the use of defined danger areas over the high seas (→ Safety Zones; → Security Zones), and extension of traffic control, or air traffic identification, by a coastal State to areas adjacent to, but outside that State's territorial airspace. Art. 11 Chicago Convention expressly recognizes the right of each State to establish laws and regulations relating to the admission to or departure from its territory of aircraft engaged in international air navigation (→ Air Law).

5 However, for safety and national defence purposes, aircraft operating in airspace adjacent to a State but not intending to enter that State's airspace have been required to comply with identification and control procedures similar to those imposed by the adjacent State on aircraft intending to enter its airspace.

C. Current Legal Situation

6 There are no treaty provisions governing the establishment or operation of ADIZs per se. States that have established standing ADIZs include Canada, France, Japan, Republic of Korea, the United States, and Indonesia (over Java). Australia has, from time to time, declared an ADIZ for military exercise purposes. These unilateral claims have not been objected to and it may be presumed that the right to declare an ADIZ is now recognized as a right under → customary international law.

D. Special Problems

7 ADIZ regulations promulgated by the States apply to aircraft bound for their territorial airspace and require the filing of flight plans and periodic position reports. The coastal State has no right to require a foreign aircraft to identify itself or otherwise to apply its ADIZ procedures if it does not intend to enter national airspace.

8 Failing voluntary identification, an aircraft can be expected to be identified by interceptor aircraft, and not be fired upon as a Soviet fighter aircraft did on 1 September 1983 against Korean Airline flight 007 when it strayed into Soviet airspace (→ Korean Air Lines Incident [1983]). As a result of this incident, Art. 3 *bis* Chicago Convention was adopted in 1984 (Protocol relating to an Amendment [Article 3 *bis*] to the Convention on International Civil Aviation) and the procedures for identification of civil aircraft have been set out in an attachment to the International Civil Aviation Organization Rules of the Air in implementation of Art. 3 *bis* Chicago Convention ('Attachment A: Interception of Civil Aircraft' in Annex 2 to the Convention on International Civil Aviation: International Standards and Recommended Practices-Rules of the Air [ICAO 10th edn Montreal 2005] ATT A-1).

9 The declaration of an ADIZ does not confer on an intercepting pilot the right to engage an aircraft. The international law of → self-defence (→ Self-Defence, Anticipatory) and national rules of engagement will provide guidance on the circumstances in which an aircraft may be engaged in peacetime.

10 It should be emphasized that the foregoing contemplates a peacetime or non-hostile environment. In the case of imminent or actual hostilities, a State may find it necessary to take measures in self-defence that will affect overflight in international airspace (→ Air Warfare).

11 The International Civil Aviation Organization ('ICAO') has considered whether the Chicago Convention should be amended to take into account developments in the law of the sea, including recognition of the status of the airspace over certain archipelagic waters as national airspace wherein foreign aircraft have the right of archipelagic sea lanes passage over archipelagic sea lanes. In its 1987 study of the implications of the UN Convention on the Law of the Sea on the Chicago Convention (ICAO Legal Committee, Secretariat Study 'United Nations Convention on the Law of the Sea: Implications, if any, for the Application of the Chicago Convention, its Annexes and other International Law Instruments' [ICAO document C-WP/7777 done 1984, reproduced 1987 as Working Paper LC/26-WP/5-1] reprinted in [1987] 3 NILOS Yearbook 243 para. 10.8) and other international air law instruments, the ICAO Secretariat concluded that there was no need for a textual amendment of the Chicago Convention, that Art. 2 Chicago Convention will have to be read as meaning that the territory of a State shall be the land areas, territorial sea adjacent thereto and its archipelagic waters. In 2008 the ICAO's Legal

Committee considered an Indonesian proposal to amend Art. 2 Chicago Convention to recognize the archipelagic State's sovereignty over its archipelagic waters and superjacent airspace (ICAO Legal Committee, 'Proposal to Amend Article 2 of the Chicago Convention' [Working Paper LC/33-WP/4-7 ICAO Legal Committee 17 April 2008]). At the recommendation of the ICAO Legal Committee at its 33rd session, the ICAO Council decided that, as the rights of aircraft in designated air routes were not impinged upon, no amendment to Art. 2 Chicago Convention was necessary.

E. Significance

12 The evolution of ADIZs since World War II has been a natural outcome of the growth in capabilities of aircraft, especially their speed that materially reduces coastal State reaction time to perceived threats. The balance of interests now reflected in the rules governing the operation of ADIZs and interception of aircraft is likely to be maintained in the foreseeable future, except in those geographic areas where the political and defence interests of States with national airspace contiguous to international airspace are not in harmony, eg → China and → Taiwan (see also → Straits, International).

13 In December 2007 China announced its intention to designate an ADIZ within the Taiwan Strait, and to begin a new air route on the Chinese side of, but close to, the median line. The authorities on Taiwan responded that this plan would undermine the stability in the strait and international aviation safety. Chinese authorities subsequently denied having such a plan.

14 Effective 10:00 am, 23 November 2013, China declared an ADIZ covering much of the East China Sea, overlapping the Taiwan, Japanese, and South Korean ADIZs and including the disputed → Senkaku/Diaoyu Islands and the submerged rock Socotra/Ieodo claimed by South Korea and China. Accompanying the government statement announcing the ADIZ was the Ministry of National Defense ('MND') announcement of Aircraft Identification Rules for the East China Sea ADIZ. Unlike other ADIZ rules, the Chinese rules apply to all aircraft flying in the ADIZ, requiring them to report flight plans to the MFA or the Chinese CAA and identify themselves to the MND. The rules also state that 'China's armed forces will adopt defensive emergency measures to respond to aircraft that do not cooperate in the identification or refuse to follow instructions.' Unlike other ADIZ rules, the rules make no exception for aircraft not intending to enter Chinese national airspace. Further, unlike other ADIZs, the rules do not distinguish between civil and state aircraft. Japan, Korea, Australia, and the United States promptly protested these Chinese actions. While China is free to intercept aircraft in flight in its ADIZ, it must do so in accordance with the international procedures described above. Any threat or use of force against aircraft exercising their high seas freedom of overflight would be unlawful. On 28 November 2013 a PLA spokesman said the ADIZ was neither a no-fly zone nor territorial airspace and that it was incorrect to suggest China would shoot down planes within the zone. In response Japan and South Korea extended their ADIZs.

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Air Warfare

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A. Introduction

1 The law of air warfare is an integral part of the international law of armed conflict (→ Armed Conflict, International). Whereas land and sea warfare have beset mankind since time immemorial, air warfare began to develop only recently. Its dawn was the introduction of balloons in the 19th century. But it was the first flight of the aeroplane, at the onset of the 20th century, that revolutionized warfare. World War I was the first armed conflict to reveal the far-reaching potential inherent in mastering air warfare. World War II and subsequent armed conflicts have shown that, in actuality, air warfare can be the most crucial—as well as the most devastating—form of hostilities between belligerent parties. The Kosovo Air Campaign of 1999 demonstrated that, in certain circumstances, war can be won from the air alone (→ Kosovo).

2 Much of the law of air warfare has consolidated as an offshoot of analogies drawn from the law of land and sea warfare (→ Naval Warfare). Yet, it has become quite clear—at least since World War II—that such analogies are often inadequate, inasmuch as conditions of air warfare differ radically from those prevailing

on land and at sea. The high speed, the vast space, and the state-of-the-art sophistication of air warfare invited the development of rules that respond to the challenges of this new pattern of combat.

3 Accordingly, customary international law (to wit, general State practice accepted as law) has come up in the last few decades with numerous norms adapted to the specific circumstances of air warfare. No similar progress has occurred in treaty law, which only sporadically alludes to air warfare as such. Possibly, this is due to over-hasty and unrealistic endeavours to cope with air warfare by treaty in an earlier period. The First International Peace Conference, held at The Hague in 1899, adopted a Declaration (constituting a treaty) to Prohibit for the Term of Five Years the Launching of Projectiles and Explosives from Balloons, and Other Methods of a Similar Nature. The Second Peace Conference at The Hague, in 1907, reiterated the interdiction—for a period extending up to the close of the Third Peace Conference (which was supposed to have been held eight years later, namely, in 1915)—in a Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons. The Third Peace Conference was never convened, owing to the outbreak of the World War I in 1914. In any event, only a few States ratified the Declaration, either in its first or second version. Moreover, no belligerent party observed its provisions in the course of World War I or any subsequent armed conflict, and it may be regarded as a dead letter. No further quixotic attempts to exclude air bombardments altogether have been made since 1907.

4 The lesson learnt from the initial failure seems to have been a deep-rooted reluctance to confront the broad issues of air warfare in treaty law. Only a few specific aspects have been selected for regulation in a binding fashion by *ius scriptum*. Thus, medical aircraft are dealt with in Geneva Conventions (I) and (II) of 1949 (→ Geneva Conventions I–IV [1949]), as well as in → Geneva Conventions Additional Protocol I (1977) (see, eg, para. 11). The Additional Protocol also accords protection to occupants of aircraft in distress when they are parachuting for safety (see para. 54), and it includes some provisions that are of particular significance in air warfare (see, eg, the issue of 'target area' bombings, para. 22). Later treaty clauses relate to air-delivered incendiaries, land mines, and cluster munitions (see paras 59–62). This still leaves out of the spectrum of treaty law most of the legal regime of air warfare.

5 To fill the vacuum in the *ius scriptum*, non-binding, albeit authoritative, restatements of the law of air warfare have been twice crafted by independent experts. The first restatement was produced in 1923, in the Hague Rules of Air Warfare (General Report of the Commission of Jurists of the Hague Part II: Rules of Aerial Warfare)—drawn up by a Commission of Jurists, established in 1922 by the Washington Conference on the Limitation of Armament. This non-treaty text has had a lot of impact on the subsequent evolution of the law of armed conflict (for an example, see paras 16 and 59), although it must be borne in mind that it was formulated at a time when air warfare was in its infancy.

6 It took 80 years until a fresh effort was made to prepare an informal restatement of the law of air warfare, as reflected in general State practice in the first decade of the 21st century. The outcome is a Manual on International Law Applicable to Air and Missile Warfare, formulated by an independent Group of Experts (directed by the author of this entry), under the imprimatur of the Program on Humanitarian Policy and Conflict Research at Harvard University ('HPCR'). The new Manual, adopted by consensus after consultations with representatives of most of the leading States in the sphere of air warfare, was formally launched in Brussels in March 2010. There are 175 Black-letter Rules, accompanied by a detailed Commentary produced by a Drafting Committee. Much of the present entry will be based on these up-to-date texts.

B. The Different Types of Aircraft

7 Air warfare relates to hostilities conducted during armed conflict by or against aircraft. The term 'aircraft' must be understood in a comprehensive manner. Aircraft are defined as deriving their support in the atmosphere from the reactions of the air. They may have either fixed or rotary wings (helicopters), and they encompass blimps as well as unmanned aerial vehicles ('UAVs').

8 Military aircraft are all those aircraft (manned or unmanned) that are operated by the armed forces of a State and bear its military markings. In definitional

terms, it does not matter whether military aircraft are armed or unarmed. Air transports, air tankers, and other auxiliary aircraft come under the same rubric as fighter planes or bombers. The principal feature of military aircraft is that they are the only type of aircraft entitled to engage in hostilities between the belligerent parties.

9 → State aircraft are not confined to military aircraft. They also include other aircraft owned or used by a State for a variety of purposes such as law enforcement, customs, and weather analysis. Non-military State aircraft cannot engage in hostilities.

10 Civilian aircraft are neither military nor State aircraft. The definition is negative and far-ranging. It embraces all private aircraft with fixed or rotary wings and even UAVs used as toys. In conformity with the basic principle of distinction, underlying the whole gamut of the law of armed conflict, civilian aircraft are exempt from attack except when prescribed conditions are met (see para. 19).

11 Special protection from attack is granted to medical aircraft (see paras 46–9; see also → Medical Transportation). Medical aircraft may be either military or civilian aircraft, permanently or temporarily assigned—by the competent authorities of a belligerent party—to the transportation, including treatment, of wounded, sick, or shipwrecked persons; medical, or religious, personnel; or medical equipment and supplies. A medical aircraft must be marked with the distinctive emblem of the Red Cross (or its counterparts; at the time of writing, the Red Crescent or the Red Crystal). But the speed of air warfare requires additional means of identification (flashing blue lights, radio and electronic signals), detailed in Annex I of Additional Protocol I. Although the Annex was amended in 1993, there is a glaring need of further technical updating.

12 Special protection from attack is also conferred on (i) aircraft granted safe-conduct by agreement of the belligerent parties, especially, 'cartel' aircraft used for exchanges of prisoners of war, see para. 45; and on (ii) civilian airliners, which are civilian aircraft engaged in carrying civilian passengers in scheduled or non-scheduled service (see paras 43–4).

13 This entry will not deal with → missile warfare. Missiles are not aircraft: they are self-propelled unmanned weapons. While frequently used in air warfare, missiles can also be launched from land or sea launchers against land or sea targets.

C. The Region of Air Warfare

14 Air warfare takes place by, from, or against aircraft in airspace. Airspace is defined as stretching up to the highest altitude at which an aircraft can fly (below the level at which artificial satellites orbit Earth). Given present technology, this altitude is configured at roughly 100 km above sea level.

15 Air warfare can lawfully be conducted only in the following areas: (i) the airspace above the territories of all the belligerent parties, that is to say, the airspace over their land areas, internal waters, archipelagic waters, and territorial seas; (ii) the airspace above any area not subject to the sovereignty of any State, in practical terms, this means the high seas, including the contiguous zones, exclusive economic zones, and continental shelf of neutral States. The present entry will not deal with the conduct of hostilities in → outer space (above airspace).

D. Military Objectives in Air Warfare

16 Art. 24 (1) of the 1923 Hague Rules of Air Warfare addresses the problem of targeting by introducing the concept of → military objectives:

> Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.

17 The innovative concept of the military objective, originally devised for the singular purposes of air warfare, nowadays lies at the root of the whole law of armed conflict (by air, by land, or by sea). In the language of Art. 52 (2) Additional Protocol I (a clause almost uniformly viewed as declaratory of customary international law):

> Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total

or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

18 Enemy combatants are always subject to attack by military aircraft, unless they are *hors de combat* by virtue of surrender, wounds, sickness, or shipwreck (→ Wounded, Sick, and Shipwrecked). As for objects, their characterization as military objectives is chiefly contingent on 'their nature, location, purpose or use' (Art. 52 (2) Additional Protocol I). By nature, all enemy military aircraft constitute military objectives. This being the case, they may be attacked anytime (whether or not in flight) anywhere, except in neutral airspace. It should be added that, if captured on the ground, enemy military aircraft become booty of war, that is to say, title over them is acquired automatically by the captor belligerent party.

19 Although non-military aircraft do not constitute military objectives by nature, attention must be given to the additional phrase 'location, purpose or use' appearing in the definition (see paras 16–17). It follows that even non-military aircraft may become, 'in the circumstances ruling at the time' (Art. 52 (2) Additional Protocol I), military objectives due to use, by serving a military function in the course of hostilities; purpose, there being a clear-cut enemy intent to convert them to military use in the future; or location, for an illustration, see para. 65. Principally, non-military aircraft are transformed into military objectives when they engage in hostile acts in support of the enemy, eg, by providing targeting information to enemy forces; facilitate enemy military operations, eg, by transporting troops or military supplies; or otherwise make an effective contribution to the enemy military action. Since 11 September 2001 it is impossible to forget that even civilian airliners—when hijacked by terrorists—are liable to be used as means of attack.

20 Military objectives by nature, which are exposed to attack from the air, cover not only aircraft. Military objectives by nature on the ground range from airfields to weapon systems and military supplies. An archetypical military objective by nature is a munitions factory. The problem with munitions factories is that the labour force employed there is usually composed of civilians, often, women. Irrefutably, these civilians enjoy no immunity from the consequences of an air attack directed at their place of work. When a munitions factory is bombed, casualties among the civilian labourers are likely to be considerable. Still, as a rule, they would come under the heading of permissible 'collateral damage' (see para. 30).

21 It must be understood that—notwithstanding the attendant and unavoidable risks run by working in a munitions factory during an air raid—the labourers do not lose their status as civilians. Admittedly, a notion has been advanced that civilians working in munitions factories assume the status of so-called 'quasi-combatants' and that, as such, they may be lawfully bombed not only when at work but also when they are at home or on their way to and from the factory (→ Combatants). However, the concept of a 'quasi-combatant' workforce has gained no traction in customary international law. When civilian labourers are killed or wounded as a result of an air strike against a munitions factory, the human losses are lawfully sustained not because the victims are 'quasi-combatants', but solely because they happen to be present within premises constituting a military objective; that presence does not permanently contaminate the labourers, turning them as it were into 'quasi-combatants'. Upon leaving the factory, civilian labourers shed the hazard of being subject to an air attack. Military aircraft are forbidden to follow the workforce home and hit civilians there. Military aircraft are also not allowed to strike at them when they are commuting to or from work, unless they happen to use leading arteries of communication—major highways or mainline railroads—that by their nature also constitute military objectives.

22 The legal position is utterly different when 'target area' bombing is involved, viz when an air attack is launched against a cluster of military objectives in relative spatial proximity to each other, so that they are treated as a single target area (→ Bombardment). This type of bombing developed during World War II, when large 'target areas' with heavy concentrations of military objectives—epitomized by the Ruhr Valley in Germany, teeming with a huge concentration of munitions factories, coal mines, etc, but stretching also over significant civilian residential areas such as the cities of Essen and Dortmund—were subjected to 'saturation bombings', designed to blanket the entire target area rather than search for a point target. Thus, the Ruhr air bombings struck the civilian labourers

not only inside the munitions factories but also when they were at home. 'Target area' bombing policy was harshly criticized after World War II. Eventually, in 1977, Art. 51 (5) (a) Additional Protocol I addressed the issue by prohibiting to conduct:

> […] an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects.

23 While making the contours of target area bombings somewhat narrower, it must be appreciated that the Additional Protocol's provision still permits an aerial bombing that 'treats as a single military objective' a set of targets that are not 'clearly separated and distinct' (ibid.). The meaning of the phrase 'clearly separated and distinct' is far from self-evident. Paradoxically, it is the adverb 'clearly' that blurs the clarity of the issue. The ambiguity is regrettable, considering that target area bombing strains the basic principle of distinction between military objectives (susceptible to attack) and civilians or civilian objects (exempt from attack) during air raids.

24 The definition of a military objective (see para. 16) makes it plain that its destruction or neutralization, in the circumstances ruling at the time, must offer a definite military advantage to the attacker (→ Military Necessity). The advantage gained from an attack has to be military and not purely political. This important point was missed in 2005 by a majority of 4:1 of the → Eritrea-Ethiopia Claims Commission, when it held that an Ethiopian aerial attack against an Eritrean power station under construction was lawful, inter alia, since it was a factor in driving Eritrea politically to accept a ceasefire. By law, a potential political outcome is not an admissible consideration in assessing the character of the object as a military objective and forcing a change in the negotiating posture of the enemy cannot be deemed a proper military advantage.

25 The military advantage envisaged needs to be 'definite'. Yet, it does not have to relate to a single sortie. Indeed, Art. 8 (2) (b) (iv) of the 1998 Rome Statute of the → International Criminal Court (ICC) adds to the anticipated military advantage the adjective 'overall', and this coincides with general State practice. What the word 'overall' connotes is that an air raid of no perceptible military advantage in itself may be lawful if scrutinized in a wider context. The emblematic case in point is the extensive air campaign in the Pas-de-Calais, on the eve of the Allied landings in Normandy in World War II, which misled the enemy to shift its strategic gaze to the wrong sector of the French coastline. Nonetheless, it is a gross exaggeration to suggest—as has been done by the Eritrea-Ethiopia Claims Commission—that 'a definite military advantage must be considered in the context of its relation to the armed conflict as a whole at the time of the attack' (Eritrea-Ethiopia Claims Commission 'Partial Award: Western Front, Aerial Bombardment and Related Claims Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 & 26 between the State of Eritrea and the Federal Democratic Republic of Ethiopia' para. 113)—or to 'the military operations between the Parties taken as a whole'—and 'not simply in the context of a specific attack'. What is allowed is to consider an attack—or even a campaign—in its entirety, but not 'the armed conflict as a whole'.

26 General State practice shows that considerations of 'military advantage' may include the security of attacking force. Hence, bombing raids may be conducted from a relatively high altitude (above the ceiling of local air defences), in order to minimize casualties to the attacking aircrews, provided that the attacks are not indiscriminate (see para. 27). In fact, the air attacker may try to gain victory with zero casualties to its forces, as was attempted in the Kosovo Air Campaign of 1999.

E. The Prohibition of Attacks against Civilians

27 In keeping with the principle of distinction, air attacks against civilian objects or civilians are forbidden, unless the civilians are directly participating in hostilities (see para. 74). This is true not only of direct attacks but also of attacks that are indiscriminate (→ Indiscriminate Attack). The prime category of indiscriminate attacks from the air is the bombing of large metropolitan areas—which are also the sites of some military objectives or in which combatants are stationed—without concern for the location or density of the civilians or civilian objects present on

the ground. It is also noteworthy that the aircrew of a military aircraft may not jettison weapons, prior to returning to base, in disregard for the precise location where these weapons may explode.

F. The Principle of Proportionality in Air Warfare

28 Identifying an enemy target as a military objective is not enough. It is indispensable to factor in the requirements of the principle of → proportionality. This principle prohibits, in the words of Art. 51 (5) (b) Additional Protocol I:

> … an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

29 The requirement of proportionality is, without doubt, part and parcel of customary international law today. It brings to the fore the issue of 'collateral damage', which is central to modern warfare. Although the topic cuts across the board of hostilities in armed conflict, it has acute repercussion in air warfare.

30 The principle of proportionality and the concept of collateral damage must be fully appreciated: (i) proportionality relates only to civilians or civilian objects affected by an attack against lawful targets. It does not pertain to any attack against military objectives or combatants as such. Even huge casualties inflicted on enemy combatants and horrific devastation caused to enemy military objectives do not count in the analysis of proportionality. (ii) Disproportionality is predicated on the expectation that the collateral damage be 'excessive' compared to the military advantage anticipated. 'Excessive' is not to be confused with extensive. By way of illustration, as noted (para. 20), when a munitions factory is struck, the casualties among the civilian labourers may be extensive. In such an instance, the collateral damage cannot be branded with the stigma of being 'excessive'. (iii) Proportionality and disproportionality are entirely linked to expectations and anticipations prior to the commission of the act (based on the information available at the time), rather than on hindsight.

31 The assessment of what is 'excessive' in the circumstances prevailing at the time entails a mental process of weighing dissimilar considerations—namely, civilian losses and military advantage—and it is not an exact science. There is an inevitable subjective ingredient latent in the process, but it must be subordinated to a requirement of reasonableness. The air attacker needs to act in good faith, in light of the information at its disposal. Regrettably, given the 'fog of war', the information available at the moment of action may be inaccurate or wrongly interpreted. A notorious example is that of an underground command and control bunker in Baghdad, struck by the United States from the air in 1991. The air attack led to hundreds of civilian losses because—unbeknown to the attacker—they were allowed shelter in the bunker, which was deemed a safe place by the Iraqis. The modern availability of UAVs makes it easier, however, to acquire reliable information in real time.

32 The use of precision-guided munitions ('PGMs')—often referred to as 'smart bombs'—must be examined in this setting. If a belligerent party plans to attack from the air a small military objective surrounded by a densely populated civilian residential area, the only lawful modus operandi may be recourse to a surgical raid with PGMs. The availability of PGMs is advantageous to the attacker in the sense that they open up the possibility of a pin-point attack; otherwise, the attack may have to be called off by dint of an expectation of excessive 'collateral damage' to civilians. However, PGMs must not be seen as a panacea. As shown by the scenario of the Baghdad bunker, an air attack may be entirely accurate, yet cause large-scale civilian losses owing to faulty intelligence.

G. Feasible Precautions in Air Attack

33 Since all aircraft in flight are vulnerable, it is imperative that—before an aircraft is attacked in the air—all feasible precautions, meaning precautions that are practically possible, be taken to verify that it actually constitutes a military objective. This obligation overrides the need for swift decision-taking in air warfare. Verification may be based on visual identification; radio communications; radar, electronic or infrared signature, flight characteristics, and the like.

34 Air attacks against targets on land or at sea must also be conducted with all feasible precautions, with a view to determining that an enemy target is a military

objective and that collateral damage to civilians is not 'excessive'. This obligation devolves not only on those who plan and order an air attack, but also on the aircrew tasked with the execution of the mission. The aircrew must show situational awareness and watch out for changes occurring in the zone of operations. If it detects that the actual presence of civilians within or next to a military objective far exceeds what was originally expected, the air strike may have to be aborted.

35 Where collateral damage to civilians and civilian objects cannot be avoided, it must be minimized. This may require a nuanced decision-making process in planning an attack. Timing of the attack may be critical. Thus, if feasible, attacks against munitions factories may have to be carried out over the weekend or at night, when the premises are presumed to be shut down, thereby minimizing injury to the civilian workforce. But resetting the time of an attack is not a universal remedy. If the factories are operating around the clock, their destruction cannot be accomplished at any temporal point without causing severe civilian losses.

36 Art. 57 (3) Additional Protocol I lays down:

> When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

37 Of course, the implementation of this provision calls for the exercise of subjective judgement by the commander in charge as to whether two or more potential targets for attack actually offer a similar military advantage.

H. The Protection of Non-Military Aircraft

1. Civilian Aircraft

38 Civilian aircraft are civilian objects and as such are protected from attack. All the same, civilian aircraft ought to avoid areas of potentially hazardous military operations. Whenever feasible, as the HPCR Manual sets forth, a Notice to Airmen ('NOTAM') ought to be issued by belligerent parties, providing information on military operations hazardous to civilian aircraft. The construct of NOTAM is spawned by procedures established by the → International Civil Aviation Organization (ICAO), but its application to armed conflict is consistent with general State practice. Should a NOTAM exist, civilian aircraft must comply with any instructions as to altitude, course or speed restrictions. In the absence of a NOTAM, armed forces have to warn an incoming civilian aircraft, through radio communication or otherwise, before taking military action against it.

39 As pointed out (para. 19), civilian aircraft—due to their use, purpose, or location—may be transformed into military objectives, and they are then susceptible to attack as military objectives. Not only enemy but even neutral civilian aircraft, flying outside of neutral airspace, are affected by this rule (→ Neutrality in Air Warfare).

40 Neutral civilian aircraft may not cross an aerial blockade line—imposed by one belligerent party against another—nor are they supposed to carry → contraband items, ie goods ultimately destined for territory under control of a belligerent party and susceptible for use in the armed conflict. If they do, the other side may capture them as prize after adjudication (→ Prize Law). When there is reasonable ground to believe that a neutral civilian aircraft is attempting to cross a blockade line or carrying contraband, it may be intercepted, diverted from its course, or ordered to land for inspection. Refusal to comply with such orders would turn the neutral civilian aircraft into a military objective.

41 In air warfare, inspection (in an accessible airfield that is safe for the type of aircraft involved) takes the place of visit-and-search of vessels at sea (→ Ships, Visit and Search). The reason is that visit-and-search is irrelevant to aircraft, since boarding cannot be effected in mid-flight. Moreover, inasmuch as the circumstances of inspection on the ground are completely different from those of visit-and-search at sea, there is no justification ever for destroying a neutral civilian aircraft prior to prize proceedings.

42 Enemy civilian aircraft are always liable to be captured as prize after adjudication. This is not contingent on their carrying contraband or crossing an aerial blockade line.

2. Civilian Airliners

43 Civilian airliners are civilian aircraft entitled to particular care due to the enormous risks posed

to innocent passengers in areas of armed conflict. Mistakes in identification have demonstrated in practice, eg, in the well-known case of the USS *Vincennes* shooting down an Iranian civilian airliner in 1988, the need for particular care in terms of precautions. Evidently, if used to transport troops or weapons, civilian airliners may make a significant contribution to the enemy and will then be regarded as military objectives but the presumption must be against it. When there are reasonable grounds to suspect a civilian airliner, it may be ordered to land for inspection in an accessible and safe airfield. Enemy civilian airliners may be captured as prize, but only on condition that all passengers and crews are deplaned.

44 Even when a civilian airliner is rendered a military objective, by making an effective contribution to the enemy's military action, it may be attacked only on condition that the principle of proportionality is observed (paras 28–32). The mere fact that a few enemy soldiers or a small shipment of arms are on board does not by itself justify opening fire on an airliner carrying dozens, let alone hundreds, of civilians. The position is different if the airliner is hijacked and is expected to be used as a 'flying bomb' (see para. 19).

3. Aircraft Granted Safe-Conduct

45 Aircraft granted safe-conduct by agreement of the belligerent parties, such as 'cartel' aircraft, must not be attacked as long as they comply with the terms of that agreement (→ Safe-Conduct and Safe Passage), and even then the circumstances must be sufficiently grave to turn the aircraft into military objectives. As long as they operate within the ambit of their agreed-upon mission, such aircraft cannot be captured as prize.

4. Medical Aircraft

46 Medical aircraft are entitled to special protection from attack. However, when flying over areas not controlled by friendly forces, prior consent has to be obtained from the enemy and any stipulations modifying that consent must be strictly adhered to. In the absence of consent, medical aircraft fly at their own risk. When in airspace over areas controlled by the enemy, medical aircraft must also comply with any order to land for inspection.

47 Medical aircraft are not to be used for search-and-rescue missions within areas of combat operations, unless enemy consent has been obtained first. Search-and-rescue aircraft, sent to recover military personnel, do not enjoy any protection from attack.

48 Medical aircraft must not possess or employ equipment to collect or transmit intelligence data harmful to the enemy. Still, State practice indicates that the mere possession or employment of encryption equipment—used solely to facilitate navigation, identification, and communication consistent with the execution of their humanitarian mission—is not forbidden.

49 Medical aircraft may be equipped with deflective means of defence, such as chaff or flares, and carry light individual weapons necessary to protect the aircraft, the medical personnel, and the wounded, sick, or shipwrecked on board.

5. State Aircraft

50 Non-military enemy State aircraft are not entitled to engage in hostilities and are not treated as military objectives by nature. They may be attacked only if they make an effective contribution to the enemy's military action.

51 When non-military enemy State aircraft are captured, it is necessary to draw a distinction between them based on their employment. Enemy State aircraft used for law enforcement or customs purposes are treated like military aircraft in that they constitute booty of war, so that the acquisition of title by the captor belligerent party is automatic (→ Booty in Warfare). Conversely, other enemy State aircraft have to be treated on the same footing as enemy civilian aircraft, and they can only be captured as prize following adjudication.

52 As for neutral State aircraft of all types, belligerent parties must respect the fact that they benefit from sovereign immunity. Consequently, they may not be interfered with by belligerent parties unless they constitute military objectives. In other words, the belligerent party's right of interception, inspection, or diversion, which applies to neutral civilian aircraft, out of neutral airspace (see para. 40), does not apply to neutral State aircraft.

I. The Special Circumstances of Air Warfare

53 There is no need to repeat in this entry the overarching limitations imposed by the law of armed conflict on the use of means of warfare (weapons) or methods of warfare in all types of warfare (see → Warfare, Methods and Means). But the special circumstances of air warfare occasionally call for some calibrated norms, applicable at variance from those prevailing in land or sea warfare. The more conspicuous instances will be listed below.

1. Exemptions from Attack

(a) Non-Defended Localities

54 As a rule, once a belligerent party declares a locality to be non-defended, in the past called 'open cities', it may not be attacked by the enemy, provided that certain conditions are fulfilled. However, the concept is applicable only if the locality in question is situated in or near the front line (the 'contact zone'), so that it is open for occupation by enemy ground forces whenever the enemy chooses to do so. As regards rear areas which are not accessible to enemy ground forces, it is impossible for a belligerent party—acting unilaterally—to exempt a locality from air attacks by declaring it to be non-defended. This can only be accomplished by a specific agreement with the enemy.

(b) Air Corridors or Air Routes

55 When humanitarian assistance is distributed from the outside to the civilian population, subject to agreement between the belligerent parties, the unimpeded passage of relief consignments may depend on technical arrangements, eg, the establishment of air corridors or air routes (→ Humanitarian Assistance, Access in Armed Conflict and Occupation). Aircraft flying on humanitarian missions within those corridors or along those routes must not be attacked.

(c) Parachutists in Distress

56 It is not permissible to attack any person parachuting from an aircraft in distress during the descent. Although this prohibition does not apply to airborne troops, it does apply to aircrews, as well as passengers, saving themselves by abandoning a disabled military aircraft, wherever the parachutists may ultimately land. That is to say, parachutists from a military aircraft in distress must be considered *hors de combat* during their descent, even though they may reach safety and fight another day. Should the parachutists alight in a territory controlled by the enemy, they must be given an opportunity to surrender.

(d) Surrender by a Military Aircraft

57 It is generally prohibited to deny quarter to combatants manifesting intent to surrender. However, air warfare is sharply different from land or sea warfare when it comes to the application of this precept. The reason is that there is no accepted mode by which the aircrew of a military aircraft in flight may express its intent to surrender. Rocking the aircraft's wings or lowering the landing gear is not conclusive evidence of an intent to surrender. The fact that the aircraft is disabled only means that those on board, other than airborne troops, may parachute safely to the ground. The sole way for an aircrew to communicate, in a clear manner, their wish to surrender is through radio communication to the enemy, and even then the enemy may insist that the surrender be effected in a prescribed mode.

(e) Surrender from the Ground to a Military Aircraft

58 Combatants on the ground, or at sea, who surrender to a military aircraft in flight must stay visible to the aircraft and obey any instructions given to them, until they are taken into custody by any other aircraft, especially helicopters, ground forces, or vessels called to the scene. Having surrendered, such combatants become *hors de combat* and they may no longer be attacked. This is true even if it is not feasible to take them into custody, as long as they actually refrain from further fighting.

2. Means of Warfare

(a) Explosive Bullets

59 Under the 1868 St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight—now enshrined in customary international law—it is not permissible for military or naval troops to use projectiles weighing below 400 grammes, which are either explosive or charged with fulminating or inflammable substances (→ Weapons, Prohibited). By contrast, Art. 18 Hague Rules of Air Warfare sanctions the use of explosive projectiles by military aircraft, adding that this applies equally to parties and non-parties to the

St Petersburg Declaration. The Commission of Jurists that drew up the Hague Rules commented, in an explanatory note, that—since it is impracticable for aircrews in flight to change ammunition when aiming at different targets—military aircraft may fire such projectiles at land forces. State practice confirms the widespread use of explosive bullets by military aircraft strafing enemy personnel.

(b) Air-Delivered Incendiary Weapons

60 Art. 2 (2) of the 1980 Protocol III to the Convention on Conventional Weapons ('CCW') forbids 'in all circumstances to make any military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons'. This does not mean that the use of air-delivered incendiary weapons is excluded against military objectives, such as fortifications or tank formations. It means that, for contracting parties, such use, otherwise implicitly permissible, is prohibited if—and only if—there is a concentration of civilians around the military objective.

(c) Air-Delivered Land Mines

61 The 1996 Amended Protocol II to the CCW restricts the use of air-delivered land mines 'dropped from an aircraft' (Art. 2 (1)) by introducing requirements regarding self-destruction and self-deactivation. For its part, the 1997 Ottawa Convention prohibits altogether the use of all anti-personnel land mines, including those that are air-delivered. Neither provision reflects existing customary international law.

(d) Cluster Munitions

62 The 2008 Dublin Convention on Cluster Munitions expressly prohibits the use of explosive bomblets (weighing less than 20 kg) that are specifically designed to be dispersed or released from dispensers affixed to aircraft (→ Cluster Munitions). This edict is binding solely on contracting parties.

3. Methods of Warfare

(a) No-Fly, Air Exclusion, and Warning Zones

63 The HPCR Manual distinguishes between no-fly and air exclusion zones. No-fly zones are established and enforced by a belligerent party within its own or in enemy national airspace, and the rule is that any aircraft entering a no-fly zone without specific permission is liable to be attacked, after feasible precautions have been taken.

64 Air exclusion zones are set up in international airspace, over the high seas, but—while they may be regarded as warning zones—the same rules of armed conflict apply inside as outside the zones.

65 It is commonly recognized that a belligerent party is allowed to establish and enforce a warning zone, 'defence bubble', around military units stationed on the ground or naval units sailing at sea (→ Warning Zones at Sea). Such warning zones serve to keep non-military aviation at a distance from the force subject to protection: any aircraft entering the zone is at increased risk of defensive action. Still, the establishment of a warning zone may never result in an attack against an incoming aircraft without prior warning. Only after receiving the prior warning does the incoming aircraft—if it persists in its course—expose itself to the possibility of attack, owing to its location.

66 All such zones, no-fly, air exclusion, and warning zones, are different from an aerial → blockade (see para. 40). An aerial blockade is designed to deny the enemy the use of neutral aircraft to transport personnel or goods across a blockade line, thus precluding both imports and exports. However, zones are three-dimensional areas—sometimes extending over large spaces—in which air traffic is discouraged, to say the least, whereas blockades are merely notional lines or curtains that must not be crossed in either direction.

(b) Air Reconnaissance versus Espionage

67 It is required to distinguish between air reconnaissance and espionage. Air reconnaissance is conducted by military aircraft openly engaged in information-gathering missions, wherever these missions takes place, even within enemy airspace. Espionage under customary international law consists of obtaining information clandestinely or under false pretences behind enemy lines (→ Spies).

68 Civilian aircraft and State aircraft other than military aircraft may gather information about the enemy—without the action amounting to espionage—only if they are engaged in the act outside the airspace controlled by the enemy. Of course, irrespective of whether such activities amount to espionage,

the enemy is allowed to attack any aircraft engaged in information-gathering, subject to the principle of proportionality.

69 Espionage per se is not unlawful under the law of armed conflict, but a member of the armed forces caught in the act is not entitled to the status of a prisoner of war (→ Prisoners of War). Usually, the test will be whether a member of the armed forces, engaged in information-gathering behind enemy lines, was wearing a uniform at the time. It is therefore important to emphasize that aircrews on board military aircraft are not obliged to wear uniforms during flight. Nonetheless, once they are conducting military operations, including information-gathering, when detached from the aircraft, they must distinguish themselves from the civilian population as required by the general law of armed conflict. Otherwise, they are liable to lose their entitlement to prisoners of war status.

(c) Perfidy versus Ruses of War

70 It is considered perfidious to feign the status of a medical aircraft, a civilian aircraft, a neutral aircraft, or any other type of an aircraft protected in the circumstances. → Perfidy hinges on an intent to betray the confidence of an adversary. It is unlawful under customary international law when linked to the act of killing or injuring—and according to Art. 37 (1) Additional Protocol I, even capturing—an adversary.

71 Whether or not the act is perfidious, the improper use of the Red Cross emblem, and its counterparts, enemy military emblems, neutral, or United Nations' emblems is prohibited at all times. It is noteworthy that the law of air warfare follows the law of land warfare—rather than the law of sea warfare—in that it does not permit the display of false enemy or neutral markings prior to an actual armed engagement.

72 The prohibitions of certain acts of perfidy and improper use of emblems do not rule out lawful → ruses of war, which encompass aircraft camouflage; mock operations, designed, for instance, to entice the enemy to activate its air defence systems; the use of false military codes, other than distress codes, or decoys; and the construction of dummy aircraft or hangars.

(d) Distress versus Distress Codes

73 The law of air warfare permits a military aircraft to simulate a state of distress, in order to induce the enemy to discontinue an attack. As indicated (para. 57), this will not necessarily convey an intent to surrender and thus the deception will not betray any confidence. By contrast, an improper use of distress signals is disallowed, since such signals must be reserved for humanitarian purposes.

4. Direct Participation of Civilians in Hostilities

74 The general rule of the law of armed conflict is that civilians directly participating in hostilities may be attacked for such time as they are doing so (→ Civilian Participation in Armed Conflict). The trouble is that there is profound disagreement about the scope of activities tarred with the brush of direct participation in hostilities and the exact time-frame during which civilians may be attacked because of such activities. Yet, the HPCR Manual managed to identify by consensus a series of activities relating to air warfare that qualify beyond dispute as direct participation of hostilities. The paramount examples are refuelling of, or loading ordnance onto, military aircraft about to engage in combat operations; servicing or repairing such aircraft at such time; remote control of UAVs; participation in target acquisition; and engaging in the planning of an air attack.

J. Neutrality

75 Air warfare must not take place in the airspace over the territories, ie land areas, internal waters, or territorial seas of neutral States. As indicated (para. 15), air warfare may nevertheless be conducted in the airspace over contiguous zones, exclusive economic zones, and the continental shelf of neutral States. But due regard must paid to the neutral use of the exclusive economic zones and the continental shelf, in particular artificial islands, installations, structures, and even → safety zones.

76 Any incursion or overflight by military aircraft of belligerent parties into or through neutral air space is prohibited. The only exceptions are: (i) the right of air transit passage over international straits and

archipelagic sea lanes; (ii) entry in distress; and (iii) entry for purpose of capitulation.

77 The neutral State is entitled—and, indeed, must—use all the means at its disposal, including force, to prevent or terminate any violation of its airspace by military aircraft of a belligerent party. The encroaching aircraft must land: the aircraft and the aircrews must then be interned by the neutral State for the duration of the armed conflict.

K. Non-International Armed Conflicts

78 Although the rules of air warfare have developed in international armed conflicts, many of them are applicable also in non-international armed conflicts (→ Armed Conflict, Non-International). This applicability is not valid across the board. It must be kept in mind, especially, that (i) military and other State aircraft can only belong to the central government; (ii) insurgent aircraft, if any, can only come under the heading of civilian aircraft directly participating in hostilities (see para. 74); and (iii) there is no neutral status in non-international armed conflicts. The basic terminology, including references to 'belligerent parties', 'combatants' and the like must also be adjusted. Hence, even where applicable, the rules of air warfare can be implemented in non-international armed conflicts only *mutatis mutandis*.

L. Assessment

79 Despite the paucity of treaty law, the law of air warfare is well-entrenched in the existing (customary) law of armed conflict. The HPCR Manual shows that, even when the norms of the general law of armed conflict are quite controversial, as they are in the domain of direct participation in hostilities, it is not impossible to reach a consensus as regards particular modalities of action that are forbidden in the context of air warfare (see para. 71). On the other hand, certain aspects of the existing law of air warfare leave a lot to be desired, eg, as regards (i) beyond-visual-range identification of medical aircraft (see para. 11); and (ii) the establishment of an accepted mode of effecting surrender in the air, in the absence of radio communication (see para. 57). There is a constant and obvious need to adapt the law of armed conflict to the changing and challenging contingencies of air warfare.

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Armed Attack

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A. General

1 Art. 51 UN Charter makes an 'armed attack' the condition for the exercise of the right of → self-defence. In the judgment on the merits of the → Military and Paramilitary Activities in and against Nicaragua Case (*Nicaragua v United States of America*) ('*Nicaragua Case*') the International Court of Justice ('ICJ') declared, however, that 'a definition of "armed attack" which, if found to exist, authorizes the exercise of the "inherent right" of self-defence, is not provided in the United Nations Charter, and is not part of treaty law' (*Nicaragua Case* para. 176). The statement was one link in the chain of arguments which the Court used to show that Art. 51 UN Charter was actually referring to pre-existing → customary international law. Customary law thus determines the content of the term 'armed attack'. While the Court stressed that '[t]he areas governed by the two sources of law [ie the Charter and customary law] do not overlap exactly, and the rules do not have the same content' (ibid.), it nevertheless confirmed in a later part of the judgment that '[t]here appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks' (*Nicaragua Case* para. 195).

2 To illustrate the agreement, the Court cited the description, contained in Art. 3 para. (g) of the definition of → aggression annexed to Resolution 3314 (XXIX), which the General Assembly of the UN had adopted in 1974. Given that the French text of Art. 51 UN Charter uses the term 'agression armée' for 'armed attack', some scholars argue that 'armed attack' is a subcategory of 'aggression'. But this view is not shared by the majority opinion (Alexandrov 105–7, Constantinou 60–2). As, counter to the assumption of the Court, no consensus of opinion as to the acts which constitute → armed attacks exists, States involved in the process of self-defence have to determine themselves whether an armed attack has occurred, at least until the Security Council takes measures necessary to restore peace (Alexandrov 98).

3 One must, however, take into account that both judgments in the *Nicaragua Case* (1984 and 1986) declared the law as the Court found it at the time of the judgments. That law may not be the same today. The cardinal point in the Court's reasoning was the emphasis on the customary nature of the applicable international law, and custom is a dynamic body subject to modification by a change of *opinio iuris* confirmed by corresponding State practice. To determine the law as it now stands therefore requires a review of its application during the last decades and its possible development in that process.

4 The words '… if an armed attack occurs …' suggest that they refer to an event which has just taken place or is presently taking place. It would, however, be unrealistic to expect a State which detects preparations of a large-scale attack to remain a sitting duck. But it is equally obvious that a State may feign the imminence of an attack to camouflage its own aggressive aims against another, or it may honestly mistake a military operation by a neighbouring state, eg manoeuvres near its border, as an impending attack where none is intended. On balance the majority opinion accepts nevertheless that a manifestly imminent armed attack which is objectively verifiable, ie an attack in progress, falls within the meaning of Art. 51 UN Charter (Constantinou 112–15; Duffy 156–7). The Japanese attack on Pearl Harbour is usually cited as an example where interceptive self-defence would be permissible (Dinstein [2005] 190–1). The lawfulness of this type of anticipatory self-defence was also endorsed by the UN High Level Panel on Threats, Challenges and Change in 2004 (at para. 188 self Defence, Anticipatory). As presently construed, the word 'occur' thus includes demonstrable imminence, but does not include the threat of only a possible attack at some point in the future (Bothe 229, 231–2).

B. Armed Attack by a State

5 Although the introductory words of Art. 51 UN Charter '… if an armed attack occurs' do not reflect it,

one may assume that the drafters had States and governments in mind as 'attackers' because, at that time, they alone had → armed forces at their disposal which could launch an armed attack. The ICJ still subscribes to that view, as did or do some scholars (Brownlie 244–5), although it is hard to imagine that an 'inherent' right should only protect against a particular type of assailant (Schwebel 482).

6 In the decades following the founding of the United Nations, attacks by irregular forces became more frequent and the ICJ reacted to that development in its 1986 *Nicaragua Case* judgment. Borrowing from the law of state responsibility and from the definition of aggression, it broadened the term 'attacker' by including 'the sending of or on behalf of a State of armed bands, groups, irregulars or mercenaries' in the list of acts that could constitute an armed attack in the sense of Art. 51 UN Charter (*Nicaragua Case* para. 195). According to the Court, such an attack is imputable to the 'sending' State if the latter has 'effective' control of it (*Nicaragua Case* paras 109, 115). This view was disputed by the Appeals Chamber of the ICTY in the → Tadić Case, which considered 'overall' control sufficient (*Prosecutor v Tadić* at para. 145). However, when the occasion arose in the judgment on the → Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case (Bosnia and Herzegovina v Serbia and Montenegro), the ICJ reaffirmed its earlier opinion (at paras 402–7). Yet it does not look as if that has put an end to the controversy (see A Cassese 'The *Nicaragua* and *Tadić* Test Revisited in the Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 EJIL 649–68).

7 The judgment in the *Nicaragua Case* focused on the 'scale and effects' (*Nicaragua Case* at para. 195) of an armed attack to distinguish it from a 'mere frontier incident' (ibid.). The criteria seem adequate for the subsequent evaluation of an armed attack in judicial proceedings, but they are less so as operational guidance for the attacked State at the onset of the attack, when it may not be easy to recognize what is what. But the thrust of the Court's thinking is clear: an isolated minor incident which, by the manner in which it takes place, cannot be mistaken for a threat to the safety of the State would not qualify as armed attack under Art. 51 UN Charter. However, with more empirical data available, the Court reflected decades later in the → Oil Platforms Case (*Iran v United States of America*), on whether a series of minor attacks could cumulatively be considered an armed attack in the sense of Art. 51 UN Charter (*Oil Platforms Case* at para. 64). Although it did not find so in the case, it is significant that it entertained the idea not with standing inconclusive academic opinion (Wandscher 170–2), equivocal State practice (Ruys 174), and the Security Council's longstanding refusal to accept the 'accumulation of events' theory (Oellers-Frahm 510).

8 The judgment in the *Nicaragua Case* added still another aspect to the evaluation by distinguishing 'the most grave forms of the use of force (those constituting an armed attack) from other less grave forms' (at para. 191). Dinstein commenting thereon has justly observed that the Court had failed to indicate what threshold must be reached for the use of force to qualify as an armed attack and concluded: 'There is certainly no cause to remove small-scale armed attacks from the spectrum of armed attacks' (Dinstein [2005] 195). It is, moreover, unclear whether the distinction is not just another expression of the 'scale and effects' criterion mentioned above. A passage in the *Oil Platforms Case* suggests so, since in that case the Court found that armed attacks of a lesser gravity, even when made by the armed forces of a State, did not justify self-defence (*Oil Platforms Case* at para. 51). That makes the Court's idea of the proper response to an attack which takes one of the 'less grave forms' of the use of force something of an enigma. The answer in the *Nicaragua Case* judgment that the use of force, although not permitted as self-defence, may be permitted as countermeasure may appear as artificial distinction but is significant because it excludes the possibility of collective action (*Nicaragua Case* para. 210). Inexplicably, however, the Court undermined its own argument by adding the suggestion that forceful third-party assistance may be justified 'in exercise of some [sic] right analogous to the right of self-defence' (ibid.). Implicitly, the Court's suggestion thus recognized as legal the use of force outside the Charter system (Oellers-Frahm 508).

9 The judgment in the *Oil Platforms Case* named yet another requirement for an attack to qualify as armed attack in the sense of Art. 51 UN Charter. The Court found that the attack must be undertaken with the

'specific intention of harming' (*Oil Platforms Case* para. 64). By invoking the 'intention' of the attacker, the Court has apparently borrowed from domestic criminal law. But the motive of an attacker can only be established in judicial proceedings. Taking the intention into account is thus suitable in a domestic legal system where such proceedings are mandatory. The occasional judicial proceedings of the current international system do not warrant making harmful intentions a condition of unlawfulness in the application of a norm which usually has to be applied by States without the aid of a court. How should the victim discover the motive of the attacker in such circumstances? Unless clear indications point to the contrary (Ruys 167), one would assume that the attack itself was unrebuttable proof of harmful intentions (Constantinou 62).

10 Constantinou (at 64) has comprehensively summarized the elements which satisfy the conditions of 'scale and effect'. She states: '… armed attack implies an act or the beginning of a series of acts of armed force of considerable magnitude and intensity (ie scale) which have as their consequence (ie effects) the infliction of substantial destruction upon important elements of the target State namely, upon its people, economic and security infrastructure, destruction of aspects of its governmental authority, ie its political independence, as well as damage to or deprivation of its physical element namely, its territory' (ibid. at 63–4) and furthermore adds the 'use of force which is aimed at a State's main industrial and economic resource and which results in the substantial impairment of its economy …' (ibid. at 64). In sum, it is submitted that regardless of the dispute over degrees in the use of force, or over the quantifiability of victims and damage, or over harmful intentions, an armed attack even when it consists of a single incident, which leads to a considerable loss of life and extensive destruction of property, is of sufficient gravity to be considered an 'armed attack' in the sense of Art. 51 UN Charter.

11 The state of knowledge and experience in 1945 suggests that the drafters of Art. 51 UN Charter thought of 'armed' attack in conventional military terms, meaning use of the standard weaponry of World War II, with the probable addition of the German V-rockets and the nuclear bombs. That view had not changed by 1956, as the proceedings of the UN Special Committee on the Question of Defining Aggression, which inter alia considered defining 'armed attack'. It was only in 1961 that Brownlie proposed the additional consideration of bacteriological, biological, and chemical weapons since they 'are employed for the destruction of life and property' (Brownlie 255–6; → Biological Weapons and Warfare; → Chemical Weapons and Warfare).

12 The continuing development in weapons technology makes it increasingly difficult to determine when an armed attack begins or when it can be considered as being manifestly imminent (Gray 108). It is doubtful whether the present concept of demonstrable imminence, and hence that of permissible interception, is adequate for an attack with → Weapons of Mass Destruction ('WMD'), especially when delivered with missiles, because that attack has a distinct quality: it may cripple the State as a whole and annihilate its capacity to defend itself if it is not blocked in time. The reluctance of the ICJ in the *Nuclear Weapons Advisory Opinion* to pronounce definitely on the legality of the use of nuclear weapons in self-defence shows how ambivalent the current legal opinion is on the use of, or the defence against, WMD (*Legality of the Threat or Use of Nuclear Weapons [Advisory Opinion]* [1996] ICJ Rep 226 para. 97; → Nuclear Weapons Advisory Opinions).

13 Recent events demonstrated the possibility of yet another manner of attack. Computer network attacks ('CNAs') are actions taken through the use of computer networks to disrupt, degrade, or destroy information resident in computers or computer networks, or the computers and networks themselves (Harrison Dinniss 4). Viruses, worms, Trojans and similar devices destroy or alter data and programmes, while denial of service attacks ('DoS') flood an internet site, a server, or a router with more requests for data than it can process to shut it down. A CNA can either be undertaken in conjunction with a conventional (kinetic) armed attack or as self-contained end in itself. Provided that the autonomous CNA has the 'scale and effect' which the ICJ named as condition of an armed attack (see para. 7), the mainstream 'effect based approach' (Roscini 129), which draws on the conclusions of

the debate after 9/11 concerning the definition of 'arm' (see para. 21), considers it an 'armed attack' in the sense of Art. 51 UN Charter. The supplementary question, whether a device that causes damage only indirectly (eg by shutting down the computer system controlling the electric grid of an area) can initiate an 'armed attack', has already been settled in connection with bacteriological, biological, or chemical weapons (see para. 11). However, since the probability of reliably identifying the source of a CNA with the currently available technology is small, it may be doubtful against whom a right of self-defence exists. Opinions are, moreover, divided over the permissible defence against an autonomous CNA, some advocating a limitation to measures in kind (Roscini 120), while others consider a response with conventional weapons legal (Schmitt 928).

C. Armed Attack by a Non-State Actor

14 Since the attack of '9/11' the question whether a terrorist attack of that magnitude qualifies as 'armed attack' in the sense of Art. 51 UN Charter has become the subject of debate. The ICJ maintains the position expressed in the *Nicaragua Case* judgment, that only acts attributable to a State can constitute an 'armed attack'. It has reiterated its view in the → Israeli Wall Advisory Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory) (at para. 139) and in the *Armed Activities on the Territory of the Congo Case (Democratic Republic of Congo v Uganda)* (at paras 146 and 160; → Armed Activities on the Territory of the Congo Cases). But, as Ruys (473) observes, 'it did so in a rather confusing manner that is bound to exacerbate legal uncertainty'. Hence it is not surprising that some judges challenged the majority view and appended declarations or separate opinions to the *Israeli Wall Advisory Opinion* (Judges Buergenthal, Higgins, and Kooijmans) and the judgment in the *Congo v Uganda* case (Judges Kooijmans and Simma). Judge Simma remarked on that occasion: 'Such a restrictive reading of Article 51 might well have reflected the state, or rather the prevailing interpretation, of the international law on self-defence for a long time. However, in the light of more recent developments not only in State practice but also with regard to accompanying *opinio juris*, it ought urgently to be reconsidered, also by the Court' (*Congo v Uganda [Separate Opinion Judge Simma]* para. 11).

15 The ICJ's position disregards resolutions adopted by the Security Council after 9/11. In a letter by the US Permanent Representative to the Security Council the United States had justified its reaction to the attack with the exercise of its right to self-defence (UNSC 'Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council' [7 October 2001] UN Doc S/2001/1946). The Security Council expressly referred to that right in the preambles of the relevant resolutions 1368 (2001) and 1373 (2001). It can be argued that the Council thereby accepted the claim of the United States and implicitly recognized the terrorist attack as 'armed attack' in the sense of Art. 51 UN Charter (*Congo v Uganda [Separate Opinion Judge Simma]* para. 11). This view was challenged by academics who maintain that the resolutions 'do not provide a clear indication whether they intend to refer to a wide concept of armed attack which would comprise also acts which are not attributable to a State'. It was also suggested that the terrorist acts of 9/11 should be regarded rather as conventional crimes than as armed attack. Other scholars retorted that the significant scale and effect of the attack, as well as the subsequent reactions of the international community, make a credible case for an armed attack (Gray 164–5). The admission that 'in fact, the incidents can properly be characterized as *both* a criminal act and an armed attack' (Murphy 49) expresses the ambiguity of the unsettled legal situation.

16 The analysis of the text of Art. 51 UN Charter does not clarify the issue. It is obvious that the words '… if an armed attack occurs …' do not indicate the nature of the attacker. Scholarly examinations have found no evidence in the legislative history of Art. 51 UN Charter (Scholz 101), or in the practice of States subsequent to 9/11 (Bruha and Tams 95–9), that supports the Court's majority view. Their findings rather tend to support the opposite conclusion: nothing suggests that an armed attack can only be launched by a State or that the right of self-defence would, consequently, only be available against inter-State attacks. The majority view of the Court is rather the consequence of the

specific conceptual construction of international law as law between States and some entities created by them, a conception which is still shared by many, but increasingly criticized by others.

17 Treating international terrorists as initiators of an 'armed attack' in the sense of Art. 51 UN Charter is, however, complicated by their lack of international personality and of territory in the sense of international law. No generally agreed definition of international → terrorism and its actors exist (Duffy 18–46). Terrorist acts which occurred prior to 9/11 were not connected with Art. 51 UN Charter. This is explained by the Court's construction of Art. 51 UN Charter which requires the imputability of the attack to a foreign State. Acts of 'indigenous terrorists', based and operating on the territory against which their acts are directed, even when that territory is only occupied, are not attributable to a foreign source. As the Court observed in the *Israeli Wall Advisory Opinion* of Palestinian terrorist acts against → Israel: '… Israel does not claim that the attacks against it are imputable to a foreign State' (at para. 139). As for attacks by 'transboundary terrorists', based in neighbouring States and operating therefrom, they may sometimes show elements of an armed attack, but did not, in the past, amount to the scale required by the ICJ.

18 The situation changed fundamentally with 9/11. Never before had an operation of that magnitude been planned and carried out by a globally acting terrorist organization, which had 'sleeping' members in many countries and could call them together for a specific operation that was directed by headquarters of unknown locality, communicating with its members through the internet. The little that is known of internationally active terrorists suggests that they operate as a loose network of cells with a horizontal rather than a vertical structure. They have no territory of their own, but operate from the territory of one or several States. Whether the 'host' State thereby violates its duty under international law which the ICJ had characterized in the → Corfu Channel Case as 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States' (*Corfu Channel Case* 22), a statement which was recently reiterated in the case *Congo v Uganda* (at para. 162), is a matter to be determined eventually under the law of State responsibility (Dinstein [2005] 206). Sometimes, when the 'host' State was unwilling or unable to prevent cross-border attacks, the victim treated them as 'armed attack' in the sense of Art. 51 of the Charter warranting measures of self-defence (Bothe 233), but the relevant State practice is inconsistent (Ruys 455, 486–7). It excludes, at any rate, purely preventive measures (Dinstein [2005] 208; → Self-Defence, Pre-Emptive).

19 9/11, taken as a paradigmatic case of a terrorist 'armed attack', unquestionably had the magnitude and intensity, and hence the significant scale, required by the ICJ's *Nicaragua Case* judgment for qualifying as armed attack in the sense of Art. 51 UN Charter. But it also had distinctive features of its own. While there is no doubt about the substantive destruction of civilians and → civilian objects, the purpose of destruction and the manner in which it was carried out make 9/11 different from an inter-State attack.

20 A State attacks in pursuit of a strategic, political, or economic aim which it wishes to achieve through the attack. A terrorist attack has the ideological aim to create terror through damage and through demonstrating the vulnerability of the object-State, but as a physical act it is an end in itself. If it is not foiled before it takes place, defensive action can only deflect it by chance. Terrorists taking part in the attack may be prepared or even determined to lose their own lives. Since the attack runs its course with the destruction, self-defence *strictosensu* is not possible. If the attacked State attempts to eliminate the persons or organizations behind the attack, it is an act of → self-help rather than of self-defence.

21 The criteria for arms which would qualify a terrorist attack as 'armed' in the sense of Art. 51 UN Charter are not different from those applying to inter-State attacks. But what about highjacked civil airliners? They were used in the attacks of 9/11 for the destruction of human life and property, and had the same effect as bombs or missiles had they been used, which are conventional weapons. Hence it is submitted that it is neither the designation of a device, nor its normal use, which make it a weapon but the intent with which it is used and its effect. The use of any device, or number of devices, which results in a considerable loss of life and/or extensive destruction of property

must therefore be deemed to fulfil the conditions of an 'armed' attack, and that includes CNAs.

D. Assessment

22 As far as armed attacks attributable to States are concerned, the interpretation of Art. 51 UN Charter has been thoroughly discussed in academic writings and was further clarified in judgments and opinions of the ICJ. It may only need refinement to make the distinction between attacks entitling self-defence, and others causing State responsibility, more transparent (see para. 8). More intensive consideration must, however, be given to cover WMD and computer network attacks as instruments of attack, since the technical progress increases the likelihood of their use in the future (see paras 12, 13).

23 The legal evaluation of attacks by non-State actors is still controversial. Even if a large-scale spectacular assault like 9/11 has not happened again, it may in the future, for which reason achieving a consensus of opinion on the matter is clearly indicated. The most significant obstacle in the endeavour is the interpretation of Art. 51 UN Charter presently preferred by the majority of the judges of the ICJ (see para. 14).

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Armed Conflict, Effect on Contracts

Niels Petersen

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A. Introduction

1 The outbreak of an international armed conflict has certain automatic legal effects in international law (→ Armed Conflict, International). Save special contractual clauses, it has, however, no direct legal effects on private contracts of individuals and companies related to the parties of the conflict, or contracts between companies and States involved in the war. But an armed conflict may nevertheless affect contractual relationships in several ways. On the one hand, wars have a considerable factual influence on contractual relationships: the object of the contract may perish because of a combat operation, or the execution may be complicated considerably because of the dangers related to the armed conflict.

2 On the other hand, the economic framework often changes in times of war. Wars are not only won on the battle ground, but also by economic measures. States thus seek support from their economy and try to harm their enemies (→ Economic Warfare). They change the economic parameters by issuing import and export restrictions, expropriating foreigners, nationalizing the economy, and prohibiting → trading with the enemy. Moreover, wars have considerable effects on market prices, as goods are, in general, scarcer than in peace times.

3 There is no homogenous body of laws governing these effects of wars on private contracts. Most of the work is done by the domestic legal orders. But there are also international points of contact. The fate of private contracts may be governed by → peace treaties or, in some cases, resolutions of the United Nations Security Council. Furthermore, international economic law increasingly provides for some restrictions on wartime regulations of States.

B. Domestic Law and Private International Law

4 The most important body of law concerning the effect of armed conflict on private contracts does not originate in international law, but in different domestic legal orders. This section will give a short overview of the different solutions found in the legal orders of France, Germany, the United Kingdom, and the United States. All of these orders have similar rules on the fate of contracts after performance has become physically impossible. They vary more with respect to fundamental changes of circumstances that impose a severe economical hardship on one of the parties (see paras 5–9 below). However, wars do not only have factual implications on contracts. Several countries, such as the UK, the US, or France, prohibit trading with the enemy, which has automatic legal consequences on contracts between their citizens and any enemies (see paras 10–11 below). Finally, this section considers some international aspects of contract law (see paras 12–13 below).

1. Impossibility and Fundamental Change of Circumstances

5 In principle, it is a matter of fact that a contract cannot be performed if the performance is impossible. However, there may be disagreement among different legal orders on what constitutes impossibility, as the notion often not only comprises the physical inability to perform. One may identify some aspects, though, that are common to all legal orders in determining whether a party is discharged of its contractual obligations because of events or developments originating from an armed conflict. There must be a supervening event which is neither attributable to, nor foreseeable for, the Contracting Parties and which prevents one party from performance. The determination of whether a party is

prevented from performance is the key element of the formula. The jurisprudence on this aspect differs among the examined legal orders. While in France, in principle, only physical impossibility is recognized as a ground for exculpation, courts in Germany, the US, and Britain also try to solve severe economic imbalances, although the legal consequences in this respect differ.

6 In Germany, the debtor can refuse to perform if performance is impossible for him or for everybody (*Unmöglichkeit*, § 275 (1) Bürgerliches Gesetzbuch ['BGB'] [Civil Code] [done 18 August 1896, entered into force 1 January 1900] [1896] RGBl 195, as amended). The legal doctrine distinguishes physical from legal impossibility. The German jurisprudence has recognized cases of physical impossibility, eg, in a future delivery, where the place of performance could not be reached in time because of war events (*Urteil vom 4. Februar 1916* Reichsgericht [Supreme Court of the German Reich] [4 February 1916] [1916] 88 Entscheidungen des Reichsgerichts in Zivilsachen 71). However, legal impossibility is a much more common ground for non-performance during war. Legal impossibility is assumed when the performance has been forbidden by legislation or by an administrative order. The contract is also frustrated if the debtor is, in principle, physically able to perform, but if performance cannot be expected of him (*Unzumutbarkeit*, § 275 (2) BGB). This may be the case if he refuses to perform in a combat territory because the situation there would endanger his or his employees' life or health. Then, the obligation is pending, but still valid. The legal consequence of impossibility is that the debtor has neither to perform nor to pay damages for non-performance because a war is an event for which the debtor is not responsible. In some cases, the parties are not discharged of their contractual obligations. Instead, the debtor may claim the adjustment of the contract if the economic framework changes fundamentally (*Störung der Geschäftsgrundlage*, § 313 BGB; → Treaties, Fundamental Change of Circumstances) and if the implementation of the contract in its present form cannot be expected of the debtor. In these cases, the damage is not solely imposed on the debtor, but is born by both parties.

7 The French jurisprudence on impossibility and change of circumstances is probably the most restrictive of the compared jurisdictions. In France, contracts are generally upheld (Art. 1134 Code civil [Civil Code] [done 1803–4, entered into force 21 March 1804] [1804] 3 Bulletin des lois de la République Française 354 no 3677, as amended) except in the case of *force majeure* (Art. 1148 Code civil). The application of Art. 1148 Code Civil requires the fulfilment of three conditions: the event has to be irresistible (*irrésistibilité*), ie, performance has to be physically impossible; it has, furthermore, to be unforeseeable (*imprévisibilité*); and outside of the influence of the parties, in particular unavoidable for the debtor (*extériorité*). The outbreak of a war does not automatically constitute *force majeure*, but war may be one circumstance leading to the acceptance of exculpation under this provision. The mere change of the economic framework, even if it is fundamental, usually does not affect the contract. The doctrine of *imprévision*, which has been developed in order to deal with contracts becoming economically imbalanced because of unforeseeable supervening events, has, in general, been rejected by the French Supreme Court (*Cour de Cassation*) and is only applied in very exceptional circumstances.

8 In the UK, the performance of the contract is discharged if its performance has become unexpectedly burdensome or even impossible (*Taylor v Caldwell* England and Wales High Court [Queen's Bench] [6 May 1863] [1863] 122 English Reports 309). The doctrine applies if the circumstances of the contract are fundamentally altered so that the following conditions are fulfilled: since the formation of the contract certain unpredictable events or circumstances must have supervened, of such a character that the Court will form the view that reasonable men in the position of the parties would not have made the contract. These circumstances have to be objective, ie they must not depend on the parties' intention or even knowledge of the event. It must not be attributable to the party alleging frustration, which will typically be the case with armed conflicts. The consequences of frustration are that both parties are automatically discharged of their contractual obligations. Money that has been paid by one party to the other in pursuance of the contract shall be recoverable, but is subject to a deduction of such a sum as represents a fair allowance for expenditure for the purpose of performing the contract. But not every considerable change of the economic framework of a contract leads to a frustration of

the contract. In their jurisprudence, the British courts are rather reluctant to apply the doctrine.

9 The legal situation in the US is similar to that in Britain. However, the American doctrine of impracticability seems, prima facie, to be more sensitive to changes in the economic framework, such as severe price fluctuations. The doctrine was established in *Mineral Park Land Co v Howard et al.* (Supreme Court of California [13 March 1916] [1916] 156 The Pacific Reporter 458). According to it, a party may be discharged of its contractual obligations if, as a result of unexpected supervening events, such as a sharp increase in prices because of the outbreak of war, performance has become extremely burdensome. However, the US courts are very restrictive in granting impracticability due to market movements. In *Publicker Industries Inc v Union Carbide Corp*, the Court, eg, indicated that an increase in production costs of less than 100% does never make the seller's performance impracticable (United States District Court Eastern District of Pennsylvania [1975] 17 Uniform Commercial Code Reporting Service 989). But even sharper increases are not automatically sufficient to bring about discharge.

2. Illegality of the Contract

10 In common law countries, an armed conflict does not only have factual effects on contracts. In some cases, there may be automatic legal effects, once the competent agent of the executive qualifies a certain situation as a war. After the outbreak of the war, the doctrine of the prohibition of trading with the enemy applies, which renders any further performance of a contract with an enemy, ie any individual residing on enemy territory notwithstanding his or her nationality, illegal. Consequently, any pre-war contract with an enemy is abrogated automatically. The leading case in this respect is *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*, where a contract for a sale of machinery by an English seller to a Polish buyer had been made in July 1939. According to the terms of the contract, the goods had to be shipped to Gdynia within three or four months. However, before the shipment of the machinery, World War II broke out, and German forces occupied Gdynia. The contract was held to have been discharged on the grounds that it had become illegal since the delivery of the goods was to be made in territory held by the enemy (*Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* United Kingdom House of Lords [15 June 1942] [1943] The Law Reports: Appeal Cases 32).

11 In France, the legal situation is similar. Modelled on the British example, the French government issued a prohibition on trading with the enemy in both World Wars. All contracts that are concluded with an enemy after the outbreak of the war are void *ipso facto* (see also → Nullity in International Law). Contracts that have been concluded before the outbreak of the war are suspended until the end of the armed conflict. During the suspension, in principle, neither of the parties is allowed to perform the contract. But the contract is only pending and regains its original status after the end of the war. However, a party may claim the dissolution of a contract according to Art. 1184 Code civil if the performance, because of its nature, its time, or similar circumstances, would be fundamentally different than it was supposed when the contract was concluded.

3. International Aspects of Private Law

12 If a contract between two parties originating from different countries is governed by the United Nations Convention on Contracts for the International Sale of Goods ('CISG'; [concluded 11 April 1980, entered into force 1 January 1988] 1489 UNTS 3), the debtor is not liable for his failure to perform if the failure was due to an impediment beyond his control and if he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract (Art. 79 CISG). The outbreak of a war causing the failure of the performance typically has to be considered as a reason liberating the debtor of his liability under the CISG. It is highly disputed whether this liberation is also valid in cases in which the debtor is not physically or legally unable to perform, but in which the costs of performance have risen to such an extent that holding him liable would impose a disproportionate hardship upon him. While some scholars would like to include the case of *clausula rebus sic stantibus* into the scope of Art. 79 CISG, others propose that this situation is not governed by the CISG and should thus be determined by the applicable domestic law (on this discussion, see Flambouras 277–81 with further references).

13 As many of the transactions affected by an armed conflict are cross-border contracts, sometimes issues concerning a conflict of laws may be involved. If a case governed by the doctrine of trading with the enemy before a British court would attract foreign law, which does not recognize this doctrine, it would be contrary to British public policy to enforce the contract, even if the foreign law would ask for the enforcement. Equally, a corresponding foreign judgment could not be enforced in Britain because to do so would be contrary to rules of English public policy (*Ertel Bieber & Co v Rio Tinto Co Ltd; Dynamit AG [vormals Alfred Nobel AG] v Rio Tinto AG; Vereinigte Koenigs und Laurahuette fuer Bergbau und Huettenbetrieb AG v Rio Tinto Co Ltd United Kingdom* House of Lords [25 January 1918] [1918] The Law Reports: Appeal Cases 260).

C. Special Provisions in Peace Regulations

14 In some cases, peace regulations after the end of an armed conflict contain special norms regarding the status of private contracts concerning the territory of combat. Traditionally, these regulations are set up in peace treaties (see paras 15–17 below). However, there are also an increasing number of resolutions of the UNSC regulating post-conflict situations (see paras 18–19 below).

1. Peace Treaties

15 Certain peace treaties contain provisions concerning the legal status of pre-war contracts, and some even established a judicial body in order to decide about claims of private persons against each other or against a State involved in the war. The → peace treaties after World War I, such as the → Versailles Peace Treaty (1919), the → Neuilly Peace Treaty (1919), the → St Germain Peace Treaty (1919), the → Trianon Peace Treaty (1920), and the → Lausanne Peace Treaty (1923) established mixed arbitral tribunals, of which one was set up between each Allied Power against each former Central Power. These tribunals were charged with deciding all questions relating to contracts concluded before the coming into force of the peace treaties between nationals of the Allied Powers and German nationals. However, questions falling into the jurisdiction of the domestic courts of the Allied Powers were excluded.

16 The tribunals had to apply various legal standards. The most important source was domestic private law and the relevant provisions of the applicable → private international law. In some cases, though, the peace treaties contained particular provisions regarding the effect of private contracts. One of the principal questions the tribunals had to deal with was the amount of → compensation for the performance of a contractual obligation. Because most currencies had broken down during the war period, the agreed price was no equitable compensation if the contract had been performed after the outbreak of the war. Consequently, the tribunals preponderantly granted compensations equal or close to the current price on the world market (See *Savitch & Co v Schnellpressenfabrik Frankenthal Albert & Co AG* [1923] 2 TAM 633; *Jaspar v Doering* Section IV du tribunal franco-allemand 239).

17 The majority of the peace treaties after World War II, such as the peace treaties with Bulgaria, Finland, Hungary, Italy, and Romania (→ Peace Treaties [1947]), the → peace treaty with Japan (1951) or the → Austrian State Treaty (1955), contain blanket clauses, which stipulate that the pre-war private obligations between citizens of the parties of the conflict continue to exist. The decision on concrete contractual relationships of private parties is thus referred to domestic law. The Treaty of Peace with Italy established a conciliation commission, which decided about the restoration of all legal rights and interests of 'United Nations nationals' or persons treated as enemies and thus affected by Italian wartime measures (→ Conciliation Commissions Established Pursuant to Art. 83 Peace Treaty with Italy [1947]).

2. Resolutions of the United Nations Security Council

18 Peace settlements do not only occur through formal treaties between the parties of the armed conflict, but may also be contained in resolutions of the UNSC. The most prominent example is UNSC Resolution 687 (1991) of 3 April 1991 ('Resolution 687'; SCOR 46th Year 11) determining the terms of the peace after the war of Allied forces against Iraq after the latter's invasion of Kuwait. 692 (1991) of 20 May 1991 (SCOR 46th Year 18) established the → United Nations Compensation Commission (UNCC) and a corresponding compensation fund for

meeting the justified liabilities. The UNCC was supposed to deal with all damages directly resulting from Iraq's unlawful invasion and occupation of Kuwait (→ Iraq-Kuwait War [1990–91]).

19 Any individual could thus claim damages for non-performance of the contract or lost profits if the completion of the contract had been prevented by the invasion. The key decision in this respect is decision S/AC.26/1992/9 of the UNCC Governing Council (UN Compensation Commission Governing Council 'Propositions and Conclusions for Business Losses: Types of Damages and Their Valuation' [Decision] UN Doc S/AC.26/1992/9). According to this decision Iraq was not only liable for breaches of contracts it had entered into with individuals. It was also liable if the performance of the contract became impossible for the other party because of Iraq's invasion and occupation of Kuwait (ibid. para. 9). With regard to contracts between private parties, Iraq is responsible if the frustration of the contract is due to the invasion, even if it has not been party to the contract (ibid. para. 10). One major category in this context was employment contracts affected by the invasion. Iraq was liable for every wage loss that resulted from the occupation of Kuwait (see for details UN Compensation Commission Governing Council 'Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of Individual Claims for Damages up to US$ 100,000 (Category "C" Claims)' [21 December 1994] UN Doc S/AC.26/1994/3, 168–94). However, Iraq's responsibility did not extend to all damages somehow related with the war. Damages caused by the trade embargo imposed by UNSC Resolution 661 (1990) of 6 August 1990 (SCOR 45th Year 19) were not compensable by the UNCC.

D. International Economic Law

20 Measures of economic warfare affecting private cross-border contracts are becoming increasingly problematic under international law. → Economic sanctions directed against foreigners pose problems under international investment law (→ Investments, International Protection) as well as under world trade law (→ World Trade Organization [WTO]; → World Trade, Principles).

21 If foreigners are subject to a trade restriction or a taking of property during war, such measures may come into conflict with the principles of → fair and equitable treatment and the protection against expropriation in a bilateral investment treaty ('BIT'; → Investments, Bilateral Treaties) that has been concluded between the two States in question. The principle of fair and equitable treatment essentially guarantees the maintenance of a stable business environment in the host State. The stability of the business environment may be harmed by governmental or parliamentary measures induced by the armed conflict, such as import or export restrictions.

22 But such restrictions may be justified. BITs sometimes contain explicit security exceptions, according to which measures necessary for the maintenance of public order or the protection of essential security interests are not precluded by the contract. If such a security exception is missing, the general customary rule of necessity, as laid down in Art. 25 UN ILC 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' ([2001] GAOR 56th Session Supp 10, 43; → State Responsibility), is applicable. According to the customary rule, a state of necessity may be invoked if the act violating the obligation under the treaty safeguards an essential interest of the State against a grave and imminent peril. The measure otherwise inconsistent with the treaty thus has to serve an essential interest of the host States.

23 Mere penal measures against citizens of the enemy are not allowed. Furthermore, the host State may not invoke the state of necessity if it has contributed to its occurrence. If the host State is thus responsible for the outbreak of the armed conflict, it may not invoke a justification for measures restraining foreign investment. If a State has violated the provisions of an investment treaty, the affected private party may claim damages. In case the security or necessity exception does not apply, many BITs contain non-discrimination clauses for the treatment of foreigners in times of war: individuals protected under the BIT should not receive less favourable treatment than nationals of the host country with regard to the compensation of losses suffered in relation to an armed conflict.

24 Measures aiming at a trade restriction are not only problematic under international investment law. They may also be inconsistent with the prohibition of trade-restrictions of Art. XXI GATT 1947. In times of war, however, a State may invoke the security exception of Art. XXI (b) (iii) GATT 1947 so that trade restrictions that are undertaken during armed conflicts are generally justified (→ General Agreement on Tariffs and Trade [1947 and 1994]).

E. Evaluation

25 The effect of armed conflicts on private contracts is an area that is still predominantly governed by domestic law. The different domestic legal systems determine when a party is discharged because of economic hardship after the outbreak of the war, and some even apply doctrines prohibiting the trade of their citizens with individuals living on enemy territory, automatically rendering void corresponding contracts. However, there is an increasing influence of international law in this field. Some peace regulations after the end of armed conflicts contain special provisions about the effect of the war on contractual relationships. Some of these are even dealt with by international → arbitration, such as the UNCC, which was set up by the UNSC. Moreover, international investment provisions restrict to a certain extent the possibilities of States to undertake certain economic measures during armed conflicts.

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Armed Conflict, Effect on Treaties

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A. Introduction

1 The question of the effect of an armed conflict on treaties was and is one of the most disputed subjects in public international law. Neither in → State practice nor in legal doctrine, was there a common view on the question whether peacetime international law is applicable to belligerent States during an international armed conflict in general. In the 19th century there is some evidence for the *opinio iuris* that '[b]y the Law of Nations war abrogates all treaties between the belligerents' (Hardings cited in McNair 700; cf Harvard Draft Convention Comment at 1184). On the other hand the Instructions for the Government of Armies of the United States in the Field ('Lieber Code'), the first military manual of the United States, said that treaties which are concluded between the belligerents during a war as well as treaties which were concluded between the belligerents before a war, but with the intention to stay in force during the war, are not void because of a war (Art. 11 Lieber Code). The drafter of the Code, Francis Lieber, argued that instead of the rule *inter arma silent leges* the rule *fides etiam hosti servanda* has to be applied because the aim of a just war is peace. Since confidence between the belligerents is considered the basis for the future peace, one would destroy the very object of war if no degree of confidence would remain between the belligerents (see Vöneky [2002] 458). Nearly 50 years after the Lieber Code, in 1910, the tribunal in the arbitration on the Question Relating to the North Atlantic Coast Fisheries stated: 'International Law in its modern development recognizes that a great number of Treaty obligations are not annulled by war, but [are] at most suspended by it' (for details see Vöneky [2001] 204 [state practice since 17th century], 213 [judgments of international courts and tribunals]).

2 The same development can be observed in regard to legal doctrine: traditionally legal doctrine holds that all treaties between belligerents terminated *ipso facto* at the outbreak of war (McNair 698). The rationale behind this view was that war is the absolute opposite of peace and involves a complete rupture of relations (see UN ILC UN Doc A/CN.4/552 at 4). Additionally, commentators often advanced the argument of *lex specialis derogat legi generali* (specific law overrules general laws) generally to deny the applicability of peacetime treaties between belligerent parties during an armed conflict: since the law of armed conflict is a specialized set of laws, to the extent that its provisions are contrary to those of peacetime treaties, the law of armed conflict prevails.

3 Today the majority view seems to approve the general applicability of peacetime law during war in regard to certain types of peacetime treaties (see paras 5–11). The topic is still disputed as neither the UN Charter nor other multilateral treaties include rules in regard to the effect of armed conflict on treaties. The → Vienna Convention on the Law of Treaties (1969) (VCLT) only says that the Convention does not cover these questions (Art. 73: 'The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty … from the outbreak of hostilities between States'). This was due to the fact that the conduct of hostilities was seen as wholly outside the scope of the general law of treaties to be codified in the articles of the VCLT by the drafters (Wetzel and Rauschning 480). Besides this there is no decisive judgment or advisory opinion of the → International Court of Justice (ICJ) to the general question of the effects of armed conflicts on peacetime treaties (see *United States Diplomatic and Consular Staff in Tehran [United States of America v Iran]*, dealing only with the Vienna Conventions on Diplomatic and Consular Relations, see below para 6; *Legality of the Threat or Use of Nuclear Weapons [Advisory Opinion]*, dealing with the question of the protection of the environment during armed conflict without giving a clear answer in regard to the question of the applicability of peacetime environmental treaties during armed conflicts, see below para 10).

4 After World War II, expert bodies dealt with the problem of the effect of armed conflict on treaties. The first important resolution was drafted by the → Institut de Droit international (IDI) in 1985 (see the resolution 'The Effects of Armed Conflict on Treaties'). The → International Law Commission (ILC) finally included this topic in its current programme of work in 2004 (UNGA Res 59/41 of 16 December 2004); a first report was drafted by special rapporteur Ian Brownlie in 2005 and in 2008 the ILC adopted, on first reading, a set of 18 draft

articles on the effects of armed conflicts on treaties ('ILC Draft Articles'). In 2010 Lucius Caflisch, the new special rapporteur, proposed a number of changes to the initial set of draft articles after these articles were commented by States. The most crucial topics of discussion have been inter alia the scope of the articles; effects of non-international armed conflicts; the indicia for identifying treaties which continue in operation; the types of treaties whose subject matter implies their survival in whole or in part; and the effects of international or civil war conditions involving a single State Party or several States Parties to treaties.

B. General Applicability of Peacetime Treaties under General International Law

5 Today the traditional dichotomy between the international law of war on the one hand and the law of peace on the other hand is dissolving: the dominant view is that whether a treaty continues to be in force in wartime depends on the type of treaty in question, its object and purpose (Oppenheim and Lauterpacht 303). The ILC Draft Articles on Effects of Armed Conflicts on Treaties (see UN Doc A/65/10 289) state accordingly: 'The outbreak of an armed conflict does not ipso facto terminate or suspend the operation of treaties as: (a) Between the State Parties to the treaty that are also parties to the conflict; (b) Between a State Party to the treaty that is also a party to the conflict and a State that is a third state in relation to the conflict' (ibid. 295). This approach can be based on sufficient State practice: even if the States' practice seems to vary over time, for certain kinds of treaties and provisions rules have been established regarding their applicability between belligerent States. This seems particularly true for the following five categories of treaties: (1) treaties providing for continuance during war; (2) treaties that are compatible with the maintenance of war; (3) treaties creating an international regime or status; (4) treaties for the protection of human rights; (5) treaties relating to the protection of the environment; and for (6) *ius cogens* rules and obligations *erga omnes* (see also Art. 5 Annexes (a), (b), (e), (f) ILC Draft Articles). The rationale behind the categories (1) to (5) is that, as the ILC Draft Articles state, the subject matter of those treaties involve the implication that they continue in operation, in whole or in part, during armed conflict, and hence the incidence of an armed conflict will not as such affect their operation (Art. 5 ILC Draft Articles). However, it is argued that the treaties listed in the annex by the ILC do not all conform to the conditions cited in Art. 5, as for instance so called 'law-making treaties' (see UN Doc A/CN.4/622 13, 15; UN Doc A/CN.4/627 para 52 *et seq*; Art. 5 and Annex ILC Draft Articles).

1. Treaties which Provide for Continuance during War

6 First of all, it is not disputed that treaties that expressly or according to their object and purpose provide for continuance during war cannot per se be suspended or terminated because of an armed conflict, and that, vice versa, treaties may be suspended or terminated during war when expressly provided in the treaty (see Art. 7 ILC Draft Articles; Art. 3 IDI Resolution). This is evident in regard to treaties relating to the law of armed conflict, including treaties relating to international humanitarian law (see Art. 5 Annex (a) ILC Draft Articles). Yet many peacetime treaties fail to address this issue directly. Exceptions are, for example Art. 27 → Vienna Convention on Consular Relations (1963) ('in the event of the severance of consular relations between two States: … the receiving State shall, even in case of armed conflict, respect and protect the consular premises') and Art. 45 → Vienna Convention on Diplomatic Relations (1961) (concerning their application see in the affirmative the ICJ in *United States Diplomatic and Consular Staff in Tehran*). Another exception was Art. XIX (1) of the 1954 International Convention for Prevention of Pollution of the Sea by Oil, which permitted State Parties '[i]n case of war or other hostilities … [to] suspend the operation of the whole or any part of the present Convention'. Besides this, international conventions establishing civil liability regimes exempt damage caused by measures and means of warfare (cf Sands 231). Nevertheless, the latter does not mean that the applicability of these conventions during armed conflicts is per se excluded, as their application is not limited to peacetime but to non-military conduct only.

2. Treaties which are Compatible with the Maintenance of War

7 There is a strong, but sometimes disputed view that belligerents are not allowed to suspend or terminate peacetime multilateral treaties whose execution is compatible with the maintenance of war even without an explicit treaty provision (cf Berber 95; Chinkin 185; Klein 295; Tarasofsky 64; Simonds 195, 215; for a different view Stone 447; Art. 5 (a) IDI Resolution). According to this, multilateral peacetime treaties whose application does not limit methods and means of warfare continue to apply during an international armed conflict even between belligerent States (see ICRC Guidelines Art. 5; Vöneky [2001] 243, 249): eg a multilateral treaty entailing obligations to protect the marine environment during land warfare continues to apply during an international armed conflict between belligerent States. There seems to be sufficient State practice supporting this view (see *Goss v Brocks* Nebraska Supreme Court (1929) 223 NW 13; *Techt v Hughes* New York Court of Appeals (1920) 229 NY 222, cert denied (1920) 254 US 643; *Brownell v San Francisco* California Court of Appeals (1954) 26 Cal App 2d 102, 271 P 2d 974; cf Prescott 208, 214), and as there is no direct interference with the rules of the *ius in bello*, there do not seem to be convincing arguments that an application of such treaties could be denied.

3. Treaties Declaring, Creating, or Regulating a Permanent Regime or Status

8 More problematic than the applicability of compatible peacetime treaties is the continued validity of treaties that impose additional and higher standards upon belligerents than the traditional laws of armed conflict. The first type of treaties that generally bind belligerent States, even though they can interfere with military interests, constitute the so-called 'treaties creating an international regime or status' (see Art. 5 Annex (b) ILC Draft Articles). These treaties establish a territorial order in the general interest of the international community, such as treaties providing for the → demilitarization or neutralization of zones or the internationalization of waterways (Klein 295 *et seq*; McNair 720; Vöneky [2001] 255 *et seq*, 268 *et seq*).

4. Treaties for the Protection of Human Rights

9 Human rights treaties are another type of treaty commonly regarded as applicable during war, even though they impose additional restraints on the methods and means of warfare. This view was shared by the drafters of the resolution of the Institut de Droit International, which asserts: 'The existence of an armed conflict does not entitle a party unilaterally to terminate or to suspend the operation of treaty provisions relating to the protection of the human person, unless the treaty otherwise provides' (Art. 4 IDI Resolution; see as well Art. 5 Annex (e) ILC Draft Articles). This view was supported by the UN General Assembly (see eg UNGA Res 2677 (XXV) of 9 December 1970) and the ICJ (see *Legality of the Threat or Use of Nuclear Weapons [Advisory Opinion]* at para 25; against this view is the so-called separatist theory during the 1970s, cf Mushkat 161: the separatist theory argues that the law of armed conflict and international human rights are two different bodies of international law that have to be separated because of their *antinomie irréductible*, cf Meyrowitz 1095; → Human Rights and Humanitarian Law).

5. Treaties Relating to the Protection of the Environment

10 It is still disputed whether and to what extent treaties relating to the protection of the environment are applicable between belligerent States—apart from those which are compatible with the maintenance of war (see para. 7). The ILC Draft Articles include in rather broad terms 'treaties relating to the protection of the environment' (Art. 5 Annex (f) ILC Draft Articles, UN Doc A/65/10 at 298), arguing that the subject matter of these treaties involves the implication that they continue in operation (ibid. Art. 5). This seems convincing in regard to international agreements regulating the protection and use of areas beyond national jurisdiction—such as the → high seas, the deep sea-bed, outer space, and → Antarctica—as they share certain similarities with treaties establishing objective regimes (see para 8 above). Such treaties regulating the protection and use of areas beyond national jurisdiction seek to protect the environment or parts of it in the interest of the State Community as a whole. The same is true

with regard to environmental treaties protecting common goods (such as the climate, the ozone layer, or biodiversity) and global environmental resources (see Vöneky [2001] 204 *et seq*, 210 *et seq*). Thus one can argue that environmental treaties protecting common goods are sufficiently equivalent to human rights conventions, which also bind belligerents during armed conflict (see above para 9). According to this line of reasoning it seems convincing to add a third category of environmental treaties which remain in force during armed conflict: treaties governing the use and protection of shared natural resources—international watercourses, rivers, and lakes—if and only if these treaties seek to protect an environmental good in the common interest of the State Community as a whole (Vöneky [2001] 215 *et seq*; for a broader approach Art. 5 Annex (g) ILC Draft Articles). The ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* avoided answering the question whether and to what extent peacetime treaties relating to the protection of the environment are applicable between belligerent States (at para 30 *et seq*) and concluded only that peacetime environmental law is not the 'most directly relevant applicable law' during an armed conflict (at para 34).

6. Ius Cogens *Rules and* Erga Omnes *Obligations*

11 Finally, rules which are part of → *ius cogens* or are → obligations *erga omnes* seem to be generally accepted as remaining in force during armed conflicts for belligerent States (Chinkin 188; Vöneky [2001] 290 *et seq*). In more general terms this is stressed by the ILC Draft Articles that state: 'The termination of or the withdrawal from a treaty, or the suspension of its operation, as a consequence of an armed conflict, shall not impair in any way the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of that treaty' (Art. 9 ILC Draft Articles).

C. Exceptions and Derogations

12 Having stated that several types of peacetime treaties and other provisions of peacetime international law continue to apply between belligerent States, it is necessary to consider the extent to which these treaties bind belligerent States. It cannot be doubted that if peacetime standards bind parties during an armed conflict in the same way as during peacetime, the duty to fulfil these treaties would hardly be realistic. Although it is beyond the scope of this entry to examine this problem in depth, some general comments may be made in respect of the possibilities for modifying peacetime obligations generally applying to belligerents due to the extraordinary circumstances of an armed conflict.

13 In legal doctrine, there are four dominant approaches regarding the limitation of peacetime treaty obligations in cases of armed conflict. These are: (1) express derogation clauses; (2) inherent limitations of the treaty concerned; (3) justifications recognized in the law of State responsibility, particularly the state of necessity; and (4) general principles of international law relating to the suspension and termination of treaties.

1. Express Derogation Clauses

14 First of all, it is not doubtful that if a peacetime treaty entails special derogation clauses for emergency situations or armed conflicts—as do the major human rights treaties—these clauses must be applied (eg Art. 4 → International Covenant on Civil and Political Rights [1966]; Art. 15 → European Convention for the Protection of Human Rights and Fundamental Freedoms [1950]). Other peacetime treaties, as, for instance, environmental treaties, rarely entail such express derogation clauses (but see Art. XVII African Convention on the Conservation of Nature and Natural Resources). Some peacetime treaties do not entail general derogation clauses, but have clauses allowing deviations from particular obligations because of urgent national interests (Art. 9 (1) Convention on the Conservation of European Wildlife and Natural Habitats; Art. III (5) (d) Convention on the Conservation of Migratory Species of Wild Animals; Art. 2 (5) Convention on Wetlands of International Importance especially as Waterfowl Habitat). Other provisions permit State Parties to not fulfil certain information duties in case the transfer of information could affect national security (Art. 8 Convention on the Protection and Use of Transboundary Watercourses and International

Lakes; Art. 18 (1) Convention on the Protection of the Marine Environment of the Baltic Sea Area; Art. 9 (3) Convention for the Protection of the Marine Environment of the North-East Atlantic; Art. 12 (5) Convention on Co-operation for the Protection and Sustainable Use of the River Danube; similar as well Art. 302 UN Convention on the Law of the Sea).

2. Inherent Treaty Limitations

15 The second approach applies to treaties where express derogation clauses are missing but the obligations can be modified by reference to inherent limitations. For example, some commentators assert that Art. 2 (1) and (4) → International Covenant on Economic, Social and Cultural Rights (1966) recognizes that the extraordinary circumstances of an armed conflict can modify the standards and obligations for protecting human rights (Kälin and Gabriel 23 *et seq*, 83). This technique for modifying the peacetime standards can be applied to other peacetime treaties where the fulfilment of an obligation is linked to the 'particular conditions and capabilities' of the States or where the duties are only to be fulfilled 'as far as possible and appropriate' (eg Art. 194 (1) UN Convention on the Law of the Sea).

3. Justifications Recognized in the Law of State Responsibility

16 The third and most important approach to modify peacetime standards is to rely on the justifications recognized under the general international law of State responsibility. If the conditions of one of the justifications are met by the circumstances of an international armed conflict, a State cannot be responsible for the injury of a peacetime treaty obligation. Justification on grounds of → self-defence, countermeasures in respect of an internationally wrongful act, and necessity are especially relevant during international armed conflicts. The ILC Draft Articles state in this regard '[a] State exercising its right of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right' (Art. 13 ILC Draft Articles). However, concerning the justification on grounds of self-defence it is questionable whether every State that is a victim of an act of → aggression or claims on justified grounds to be such a victim can refer to this justification. One could argue that it would be contrary to the principle that during an armed conflict there is no difference between the aggressor State and the victim State in regard to the international rules regulating the conduct of hostilities. Hence, it seems to be preferable to opine that a State can only refer to the justification of self-defence in breaching peacetime treaties if this justifies a reaction to a specific breach of the *ius in bello* of the other State Party; this would mean that not only the victim of an aggression but also the aggressor State could in principle refer to the justification of self-defence in regard to specific military actions (Vöneky [2001] 480). The ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* draws the threshold at the deprivation of the right of self defence and concludes rather imprecisely: 'The Court does not consider that the [peacetime environmental] treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law …' (para. 30). It has to be noted, as well, that the most important justification during armed conflict—a state of necessity—is strictly limited to cases where non-compliance is necessary and proportional.

4. General Principles Relating to the Suspension and Termination of Treaties

17 A fourth approach considers the general principles of international law relating to suspension and termination of treaties on grounds of a material breach, supervening impossibility of performance, and fundamental change of circumstances (see Art. 17 ILC Draft Articles; Ipsen 1050 et seq; Tarasofsky 65 *et seq*). These principles apply at least to the same extent during international armed conflict as during peacetime, since belligerent States shall not be given fewer possibilities to suspend their treaty obligations than contracting parties in peacetime. These general principles also entail several limitations. For instance it is generally acknowledged that a material breach cannot be invoked to suspend or terminate peremptory norms of international law (Art. 60 (5) VCLT); an impossibility of performance and a fundamental change of circumstances may not be invoked when it is the result of a breach of an international obligation

by the party invoking the ground (ibid.; Arts 61 (2), 62 (2) VCLT). As a breach of the *ius ad bellum* constitutes such a breach of an international obligation, an aggressor State cannot terminate or suspend peacetime treaty obligations by claiming impossibility of performance or fundamental change of circumstances (Vöneky [2001] 222); even in broader terms the ILC Draft Articles emphasise that '[a] State committing aggression within the meaning of the Charter of the United Nations and GA Res. 3314 (XXIX) of the General Assembly of the United Nations shall not terminate, withdraw from, or suspend the operation of a treaty as a consequence of an armed conflict of the effect would be to the benefit of that State' (Art. 15 ILC Draft Articles).

D. Conclusion

18 Since the end of World War II the international legal order seeks to promote peace and peaceful relations between States; because of this it seems prima facie convincing that peacetime obligations bind States during an armed conflict if there are not compelling reasons that speak against the application. However, looking at State practice it can be shown that the question of the effect of an armed conflict on treaties is still in many parts one of the most unsettled and complicated topics in international law. The discussions in the ILC show that there are several questions which are highly controversial in regard to the effect of armed conflicts on peacetime treaties. Nevertheless, as elaborated above, there is a trend towards an increasing application of peacetime treaties: at least some categories of peacetime treaties and rules remain per se applicable even if the obligated States take part in an armed conflict (paras 5–11 above). This does not exclude belligerent States from modifying these peacetime standards which are applicable during armed conflict (paras 12–17 above), but in the end there do exist 'core obligations' of peacetime law; these are defined by the peremptory norms, and the limitations of necessity and proportionality, and they provide a fruitful approach for determining the core standards applicable during an armed conflict on a case-by-case basis. Looking from a broader perspective, the development of the last decades seems to indicate that there may be a paradigm shift in the future: then it will be necessary that each State must give convincing reasons why a certain peacetime obligation cannot be fulfilled because of an armed conflict.

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Armed Conflict, International

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A. Introduction: Concept and Definition

1 International armed conflict involves armed hostilities between two or more sovereign States, regardless of whether a 'state of war' has been declared or accepted. This definition adopted in 1949 with Common Art. 2 → Geneva Conventions I–IV (1949) also includes all cases of partial or total occupation of the territory of a party to the conflict, even if such occupation meets with no resistance (→ Occupation, Belligerent). Since 1977 and the adoption of → Geneva Conventions Additional Protocol I (1977), the definition of international armed conflict has expanded to include → wars of national liberation—that is, wars fought by peoples fighting against colonial domination, alien occupation, and racist regimes in the exercise of their right to → self-determination.

2 The term 'armed conflict' as a legal term originates with the Geneva Conventions. The Commentary to the First Geneva Convention of 1949 makes it clear that the substitution of 'war' for 'armed conflict' is intentional, done to ensure that States do not attempt to deny the applicability of the law by claiming that they are engaged only in a police action, rather than a war (Pictet vol 1 [1952] 32). Thus, any dispute involving two or more States in which the → armed forces of those States are involved is deemed an armed conflict. This definitional approach was confirmed by

the → International Criminal Tribunal for the Former Yugoslavia (ICTY) in the 1995 decision *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* IT-94-1-AR72 (2 October 1995) (the → Tadić Case), in which the Tribunal states that 'an armed conflict exists whenever there is a resort to armed force between States' (para. 70).

B. Historical Development of Legal Rules

3 The first modern laws of armed conflict were codified in the latter part of the 19th century. The first major international treaty regulating armed conflict was the 1864 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field ('1864 Geneva Convention'). This treaty set down rules regarding the treatment and care of persons who have been wounded in the field of battle, as well as protections for persons who come to the aid of the wounded (see also → Wounded, Sick, and Shipwrecked). The convention was a direct result of advocacy initiated by Swiss businessman Henri Dunant, whose short book *Un Souvenir de Solferino* (*A Memoir of Solferino*) was a proposal for the establishment of a neutral, international relief organization for tending to the wounded and sick in armed forces in the field. Dunant's work eventually led to the creation of the → International Committee of the Red Cross (ICRC).

4 The 1864 Geneva Convention was soon followed by the 1868 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight ('St Petersburg Declaration')—the first international treaty that banned a specific means of warfare (→ Warfare, Methods and Means; → Weapons, Prohibited). This instrument prohibited the use of small calibre projectiles in warfare, as they were deemed to cause unnecessary suffering and superfluous injury. As such, these projectiles were considered a violation of the principle of → proportionality, in that they caused injury considered to be disproportionate to the aims of warfare. As stated in the preamble of the St Petersburg Declaration, the 'only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy … this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable'.

5 The process of formalization of the laws of war continued with the development of two → non-binding agreements. The first of these was the document adopted at the culmination of an international conference in 1874, convened to continue the development and codification of the laws of war. Though the conference failed to take the document to treaty stage, the Project of an International Declaration concerning the Laws and Customs of War, also known as the → Brussels Declaration (1874), was an important step in the ongoing development of the international law of armed conflict. This was followed in 1880 with the production by the → Institut de Droit international of *The Law of War on Land* (Oxford Manual), another non-binding but nonetheless instructive text on the contemporary law of armed conflict.

6 The end of the 19th century brought the first major international conference regarding the development of laws relating to armed conflict (→ Hague Peace Conferences [1899 and 1907]). The 1899 Hague Peace Conference culminated in the adoption of four conventions and three declarations: the Convention for the Pacific Settlement of International Disputes; the Convention with respect to the Laws and Customs of War on Land ('1899 Hague Convention II'); the Convention for the Adaptation to Maritime Warfare of Principles of the Geneva Convention of 22 August 1864 ([1907] 1 AJIL Supp 159); the Convention Prohibiting the Launching of Explosives and Projectiles from Balloons or Other New Methods of a Similar Nature ('1899 Hague Convention IV'; [1907] 1 AJIL Supp 153); the Declaration respecting the Prohibition of Discharge of Projectiles from Balloons (91 BSP 1011); the Declaration to Prohibit the Use of Projectiles, the Only Object of Which is the Diffusion of Asphyxiating or Deleterious Gases ([1907] 1 AJIL Supp 155); and the Declaration to Prohibit the Use of Bullets Which Expand or Flatten Easily in the Human Body (91 BSP 1017), such as bullets with a hard envelope, of which the envelope does not entirely cover the core or is pierced with incisions.

7 The 1899 Hague Peace Conference delegates also adopted what would come to be known as the → Martens Clause. Included in the preamble to both the 1899 Regulations respecting the Laws and Customs of War on Land, annexed to 1899 Hague Convention II; and the 1907 Regulations concerning the Laws and

Customs of War on Land, annexed to 1907 Hague Convention IV ('Hague Regulations'), the Martens Clause was adopted to resolve a dispute at the 1899 Hague Peace Conference over the status of resistance fighters who take up arms against an occupying authority. During the conference, argument was divided over whether those who forcibly resisted an invading army could be considered legitimate → combatants and thus entitled to combatant and → prisoners of war status, or whether such people were to be treated as criminals. The conference was deadlocked until the Russian delegate von Martens suggested that a clause be included in the preamble to the conventions that reaffirmed that, in situations not explicitly dealt with in the conventions, all persons were to be treated according to certain minimum fundamental standards of behaviour, as understood by considerations of 'humanity' and 'public conscience' (→ Humanity, Principle of).

8 The 1899 Hague Peace Conference was reconvened in 1907, with the aim to examine expanding the laws of war to better regulate → naval warfare. The conventions adopted at the 1907 Hague Peace Conference were: the Convention for the Pacific Settlement of International Disputes ([1907] 205 CTS 233); the Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts ([1908] 2 AJIL Supp 81); the Convention relative to the Opening of Hostilities; the Convention respecting the Laws and Customs of War on Land ('1907 Hague Convention IV'; → Land Warfare); the Convention respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (→ Neutrality in Land Warfare); the Convention relative to the Status of Enemy Merchant Ships at the Outbreak of Hostilities; the Convention relative to the Conversion of Merchant Ships into War Ships; the Convention relative to the Laying of Automatic Submarine Contact Mines; the Convention respecting Bombardment by Naval Forces in Time of War ('1907 Hague Convention IX'); the Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention; the Convention relative to Certain Restrictions on the Exercise of the Right of Capture in Maritime War; the Convention relative to the Establishment of an International Prize Court (→ Prize Law); and the Convention concerning the Rights and Duties of Neutral Powers in Naval War. The 1907 Hague Peace Conference also adopted a Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons (100 BSP 455). The 1907 Regulations Respecting the Laws and Customs of War on Land, annexed to 1907 Hague Convention IV, also introduced laws regarding the administration of territory under belligerent occupation.

9 World War I disrupted plans to reconvene the Hague Peace Conference for the third time. Only one international document, the 1909 London Declaration concerning the Laws of Naval Warfare, was adopted during this time. However, the war itself was an impetus for the adoption of a number of new treaties and rules. These included the 1922 Washington Treaty relating to the Use of Submarines and Noxious Gases in Warfare, which never came into force (→ Submarine Warfare), and the non-binding Hague Rules of → Air Warfare in 1923 (General Report of the Commission of Jurists of the Hague Part II: Rules of Aerial Warfare [1923] 17 AJIL Supp 245). The more significant instrument came in 1925 with the adoption of the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, banning the use of certain chemical and bacteriological weaponry such as mustard and nerve gas (→ Biological Weapons and Warfare; → Chemical Weapons and Warfare). Though asphyxiating and deleterious gases had been banned under the 1899 Hague Declaration II, chlorine and mustard gas were nonetheless used extensively during World War I. The 1925 Geneva Protocol to the Hague Conventions comprehensively outlawed the use of these kinds of weapons.

10 The second set of treaties adopted during the post-World War I era came about in response to the deficiencies of the Hague Regulations with regard to the treatment of prisoners of war ('POWs'). The Hague Regulations laid down some general principles for the treatment of POWs; however, the shortcomings of the regulations were made clear during World War I. In response, the ICRC convened a diplomatic conference to revise the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field and adopted a new convention dealing specifically with the treatment of POWs. In 1929 the Geneva Convention relative to the Treatment of Prisoners of War was adopted outlining specific

rules regarding the treatment of POWs, including a prohibition on → reprisals, regulations regarding the organization and administration of POW camps, access for relief societies, and rules for → repatriation. The same conference also adopted an updated convention regarding the wounded and sick in armies in the field: the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field ([signed 27 July 1929, entered into force 19 June 1931] 118 LNTS 303).

11 While these treaties went a considerable way towards alleviating the suffering of those affected by war, other limitations and inadequacies in the existing legal protections would soon be illustrated with the outbreak of two consecutive conflicts—the → Spanish Civil War (1936–9) and then World War II (1939–45). Both conflicts involved the commission of widespread and systematic atrocities against civilians, internees, POWs, and the wounded, sick, and shipwrecked. The devastation experienced during World War II was the impetus for a considerable revision and expansion of many aspects of the law of armed conflict. The outcome of the diplomatic conference held in Geneva in 1949 was the adoption of four distinct conventions: the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field ('Geneva Convention I'); the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea ('Geneva Convention II'); the Geneva Convention relative to the Treatment of Prisoners of War ('Geneva Convention III'); and the Geneva Convention relative to the Protection of Civilian Persons in Time of War ('Geneva Convention IV').

12 The Geneva Conventions considerably widened the scope of the law of armed conflict. The Conventions expressly excluded an 'all-participation' clause, such as was adopted in the Hague Regulations. The → General Participation Clause (*clausula si omnes*) in the Hague Regulations rendered null the provisions of the regulations if one or more of the parties to the conflict were not party to the regulations. By omitting such a provision, the Geneva Conventions ensured that no State Party, upon becoming involved in an armed conflict, could deny the applicability of the Conventions based on the non-party status of their opponent or opponents.

13 The second major area where the law of armed conflict significantly expanded its application was in adopting new categories of combatants. The Geneva Conventions grant combatant status to persons participating in a *levée en masse* or organized → resistance movements. *Levée en masse* refers to a situation where, upon the approach of an invading and/or occupying army, the civilians of the threatened territory spontaneously take up arms in order to resist the invasion (→ Civilian Participation in Armed Conflict). The idea of legitimizing a *levée en masse* had originally been debated during the 1899 Hague Peace Conference, and was eventually addressed, to some degree, with the inclusion of the Martens Clause. However, the frequently brutal treatment meted out to partisan and resistance fighters who fell into Axis hands in occupied Europe during World War II prompted a re-evaluation of the status of such fighters under international law. During the diplomatic conference of 1949, those States that had recently experienced occupation by the Nazis felt that partisans and resistance fighters deserved equivalent treatment to other combatants, including full POW recognition and protection if captured. Moreover, it was argued that slightly less restrictive conditions for fulfilment of combatant status for partisans should be introduced. Among those States who had been the occupier, there was a reticence to expand the category of combatant, and it was argued that partisan fighters should fulfil more stringent conditions before being designated as a combatant.

14 The provisions eventually adopted granted combatant status to participants in a *levée en masse* and to members of organized resistance movements. *Levée en masse* is recognized under Art. 13 (6) Geneva Convention I, Art. 13 (6) Geneva Convention II, and Art. 4 (A) (6) Geneva Convention III. Organized resistance movements are recognized under Art. 4 (A) (2) Geneva Convention III, providing treatment as POWs for organized groups even if they operate in already-occupied territory. In order to qualify for combatant/POW status, participants in a *levée* must carry their arms openly and obey the laws of armed conflict. Resistance fighters are obliged to comply with similar, though more stringent, requirements as those participating in a *levée* in that they must be under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and conduct their operations in accordance with the

laws and customs of war. While recognition of *levée en masse* is still included in a number of military manuals, including those of the US, UK, and Russian Federation, in practice, *levées en masse* have been rare occurrences. The → International Criminal Tribunal for the Former Yugoslavia (ICTY), in the *Prosecutor v Orić* ([*Judgment*] IT-03-68-T [30 June 2006]), found that the criteria for *levée en masse* had been met for a brief period of time during the initial stages of the Serbian takeover of Srebrenica. However, this remains an isolated incident; arguably *levée en masse* as a category of combatant remains pertinent for historical reasons only.

15 The Geneva Conventions also widened the ambit of the law of armed conflict by expanding on the applicable rules for POWs and their captors. Increasing the number of provisions from 97 to 143, Geneva Convention III contained more specific rules regarding who was to be considered a POW, keeping in line with the expanded categories of combatants and other protected persons as outlined in Geneva Conventions I and II. It also explained in greater detail the permissible standards of detention for POWs, the type and conditions of labour for POWs, as well as expanded or more detailed rules on POW financial resources, access to relief agencies, and rights in judicial proceedings. The convention also established, in its Art. 118, that POWs are to be repatriated without delay after the cessation of active hostilities. This provision was adopted in response to the experience of some World War II POWs, some of whom were held in Japanese camps up until 1949 before being repatriated.

16 Geneva Convention IV marked the introduction of a comprehensive set of rules regarding the protection of → civilian population in armed conflict by imposing limits on the allowable acts of an occupying power. Civilians in occupied territory were now granted a protected status in much the same way as persons rendered *hors de combat* through injury, illness, or detention. Furthermore, Geneva Convention IV also outlined guidelines for the protection of enemy nationals who find themselves in the territory of the opposing State upon the commencement of hostilities. Such persons were routinely interned during World Wars I and II, and were often denied basic protections and rights (→ Internment). Geneva Convention IV extends to interned civilians similar rights and protections to those afforded to POWs under Geneva Convention III.

17 The Geneva Conventions also introduced the concept of universal jurisdiction for grave breaches of the conventions. The principle of universal jurisdiction allows any State to exercise criminal jurisdiction over persons accused of committing certain crimes against international law, regardless of nationality of either the victim or perpetrator, or the location of the crime (→ International Criminal Law; → Universality). The crimes in question are considered to be of such gravity and magnitude that they warrant their universal prosecution and repression. Grave breaches of the Geneva Conventions are considered → war crimes and thus trigger universal jurisdiction. The prosecution of persons responsible for perpetrating grave breaches is considered in the universal interest of all States, as such offences are perceived as attacks on the international order (see also → Community Interest). By implementing a system of universal jurisdiction, the hope was that such crimes would not go unpunished, should the State 'harbouring' the accused be unwilling or unable to prosecute the accused. Therefore, under Arts 50, 51, 130, and 147 Geneva Conventions I–IV respectively, a State is obliged to punish grave breaches of the conventions even if the offender or victim is not that State's national, and the offence is committed outside that State's territorial jurisdiction. Furthermore, if a State is unwilling to prosecute an offender within its territory, it is obliged to hand over the alleged offender to any State Party to the Geneva Conventions who can make out a prima facie case (→ Aut dedere aut iudicare).

18 The next major international treaty regarding armed conflict adopted was the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (→ Cultural Property, Protection in Armed Conflict). Some protection had previously been afforded under Art. 27 Hague Regulations, providing that 'in sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided that they are not being used at the time for military purposes'. A similar provision was included regarding naval bombardment in Art. 5 1907 Hague

Convention IX. The 1954 Hague Convention on Cultural Property covers a considerable range of protected property including both moveable and immovable property, but does not include places of worship, unless they are considered religious monuments. The protections outlined in the convention are similar to those contained in the Hague Regulations; the parties to the convention must undertake to respect the cultural property located within their own territory and within the territory of other parties, and must refrain from any act of hostility directed against such property. However, the convention is limited in a number of ways. Protection is limited to cultural property deemed to be of 'great importance' and part of the 'cultural heritage of the world.' There is no explanation or an objective criterion specifying which property is of 'great importance'. Furthermore, according to its Art. 4 (2), the protections of the convention can be waived if 'military necessity requires such a waiver'.

19 In 1972, a new Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction ('Biological Weapons Convention') was adopted. Supplementing the 1925 Geneva Protocol to the Hague Conventions, the 1972 convention authorized States Parties to bring breaches before the UN Security Council. Notably, the convention does not prohibit the use of biological weapons; however, if weapons were used by a State party to the convention, one could logically deduce that the party had either developed, produced, stockpiled, or otherwise acquired bio-weapons, which would therefore put them in breach of the convention.

20 A treaty regarding the environment and armed conflict was adopted in 1976 (→ Environment, Protection in Armed Conflict). Under the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques ('ENMOD Convention'), parties are prohibited from employing means or methods of warfare which are intended, or may be expected, to cause widespread long-term and severe damage to the natural environment, for example → weather modification. Such modification would include alteration of atmospheric conditions, modification of the ocean currents, or manipulation of any of the natural processes, dynamics, composition, or structure of the earth. The ENMOD Convention supplements Art. 55 Additional Protocol I, which also prohibits the employment of means or methods of warfare intended to cause serious long-term and widespread damage to the natural environment. Due to its construction and ambit, the ENMOD Convention has a limited field of operation; the environmental modification techniques envisaged by the convention can only be achieved with exceptionally advanced technology. The ENMOD Convention has not received wide recognition; its relevance in practice is thus doubtful.

21 At the same time as the ENMOD Convention and Biological Weapons Convention were being drafted and adopted, it was becoming obvious that other treaties relating to conduct in armed conflicts would need to be reassessed—specifically in light of developments related to the process of decolonization and the rise in frequency of non-international armed conflicts (→ Armed Conflict, Non-International). The result of this reassessment was the adoption in 1977 of → Geneva Conventions Additional Protocol I (1977) and → Geneva Conventions Additional Protocol II (1977) regarding international and non-international armed conflict respectively. Additional Protocol I introduced a new category of international armed conflict and a new category of combatant: the war of national liberation and members of national liberation movements. Additional Protocol II expanded the law of non-international armed conflict, introducing more rules to supplement those contained in Common Art. 3 Geneva Conventions.

22 The recognition of this 'new' type of international armed conflict came about in response to developments taking place in the → United Nations (UN) with regard to decolonization (→ Decolonization, Impact of United Nations on). Following the adoption of the UN Charter, the UN was pivotal in promoting the dismantling of existing colonial regimes throughout the world. While some dependent territories were decolonized and achieved self-determination through peaceful means, a number of colonial territories found their struggles for self-determination being resisted by their colonizers, resulting in the outbreak of armed hostilities between the colonial power and the groups seeking self-determination within the dependent territory. By the 1970s, international attention was increasingly focused on these conflicts, known as wars of national liberation. In response, the

UN General Assembly adopted a number of declarations regarding self-determination and national liberation wars, the most significant of these being the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (UNGA Res 2625 (XXV) GAOR 25th Session Supp 28, 121; → Friendly Relations Declaration [1970]). The declaration affirmed the principle of 'self-determination of peoples' as a legal right, further stating that any groups engaged in the struggle to assert this right of self-determination and to free themselves from colonial domination, a racist regime, or alien occupation were not to be hindered by any State in their efforts to assert this right. In essence, the national liberation movement was granted a limited form of international legitimacy and acknowledged as having international personality.

23 The Friendly Relations Declaration also stated that the use of force by national liberation movements in their struggle to assert the right to self-determination was not subject to the Art. 2 (4) UN Charter prohibition of the use of force under international law (→ Use of Force, Prohibition of). This meant that any conflict that arose in pursuance of self-determination and national liberation was to be considered akin to a conflict between two sovereign States. As noted in 1973 by UNGA Res 3103 (XXVIII) on the Basic Principles of the Legal Status of the Combatants Struggling against Colonial and Alien Domination and Racist Regimes:

> [t]he armed conflicts involving the struggle of peoples against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions, and the legal status envisaged to apply to the combatants in the 1949 Geneva Conventions and other international instruments is to apply to the persons engaged in armed struggle against colonial and alien domination and racist regimes (at para. 3).

24 With this in mind, Additional Protocol I recognized 'wars of national liberation' as international armed conflicts. Additional Protocol I provides for its application in situations that are deemed

> [a]rmed 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 (Art. 1 (4)).

25 Under Art. 43 Additional Protocol I, a person may be considered a member of the armed forces of a party to a conflict, provided that they belong to an organized force, group, or unit under responsible command even if such command is represented by a government or authority which is not recognized by the adverse party to the conflict. Furthermore, all such forces must be subject to an internal disciplinary system providing for the enforcement of and adherence to the rules of international humanitarian law. In addition, Art. 96 (3) Additional Protocol I requires national liberation movements to issue a unilateral declaration to the depository of the Geneva Conventions, the Swiss government, outlining their commitment to apply and adhere to the Geneva Conventions and Additional Protocol I.

26 Additional Protocol I also recognizes the methods by which such wars were usually waged, ie by → guerrilla forces using non-conventional tactics. Guerrilla fighters are granted combatant status in much the same way as partisans and resistance fighters had been in the Geneva Conventions. Guerrillas are to be considered combatants and they are to be granted full combatants rights and responsibilities, as well as the concomitant POW rights, if captured.

27 Under Art. 44 Additional Protocol I, there is no requirement for wearing a fixed, distinctive emblem, or for the open carriage of arms. This provision creates an exception to the general rule of distinction. Therefore, while Art. 44 (3) Additional Protocol I establishes the requirement that 'combatants are obliged to distinguish themselves from the civilian population when they are engaged in an attack or in a military operation preparatory to an attack', it also states that such distinction is to be considered in light of operational necessity. Art. 44 (3) Additional Protocol I also recognizes that 'there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself' and provides that such a combatant will not lose his combatant status so long as he 'carries his arms openly (a) during

each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate'. However, this article does not extend the right to regular armies to engage in guerrilla tactics. Art. 44 (7) Additional Protocol I specifies that the article is 'not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict'.

28 Expressly excluded from the newly expanded category of combatant are → mercenaries. Under Art. 47 Additional Protocol I, mercenaries are persons specially recruited to participate in an armed conflict, who do so solely for financial motivation, such compensation being substantially in excess of that promised or paid to regular combatants of similar rank and/or function in the armed forces of the party to the conflict. The prohibition on the use of mercenaries was, at the time, a new addition to international humanitarian law, and it was adopted in direct response to concerns held by the African States regarding the use of mercenaries by former colonial powers in wars of national liberation.

29 In addition to the expanded categories of combatants, Additional Protocols I and II are noteworthy in that they effected what amounts to a merger of the two previously distinct strands of humanitarian law: Hague law and Geneva law. Where Hague law deals with the means and methods of armed conflict, and Geneva law concerns itself with the protection of persons affected by armed conflict, the Additional Protocols merge these two streams.

30 Additional Protocol I also introduced the innovation of the → International (Humanitarian) Fact-Finding Commission ('IHFFC'). This body, outlined in Art. 90 and established in 1992, is a permanently constituted, independent entity with the competence to investigate allegations of grave breaches or serious violations of both the Geneva Conventions and Additional Protocol I. It is also empowered to use its → good offices to assist in restoring respect for and compliance with the conventions and protocol. As of this writing, the IHFFC has not been called upon to deliver any findings relating to armed conflicts.

31 The Additional Protocols illustrate the growing influence of international human rights law on the law of armed conflict. Indeed, when the diplomatic conference that debated and adopted the Additional Protocols was convened, it was termed the 'Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts'. The use of the term 'humanitarian law' emphasized the new direction of the law of armed conflict—one also reflected in the merging of Hague and Geneva law. The law of armed conflict was now more holistic, focused on balancing military needs and objectives with the protection of those most adversely affected by conflict: the wounded, sick, and shipwrecked; POWs and detainees; and civilians in occupied territories (→ Human Rights and Humanitarian Law).

32 It should be noted, however, that several States did not sign or ratify either one or both of the Additional Protocols. Non-party States to both protocols include the US, Israel, India, Iran, Indonesia, and Myanmar. The main source of criticism regarding the protocols was the introduction of what were considered 'subjective' criteria to the classification of armed conflict—namely, the internationalization of wars of national liberation. Also of concern was the relaxing of the criteria regarding uniforms and the carrying of weapons by irregular fighters. As noted by US President Reagan in his address to the US Congress in 1987:

> Protocol I is fundamentally and irreconcilably flawed. It contains provisions that would undermine humanitarian law and endanger civilians in war. One of its provisions, for example, would automatically treat as an international conflict any so-called 'war of national liberation'. Whether such wars are international or non-international should turn exclusively on objective reality, not on one's view of the moral qualities of each conflict. To rest on such subjective distinctions based on a war's alleged purposes would politicize humanitarian law and eliminate the distinction between international and non-international conflicts. It would give special status to 'wars of national liberation', an ill-defined concept expressed in vague, subjective, politicized terminology. Another provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists

and other irregulars attempt to conceal themselves (R Reagan 'Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions' [29 January 1987]).

The US does not consider many of the provisions of the Additional Protocols to be reflective of customary international law (see Bellinger and Haynes).

33 Following the Additional Protocols, the next major series of law of armed conflict treaties focused on the prohibition of certain weapons. In 1980, the Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, also known as the Conventional Weapons Convention ('CWC'), was adopted. At the time of adoption, three protocols were annexed to the CWC: Protocol I on Non-Detectable Fragments banned the use of weapons that injure by leaving fragments that are non-detectable in the human body; Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices banned the use of mines, booby-traps, and other explosive devices; and Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons banned the use of incendiary weapons like flamethrowers. Protocol IV on Blinding Laser Weapons was adopted in 1995 and banned the use of laser weapons that cause permanent blindness. The final protocol, Protocol V on Explosive Remnants, was adopted in 2003. It addresses explosive → remnants of war such as unexploded → cluster munitions and abandoned ordnance stockpiles left behind at the end of hostilities. The protocol obliges State Parties to endeavour to take steps to clear areas of such unexploded ordnance following the cessation of hostilities, through such measures as provision of → technical assistance, keeping records of locations of abandoned ordnance, and taking steps to prevent contamination of civilian areas with explosive remnants of war.

34 The 1990s were a period of consolidation and expansion of international humanitarian law. New treaties were adopted to regulate or prohibit the use of certain types of weaponry, while major steps regarding accountability mechanisms were taken with the establishment of the → International Criminal Tribunal for Rwanda (ICTR) and the ICTY, as well as the adoption of the 1998 Rome Statute for the → International Criminal Court (ICC). Of the treaties adopted during this period, the first was the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction ('Chemical Weapons Convention'), which comprehensively banned the use as well as the development, production, and stockpiling of chemical weapons. The ad hoc tribunals were established to address the serious violations of international humanitarian law that had taken place during the internal armed conflict in → Rwanda and the armed conflict—both international and internal in character—which had taken place in the former Yugoslavia (see also → Yugoslavia, Dissolution of). Both of these tribunals contributed to the development and reaffirmation of international humanitarian law with landmark cases such as the → Tadić Case in the ICTY and the → Akayesu Case in the ICTR (*Prosecutor v Akayesu [Judgment]* ICTR-96-4-A [1 June 2001]), exploring important issues regarding the commission of war crimes in non-international armed conflicts, the growing convergence of the laws of international and non-international armed conflicts, and the characterization of internationalized armed conflicts. The ICTR and ICTY served as a significant impetus for the international community finally adopting a treaty to establish an international criminal court—something which had been debated in international law circles since the post-World War II → International Military Tribunals. In 1998, following years of debate and negotiation, the Rome Statute of the ICC was adopted, with the ICC coming into being in 2002 following the 60th ratification. The ICC has jurisdiction to prosecute → genocide, → crimes against humanity, war crimes, and → aggression.

35 During this time, the law of naval warfare was also revisited for assessment. Over a period of seven years, 45 experts from 24 countries, including government personnel and academics, met to debate, draft, and eventually adopt a manual comprising 183 paragraphs drawn from treaties and customary international law, and further informed by recourse to national → manuals on the law of armed conflict, domestic case law, reports, papers, and opinions of publicists in the area, specially-appointed rapporteurs, as well as the opinions and perspectives offered by naval officers who served on the panel. The 1994 San Remo Manual on International Law

Applicable to Armed Conflicts at Sea, though a non-binding document, is generally considered the most authoritative statement of the law of armed conflict applicable at sea. The manual's customary status has been affirmed by the ICRC's study into customary international humanitarian law (Henckaerts Doswald-Beck).

36 Further progress in the area of weapons treaties was made in 1997 with the adoption of the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction ('Ottawa Convention'). This convention supplements and builds on Protocol II of the Conventional Weapons Convention; where the protocol prohibits or regulates the use only of → land mines, the Ottawa Convention comprehensively bans the use, stockpiling, production, and transfer of anti-personnel mines. The treaty also provides that States Parties must contribute to mine clearance programmes, education and awareness programmes regarding mines, and provide care and rehabilitation programs for persons injured by mines. The Ottawa Convention regulates anti-personnel mines only; it does not ban the use of anti-tank mines.

37 Rounding off the weapons treaties, 2008 saw the adoption of a treaty that banned the use, development, production, acquisition, stockpiling, retention, and transfer of certain types of anti-personnel cluster munitions. The Convention on Cluster Munitions came into force in 2010 following its 30th ratification, and it was an important step forward in further regulating a means of weaponry that frequently injures civilians. Cluster bombs have been notorious for their 'dud' rate—the ratio of unexploded sub-munitions to those sub-munitions which deploy as intended—being often as high as 25%. This unexploded ordnance remains dormant until disturbed, usually by civilians, often long after the cessation of active hostilities. Unexploded ordnance render vast tracts of land contaminated; the inability to accurately determine exactly where these cluster bombs have fallen often adds to the problem. In light of these issues, the Cluster Munitions Convention bans the use of cluster munitions that are not equipped with self-destruct and/or self-deactivating features and places limits on the permissible number of sub-munitions and their weight. The convention also obliges States Parties to assist in the clearance and destruction of unexploded ordnance, both within their own territory and in the territory of other States affected.

C. Current Legal Situation

38 The Geneva Conventions I–IV became the first international treaty to achieve universal ratification, with South Sudan becoming party to the Conventions in August 2013, and Palestine becoming party in 2014. The Additional Protocols I and II also enjoy high ratification records, with 174 ratifications of Additional Protocol I and 168 ratifications of Additional Protocol II (as of June 2015). Some of the weapons conventions also have similarly high ratification records, with the Chemical Weapons Convention, Ottawa Convention, and Biological Weapons Convention all with ratification numbers over 150.

39 With regard to the current status of customary international humanitarian law, the situation has been explored in more detail with the 2005 publication (and on-going updating) of the ICRC study into customary international humanitarian law. The study, conducted over 10 years, examined national legislation, domestic military manuals, and State practice to examine the extent to which the treaty law of international humanitarian law has been incorporated into State practice and achieved customary status. The study found that most of the provisions of the major treaties have achieved customary status. Another noteworthy finding of the ICRC study is that there seems to be a more uniform approach to the regulation of all armed conflicts, regardless of whether such conflicts are international or non-international. Indeed, of the 161 customary rules of humanitarian law as identified in the ICRC study, 142 rules are uniformly applicable to all armed conflicts. Key areas of the law not subject to this convergence include rules specifically related to occupation, belligerent reprisals, the question of combatants and POWs, and guaranteed access for the ICRC.

D. Special Problems

40 The attacks against the US in September 2001, and the resulting US and international responses to → terrorist organizations, have brought about a number of developments that present challenges to the current

order of international humanitarian law. The first of these challenges arose in the immediate wake of the 2001 terrorist attacks, with regard to those persons captured and detained in what was then called the 'War on Terror'. In October 2001, the US, in conjunction with → North Atlantic Treaty Organization (NATO) forces, began air strikes against the authorities in power in Afghanistan, the → Taliban, in response to a refusal to hand over suspected Al Qaeda members the US believed the Taliban were harbouring. This was soon followed by a ground invasion of Afghanistan. By 2003, the conflict expanded to include Iraq and the regime of Saddam Hussein, who was alleged to be developing → weapons of mass destruction, sponsoring terrorist acts against the US and its allies, and harbouring suspected terrorists and Al Qaeda operatives (→ Afghanistan, Conflict; → Iraq, Invasion of [2003]).

41 Both abroad and in their own territory, the US instituted a policy of detention for persons arrested in connection with the conflicts in Iraq and Afghanistan. The bulk of the foreign detainees were taken to the US → Guantánamo Naval Base in Cuba (→ Guantánamo, Detainees). The initial US position regarding all foreign nationals detained in relation to the 'War on Terror' was that neither Taliban nor Al Qaeda fighters were to be considered POWs under Geneva law. The US declared, however, that all captured Taliban and Al Qaeda fighters would be treated humanely. Though the US eventually changed its position on captured Taliban fighters, the US continued to assert that Al Qaeda fighters were 'unlawful combatants' (→ Combatants, Unlawful), and therefore, they were not entitled to any form of Geneva law protection (see US Press Secretary Fleischer Official Statement [7 February 2002]). The US government also determined that any detainees in Guantánamo would not be able to challenge their detention in a US Federal Court via petition for a writ of habeas corpus (see 'Memorandum for William J Haynes II, General Counsel, US Department of Defence, from Patrick Philbin and John Yoo, Deputy Assistant US Attorneys General, Re: Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba').

42 The attempt by the US government to limit the protections and remedies offered under both international and US domestic law for persons deprived of their liberty was rejected by the US Supreme Court in its 2006 decision in the → Hamdan Case (*Hamdan v Rumsfeld*). In this case, the US Supreme Court affirmed the universality of Common Art. 3 Geneva Conventions I–IV in international as well as non-international armed conflicts and held that the provisions of Common Art. 3 Geneva Conventions I–IV are applicable as a basic set of fundamental rules to be observed in armed conflicts, provided the conflict takes place in the territory of a party to the Geneva Conventions. The US Supreme Court determined that the military commissions set up by the Bush administration neither complied with the provisions of the US Uniform Code of Military Justice ('UCMJ'; 64 Statutes at Large 109 [1950]) nor with the Geneva Conventions, which the US Supreme Court found were incorporated in the UCMJ.

43 The *Hamdan Case* and the debate around terrorism and 'unlawful' combatants have brought to light some issues regarding 21st century armed conflict and persons who participate in armed conflicts. Since the adoption of the Geneva Conventions, there has been a sharp rise in the number of civilians who participate in armed conflict. This is partially due to the rise in non-international armed conflicts, where civilians have participated under the guise of insurgents or rebels (→ Insurgency). To some extent, international humanitarian law has responded to these changes by introducing new categories of combatants and by expanding the law regulating non-international armed conflict.

44 However, the armed conflicts in Iraq, Afghanistan, and Syria have illustrated a number of new issues, including the difficulty in determining when exactly civilians can be considered to be taking direct part in hostilities and the connected issue of the legality of so-called → targeted killing where suspected terrorist leaders are assassinated regardless of whether such assassination occurs during active hostilities. The issue of civilians participating in armed conflict was the subject of an expert study conducted by the ICRC over the course of several years. The study sought to determine, through a process of research and expert reflection, a workable set of rules for what constitutes direct participation in hostilities. The ICRC ultimately issued an 'Interpretive Guidance', in which they state that civilians who 'spontaneously, sporadically, or in an unorganised manner … directly participate in hostilities' should continue to be considered civilians under international law, except for those periods when they commit specific hostile acts, for which time

they lose their protected status. Their protected status returns, however, the moment they cease perpetrating the hostile act. Members of organized armed forces lose their civilian protection for as long as they 'assume fighting function within such forces', even if they are not actively engaged in the commission of a hostile act (N Melzer [ed] ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law [ICRC Geneva 2009] 71–73). The Interpretive Guidance was acclaimed as a 'sophisticated work, reflective of the prodigious expertise resident in the ICRC's Legal Division' (Schmitt [2010] 6). However, the proceedings were marked by controversy. On distribution of the final draft, some participants requested their names be removed from the final published document, as some conclusions in the Interpretive Guidance were considered unsuitable and problematic. Criticisms included that the document gave too little consideration to the exigencies of military necessity; that the Interpretive Guidance unnecessarily examined the rules and principles governing the targeting of direct participations; and that it was often confusing and sometimes even contradictory, applying principles only relevant for non-international armed conflicts to international armed conflicts (Schmitt [2010] 6, 14, 22). The ICRC instrument, while instructive, remains simply one perspective on the question of direct participation in hostilities.

45 Also of concern has been the rise in out-sourcing of military services, from those who provide technical support such as truck drivers and cooks, to those who provide high-level tactical services such as administration of detention facilities. The increasing 'corporatization' of conflict through the use of → private military companies has raised concerns relating to issues such as → command responsibility in a hybrid corporate-military system and the participation of civilian contractors in active hostilities. Some steps towards better regulating these new participants in armed conflict have come about from work undertaken by the ICRC. In conjunction with the Swiss government, the ICRC convened a number of meetings with government experts from a number of States, including those States who employ private military and security companies for provision of military support, as well as with academics, practitioners, and employees of private military and security firms. These meetings culminated in the 2008 Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict, which reaffirms the obligations on States to ensure that private military and security companies comply with international law in their activities in conflict zones. The document also lists 70 recommendations for States when dealing with private security and military companies.

46 The 2003 invasion of Iraq and subsequent occupation by US forces also demonstrated some shortcomings in the law relating to occupation. The law of occupation is premised on the idea that military occupation of territory is a temporary phenomenon. Numerous provisions of Geneva Convention IV and of the Hague Regulations are structured around the short-term, temporary nature of belligerent occupation, such as Art. 43 Hague Regulations and Art. 6 Geneva Convention IV. However, in places such as Iraq and Israel, the protracted occupations have raised issues regarding the law of occupation and the role of the occupying power as administrator. This was highlighted in the → Israeli Wall Advisory Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory) ([2004] ICJ Rep 136) where one of the issues was the permissibility of acts by an occupying authority that have a permanent effect on the occupied territory.

47 An additional area of concern relates to → nuclear weapons and warfare. While nuclear weapons have been subject to numerous limitations on testing and non-proliferation agreements (→ Non-Proliferation Treaty [1968]), the question of whether the use of nuclear weapons is prohibited under international law was unresolved until the question was brought before the → International Court of Justice (ICJ) in the 1995 advisory opinion (→ Nuclear Weapons Advisory Opinions); the advisory opinion ultimately delivered by the ICJ unfortunately did little to clarify this question. The ICJ stated that, while the use of nuclear weapons would generally be considered contrary to the rules of international law in armed conflict, it could not categorically state whether the use or the threat of use of nuclear weapons was illegal under international law in case of an extreme threat to the existence of the State (*Legality of the Threat or Use of*

Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226 paras 56, 86, 97). Since the advisory opinion, a number of States have been suspected of developing, or have been found to have developed, nuclear weapons capabilities, including Iran, North Korea, India, and Pakistan. The UN have continued to highlight the need to better regulate nuclear weapons and to prevent nuclear proliferation with several conferences, bi-partite agreements, and high-level meetings regarding nuclear non-proliferation taking place, with the most recent conference of the parties to the Nuclear Non-Proliferation Treaty, held in May 2015, failing to adopt a plan of action for non-proliferation and disarmament, the matter being deferred to the 2020 meeting.

E. Significance/Conclusions

48 International armed conflict remains the archetypal armed conflict when it comes to the drafting and adoption of treaties. Nearly all the major treaties in the history of international humanitarian law have been directed towards regulating international armed conflicts. However, since the end of World War II, the bulk of armed conflicts have been non-international armed conflicts involving non-conventional participants. Additional Protocols I and II went some way to addressing these new developments, but it has been over 30 years since the adoption of these protocols. While the weapons treaties have, for the most part, kept pace with political and technological developments, there have been no moves to reaffirm or develop existing Geneva or Hague Law, nor has there been any real attempt to expand the rules relating to the conduct of non-international armed conflicts. For all the talk of a growing convergence in the regulation of both international and non-international armed conflicts, there is still a gap. Common Art. 3 Geneva Conventions I–IV and Additional Protocol II do offer some protections, but these come nowhere near the comprehensive protections of the Geneva Conventions and Additional Protocol I; customary international law has filled in some of the gaps, but lacunae remain. Given the current political climate, it seems unlikely that States will draft, let alone adopt, a new treaty or expand the Geneva protections to all types of armed conflict.

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Armed Conflict, Non-International

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A. Concept and Definition

1 The distinction between international and non-international armed conflict is firmly rooted in today's law of armed conflict (→ Humanitarian Law, International). States have adhered to this distinction because they consider their relationship with → non-State actors as being different from inter-State relationships. Above all, States do not want to legitimise rebels, terrorists (→ Terrorism),

or other armed groups. Historically, the law of armed conflict only applied to sovereign States (→ Sovereignty) fighting each other; non-international conflicts were subject to the domestic law of the State concerned. Only from the → Spanish Civil War (1936–39) onwards, did scholars and others begin to discuss the need for rules of warfare (→ Warfare, Methods and Means) applicable to conflicts that did not fit the classical model of inter-State warfare. After the end of World War II, non-international armed conflicts have become more significant, less in numbers and duration than in visibility and, unfortunately, atrocities committed. However, since non-international armed conflicts are asymmetric in nature (→ Asymmetric Warfare), the development and application of humanitarian law to these conflicts is a constant challenge.

2 There is no general definition of non-international armed conflicts in public international law. Treaty law has, however, established different thresholds for its application in non-international armed conflict. Most of the rules deal with the conduct of hostilities in situations of non-international armed conflict. However, there are some international rules which address intervention by other States and, implicitly, the legality of non-international armed conflict.

3 Common Article 3 to the → Geneva Conventions I–IV (1949) does not contain a definition of a 'conflict not of an international character'. While some have considered this as positive, allowing the law to change as circumstances change, others have argued that the lack of a definition has allowed many States to simply deny that the Article applies to their conflict. The applicability of Common Article 3 largely depends on whether or not the situation amounts to an armed conflict. Whereas even a minor use of force (→ Use of Force, Prohibition of) between sovereign States may be considered an international armed conflict, in the case of internal conflict there is a higher threshold requiring a certain level of intensity.

4 → Geneva Conventions Additional Protocol II (1977) only applies to the more intense non-international armed conflicts, establishing a higher threshold of application. The Protocol applies to

> all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 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 this Protocol (Art. 1 (1) Additional Protocol II).

A number of requirements reduce its range of application; among others, the requirement of territorial control and the exclusion of conflicts not involving governmental armed forces.

5 Art. 8 (2) (f) Rome Statute of the International Criminal Court specifies that the provision on war crimes committed in non-international armed conflict

> does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a state when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups (Art. 8 (2) (e)).

The notion of 'protracted armed conflict' seems to point towards a higher threshold than Common Article 3 to the Geneva Conventions and Article 1 (1) Additional Protocol II. However, the notion was deliberately taken from the 1995 Tadić decision (*Prosecutor v Tadić [Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction]* IT-94-1-AR72 [2 October 1995] para. 70) of the International Criminal Tribunal for the Former Yugoslavia ('ICTY'), affirming the threshold of Common Article 3 to the Geneva Conventions and aiming at distinguishing the notion of armed conflict from internal disturbances.

6 While the distinction between situations of armed conflict and those of law enforcement is highly relevant in order to establish the applicability of treaty-based rules on non-international armed conflicts, few instruments explicitly refer to law enforcement, let alone include a definition of law enforcement. One of the few treaties referring to law enforcement is the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction

('Chemical Weapons Convention'; 1974 UNTS 45), which prohibits the use of riot control agents such as tear gas as a method of warfare under its Art. I (5), but does not prohibit the use of such substances for law enforcement including domestic riot control purposes (Art. II (9) Chemical Weapons Convention). Law enforcement activities thus remain below the threshold of an armed conflict.

7 Increasingly, some conflicts are considered as internationalized even though not all parties to the conflict are sovereign States. Internationalized armed conflicts are subject to the law of international armed conflicts. These include situations of outside control of insurgents, as examined in the 1999 decision of the ICTY Appeals Chamber in Tadić, requiring 'overall control' (*Prosecutor v Tadić [Judgment]* IT-94-1-A [15 July 1999] paras 130–45). This is more than financing and equipping such forces but does not require 'the issuance of specific orders or instructions relating to single military actions'. Similarly, national liberation wars are internationalized by virtue of Arts 1 (4) and 96 (3) of Additional Protocol I. Finally, a 'war on terror' may be subject to the law of international armed conflicts if military operations are directed against a transnational group, which acts on behalf of a foreign State, as has been argued for the → Taliban in Afghanistan in 2001 (→ Afghanistan, Conflict) and also during the Israeli-Hezbollah war in Lebanon in 2006 (→ Guerrilla Forces); however, these are borderline situations, which States have not achieved agreement upon.

B. Historical Evolution of the Applicable Law

8 Historically, States were reluctant to apply international law to internal conflicts. This was largely due to uneasiness about the implications of any such rules for the status of parties to the conflict. States were concerned that the application of international law to internal conflicts might restrict their ability to sanction individuals under domestic law for their belligerent acts. However, the work of Hugo Grotius (1583–1645) shows some early ideas can be found in defence of private and mercenary wars. Emmerich de Vattel (1714–1767) argued that, if rebels openly take up arms, a sovereign has to observe the laws of war. Interestingly enough, the first modern codification of the laws of war was developed by Francis Lieber (1800–1872) during the → American Civil War (1861–65). In the early years of the 20th century the → International Committee of the Red Cross (ICRC) sought to address the victims of internal conflicts, but this was often perceived as an unfriendly attempt to interfere in the internal affairs of the State concerned. When, for the first time in 1912, a draft convention on the role of the Red Cross in civil wars or insurrections was submitted to the International Red Cross Conference, it was not even discussed. In 1921, a resolution was passed providing for the right to relief of all victims of civil wars; in 1938 the XVIth International Red Cross Conference adopted a follow-up resolution, which envisaged the application by the parties to a civil war of the essential principles of the law of international armed conflicts.

9 The 1946 Preliminary Conference of National Red Cross Societies saw an impressive support for an application of the law of international armed conflicts to non-international armed conflict, an attitude, which—though weakened—continued to persist during the 1947 Conference of Government Experts. However, the Diplomatic Conference of 1949 set off with an enormous divergence of views on the subject matter. Criticism surrounded the proposal to apply the 1949 Geneva Convention(s) as such to non-international armed conflicts; the related deadlock was only overcome when a text was proposed that the principles of the Convention(s) should alone be applicable. It was on this basis that Article 3 Common to the Geneva Conventions was finally adopted.

10 Although Article 3 Common to the Geneva Conventions merely expresses a minimum of basic rules, it took many years of practical experience to recognize its shortcomings. In 1965, the XXth International Red Cross Conference noted the inadequacy of the protection of victims of non-international armed conflicts. The 1968 Teheran Conference on Human Rights (International Conference on Human Rights 'Final Act' [Teheran, 22 April–13 May 1968] UN Doc A/CONF.32/41) adopted a resolution on human rights in armed conflicts, and after ICRC sponsored expert meetings in 1969 and 1970, the first session of the Conference of Government Experts took place in 1971. The ICRC submitted a Draft Protocol additional to Common Article 3 in 1972, which was subsequently revised in light of expert comments and a revised 1973 draft submitted

to the Diplomatic Conference. In the course of the negotiations a drastically reduced draft was developed. Basically, all elements which could be interpreted as recognition of insurgent parties were deleted from the text, and only the strictly humanitarian rules were retained. Finally, Additional Protocol II was adopted on 8 June 1977 by consensus as a whole after an examination article by article.

11 The Rome Statute was adopted on 17 July 1998 during the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an → International Criminal Court (ICC) in Rome. It signals the growing relevance of → international criminal law in the enforcement of rules applicable to armed conflicts, among others. The Rome Statute includes war crimes committed in times of international as well as non-international armed conflicts. The Rome Statute neither defines the notion of non-international armed conflict nor the notion of 'internal disturbances and tensions'. However, Art. 8 (2) (d) Rome Statute includes a non-exhaustive list of situations serving as a guideline in order to determine the existence of internal disturbances and tensions.

12 Overall, international criminal tribunals, including the → Mixed Criminal Tribunals (Sierra Leone, East Timor, Kosovo, Cambodia), have contributed to the development of rules applicable to non-international armed conflicts. Most importantly, the → International Criminal Tribunal for the Former Yugoslavia (ICTY) and the → International Criminal Tribunal for Rwanda (ICTR) have built upon → customary international law related to international armed conflicts in order to specify and detail rules applicable to non-international armed conflicts. To some extent these tribunals have also addressed the distinction between armed conflicts and other situations. Thus, the ICTY in the → Delalić Case has held that situations of 'civil unrest' and 'terrorist activities' do not amount to an armed conflict (*Prosecutor v Delalić [Judgment]* IT-96-21-T [16 November 1998] para. 184).

C. Treaty Law

13 The rules that govern the conduct of hostilities in non-international armed conflicts are largely treaty-based, established by the provisions of Article 3 Common to the Geneva Conventions of 12 August 1949 as developed and supplemented by the Additional Protocol II of 1977. It has been discussed to also apply human rights law. In any case, the principles of humanity may be referred to. Furthermore, there is a tendency of extending the scope of certain rules of international armed conflicts to cover non-international armed conflicts.

1. Common Article 3 to the Geneva Conventions

14 Article 3 of the four Geneva Conventions of 1949 contains an identical provision that establishes the first specific rules of humanitarian protection that each party to an 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties' must enforce. Such rules apply, as a minimum, in situations not expressly covered by the Geneva Conventions, and to individuals who do not benefit from a more favourable regime of protection under these Conventions. The requirement that an armed conflict occurs in the territory of one of the parties to the Convention does not necessarily mean that armed groups are fighting against the government of the territory in which hostilities are conducted. It also implies situations where the conflict is fought by armed factions, confronting each other without the involvement of the government's → armed forces, or between armed groups and the State outside the territory of that State. The provisions of Common Article 3 are therefore reduced to a few minimum rules, which should receive the widest scope of application. They aim specifically at non-combatants.

15 Paragraph 1 of Common Article 3 sets the standard rule on the treatment of non-combatants; that is, all persons taking no part or no longer taking an active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause. They are required to be treated humanely in all circumstances, and without any adverse distinction based on race, colour, religion or faith, sex, birth, wealth, or any other similar criteria. The provision goes on to impose an absolute prohibition on the commission of certain acts against non-combatants. The following acts are thus prohibited at all times and in all circumstances: a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, and torture; b) taking of hostages; c) outrages upon personal dignity, in particular humiliating and

degrading treatment; and d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. This prohibition is valid even in situations short of armed conflicts, such as situations of internal disturbances and tensions.

16 Paragraph 2 of Common Article 3 encourages the parties to the conflict to bring into force, by means of special agreements, all or part of the other provisions of the Geneva Conventions, and further requires that the wounded and the sick be collected and cared for. The conclusion of special agreements to enforce all or part of the other provisions of the Geneva Conventions would supplement the fundamental guarantees of Common Article 3 in realizing the main objective of the law of armed conflict, which is to protect all victims of all armed conflicts. Furthermore, the parties to the conflict may have recourse to the services of an impartial humanitarian body, such as the ICRC. For this to happen, it is fundamental that the right of initiative of humanitarian bodies, as well as their right of access to persons affected by the conflict, be recognized in order to enable them to offer efficient relief services to all victims without being hindered or affected by the consequences of the conflict.

17 The last paragraph provides that the legal status of the parties to the conflict is not affected by the application of Common Article 3. This provision was inserted to meet the interests of certain States that felt uneasy about applying certain rules of international armed conflicts to non-international armed conflicts. In fact, during the negotiations leading to the adoption of the Geneva Conventions many States argued that such a course of action would have legal implications on the determination of the status of the parties to the conflict and would restrict their ability to prosecute individuals under their national laws pursuant to which belligerent acts constitute serious domestic crimes. These considerations justify, therefore, the insertion in Common Article 3 of a provision stipulating that humanitarian protection should not affect the legal status of the parties to the conflict.

18 The rules set forth in Common Article 3 to the Geneva Conventions provide the fundamental standard rules of protection that must be observed in all armed conflicts. They derive from the right to life and the principles of humanity (→ Humanity, Principle of), and are recognised by the → International Court of Justice (ICJ) as an emanation of 'elementary considerations of humanity' constituting 'a minimum yardstick' (→ Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14, para. 218) applicable to both international and non-international armed conflicts. Therefore, any act committed in violation of such rules constitutes a grave breach of international humanitarian law, subject to criminal prosecution under the Geneva Conventions. It may also constitute a war crime, regardless of whether it occurred within an internal or an international armed conflict.

2. Additional Protocol II to the Geneva Conventions

19 In 1977 the protective regime of Common Article 3 was supplemented by the adoption of two Additional Protocols to the Geneva Conventions of 12 August 1949. Additional Protocol II protects the victims of armed conflicts that

> take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups 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 this Protocol (Art. 1 (1)).

However, it does not apply to situations of internal disturbances and tensions, as discussed above.

20 Additional Protocol II further specifies the nature of the protection owed to the victims of non-international armed conflict, and requires that States grant certain guarantees to its citizens in the course of such conflicts. Thus, Art. 4 (1) provides for the fundamental guarantees, which must be secured for all persons who do not take a direct part or who have ceased to take part in hostilities; they are entitled to respect for their person, honour and convictions, and religion practices, and must be treated humanely in all circumstances and without any adverse distinction (→ Land Warfare). It forbids a party to the conflict to refuse to give quarter to the vanquished opponent. Art. 4 (2) prohibits the commission of a number of specific acts against the protected persons including; violence to

life and health, cruel treatment, collective punishment, outrage upon personal dignity, slavery and slave trade, pillage, gender violence, the taking of hostages, and threats to commit any of the foregoing acts. Art. 4 (3) reinforces the fundamental rights of children by requiring the Parties to the conflict to provide them with the care and aid that they require (→ Children and Armed Conflict).

21 Moreover, Article 5 reaffirms and augments the provision of Article 4 by establishing a system of minimum protection with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained. Furthermore, Article 6 provides for a number of judicial guarantees for the prosecution and punishment of persons involved in criminal offences related to the armed conflict, whereas Articles 7–12 set forth the general measures of protection, respect, and care that must be ensured to the → wounded, sick and shipwrecked. Articles 13–18 develop a set of measures of protection for the civilian population (→ Civilian Population in Armed Conflict), and establish the right of humanitarian initiative in order to enable relief organizations to undertake relief actions for the benefit of the victims of armed conflict, as well as the civilian population at large (→ Humanitarian Assistance, Access in Armed Conflict and Occupation).

22 Additional Protocol II does not establish any enforcement mechanism. State Parties are only required in terms of Article 19, to disseminate its provisions as widely as possible. However, some provisions of this instrument are considered to be declaratory of existing rules or to have crystallized emerging rules of → customary international law. In fact, the basic core of Additional Protocol II is reflected in Article 3 Common to the Geneva Conventions and is therefore part of customary law; namely the prohibition on violence towards persons taking no active part in hostilities, the taking of hostages, degrading treatment, and punishment without due process. In the *Tadić Case* the ICTY considered that it is possible to prosecute perpetrators even if Additional Protocol II was not formally ratified (*Prosecutor v Tadić [Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction]* IT-94-1-AR72 [2 October 1995] paras 128–35). It explained that customary international law imposes criminal liability for serious violations of Common Article 3 as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife. It further considered that the general principles of the law of international armed conflict may apply in the context of non-international armed conflict. The latter approach was later confirmed in a number of subsequent international criminal cases heard by the ICTY and the ICTR.

23 As pointed out above, unlike Common Article 3, Additional Protocol II establishes a higher threshold of application by: requiring in Art. 1 (1) that the dissident armed groups control a portion of the territory of the State against which they are fighting; excluding military operations against insurgents that take place outside the State's own territory; and excluding conflicts which do not involve governmental armed forces, or in which the insurgent group does not have a discernable command structure. It is usually argued that the threshold of application of Additional Protocol II would exclude armed conflicts in which dissident armed groups are fighting against each other and those in which armed groups fighting against the established government do not exercise control over a part of the State's territory or do not have a proper chain of command. Consequently, Additional Protocol II is technically inapplicable in many armed conflicts in disintegrated States, such as Somalia, in which the State government has totally disappeared or is too weak and in which various armed groups are fighting against each other (see → Failing States). The principal merit of Additional Protocol II today seems to be the fact that most of its basic provisions are rules of customary international law—analogous to those listed in Common Article 3—which are also applicable to situations below the level of conventional non-international armed conflict. Efforts are actually being made to correct the deficiencies inherent in Additional Protocol II. The most tangible move towards this direction can be found in the Declaration of Minimum Humanitarian Standards of 2 December 1990 ('Turku Declaration') (→ Human Rights and Humanitarian Law), which affirms the minimum humanitarian standards which are applicable in all situations including internal violence, disturbances, tensions, and public emergency, and which cannot be derogated from under any circumstances.

3. The Statute of the International Criminal Court

24 According to Art. 8 (2) (c) Rome Statute, the notion of 'war crimes' includes, 'in the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949'. Art. 8 (2) (d) clarifies that this excludes 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature'. Similarly, Art. 8 (2) (e) Rome Statute includes in its list of war crimes 'other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law', followed by another clarification in Art. 8 (2) (f) along the lines of Art. 8 (2) (d) but including a reference to 'protracted armed conflict' as developed in the ICTY's *Tadić Case*.

25 It is surprising that the inclusion of violations of Common Article 3 was opposed by a number of States in the negotiations even though the Appeals Chamber of the ICTY and the ICTR had already confirmed earlier that violations of Common Article 3 entail the criminal responsibility of persons committing such acts. Commentators largely agree that the mere notion of 'armed conflict' would have excluded situations of internal disturbances and tensions from the Rome Statute's scope of application. It may thus be argued that Art. 8 (2) (d) and (f) Rome Statute is to a large extent repetitious, with the exception of the fact, however, that the threshold of 'protracted armed violence' is significantly lower than the one contained in Art. 1 Additional Protocol II requiring sustained and concerted military operations.

4. Other Treaties

26 Art. 19 Convention for the Protection of Cultural Property in the Event of Armed Conflict (signed 14 May 1954, entered into force 7 August 1956; 249 UNTS 240) provides that in a non-international armed conflict 'the provisions of the present Convention which relate to respect for cultural property' should apply (→ Cultural Property, Protection in Armed Conflict). Basically this means that most of the Convention's core provisions are applicable. In addition, the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (done 26 March 1999, entered into force 9 March 2004; 2253 UNTS 172) extends all provisions of the Convention to non-international armed conflicts.

27 Art. 1 of the 1980 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 (adopted 10 October 1980, entered into force 2 December 1983; 1342 UNTS 137; → Weapons, Prohibited) was amended in 2001 to cover non-international armed conflicts (The Second Review Conference Final Declaration [adopted 21 December 2001] CCW/CONF.II/2), based upon similar developments under the 1995 Protocol on Blinding Laser Weapons (Protocol IV; adopted 13 October 1995, entered into force 30 July 1998; 2024 UNTS 163) and the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II; adopted 10 October 1980, entered into force 2 December 1983; 1342 UNTS 168). It is noteworthy that this Protocol also prohibits 'the transfer of any landmines to any recipient other than a State or a State agency authorised to receive such transfers' (Art. 8 (1) (b)). As already mentioned, Art. I Chemical Weapons Convention provides that State Parties 'never under any circumstances' develop, produce, otherwise acquire, stockpile, or transfer 'directly or indirectly, chemical weapons to anyone'.

D. Customary Law

28 Most of the treaty law discussed above is reflected in customary international law. Even more, many rules on means and methods of warfare and protection are likewise applicable in international as in non-international armed conflict. Notwithstanding the adoption of the 1977 Additional Protocol II, practice has developed rules parallel to those in Additional Protocol I and applicable as customary law to non-international armed conflicts. This may be attributed, among others, to the reluctance of States to ratify the Additional Protocol. One of the main points of controversy concerning the Additional Protocol is that

some States (especially the UK and the US) view the status and definition of → combatants to be problematic. Pertinent practice has been amply documented by the International Committee of the Red Cross in its customary international law study. This is particularly true for the rules on the conduct of hostilities and on respect for specifically protected persons and property. As argued in the *Tadić Case*, 'what is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife' (*Prosecutor v Tadić [Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction]* IT-94-1-AR72 [2 October 1995] para. 119). It is, however, more than difficult to identify and select individual rules, which equally apply to international and non-international armed conflicts.

E. Minimum Standards: Principles of Humanity

29 International humanitarian law establishes that in cases not covered by the Geneva Conventions of 1949 and the two Additional Protocols of 1977, or by any other international agreement, 'civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience'. This formulation is a restatement of the → Martens Clause inserted in the preamble of the 1899 Convention with Respect to the Laws and Customs of War on Land and its Annex: Regulations Respecting the Laws and Customs of War on Land (signed 29 July 1899, entered into force 4 September 1900 [1898–99] 187 CTS 429). This clause maintains that there exist certain duties and obligations that the State must fulfil in situations which are not expressly covered by existing rules of humanitarian law, and with respect to persons who are not protected by those rules. The principles of humanity play a guiding role and must inform each party to the conflict in its treatment of the members of the opponent party. They are unwritten rules that are inherent to existing humanitarian law and human rights law. They are essential for the full realization of the main objective of the law of armed conflict: that of maintaining the rule of law in the choice of the means and methods of warfare and in protecting the victims of all armed conflicts.

F. Special Problems

1. The Relevance of International Human Rights Law

30 Apart from their general stipulations, → human rights conventions often include an absolute protection for certain rights and freedoms, generally referred to as 'inalienable rights', 'fundamental rights', or 'core rights'. Such rights and freedoms can never be derogated from, infringed upon, or amended by a State in any circumstance, be it a situation of internal disturbances or tensions, a state of national emergency, or that of armed conflict. Any legislative enactment that limits, suspends, or violates such rights would be invalid. Even a person cannot willingly renounce such rights. Inalienable rights constitute the core minimum rights that must be respected at all times, and are considered customary norms (→ ius cogens) that impose non-derogable obligations upon States. They are defined internationally and restated regionally, taking into account a number of specific regional characteristics.

31 The 1966 International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976; 999 UNTS 171; 'ICCPR') is the main international legal instrument that provides for an absolute protection of a number of personal and procedural rights. Thus, its Art. 4 prohibits derogation from the rights listed in Arts 6, 7, 8 (1) and (2), 11, 15, 16, and 18. Art. 6 recognizes to all an inherent right to life, and the right not to be deprived thereof, except pursuant to a judgement rendered by a legally constituted and competent court. Extra-judicial executions are absolutely forbidden. Art. 7 prohibits torture or cruel, inhuman, or degrading treatment or punishment. It also outlaws the subjection of a person to medical or scientific experimentation without her free consent. Art. 8 prohibits all forms of slavery, slave trade, and servitude, while Art. 11 forbids imprisonment merely for not being able to fulfil a contractual obligation. Art. 15 establishes the principle of non-retroactivity of the law by making it clear that a criminal law shall not apply to acts that were committed before the law was enacted. Moreover, Art. 16 sets up the right to juridical personality by requiring that everyone be recognized everywhere as a person before the law. Finally, Art. 18 establishes the right of everyone to freedom of thought, conscience, and religion, including the right to manifest one's religion or beliefs. Any coercion that would impair a

person's freedom to have or to adopt a religion or belief of her choice is prohibited.

32 The fundamental rights and freedoms contained in the ICCPR are reiterated and further developed and adapted in three of the four major regional human rights documents. Accordingly, Art. 15 → European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) prohibits derogation from the following rights and freedoms: right to life (Art. 2); right to humane treatment (Art. 3); freedom from slavery (Art. 4 (1)); and freedom from retroactive law (Art. 7).

33 By the same token, Art. 27 → American Convention on Human Rights *(1969)* does not permit derogation from the following rights and freedoms: right to juridical personality (Art. 3); right to life (Art. 4); right to humane treatment (Art. 5); freedom from slavery (Art. 6); freedom from retroactive laws (Art. 9); freedom of conscience and religion (Art. 12); rights to a family (Art. 17); right to a name (Art. 18); rights of the child (Art. 19); right to nationality (Art. 20); right to participate in government (Art. 23); and the judicial guarantees essential for the protection of such rights (Art. 27).

34 Furthermore, Art. 4 (2)Arab Charter on Human Rights (2004) prohibits derogation from the following rights and freedoms: right to life (Art. 5); freedom from torture (Art. 8); freedom from medical or scientific experimentation without free consent (Art. 9); freedom from slavery and servitude (Art. 10); right to fair trial (Art. 13); right of access to court (Art. 14 (6)); freedom from retroactive laws (Art. 15); freedom from imprisonment on grounds of inability to fulfil a contractual obligation (Art. 18); freedom from double jeopardy (Art. 19); right to humane treatment (Art. 20); right to juridical personality (Art. 22); freedom of movement (Art. 27); right to seek political asylum (Art. 28); right to nationality (Art. 29); and freedom of thought, conscience, and religion (Art. 30).

35 Inalienable human rights are analogous to the fundamental guarantees under Common Article 3 to the Geneva Conventions. Both sets of rules are absolute and cannot be suspended or infringed upon. They are both applicable to all persons, in all circumstances, irrespective of the status of the beneficiary. In addition, inalienable human rights apply as a supplement to Common Article 3 in situations not covered by the law of armed conflict, such as those situations where the level of violence has not yet reached an intensity high enough to trigger the application of humanitarian law, or where individuals do not fall under the categories of protected persons established by the Geneva Conventions and their Additional Protocols.

2. Addressees of the Law on Non-International Armed Conflicts

36 The law of armed conflict is principally addressed to the parties to the conflict. The expression 'parties to the conflict' refers to State and non-State actors who are involved in hostilities. It replaces the term 'belligerent' that was used up to World War II to designate a State taking part in a war, or an individual authorized to use armed force. However, the development of new conflict situations and of new categories of actors that are not legally authorized to use force, rendered the legal definition of this term less explicit. Consequently, it was abandoned for a more inclusive one that would facilitate better protection for all victims of armed conflicts through the application of humanitarian law. Non-international armed conflicts are particularly illustrative in this regard because one of its particularities is the fact that one of the parties thereto is usually an insurgent group, a dissident armed group, or a liberation movement, whose existence is not officially recognized. Today, unlike before World War II, the → non-recognition of a party to a conflict does not per se constitute an impediment to the implementation of the law of armed conflicts.

37 As regards non-international armed conflicts, the chapeau of Common Article 3 distinguishes between the 'High Contracting Parties' and each 'Party to the conflict', whereas Additional Protocol II refers only to the High Contracting Parties. The 'High Contracting Parties' are States that have ratified the Geneva Conventions and their Additional Protocols and have committed themselves to respect the provisions therein inserted. On the other hand, a 'Party to the conflict' may be interpreted to mean anything or anyone which is actively involved in the conflict; it can be a High Contracting Party which is taking part in the hostilities, a State non-Party to the Geneva Conventions and their Protocols but which is actively involved in the hostilities, or a non-State entity such as

an insurgent group or even an individual participating in the hostilities.

38 The provisions of Common Article 3, as well as the fundamental guarantees contained in Additional Protocol II, bind all 'Parties to the conflict'. The reason underlying this argument is that such provisions are among those humanitarian law norms that have acquired the character of customary law. In this respect, the ICTR held in the → Akayesu Case that 'the norms of Common Article 3 have acquired the status of customary law in that most States, by their domestic penal codes, have criminalized acts which if committed during internal armed conflict would constitute violations of Common Article 3' (*Prosecutor v Akayesu [Judgment]* ICTR-96-4-T [2 September 1998] paras 435–47). Therefore, such rules are binding equally on all States and non-State entities involved in an armed conflict irrespective of their having ratified a particular convention.

39 The obligation of one party to the conflict to respect humanitarian law is not subject to a reciprocal commitment by the opposing party to observe the same conduct. The main problem that arises in the context of non-international armed conflicts is to determine the reason why dissident armed groups shall bind themselves by agreements that have been ratified by the very State government against which they are fighting. In addition to the argument based on the customary nature of certain rules of humanitarian law, it is generally accepted that a commitment made by a State under international law creates legal obligations that are directly binding on all its nationals, including armed opposition groups. An insurgency does not need to be recognized by the opposing State or by a third State for the law of non-international armed conflict to govern its belligerent conduct on the battlefield. The customary obligations created by international humanitarian law apply unconditionally not just to States, but also to individuals and to non-State entities such as rebel factions or secessionist movements involved in a civil war.

G. The Legality of Non-International Armed Conflicts and Intervention by Other States

40 Non-international armed conflicts are not as such prohibited by public international law; Article 2 (4) UN Charter prohibits the use of force in international relations only. In the process leading to → decolonization, it has not only been universally accepted that peoples under colonial rule have a right to → self-determination, but also that there is a legal obligation not to use force to frustrate that right.

41 Even if non-international armed conflicts are not prohibited, this does not mean that other States are entitled to intervene in such conflicts (→ Intervention, Prohibition of). First, as a general rule, foreign States are not normally allowed to provide help to the rebels in a non-international armed conflict, as has been confirmed by the → Friendly Relations Declaration (1970). If, however, the government receives foreign help, a right of counter-intervention may be argued in favour of supporting the rebels. If the rebel forces have been recognized as belligerents, the rules of neutrality apply, and foreign States are under a duty not to help the government (→ Neutrals, Disarming and Internment of Belligerents). Notwithstanding the ICJ's ruling in the *Nicaragua Case*, it is still uncertain whether foreign States are generally entitled to help a government fighting a non-international war if the rebels have not been recognized as belligerents (→ Intervention on Invitation). There is, however, agreement that it is lawful to help the government if the rebels have previously received foreign help.

42 Indeed, in its decision on the merits in the *Nicaragua Case* the ICJ gave an answer to the question of the legality of armed assistance to rebel forces. The Court emphasized that participation in a non-international armed conflict by 'organizing or encouraging the organization of irregular forces or armed bands … for incursion into the territory of another state' and by 'participating in acts of civil strife' in that State is not only an act of illegal intervention in the internal affairs of a foreign State, but also contrary to the principle of the prohibition of the use of force (*Nicaragua Case* paras 109–115). This does not apply to all forms of assistance to rebels; thus, the provision of financial assistance only may be considered an act of intervention but not a use of force. What kind of 'proportionate counter-measures' would be admissible on the part of the State which is the victim of extensive assistance to rebel forces is still a matter that remains to be clarified.

H. Current Challenges and Perspectives

43 Recent efforts to counter transnational terrorism and the so-called Islamic State in Iraq and the Levant ('ISIL'), apart from limited collective action by the Security Council, such as adopting UNSC Res 2249 (20 November 2015) and UNSC Res 2253 (17 December 2015), have drawn renewed international attention to the question of foreign intervention in non-international armed conflicts. First, the question was raised whether a government may only ask for external help from other States against a non-State party in a non-international armed conflict if (additional) considerations of legitimacy and representativeness are met. While Western States support such arguments, many others do not, including the Russian Federation and the People's Republic of China. It cannot, therefore, be argued that such criteria have to be met. Neither the Iraqi nor the Syrian government would be prevented from asking allied States to intervene in support of their fight against ISIL unless other rules of international law were to prevent them from doing so. Second, the legality of the external use of force was taken up in situations where the State on whose territory the intervention takes place does not consent. In other words, the question has been asked whether or not the US can intervene in support of Iraq on Syrian territory against ISIL without the consent of the Syrian government. States have relied on references in UNSC Res 1369 (12 September 2001) to self-defence, as well as subsequent practice, in order to argue in favour of a right of self-defence against non-State actors; alternatively, and sometimes additionally, States claim that self-defence applies where the government of the State where the threat is located is 'unwilling or unable' to prevent the use of its territory for such attacks. This formula, however, tends to weaken the prohibition of the use of force; it focuses on attribution and thus forms part of the law of State responsibility. The 'unwilling or unable' formula should not be integrated into the rules on the prohibition of the use of force. Self-defence against non-State actors, in light of pertinent international practice, does not run counter to treaty-based or customary rules on self-defence, provided that all relevant criteria, including the *Caroline* formula (→ *Caroline*, The), are met.

44 While the law applicable to non-international armed conflicts has been developed from 1949 until today both in scope and in substance, new questions and challenges have emerged over time. In contrast to the rudimentary protection granted to the victims of non-international armed conflicts on the basis of Article 3 Common to the Geneva Conventions, treaty and customary law have contributed to the development of more refined standards. Today, major challenges flow from the qualification of situations. It is less the distinction between international and non-international armed conflicts which gives rise to concern, than the distinction between law enforcement activities and the conduct of hostilities. Increasingly, States and international organizations are involved in trans- and international law enforcement activities. Military forces are often called upon to assume functions of both law enforcement and of the conduct of hostilities. The legal standards applicable are different in both situations. This requires distinctions, but also the identification of potential overlaps between them. More clarity is needed as to the determination of the respective legal paradigms governing each type of operation. It is to be hoped that the increasing concern of the ICRC with 'operations other than armed conflict' will enhance pertinent debates and contribute to a distinction between measures taken by States or international organizations to maintain or restore public security, law, and order on the one hand and their involvement in armed conflicts on the other. The concept of hostilities necessitates clarification in distinction to law enforcement activities.

45 It is against this background that a 'unified use of force rule' has been proposed, bringing together the law of armed conflict for international and non-international conflicts and for military operations other than war (including robust peace-keeping and law enforcement). Currently, it cannot validly be argued that such a rule has already become part of customary international law. Also, criticism may be voiced against this approach since the rules governing the use of force are more liberal in international humanitarian law than in international human rights law. On the other hand, the use of tear gas and dum-dum bullets is clearly outlawed as means of warfare, whereas there may be exceptional circumstances where police forces are entitled to apply such means and methods. It seems more advisable to reduce the size of the grey area that currently exists between situations of armed conflict on the one hand and law enforcement operations on the other hand than unifying the rules applicable to these situations.

46 If self-defence against non-State actors becomes an accepted pattern and thus impacts the question of the legality of external intervention in non-international armed conflicts by other States, and if States do not change the existing rules based upon the distinction between international and non-international armed conflicts, it will be ever more important to reach agreement on the law applicable to internationalized non-international armed conflicts.

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Armed Forces

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A. Definition

1 The armed forces of a party to an armed conflict consist of all organized armed forces, groups, and units placed under a command that is responsible to that party for the conduct of its subordinates, even if that party is represented by a government or an authority not recognized by the adverse party (see Art. 43 (1) → Geneva Conventions Additional Protocol I [1977]; 'AP I'). In essence, this definition covers all persons, irrespective of their nationality, who fight on behalf of a party to a conflict and who subordinate themselves to its command, including → militias and volunteer corps, as well as organized → resistance movements. Hence, a party to a conflict is responsible for all acts committed by persons forming part of its armed forces (Art. 91 AP I; see also Art. 3 Regulations Respecting the Laws and Customs of War on Land annexed to the 1907 Hague Convention IV; 'Hague Regulations').

2 The essential feature of the requirement of responsible command is that commanders accept responsibility for the acts of their subordinates and equally accept their own responsibility to, and their duty of obedience to the orders of, the power or authority upon which they depend. Partisans or paramilitary forces acting on their own initiative without accepting the authority of the belligerent party which they claim to support do not comply with this requirement and, as a result, are not considered members of an armed force.

3 The importance of the definition of armed forces lies in the fact that all members of armed forces, except medical and religious personnel, are → combatants, that is to say, they have the right to participate directly in hostilities. Upon capture in international armed conflicts, combatants are entitled to the status of → prisoners of war which means they may not be prosecuted for their lawful acts of war, unless they are so-called 'unlawful' or 'unprivileged' combatants (→ Combatants, Unlawful).

4 The law applicable in non-international armed conflicts does not contain a formal definition of armed forces, even though State armed forces and armed groups organized like armed forces may be engaged in such conflicts. This is so because the law of non-international armed conflicts does not provide for combatants' privilege to participate directly in hostilities and the concomitant immunity from prosecution for lawful acts of war. In particular, persons taking a direct (or active) part in the hostilities against the State and its armed forces are liable to prosecution under national law (eg for treason or rebellion; → Civilian Population in Armed Conflict). On the other hand, all persons taking no direct (or active) part in hostilities or who have ceased to take such a part are protected by common Art. 3 → Geneva Conventions I–IV (1949) and other relevant provisions of international humanitarian law, in particular → Geneva Conventions Additional Protocol II (1977) ('AP II') and → customary international law (see also → Civilian Population in Armed Conflict).

B. Legal History

5 The definition of armed forces builds upon earlier definitions contained in the Hague Regulations and the Geneva Convention relative to the Treatment of Prisoners of War ('Geneva Convention III') which sought to determine who the combatants are that are entitled to prisoner-of-war status. Art. 1 Hague Regulations provides that the laws, rights, and duties of war apply not only to armies, but also to militias and volunteer corps fulfilling four conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

6 It further specifies that in countries where militias or volunteer corps (so-called 'irregular' armed forces) constitute the army, or form part of it, they are included under the denomination 'army'. This definition is also used in Art. 4 Geneva Convention III, with the explicit mention of organized resistance movements and the condition that members of militias and volunteer corps, including organized resistance movements, 'belong to' a party to the conflict. Geneva Convention III implicitly recognizes the condition of not being a national of the detaining power (see Arts 87 (2) and 100 (3)). This implies, in particular, that a detaining power would not be obliged to grant its own nationals prisoner-of-war status.

7 The Hague Regulations and Geneva Convention III thus consider all members of armed forces to be combatants and require militias and volunteer corps, including organized resistance movements, to comply with four conditions in order for them to be considered combatants entitled to prisoner-of-war status. The idea underlying these definitions is that the regular armed forces tend to fulfil these four conditions, which are therefore not explicitly enumerated with respect to them.

8 The definition contained in Additional Protocol I does not distinguish between the regular armed forces and other armed groups or units, but includes all armed forces, groups, and units that are under a command responsible to a party for the conduct of its subordinates as armed forces of that party. Both definitions express the same idea, namely that all persons who fight in the name of a party to a conflict—who 'belong to' a party in the words of Art. 4 Geneva Convention III—are combatants.

9 The four conditions contained in the Hague Regulations and Geneva Convention III have been reduced to two conditions in Additional Protocol I, the main difference being the exclusion of the requirements of visibility for the definition of armed forces as such. The requirement of visibility, however, remains relevant with respect to a combatant's entitlement to prisoner-of-war status. Additional Protocol I, therefore, has lifted this requirement from the definition of armed forces (Art. 43 AP I) and placed it in the provision establishing the pre-conditions for combatant and prisoner-of-war status (Art. 44 AP I; see also → Flags and Uniforms in War; → Guerrilla Forces).

10 In addition, Art. 43 Additional Protocol I does not mention the requirement to respect the laws and customs of war but includes an obligation for armed forces to have an internal disciplinary system inter alia to enforce → compliance with international humanitarian law, but this change does not substantially alter the definition of armed forces for the purposes of determining those combatants entitled to prisoner-of-war

status. The requirement of an internal disciplinary system supplements the provisions concerning → command responsibility (Arts 86 (2) and 87 AP I) and is a corollary of the obligation to issue instructions which comply with international humanitarian law (Art. 80 (2) AP I).

11 Arts 43 and 44 Additional Protocol I reaffirm what was already stated in Geneva Convention III, namely that 'prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention' (Art. 85 Geneva Convention III), that is to say that they retain their status. These provisions preclude any attempt to deny prisoner-of-war status to members of regular or irregular armed forces on the allegation that their force does not enforce some provision of customary or conventional law of armed conflict, as construed by the detaining power. Only the failure of combatants to distinguish themselves from the civilian population or being caught as → spies or as → mercenaries warrants forfeiture of prisoner-of-war status.

12 The definition in Art. 43 Additional Protocol I is now generally applied to all forms of armed groups who belong to a party to an armed conflict to determine whether they constitute armed forces. It is therefore no longer necessary to distinguish between regular and irregular armed forces. All those fulfilling the conditions in Art. 43 Additional Protocol I are considered members of armed forces.

C. Specific Problems

13 States may decide to incorporate paramilitary or armed law enforcement agencies, such as police forces, gendarmerie, and constabulary, into their armed forces. Examples of such paramilitary agencies incorporated into the armed forces of a State include the Special Auxiliary Force attached to Bishop Muzorewa's United African National Congress in Zimbabwe, which was integrated into the national army after the Bishop became Prime Minister, and India's Border Security Force in Assam. Examples of armed law enforcement agencies being incorporated into the armed forces include France's Gendarmerie, Italy's Carabinieri, the Philippine Constabulary, and Spain's Guardia Civil.

14 Incorporation of paramilitary or armed law enforcement agencies into armed forces is usually carried out through a formal act, for example, an Act of Parliament. In the absence of formal incorporation, the status of such groups will be judged on the facts and in the light of the criteria for defining armed forces. When these units take a direct part in hostilities and fulfil the criteria of armed forces, they are considered combatants.

15 In addition, Art. 43 (3) Additional Protocol I requires a party to the conflict to notify such incorporation to the other parties to the conflict. This notification can also be done at the time of ratification. Belgium and France, for example, issued a general notification to this effect to all State Parties upon ratification of Additional Protocol I. In the light of the general obligation to distinguish between combatants and civilians, such notification is important because members of the armed forces of each side have to know who is a member of the armed forces and who is a civilian. Confusion is particularly likely as police forces and gendarmerie usually carry arms and wear a uniform, although in principle their uniforms are not the same as those of the armed forces proper. While notification does not seem to be constitutive of the status of the units concerned, it does serve to avoid confusion and thus enhances respect for the principle of distinction.

16 While States are free to decide whether to recruit both male and female members into their armed forces, they are prohibited from recruiting children who have not reached the age of 15 into their armed forces (Art. 77 (2) AP I; Art. 38 (3) Convention on the Rights of the Child of 1989 [adopted 20 November 1989, entered into force 2 September 1990] [1577 UNTS 3]; → Children and Armed Conflict). This rule also applies to State armed forces and organized armed groups involved in non-international armed conflicts (Art. 4 (3) (c) AP II; Art. 38 (3) Convention on the Rights of the Child). Art. 2 Optional Protocol to the Convention on the Rights of the Child of 2000 (UNGA Res 54/263 GAOR 54th Session Supp 49 vol 3, 6) raises the limit for compulsory recruitment to the age of 18, while maintaining under Art. 3 the possibility of voluntary recruitment at a lower age for States. With respect to organized armed groups, Art. 4 Optional Protocol provides that they 'should not,

under any circumstances, recruit or use in hostilities persons under the age of 18 years'.

17 States may decide to have their armed forces cooperate, as coalition forces, in a multinational operation (→ International Military Forces). This can take place in the context of both international and non-international armed conflicts (→ Armed Conflict, International; → Armed Conflict, Non-International). In case of coalition forces operating in an international armed conflict, the above definition of armed forces, and its legal consequences (combatant and prisoner-of-war status), will operate with respect to the members of each of the armed forces involved.

18 States may also lend their armed forces to serve in peace operations, either under the umbrella of the United Nations or of a regional organization (→ Peacekeeping Forces). In principle, such forces are not deployed as a party to an armed conflict. They may, however, become involved in the use of force and thereby become party to an armed conflict when the conditions for the existence of an armed conflict under humanitarian law are fulfilled. In such a case, the conflict may be international or non-international depending on whether the adversary of the peacekeeping forces consists of State armed forces or non-State armed groups. The status of personnel involved in peacekeeping operations also depends on the nature of the armed conflict (international or non-international) and the tasks assigned to such personnel (whether military or other such as police, law-enforcement, or humanitarian assistance).

19 Whereas States are responsible for the acts of their armed forces (Art. 91 AP I) the situation may be different when their armed forces are placed at the disposal of an international organization. In such cases, the responsibility for the acts of such armed forces may rest with the international organization. The 2011 Draft Articles on the Responsibility of International Organizations states in Art. 7 that the conduct of an organ of a State (such as its armed forces) that is placed at the disposal of an international organization shall be considered as an act of the latter if the organization exercises 'effective control' over that conduct. Ultimately this will depend on an appreciation of facts (see, eg, *Behrami and Behrami v France* and *Saramati v France, Germany and Norway* paras 128–52; *Al-Jedda v United Kingdom* paras 74–86; and *Stichting Mothers of Srebrenica v The State of the Netherlands, Ministry of General Affairs and the United Nations* paras 4.30–4.89).

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Armistice

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A. General

1 An armistice is an agreement concluded between two or more States waging war against each other. The expression is not used in non-international armed conflicts. The purport of an armistice agreement has undergone a radical change in the last century. Until the World Wars, an armistice meant an agreement designed to bring about a mere → suspension of hostilities between belligerent parties who remained locked in a state of war with each other, and the expression was synonymous with truce. In contemporary international law, the locution employed in the general practice of States for a suspension of hostilities is → ceasefire (or truce). As for armistice, its meaning has been transformed from suspension of hostilities to termination of war, without, however, introducing peace in the full sense of that term (see paras 11–15 below).

2 Semantically, Arts 36–41 Hague Regulations Respecting the Laws and Customs of War on Land annexed to the 1899 Convention with Respect to the Laws and Customs of War by Land and to the 1907 Convention concerning the Laws and Customs of War on Land, ('Hague Regulations') reflect the pre-existing State practice in this domain. Art. 36 Hague Regulations defines an armistice as a suspension of military operations by mutual agreement between the belligerent parties, either for a fixed period or without an expiry date. Under Art. 37 Hague Regulations, an armistice may be general or local in character (see para. 27 below). Arts 40–41 Hague Regulations focus on identifying violations of an armistice that warrant resumption of hostilities, with or without advance notice.

3 Arts 36–41 Hague Regulations have to be read today as applicable to ceasefire, rather than to armistice. A modern armistice agreement divests the parties of the right to renew military operations at any time and under any circumstances whatsoever. By putting an end to war, an armistice today does not brook resumption of hostilities as an option.

4 The evolution in the status of armistice was noted in 1976 by the arbitrator Lalive in the arbitral case *Dalmia Cement Ltd v National Bank of Pakistan* of the International Chamber of Commerce. The arbitrator said here (at 628):

> Armistice agreements, as a general rule, do not mean the end of the state of war, although recent practice, here too, seems to be changing the traditional rules. However that may be, it is clear that 'an armistice agreement may be capable of interpretation as showing that both parties intended not only a cessation of hostilities but also the termination of the state of war between them'. (Quotation from McNair and Watts 15)

In reality, the practice of States demonstrates that every single instrument concluded since World War II—when designated by the Contracting Parties as an 'armistice'—conveyed the intention of the parties not just to suspend hostilities but to terminate the state of war.

B. The Transformation of the Construct of Armistice

5 The transformation of the concept of armistice has its origins in the armistices which brought about the termination of World War I. A close look at the most famous armistice—the armistice with Germany of 11 November 1918—discloses far-reaching obligations undertaken by Germany that effectively barred the way for it to resume hostilities. The victorious Allied and Associated Powers solely reserved to themselves the prerogative of resorting to force, in case of breach of the armistice conditions by Germany. Initially concluded for a fixed period, the armistice was later extended indefinitely. Of course, peace with Germany came about only as a result of the → Versailles Peace Treaty (1919).

6 The innovative trend of terminating war by armistice became even more pronounced in the armistices of World War II. Significantly, in the Armistice Agreement with Romania of 12 September 1944

('Romanian Armistice') and Hungary of 20 January 1945 ('Hungarian Armistice'), these two countries declared that they had 'withdrawn from the war' against the Allied Powers (Art. 1 Romanian Armistice; Art. I (A) Hungarian Armistice). Romania announced that it 'has entered the war and will wage war on the side of the Allied Powers against Germany and Hungary' (Art. 1 Romanian Armistice), and Hungary agreed to declare war on Germany (Art. I (A) Hungarian Armistice). Likewise, Italy—which had already concluded an armistice with the Allies on 3 September 1943—declared war against Germany in October of that year. The preamble to the Treaty of Peace with Italy ([signed 10 February 1947, entered into force 15 September 1947] 49 UNTS 3; → Peace Treaties [1947]) directs attention to the fact that as a result of the declaration of war Italy 'thereby became a co-belligerent against Germany'. GG Fitzmaurice, adhering to the traditional notion of an armistice as a mere suspension of hostilities, was therefore forced to observe that 'Italy's co-belligerency created a highly anomalous situation juridically, and one which to some extent defies legal analysis and classification' (at 272). After all, if the war between the Allied Powers and Italy did not end until the Treaty of Peace with Italy of 1949, Italy—whose armed forces were fighting after October 1943 alongside Allied formations against Germany—was the co-belligerent of its enemies! Yet, once it is perceived that a modern armistice signifies the termination of war, there is no anomaly in the status of Italy during the late stages of World War II. Whereas Italy had been a co-belligerent of Germany against the Allies until September 1943, once its war against the Allies was terminated by virtue of the armistice, nothing prevented Italy from changing sides, declaring war against Germany, and becoming a co-belligerent of the Allies. The same is true of Romania and Hungary.

7 The evolution in the concept of armistice reached its zenith in the post-World War II period. The key instruments are four bilateral general armistice agreements, signed in 1949 between → Israel, on the one hand, Egypt, Lebanon, Jordan, and Syria, on the other ('Israeli Armistice Agreements'); followed by the 1953 Agreement concerning a Military Armistice in Korea ('Panmunjom Agreement'; 'Korean Armistice'). These armistice agreements terminated the Israeli War of Independence (see also → Arab-Israeli Conflict) and the → Korean War (1950–53) respectively, although they did not produce peace in the full meaning of the term. Interestingly, the Panmunjom Agreement combined 'concrete arrangements for ceasefire and armistice' jointly (Art. 2 Panmunjom Agreement). But the crux of the matter, proclaimed in the preamble, is that the Panmunjom Agreement has 'the objective of establishing an armistice which will insure a complete cessation of hostilities and of all acts of armed force in Korea until a final peace settlement is achieved'.

8 All four Israeli Armistice Agreements pronounce that, with a view to promoting a return to permanent peace in → Palestine, the parties affirm a number of principles, including a prohibition of recourse to military force and aggressive action. In keeping with these principles, the parties are forbidden to commit any warlike or hostile act against one another. The Israeli Armistice Agreements enunciate that the armistice demarcation lines are delineated 'without prejudice to the rights, claims and positions' of the parties in the ultimate peaceful settlement of the Palestine question (eg Art. V (2) General Armistice Agreement between Israel and Egypt ['Israeli-Egyptian Armistice']). The purpose of the armistice is described in their preambles in terms of a transition from truce to a permanent peace; in the case of Egypt, the armistice agreement expressly supersedes a previous general ceasefire agreement between Israel and Egypt (Art. XII (5) Israeli-Egyptian Armistice). Above all, the Israeli Armistice Agreements lay down that they will 'remain in force until a peaceful settlement between the Parties is achieved' (eg Art. XII (2) Israeli-Egyptian Armistice).

9 In the words of S Rosenne:

> True, the object of this accord was to establish transitional provisions for the restoration of peace—an objective itself mentioned in the Agreements themselves; but this is precisely the object of all general armistice agreements, as we have seen. In the sense that they are transitional they are intended to be replaced in due course by an agreed and definitive peace arrangement between the parties. It would, however, be a mistake to confuse this transiency with any temporariness. (At 82)

10 It is noteworthy that when the United Nations Security Council, in 1951, had to deal with an Israeli

complaint concerning restrictions imposed by Egypt on the passage of ships through the → Suez Canal, the UN Security Council declared in Resolution 95 (1950) that the armistice between the two countries 'is of a permanent character' and that, in consequence, 'neither party can reasonably assert that it is actively a belligerent' (at para. 5). It clearly emerges from the text of Resolution 95 (1950), and from the thorough discussion preceding it, that the UN Security Council totally rejected the Egyptian contention that a state of war continued to exist with Israel after the armistice.

C. The Difference between Armistice and Peace

11 Irrefutably, an armistice agreement is never the equivalent of a treaty of peace (→ Peace Treaties). An armistice agreement—even in the modern sense—denotes only the end of war. A treaty of peace transcends the termination of war by providing also for normalization of relations between the former belligerent parties through the introduction or restoration of diplomatic, economic, and other relations.

12 Comparatively speaking, the negation of war is of far greater significance than the initiation (or restoration of), say, trade or cultural relations. Still, when such relations are non-existent, an essential ingredient is missing from the fabric of relations between the parties. An armistice agreement not followed by a treaty of peace is fragile by nature, and any delay in the advent of peace may be fraught with danger. The mere conclusion of an armistice agreement does not imply recognition of an enemy as a new State. Notwithstanding the armistice agreement, diplomatic relations need not be established or resumed (→ Diplomatic Relations, Establishment and Severance). The frontiers between the parties (the armistice demarcation lines), are liable to remain closed (→ demarcation line). In general, relations between the former belligerent parties may be strained and stressful. The upshot is that the armed phase of the conflict is over, but the conflict itself may continue unabated.

13 Since a modern armistice terminates war, it is concluded in a formal intergovernmental agreement, namely a treaty, following negotiations that may be lengthy and elaborate. In theory, an armistice can also be imposed on the belligerent parties by a binding decision of the UN Security Council adopted under the aegis of Chapter VII UN Charter. But in actuality this has never happened: the UN Security Council has always confined its cessation-of-hostilities resolutions to ceasefires.

14 Armistice demarcation lines are often drawn up explicitly 'without prejudice' to ultimate claims in a peace settlement (see para. 8 above), and at times they are even categorized as military lines. Nevertheless, as long as they cannot be altered by force, and remain binding indefinitely pending agreement to revise them by a treaty of peace or otherwise, there is in substance little or no difference between armistice demarcation lines and permanent → boundaries. After all, the hallmark of all international frontiers is that they are subject to modification by mutual consent. It is noteworthy that, in the → Israeli Wall Advisory Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory), the International Court of Justice took it for granted that the Israel-Jordanian armistice demarcation line, popularly called the Green Line—established in the General Armistice Agreement between Israel and Lebanon ('Israeli-Jordanian Armistice')—is the boundary between Israel and the West Bank (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory [Advisory Opinion]* paras 72 and 78; see also → Israel, Occupied Territories).

15 By terminating war, a modern armistice cleans the slate of hostilities in the relations between the former belligerent parties. In this respect, an armistice is just like a treaty of peace. If hostilities erupt again between the parties to either an armistice or a peace treaty, the conflagration must be considered a new war, rather than a resumption of the previous one. This is in contradistinction to a breach or denunciation of a ceasefire, which starts another round of hostilities between the belligerent parties within the ambit of the same war. Naturally, a new war has to be analysed on its own merits in terms of the all-important assessment of → aggression (or → armed attack) and → self-defence pursuant to the *ius ad bellum*.

D. The Contents of a Modern Armistice

16 The components of an armistice agreement are as follows: Termination of hostilities: this is the distinctive feature of a modern armistice. Typically, the

preamble of the Panmunjom Agreement states as its objective the establishment of an armistice ensuring 'a complete cessation of hostilities and of all acts of armed force in Korea until a final peace settlement is achieved'. The Israeli-Egyptian Armistice declared that

> no element of the land, sea or air military or para-military forces of either Party, including non-regular forces, shall commit any warlike or hostile act act against the military or para-military forces of the other Party, or against civilians in territory under the control of that Party; or shall advance beyond or pass over for any purpose whatsoever the Demarcation Line. (At Art. 2 (2))

17 Demarcation lines: armistice agreements generally require setting precise demarcation lines between the former belligerent parties, and these are usually marked on detailed maps attached to the text. The armistice lines may match previous international frontiers or ceasefire lines, but they may also incorporate agreed upon modifications and adjustments that may require significant evacuations and withdrawals. The seminal armistice with Germany of November 1918 promulgated evacuation of German troops from all the far-flung occupied countries. The Israeli-Egyptian Armistice, in Annex I, provided for withdrawal of Egyptian troops from the Faluja Pocket in which they had been encircled following the earlier general ceasefire agreement.

18 Entry into force: as a rule, an armistice agreement enters into force immediately upon signature and it is not subject to ratification. *En principe*, this is also true of a ceasefire. But it has to be perceived that a ceasefire must allow some time for instructions suspending hostilities to be transmitted to all units through the command channels. Thus, UN Security Council Resolution 211 (1965), which brought about a ceasefire in the 1965 war between India and Pakistan, was adopted on 20 September. The resolution demanded that the ceasefire should take effect on 22 September, at 7:00h GMT. In some instances, the unavoidable interval is even longer. Moreover, the execution of certain specific stipulations of both armistice and ceasefire agreements may require a further time-lag before coming into effect (see, eg, para. 22 below re exchange of prisoners of war).

19 Duration: a modern armistice agreement, amounting to a termination of war, must be indefinite in its projected application. A termination of war and a limited period of application amount to a contradiction in terms. By contrast, a ceasefire as a suspension of hostilities is temporary by nature and, as such, it may be set for a fixed period of time. A prime example is UN Security Council Resolution 50, adopted on 29 May 1948, following the invasion of Israel upon its establishment by Arab armies. Resolution 50 (1948) called for 'a cessation of all acts of armed force for a period of four weeks' (at para. 1). After several delays, this ceasefire, known as the First Truce, came into force on 11 June 1948 and ended after four weeks. On 7 July 1948, the UN Security Council appealed to the parties 'to accept in principle the prolongation of the truce' (UNSC Res 53 (1948)), but hostilities resumed nevertheless.

20 Demilitarization: the parties to an armistice may agree on complete or partial → demilitarization, either all along the demarcation line, as in Korea, or in prescribed areas as in the Israeli armistice agreements with Egypt and Syria. By separating the military forces of the former belligerent parties, demilitarized zones are designed to minimize friction in the future. However, in the long run demilitarized zones by themselves may turn into irritants—due to frequent charges of breaches and counter-breaches—thereby increasing tensions between the parties instead of alleviating them.

21 Supervisory mechanism: the setting-up of a supervisory mechanism may prove vital to the success of an armistice, as well as a ceasefire, agreement. This is true not only with respect to the initial period, which is almost invariably attended by difficulties of on-the-ground implementation, but also in subsequent stages. The Israeli Armistice Agreements set up Mixed Armistice Commissions ('MACs') chaired by a United Nations official for supervision of the armistices, eg Art. X Israeli-Egyptian Armistice. The Korean Armistice established a different Military Armistice Commission composed of officers from both sides (Art. II Section B Panmunjom Agreement) plus a Neutral Nations Supervisory Commission (Art. II Section C Panmunjom Agreement). Generally speaking, the monitoring mechanism consists of elements of observation, inspection, and investigation.

22 Release of prisoners of war: often an armistice agreement deals explicitly with exchange of prisoners

of war within a predetermined period. A good illustration is the Israeli-Egyptian Armistice Agreement, which ordained that the exchange of prisoners of war begin within ten days after signature and shall be completed not later than 21 days following (Art. IX (1) Israeli-Egyptian Armistice Agreement). In the case of Korea, a special agreement on prisoners of war—an exceptionally thorny problem in the negotiations—was concluded several weeks prior to the armistice, although its execution was to begin only '[w]ithin two months after the armistice agreement becomes effective' (Agreement on Prisoners of War [signed 8 June 1953, entered into force 27 July 1953] [1953] 47 AJIL Supp 180).

23 What is the legal position when the armistice agreement is silent on this issue? Pursuant to Art. 118 (1) Geneva Convention of 1949 Relative to the Treatment of Prisoners of War ('Geneva Convention III'), prisoners of war must be released 'without delay after the cessation of active hostilities'. While the point in time of a genuine 'cessation of active hostilities' is not always readily apparent, there can be no doubt that it occurs once an armistice has been arrived at. Therefore, if the matter is not resolved overtly in the text of the armistice agreement, each belligerent party is duty bound—in conformity with Geneva Convention III—to release unilaterally all prisoners of war in its hands, as soon as this is feasible after the entry into force of the armistice agreement.

24 Miscellaneous provisions: an armistice agreement may deal with diverse specific and local issues, as circumstances dictate. Thus, the Israeli-Jordanian Armistice Agreement deals with free access to → Holy Places, resumption of operation of a railroad to Jerusalem, etc (Art. VIII (2) Israeli-Jordanian Armistice Agreement).

E. The Difference between Armistice and Ceasefire

25 An armistice and a ceasefire agreement may be structured in a similar fashion. Clauses regarding supervision, demilitarization, exchange of prisoners of war, etc, may look very much alike. In fact, a ceasefire may go very far. This becomes obvious when one consults the most elaborate ceasefire arrangement ever worked out, namely, UN Security Council Resolution 687 (1991) concerning the → Iraq-Kuwait War (1990–91). The breadth and range of this text, which covers compensation for claims and destruction of → weapons of mass destruction, are as awesome as they are unprecedented. How do we know that this is only a ceasefire? The answer is simple: Resolution 687 (1991) says so expressly (paras 1 and 33).

26 To date, all UN Security Council resolutions and almost all agreements relating to 'cessation of hostilities' have dealt explicitly with ceasefires (see para. 13 above). But what is the legal position when the text does not employ the term ceasefire *expressis verbis*? The problem is exacerbated by the fact that the frequently-used phrase 'cessation of hostilities' may be reconciled with both suspension and termination of war. When the language used is equivocal, it is necessary to look for the intention of the parties. The tell-tale indication revealing that the parties had only a ceasefire in mind is the temporary nature of the 'cessation of hostilities'. A modern armistice—unlike a ceasefire—must, in the words of the Korean Armistice,

> remain in effect until expressly superseded either by mutually acceptable amendments and additions or by provision in an appropriate agreement for a peaceful settlement at a political level between both sides (Art. 5 (62) Panmunjom Agreement).

27 Art. 37 Hague Regulations differentiates between a general and a local armistice in the sense of suspension of hostilities. The Israeli Armistice Agreements pointedly carry in their titles the adjective 'general'. The Panmunjom Agreement already omits the adjective. The omission is consistent with the modern thrust of an armistice agreement as an end to war, for a termination of war cannot be localized. An authentic termination of war must be general in its scope, that is to say, the war must end on all fronts and embrace all locations.

F. Conclusion

28 It is widely admitted that there exists a 'semantic confusion' in the usage of the terms ceasefire, truce, and armistice (Bailey 467–69). Nevertheless, there is a marked reluctance in much of the legal literature to undertake any reappraisal of the role assigned to armistice in the vocabulary of war since the Hague

Regulations. The general tendency is to follow in the footsteps of the Lalive-McNair/Watts approach (see para. 4 above). A leading example is the 2004 UK Ministry of Defence's Manual of the Law of Armed Conflict. This manual, relying on Art. 36 Hague Regulations, first defines an armistice as a suspension of military operations (at 10.14). Later, the manual concedes that '[a]n armistice can put an end to armed conflict if that is the intention of the parties' (at 10.16). The 2013 German Law of Armed Conflict Manual records that armistices may be 'intended to result in a permanent end to hostilities' (at 224).

29 In reality, the intention of the parties to resort to an armistice as the legal tool to put an end to war in a manner that is not consonant with the vocabulary of the Hague Regulations has been evinced in every instance since the end of the World War I. Suspension of hostilities through an instrument entitled 'armistice' is actually in disuse. Surely, the present terminology has to be adjusted to fit the modern practice of States, which consistently attests the transformation that has occurred over the years in the legal status of a modern armistice.

30 This is not to suggest that Arts 36–41 Hague Regulations have lost their standing as an expression of customary international law. What has changed as a result of the evolution of international law since the World Wars is solely a matter of nomenclature. The substance of Arts 36–41 Hague Regulations remains unaffected where the suspension of hostilities is involved. But semantically, as the modern practice of States demonstrates, the Hague Regulations are applicable to those agreements that are today called ceasefires or truces. As far as modern armistices are concerned, they have now moved away from the span of Arts 36–41 Hague Regulations. They have become akin to what used to be called in the past peace preliminaries: bringing war to an end without introducing full and formal peace.

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Arms Control

Adrian Loets

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A. Concept and Definition

1 There is no uniform definition of arms control. According to a recent definition by Den Dekker, the concept can be broadly described as 'unilateral measures, bilateral and multilateral agreements as well as informal regimes ('politically binding' documents, 'soft' law) between States to limit or reduce certain categories of weapons or military operations in order to achieve stable military balances and thus diminish tensions and the possibility of large-scale armed conflict'. Arms control law consequently refers to 'that part of public international law that deals with the restrictions internationally placed upon the freedom of behaviour of States in regard to their national armaments, and with the applicable supervisory mechanisms' (den Dekker 316–317; similarly Morgan 17).

2 The distinction between → disarmament and arms control is unclear. Both terms relate to armament and can comprise quantitative and qualitative restrictions on weapons in general or on certain types of weapons. The difference lies in the aim: whereas disarmament seeks to reduce military capacity of all States—eventually to zero—arms control is primarily concerned with curbing the build-up of arms by introducing quantitative or qualitative ceilings for weapon systems, arms, and man power (Ipsen 1133–1134). Arms control attempts to stabilize the security environment but does not necessarily entail reduction of military capability. It can also include preventive prohibitions of the development, testing, or build-up of certain armaments or of technologies threatening to upset the strategic balance, such as anti-ballistic missiles ('ABMs'). Non-proliferation (→ Weapons of Mass Destruction) represents another important pillar. In addition, the temporal scope of an instrument can provide an indication for its classification: arms control agreements are sometimes concluded for a limited time frame (although they would be extendable) whereas disarmament commitments, in accordance with their aim for perpetual peace, are usually of indefinite duration (Venturini 347).

3 Frequently, arms control is complemented by other stabilizing instruments, for example, voluntary → confidence-building measures. It can be distinguished between mutually agreed arms control conventions and unilaterally applicable limitations.

B. Evolution of Arms Control

1. Origins before 1945

4 Efforts to limit armament and certain weapon types date back to old times. There is evidence of an armament

conference in ancient China of 546 BC. In 1139, the use of the crossbow (against Christians) was banned by the Second Lateran Council (Dupuy and Hammerman 3–11). One of the first modern examples is the Rush–Bagot Agreement of 1817 between the US and Britain, restricting the number of naval forces on the Great Lakes. With the advent of humanitarian law in the late 19th century, restrictions on particular weapons, as well as methods and means of warfare emerged (→ Warfare, Methods and Means; → Weapons, Prohibited). Notably the 1868 St Petersburg Declaration and the Conventions resulting from the → Hague Peace Conferences (1899 and 1907) are to be cited in this context. The → Versailles Peace Treaty (1919) subjected the German armed forces to quantitative restrictions and established a verification regime. Further limitations of naval armament (→ Naval Warfare) were adopted in a series of conferences in London and Washington in 1922 and throughout the 1930s.

5 This brief overview demonstrates the ambiguous motivation behind armament restrictions. The Treaty of Versailles clearly pursued the objective of containing Germany's military power but also States that this was done 'in order to render possible the initiation of a general limitation of the armaments of all nations'. The humanitarian initiative by the Russian Tsar Nicholas II leading to the St. Petersburg Declaration, as well as the Rush–Bagot treaty were at least partially induced by soaring armament costs (Keefer 7–9).

2. Development of Nuclear Arms Control after 1945

6 In the period after World War II, the arms control debate centred on the new and destructive nuclear weapons (→ Nuclear Weapons and Warfare). The Soviet Union's first nuclear test in 1949 triggered a nuclear arms race that was defining for the → Cold War (1947–91). Efforts to place nuclear weapons under international control within the UN framework failed due to increasing mistrust between the superpowers (→ Superpowers and Great Powers). Yet, in 1963, a Partial Test Ban Treaty was adopted by the USSR, the US, and the UK, prohibiting testing in the atmosphere, under water, or in space. The original ambition of reaching a Comprehensive Nuclear Test Ban Treaty ('CTBT') was thwarted by disagreement on the supervision. Nevertheless, another partial restriction was introduced by the Threshold Test Ban Treaty of 1974, limiting underground testing of nuclear warheads above a certain size. A CTBT was finally agreed upon in 1996, but is still awaiting sufficient ratification.

7 On another track, the US and the USSR began to discuss reducing the number of nuclear weapons in the → Strategic Arms Limitation Talks (SALT). The first SALT agreement ('SALT I') 1972 stipulated a → moratorium on land- and submarine-based intercontinental ballistic missiles. A reduction of ABM launching facilities was agreed upon in the ABM Treaty of 1972 and the ABM Protocol of 1974, from which the US withdrew in 2001. Negotiations for further reductions ('SALT II') were only concluded in 1979. Due to the Soviet invasion of Afghanistan that year, the US halted the ratification process. Still, both sides tacitly complied with the agreement in the years that followed on the basis of → reciprocity. Continued talks finally led to the Treaty between the United States of America and the Union of Soviet Socialist Republics on the Elimination of their Intermediate-Range and Shorter-Range Missiles ('INF Treaty') in 1987, in which the elimination of short- and medium-range missiles was pledged

8 The SALT negotiations aimed at limiting the number of weapons owned by the nuclear powers, in other words, at vertical proliferation. Faced with the prospect of a growing number of countries pursuing nuclear weapons programmes in the early 1960s, another dimension of arms control, notably horizontal non-proliferation, was tackled. The outcome, the → Non-Proliferation Treaty (1968), rests on three pillars. First, it obliges States that had not exploded a nuclear weapon before 1967 (Non-Nuclear Weapons States, 'NNWS') to refrain from obtaining such weapons. This obligation is supervised by the → International Atomic Energy Agency (IAEA) (non-proliferation pillar). Second, the right of States to peaceful use (→ Nuclear Energy, Peaceful Uses) is reiterated (peaceful use pillar). Third, in exchange for the abstinence of NNWS, the nuclear weapons States ('NWS') pledge to pursue nuclear disarmament in → good faith (bona fide) (disarmament pillar). Although the treaty enjoys wide ratification and is mostly considered a success, its compliance and verification record are equivocal, and it has not stopped signatory States from (successfully) engaging in military nuclear programmes. In addition—while representing a relative success compared to the failed 2005

NPT Review Conference—the 2010 conference again could neither agree on specific disarmament time frames nor a global verification standard, joint responses on default by signatory States, nor multilateral fuel supply schemes. An important outcome of the 2010 conference was the call for a Nuclear Weapons Free Zone ('NWFZ') in the Middle East under UN auspices, even though the conference on the issue planned for December 2012 has been indefinitely postponed

3. From START and SORT to a New START

9 On the bilateral track, it was not until 1991, immediately before the dissolution of the USSR, that the round of talks labelled 'Strategic Arms Reduction Talks' ('START'), was concluded with a treaty between the US and the USSR ('START I') introducing fixed caps for warheads and missiles. A second treaty ('START II') was adopted in January 1993, but never ratified by → Russia. However, further reductions were agreed upon in the 2002 Strategic Offensive Reduction ('SORT') treaty. On 2 April 2010, Presidents Obama and Medvedev signed the latest nuclear reduction agreement ('New START') in Prague, so as to replace the expired START I along with SORT, which was bound to run out in 2012 (for details on the commitments see Woolf 3–14). New START does not, however, address the particularly contentious issue of American ABM systems, and is limited to strategic weapons (Kerry 112–115). As the latest step, the US adopted a revised Nuclear Posture Review Report in late 2010, unilaterally declaring that nuclear weapons would not be used against non-nuclear weapons States (paras vii–viii) (Moxley 755–773). Unofficial remarks by the US and Russian Presidents at the side of the Seoul Nuclear Security Summit in March 2012 indicated their willingness for further reductions in the future.

C. Arms Control under the UN Charter

10 Within the United Nations framework, both the General Assembly ('UNGA') and the Security Council ('UNSC') play a role in arms control. The UNGA's role lies mainly in the preparation of multilateral conventions. Pursuant to Art. 11 → United Nations Charter, it can make recommendations on the 'principles governing disarmament and the regulation of armaments' to the Member States and the UNSC. The Assembly's First Committee mainly administers this function. With the gridlock in the UN Conference on Disarmament, it has become an important arms control forum in the UN system and has passed several significant arms control resolutions at its 2012 session. The UNSC is 'responsible for formulating … plans to be submitted to the Members of the [UN] for the establishment of a system for the regulation of armaments', assisted by the Military Staff Committee (Arts 26, 47). In practice, however, the Council has been relying on its far more effective Chapter VII powers to impose unilateral obligations on certain States. UNSC Resolutions 687 and 1441, for instance, prescribed highly detailed arms control obligations for Iraq (→ Iraq–Kuwait War [1990–91]).

D. Control of Biological and Chemical Weapons

11 Unlike in the case of nuclear weapons, biological and chemical weapons have been outlawed for some time. The Geneva Protocol 1925 on gas warfare represents an early example. The Biological Weapons Convention ('BWC') was already adopted in 1972, and entered into force in 1975 (→ Biological Weapons and Warfare). The Chemical Weapons Convention ('CWC') became effective in 1997 (→ Chemical Weapons and Warfare). Both the BWC and the CWC establish absolute prohibitions of biological or chemical weapons agents, and require the destruction of previously produced stocks (Arts II BWC and I (2) CWC), although the USSR pursued a clandestine biological weapons programme after its ratification. Significant differences exist between the two agreements' verification and compliance regimes. There is also an absolute prohibition of the use of biological and chemical weapons, including gas weapons, under customary international law.

E. International Humanitarian Law and Arms Control

12 It is now recognized that international humanitarian law, although not directly concerned with arms control, imposes prohibitions as well as limitations on the use and development of certain weapons. Notably the principle of distinction and the prohibition of inflicting superfluous injury or unnecessary

suffering, which are considered customary law by the → International Committee of the Red Cross (ICRC) (ICRC Customary Humanitarian Law Study, Rules 1–6, 11–12, 71), are of 'considerable contextual importance' to the law of arms control (Boothby 41).

13 Art. 51 (4) (b) and (c) AP1 (→ Geneva Conventions Additional Protocol I [1977]) provide that 'a method or means of combat which cannot be directed at a specific military objective' or 'the effects of which cannot be limited as required by [the] Protocol' are prohibited. The International Court of Justice has affirmed in its *Nuclear Weapons Advisory Opinion* of 1996 that 'weapons which are incapable of distinguishing between civilian and military targets', in other words intrinsically indiscriminate weapons, are prohibited under customary international law (at para. 257; → Nuclear Weapons Advisory Opinions) (→ Indiscriminate Attack). The difficulty is to determine whether a particular weapon is incapable of distinction by design and not merely used in an indiscriminate way (Dinstein 62).

14 Art. 35 (2) AP1 expressly prohibits 'weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering'. This is commonly understood to prohibit the use of weapons that (objectively) do greater harm than that inevitable to achieve legitimate military objectives (Dinstein 65). Again, the difficulty is to identify the specific arms in contradiction of the principle (see Pilloud and others paras 1419–1425).

15 There are established customary law prohibitions of certain weapon types with regards to these two principals, for instance poison, biological and chemical agents, gas warfare and expanding or exploding bullets (ICRC Customary Humanitarian Law Study, Rules 73–80). For other weapons, for instance → land mines and incendiary weapons, customary law stipulates at least limitations of their use. Frequently, the two principles will overlap but some weapons, such as blinding laser beams, are expressly prohibited under the consideration of causing superfluous injury (Dinstein 79).

16 Beyond these general rules, the Convention on Certain Conventional Weapons of 1980 and its five Protocols specifically prohibit a number of conventional weapons considered to have indiscriminate effect. Although the Protocols prohibit some particularly contentious weapons such as booby traps (Protocol II) and non-detectable fragments (Protocol I), they do not stipulate an outright ban on land mines (Protocol II) and unexploded → remnants of war (Protocol V). In addition, Protocol V only covers defective unexploded ordnances, and consequently not unexploded but functional → cluster munitions (Docherty 944).

17 The 1997 Ottawa Convention stipulates a comprehensive ban of anti-personnel mines. The similarly phrased Convention on Cluster Munitions entered into force in August 2010 and has so far attracted 82 State parties. Due to its strong preventive and remedial obligations, it has been considered as one of the most extensive arms control treaties (Docherty 949–962). The most important owners and manufacturers of these weapons have, however, not ratified the conventions at the time of writing.

F. Regional Arms Control Arrangements

18 Given the overarching aim of enhancing stability, some arms control treaties specifically regulate strategic balance on a regional level. In the 1974 Ayacucho Declaration, eight Latin American States generally pledged 'effective limitation of armaments'. On the European level, the Conventional Armed Forces in Europe ('CFE') Treaty (→ Conventional Armed Forces in Europe [CFE] Regime) entered into force in 1992 under the auspices of the → Organization for Security and Co-operation in Europe (OSCE). Its initial purpose to ensure parity between the forces of the → Warsaw Treaty Organization and the → North Atlantic Treaty Organization (NATO) by capping the deployment of certain weapon systems, a notification, and an on-site inspection system, was outrun by the dissolution of the Eastern bloc in 1991. The treaty was accordingly revised at the 1999 review conference and the verification mechanism strengthened. Since 2007, however, Russia has suspended its participation in the CFE regime due to the ABM dispute with the US. Regional treaties on NWFZ, on the other hand, belong to the realm of disarmament law.

G. Problems and Criticism

1. Constant Need for Adjustment

19 One issue is that even the most detailed and sophisticated arms control regimes remain vulnerable

to changing external circumstances. First, technological progress can have a destabilizing effect on the carefully balanced equilibrium. The present ABM dispute between the US and Russia demonstrates this problem quite aptly. Another example is the development of small tactical nuclear weapons (so-called 'mini nukes') or unmanned war drones. Second, internal political considerations could also cause governments to ignore their treaty obligations and increase armament (Schmalzgruber 214–248), for example, in the case of North Korea.

2. Implementation and Supervision

20 The intensity of supervision between the different arms control treaties varies significantly. As a rule, however, where international (and not merely unilateral) supervision is provided for, there is usually a focus on mere monitoring. Some treaties also provide for verification, that is the assessment of compliance regarding a particular finding, normally by an international organization, and requires a complaint by a State party to trigger the mechanism. Where conventions charge international organizations with the supervision, these tend not to be competent to take sanctions for the enforcement (→ International Organizations or Institutions, Supervision and Sanctions). Rather, they represent mere forums for debate between the State parties.

21 Generally, the instruments range from mere reporting duties and routine inspections (monitoring) to more invasive ad hoc inspections, sometimes so-called 'challenge inspections' at the request of a Member State (verification), up to compulsive methods in case of a determined breach (enforcement).

22 One example of supervision of an arms control treaty by an international organization is the IAEA's supervision of the NPT. Here, supervision encompasses all three elements, monitoring, verification, and enforcement. Supervision is organized through bilateral Comprehensive Safeguards Agreements, providing for reporting duties, routine inspections, as well as unannounced inspections, and remote supervision of facilities. Most States have also ratified an Additional Protocol with the organization (Model Additional Protocol), providing for further monitoring measures (Venturini 363). In case of determined non-compliance, the IAEA can request remedial action, and, failing that, the Board of Governors can relate the matter to the UNSC or the UNGA.

23 The CWC is supervised by the independent Organization for the Prohibition of Chemical Weapons ('OPCW'), inter alia through reporting duties and inspections. It also provides for a challenge inspection procedure which is considered one of the most extensive verification procedures in the law of arms control, but has never been used, mainly due to political constraints (Asada 88–92).

24 By contrast, the BWC's supervisory mechanism mainly consists of review conferences in five year intervals. The State parties have the option of initiating a complaint procedure about a suspected breach to the UNSC which has, however, never been triggered. Negotiations to install an independent supervisory organization have been stalled since 2001.

25 Weak verification and enforcement mechanisms represent a main challenge for the effectiveness of arms control law. A stabilizing effect, it has been argued, required that the State parties could rely on the compliance of the other side, excluding any possibility of deception. Other scholars have acknowledged the benefits of the more 'managerial' supervision in arms control law with a focus on confidence building and informal exchange of information. They have pointed out that breaches of arms control law are difficult to prove for third States and that a confrontational and enforcement-oriented supervision might lead to increased tensions instead of stability (den Dekker 323–9).

26 The track record of arms control supervision supports both views. Despite the relatively strong supervision, CWC has produced mixed results regarding the obligation to destroy weapon stocks (Venturini 375). But also the more informal BWC scheme has had only modest success. It did not prevent the USSR from pursuing a secret biological weapons programme despite its being party to the Convention. In the case of Iraq, the referral to the UNSC could not resolve the issue and the conflict ended in a US armed intervention. The procedure also did not dissuade North Korea from testing three nuclear devices and several missile systems. To date,

it remains unclear whether the sanctions against Iran will be able to stabilize the conflict about its nuclear programme.

H. Conclusions and Outlook

27 With the end of the Cold War, arms control has entered into a new phase. Yet, although the rivalry between the blocs has diminished, the idea of agreeing on mutually binding armament limitations and subjecting them to international supervision remains topical for the maintenance of a stable security environment. The ongoing tensions between the US and Russia over the ABM Treaty adequately demonstrate the need for such agreements as well as their fragility in the face of conflicting geostrategic interests. Even if the superpowers can agree on further reductions of nuclear weapons, neither of them is yet willing to relinquish them entirely, as the staggering maintenance and overhaul investments by NWS demonstrate. Their failure to determinedly pursue disarmament also upsets the bargain at the heart of the NPT regime, certainly contributing to its inability to halt proliferation. Nuclear arms control is likely to become more complicated with the rise of new powers and the ensuing struggle for a new strategic balance. Implementation and supervision of the existing arms control treaties are also still in want of improvement. A major challenge is the frequent occurrence of non-international armed conflict and the risk of weapons of mass destruction, not only nuclear devices, falling into the hands of → non-State actors. Ideas to overcome the political deadlock in present arms control negotiations are on the table: in order to prepare the ground for the (currently stalled) negotiations on a Fissile Material Cut-Off Treaty, a uni- or bilateral moratorium on the production of fissile materials could be declared. The ABM dispute could be assuaged by a cooperative NATO–Russian missile defence arrangement for a trial period (Pifer and O'Hanlon 11–14). The CTBT ratification could be revitalized by unilateral moratoria or the dismantling of testing facilities (like France did, Danon 150–1). Establishing a reliable and impartial multilateral fuel supply could strike a compromise between the need for verification and the right to peaceful use. Although general and complete disarmament may be politically unattainable in the foreseeable future, the approach of realistic and small steps that characterizes arms control stays as relevant as ever in paving the way to an eventual 'global zero'.

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Arms, Traffic in

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A. Introduction

1 Traffic in arms, also referred to as 'arms trade' or 'arms trafficking', encompasses all stages of transfers of new or surplus conventional weapons and military equipment, including parts, components, and ammunition between States, between non-State entities, or between States and non-State entities. This includes conduct or activities that might be described as forming part of one or more of the following: sale, acquisition, delivery, import, export, transit or transshipment of arms, or the brokering of arms deals. Traffic in arms may also involve the supply of weaponry together with other forms of military assistance, such as technical assistance, technology transfer, and training the personnel of the recipient State or non-State entity. Trafficking in non-conventional (nuclear, chemical, and biological) weapons and their means of delivery is also sometimes addressed as an arms trafficking issue. Arms brokering is the arrangement or facilitation of potential arms transfers by intermediaries acting between manufacturers or suppliers of arms on the one hand and buyers and recipients on the other. The term 'trafficking' often connotes illicit dealings in arms. The term 'trade' is suggestive of licit dealings in arms. This entry deals with the international regulation of both illicit and licit dealings in arms. International efforts to regulate traffic in arms should be distinguished from international regulation concerning → arms control and → disarmament, which are concerned with the limiting, quantitatively and qualitatively, of the build-up of arms by States.

2 Traffic in arms has increasingly become a concern for States, international organizations, and non-governmental organizations. The end of the → Cold War led to an increase in traffic in arms for commercial purposes, less influenced by strategic considerations than in the past. Reductions in the stockpiles of conventional weapons, particularly in Europe, also led to a significant increase in the supply of arms to areas of conflict. The reduction in 'super-power' patronage for regimes and armed groups was followed by increased privatization of armed conflict, the emergence of armed groups engaged in illicit commercial activities, and increased numbers of non-international armed conflicts (→ Armed Conflict, Non-International), all of which fuelled an increase in demand for arms. The equipping of → non-State actors with highly lethal weapons to rival police or even military forces has sustained conflicts and transnational criminal activity (→ Transnational Organized Crime) and has threatened the safety and effectiveness of → peacekeeping and humanitarian operations. In response to these developments, global and regional security, humanitarian, and development concerns have prompted international action, in particular regarding the proliferation and dispersion of small arms and light weapons (→ Small Arms, International Restrictions on the Trade in). Humanitarian concerns have also motivated efforts to prohibit and restrict the transfer of anti-personnel → land mines and → cluster munitions. Notwithstanding the profound human suffering that is associated with traffic in arms, international legal regulation remained fragmented: in terms of States that assumed legal obligations; in terms of the weapons that were regulated; and in terms of the types of transfers (State to State, State to non-State actor, non-State actor to State) targeted by the regulation. In recent years this fragmentation has gradually been reduced and the coherence of

international legal regulation of traffic in arms has been significantly enhanced by the negotiation of the Arms Trade Treaty (2013), which came into force in 2014.

B. State to State

1. Customary International Law

(a) In the Absence of an Existing Armed Conflict

3 Despite the growing concern about traffic in arms, no rules of customary international law have developed that regulate State acquisition of arms through the arms trade between States. In → Military and Paramilitary Activities in and against Nicaragua Case (*Nicaragua v United States of America*) (Merits) ([1986] ICJ Rep 14), the → International Court of Justice (ICJ) concluded that '… in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception' (at para. 269). This generally recognized freedom of States to acquire arms is the basis for excluding State to State arms transfers in some international treaties regulating the arms trade discussed below.

4 There are certain primary rules that may prohibit arms transfers between States. In the case of peremptory norms that give rise to obligations to exercise due diligence to prevent violations—such as to prevent → genocide and → slavery—transfers of arms and the failure to restrict transfers may give rise to State responsibility. The ICJ considered such obligations arising under the Convention on the Prevention and Punishment of the Crime of Genocide (1948) in its judgment in the → Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case (*Bosnia and Herzegovina v Serbia and Montenegro*) ([2007] ICJ Rep 43 at paras 429–32).

5 The customary international law rules on State responsibility may also operate to effectively prohibit arms transfers between States in two situations, which are dealt with by Arts 16 and 41 of the Articles on State Responsibility of the → International Law Commission (ILC). Art. 16 contemplates the derivative responsibility of a State that transfers arms to another State for the purpose of providing aid or assistance in the commission of an internationally wrongful act by the recipient State. The ILC, in its commentary to Art. 16, observed that

> a State may incur responsibility if it assists another State to circumvent sanctions imposed by the United Nations Security Council … or provides material aid to a State that uses the aid to commit human rights violations. In this respect, the United Nations General Assembly has called on Member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations.… Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct. (At para. 9.)

Art. 41 provides that where a State has committed a serious breach of a peremptory norm, all other States are under an international legal obligation to not render aid or assistance that would allow the recipient State to maintain the situation created by the serious breach. A transfer of arms in those circumstances would result in State responsibility for the transferring State. Although the Articles on State Responsibility purport to contain only *secondary* rules concerning the consequences of a breach of a primary rule, Arts 16 and 41 straddle the primary/secondary rule distinction insofar as their effect is to impose positive duties on States in the circumstances with which they are concerned.

(b) In Cases of International Armed Conflict

6 In the case of an international armed conflict, the customary rules concerning whether a State may supply arms to a party to the conflict depend primarily on two things: the identity of the recipient State and the status of the supplying State. In respect of the identity of the recipient State, international law prohibits the giving of assistance, including through the supply of arms, to a State that has committed a serious breach of the prohibition on the use of force. As the unlawful use of force (or on a narrower view, aggression) constitutes a serious violation of a peremptory norm, in accordance with the customary rule contained in Art. 41 Articles on State Responsibility discussed above,

international law prohibits the supply of arms that would assist that State. If, on the other hand, a State chooses to participate in an international armed conflict to assist a State that was the victim of an armed attack through collective → self-defence, there are no customary international law rules restricting the supply of arms to the victim State.

7 If a State chooses not to participate in the armed conflict, it would have the status of a neutral State, and any supply of arms would be regulated by the customary rules of neutrality (→ Neutrality, Concept and General Rules). The rules of neutrality were codified during the early 20th century in the Convention concerning the Rights and Duties of Neutral Powers in Naval War (1 Bevans 723; '1907 Hague Convention XIII') and the Convention respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land ([1907] 205 CTS 299; '1907 Hague Convention V'). Art. 6 1907 Hague Convention XIII forbids the 'supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of warships, ammunition, or war material of any kind whatever'. This prohibition is absolute and applies irrespective of whether one or both of the parties to the conflict are being armed by other States. This prohibition was not, however, applicable to most private sales of arms (Art. 7 1907 Hague Conventions V and XIII, cf the → Alabama Arbitration), but private shipments of arms were subject to seizure as contraband. There has been no comprehensive codification of the law of neutrality since 1907 (cf private restatements of certain aspects of the law of neutrality, in particular the 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea) and State practice since the early 20th century has altered or rendered obsolete some of the rules of neutrality in the 1907 Hague Conventions. Relevantly, the customary rule reflected in Art. 7 1907 Hague Conventions V and XIII has been modified to the extent that if the transport or export of arms by private persons or enterprises to a State that is party to an international armed conflict is subject to control by a neutral State, the neutral State has a customary obligation to prevent such a supply of arms by, for example, prohibiting the export. States that support a party to an international armed conflict through the supply of arms but do not themselves participate in the armed conflict (sometimes referred to as declared or undeclared non-belligerency), are in violation of the rules of neutrality, as occurred with a number of States supporting the 2003 invasion of Iraq.

8 It also appears that customary international humanitarian law prohibits the supply of arms that seeks to encourage its breach. In its decision in → Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*) (Merits), the ICJ appeared to accept that a State may violate its obligations under customary international law to respect, and ensure respect for, the rules of customary international humanitarian law if the State, by the transfer of arms, seeks 'to encourage persons or groups' engaged in armed conflict 'to act in violation of' the rules of customary international law now reflected in Art. 3 common to the four Geneva Conventions of 1949 (at para. 220) applicable in both international and non-international armed conflicts.

(c) In Cases of Non-International Armed Conflict

9 Under the customary principle of non-intervention, States must not supply arms to insurgents in other States. The application of this principle has been contested in cases of → wars of national liberation. It is also at least arguable that the principle is inapplicable to military assistance provided to victims of genocide—see, on a related issue, the *Separate Opinion of Judge ad hoc Lauterpacht in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Order)* ([13 September 1993] at paras 98–104).

2. Treaties Addressing Traffic in Specific Types of Arms

(a) Global Treaties

10 There are a number of multilateral treaties addressing traffic in particular types of arms that either prohibit transfers absolutely, or that address either the lawful or illicit trade in such arms.

11 Various multilateral treaties applicable to non-conventional (nuclear, chemical, and biological) weapons prohibit absolutely the transfer of weapons or related materials. The Treaty on the Non-Proliferation of Nuclear Weapons ('Nuclear NPT') ([1968] 729 UNTS 161) prohibits, for example, the transfer of

nuclear weapons and other nuclear explosive devices (see Arts I and II). The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction ('Biological Weapons Convention') ([1972] 1015 UNTS 163) prohibits the transfer of any of the agents, toxins, weapons, equipment, or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict (see Arts I and III; → Biological Weapons and Warfare). The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction ('Chemical Weapons Convention') ([1993] 1974 UNTS 45) prohibits the transfer of chemical weapons (see Art. I; → Chemical Weapons and Warfare). These three treaties apply in respect of direct or indirect transfers to any recipient whatsoever, and therefore apply in respect of State to State transfers and State to non-State actor transfers.

12 A number of multilateral treaties concerning particular types of conventional arms also prohibit transfers absolutely. Two of the protocols annexed to 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 ([1980] 1342 UNTS 137; 'CCW Convention') are examples. The Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) obliges States Parties not to transfer any mine the use of which is prohibited by the Protocol (see Art. 8), and the Protocol on Blinding Laser Weapons (Protocol IV) requires States Parties not to transfer laser weapons specifically designed to cause permanent blindness to any State or non-State entity (see Art. 1). Additionally, States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction ([1997] 2056 UNTS 211) are obliged never to transfer to anyone, directly or indirectly, anti-personnel mines (see Art. 1). States Parties to the 2008 Convention on Cluster Munitions (2688 UNTS 39) are bound by the same obligation in relation to cluster munitions (Art. 1).

13 The Arms Trade Treaty (2013) regulates the lawful trade in a broad range of conventional weapons: battle tanks; armoured combat vehicles; large-calibre artillery systems; combat aircraft; attack helicopters; warships; missiles and missile launchers; small arms and light weapons; ammunition/munitions for covered arms; and parts and components of such arms (Arts 2–4). Building on existing obligations under customary international law and treaties dealt with in this entry (see Art. 6), the Arms Trade Treaty creates additional obligations regarding exports (Art. 7), imports (Art. 8), transit and trans-shipment (Art. 9), brokering (Art. 10), the prevention of the diversion of arms (Art. 11), record keeping (Art. 12), and reporting (Art. 13). These additional obligations include obligations to establish and enforce national control systems to implement the Treaty's obligations (Arts 5 and 14). Art. 7 requires exporting States to undertake risk assessments as to whether covered arms, ammunition/munitions, parts, or components 'could be used to', inter alia, 'commit or facilitate a serious violation' of 'international humanitarian law' or 'international human rights law'. Similar risk assessments are to be undertaken in respect of offences under international treaties relating to terrorism and organized crime. If, following such a risk assessment, an exporting State 'determines that there is an overriding risk' of such a violation or offence, then the exporting State 'shall not authorize the export'.

14 In the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime ([2001] 2326 UNTS 208), States Parties are required to criminalize 'illicit trafficking in firearms, their parts and components and ammunition' (see Art. 5). Art. 4 of the Protocol expressly provides that the protocol 'shall not apply to state-to-state transactions or to state transfers in cases where the application of the Protocol would prejudice the right of a State Party to take action in the interest of national security consistent with the Charter of the United Nations'. The *travaux préparatoires* of the Protocol nonetheless indicate that it applies to commercial transfers of firearms 'between entities owned or operated by Governments, such as state-owned arms manufacturers'. States Parties are required to 'establish and maintain an effective system of export and import licensing or authorization, as well as of measures on international transit, for the transfer of firearms, their parts and components and ammunition' (see Art. 10). In order to facilitate tracing, the Protocol imposes obligations on States Parties to require distinct and identifiable markings to be applied to firearms manufactured in, or imported into,

their territory (see Art. 8). States Parties that have not already established a system regulating firearm brokers and brokering are also required to 'consider establishing a system for regulating the activities of those who engage in brokering' (see Art. 15).

(b) Regional Treaties

15 The Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials (1997), which was negotiated under the auspices of the → Organization of American States (OAS), contains provisions similar to those of the 2001 Protocol to the United Nations Convention against Transnational Organized Crime referred to above. The Inter-American Convention also applies to State transfers in cases where firearms are transferred to or across a State Party's territory without its authorization, but the treaty does not address brokering. Regional and sub-regional initiatives have also been taken by developing States in the African region. Three treaties, imposing significant obligations on Parties regarding traffic in small arms and light weapons, have entered into force. Small arms are generally considered to encompass weapons intended for personal use such as assault rifles and light machine-guns. Light weapons are generally considered to cover those weapons intended to be used by several persons serving as a crew, such as heavy machine guns and mortars of a calibre less than 100mm.

16 The first of the treaties, the Protocol on Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community Region (2001), was negotiated by 14 States, members of the → Southern African Development Community ('SADC'). The Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa (2004), was the product of negotiations between 11 States. The ECOWAS Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials (2006) was negotiated under the auspices of the → Economic Community of West African States (ECOWAS). These treaties impose obligations on parties to criminalize illicit trafficking, require the establishment and maintenance of licensing and authorization procedures for transfers (including brokering), and require the establishment and maintenance of tracing mechanisms. The ECOWAS Convention requires collective authorization on the basis of consensus by ECOWAS Member States before certain transfers are permitted under the Convention. A fourth African regional treaty, the Central African Convention for the Control of Small Arms and Light Weapons, their Ammunition and All Parts and Components that Can Be Used for their Manufacture, Repair and Assembly ('Kinshasa Convention') was negotiated in 2010 but has not yet entered into force. The allocation of sufficient resources will be critical to ensure compliance with the obligations created under these instruments. Inadequate institutional capacity has been a significant factor in past failures to restrict traffic in arms within the region.

(c) Treaties Imposing Obligations on Particular States

17 The Final Protocol between the Powers and China ('Treaty of Peking') (1901) subjected China to a prohibition on arms imports. After World War I, restrictions on arms trade and production were imposed on particular States by peace treaties such as, for example, the Treaty of Peace between the Allied and Associated Powers and Germany (→ Versailles Peace Treaty [1919], see Arts 170, 171, 191, and 198).

3. Binding Security Council Resolutions Imposing Arms Embargoes

18 The United Nations Security Council has imposed arms embargoes in respect of various crises. During the Cold War mandatory arms embargoes were imposed by the Security Council only twice: in respect of the regimes in Southern Rhodesia and South Africa. Since the end of the Cold War the Security Council has imposed arms embargoes in respect of regimes and non-State actors in more than 20 States. Violations of such embargoes, in particular by non-State entities, have been of major concern and States have been encouraged to criminalize violations of arms embargoes under their national laws. States are legally obliged to comply with mandatory arms embargoes imposed by the Security Council acting under Chapter VII of the United Nations Charter (see Arts 2 (5) and 25 UN Charter). Individual States and regional organizations, such as the European Union, have also imposed arms embargoes extending beyond relevant Security Council embargoes.

4. Binding Security Council Resolutions as regards Traffic in Specific Weapons

19 In UNSC Res 1540 (2004) ([28 April 2004] SCOR [1 August 2003–31 July 2004] 214) the Security Council decided that 'all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery'. The Council also decided that States 'shall take and enforce effective measures to establish domestic controls to prevent the proliferation' of such weapons and their means of delivery including through 'appropriate effective border controls and law enforcement efforts to detect, deter, prevent, and combat … illicit trafficking … in such items'. The Security Council established a committee to monitor and report on compliance with the obligations contained in this resolution. The Security Council has subsequently adopted resolutions in relation to specific concerns regarding the proliferation of nuclear weapons, for example, in relation to North Korea (UNSC Res 1718 [14 October 2006]) and Iran (UNSC Res 1737 [23 December 2006]; UNSC Res 1747 [24 March 2007]; and UNSC 2231 [20 July 2015]).

5. 'Soft Law' Instruments

20 Various informal arrangements designed to improve export controls to prevent the proliferation of → weapons of mass destruction have been established predominantly by developed States. The Australia Group, for example, was established in 1985 and comprises 40 States that cooperate to improve and coordinate national export controls to prevent the proliferation of chemical and biological weapons. Informal arrangements have also been established in relation to conventional weapons. For example, the Protocol on Explosive Remnants of War to the CCW Convention (Protocol V) includes voluntary best practices in its Technical Annex, which provides that a State planning to transfer explosive ordnance to another State that did not previously possess that type of explosive ordnance, should endeavour to ensure that the receiving State has the capability to store, maintain, and use that explosive ordnance correctly (Technical Annex, 3 (d)).

21 Towards the end of the Cold War major initiatives were taken in relation to trade in conventional arms. In 1991 the United Nations General Assembly requested the Secretary-General to establish and maintain a voluntary Register of Conventional Arms (UNGA Res 46/36 'General and Complete Disarmament (Part A – K)' [6 December 1991] GAOR 46th Session Supp 49 (I) 68–73). The focus of the register has been upon ensuring transparency in transfers of major conventional weapons such as battle tanks, combat aircraft, and → warships, although in recent years States have also been encouraged to include information on transfers of small arms and light weapons. The United Nations Register of Conventional Arms enjoys significant State support. In 1996 the United Nations Disarmament Commission adopted the UNGA 'Guidelines for International Arms Transfers in the Context of General Assembly Resolution 46/36 H of 6 December 1991' ([7 May 1996] GAOR 51st Session Supp 42, 10). The Arms Trade Treaty (2013) employs the descriptions used in the register as the basis for national implementation obligations under the treaty (Art. 5 (3)).

22 Global soft law instruments addressing small arms and light weapons have been negotiated under the auspices of the United Nations. These soft law instruments have included the 'Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects' (UN Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects [9–20 July 2001] UN Doc A/CONF.192/15, 7) and the UNGA 'International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons' ([8 December 2005] General Assembly Decision 60/519, see UN Doc A/60/88, 6). These instruments now also have particular relevance to the scope of the Arms Trade Treaty (2013) (see Art. 5 (3)).

23 Other soft law initiatives are also of significance. The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies 'Final Declaration', which currently has 41 participating States including most of the major manufacturers of conventional arms, is a voluntary arrangement under which States whose industries are engaged in the export of arms and sensitive dual-use items attempt to coordinate their export approval

standards, decisions, and practices. Guidelines have been developed that seek to ensure greater responsibility in transfers of conventional arms, aim to prevent destabilizing accumulations of such arms, and aim to prevent the acquisition of such arms by those engaged in → terrorism. The guidelines include the consideration of whether there exists 'a clearly identifiable risk' that 'weapons might be used to commit or facilitate the violation and suppression of human rights and fundamental freedoms or the laws of armed conflict' and the risk of the diversion of the arms to illicit trade or other unauthorized recipients (Wassenaar Arrangement—Elements for Objective Analysis and Advice Concerning Potentially Destabilising Accumulations of Conventional Weapons (2011)). By ensuring transparency in cases where export approval has been refused, the arrangement also seeks to prevent manufacturers in other participating States from taking commercial advantage of refusals by negotiating 'essentially identical' transactions to those refused. In 2013, the Member States of the Wassenaar Arrangement expressed their readiness 'to share their export control experience and expertise with other states, as suggested in the … [Arms Trade Treaty (2013)]'. Whilst the Wassenaar Arrangement does include major arms exporting States such as the United States, Russia, and major European Union arms exporting States, it is weakened by the non-participation of States such as Brazil, China, and Israel.

24 In addition to such global initiatives, regional measures have been taken to address traffic in arms. European regional initiatives have included efforts within the → Organization for Security and Co-operation in Europe (OSCE) to establish soft law standards to guide members of the OSCE when deciding whether to approve arms transfers. A significant instrument in this regard is the OSCE 'Document on Small Arms and Light Weapons' ([20 June 2012] FSC.DOC/1/00/Rev.1). The Council of the European Union adopted the 'European Union Code of Conduct on Arms Exports' (1998), which contains criteria similar to those set out in the Wassenaar Arrangement guidelines. Each European Union Member State is to 'assess export licence applications for military equipment made to it on a case-by-case basis against the provisions of the Code of Conduct' although the 'decision to transfer or deny the transfer of any item of military equipment will remain at the national discretion of each Member State'. The Code of Conduct is formally referred to in the Council of the European Union 'Common Position 2008/944/CFSP of 8 December 2008 Defining Common Rules Governing Control of Exports of Military Technology and Equipment' ([2008] OJ L335/99).

25 Various soft law instruments have been negotiated within the African region. These initiatives include the OAU 'Bamako Declaration on an African Common Position on the Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons' (2000), which was negotiated under the auspices of the Organisation of African Unity—the predecessor to the → African Union (AU). In relation to ECOWAS initiatives, there have been efforts to ensure coordination with participating States in the Wassenaar Arrangement.

C. State to Non-State Entities, Non-State Entities to States, or between Non-State Entities

1. Treaties and Customary International Law

26 Reference has already been made to treaties such as the Nuclear NPT (1968), the Biological Weapons Convention (1972), the Chemical Weapons Convention (1993), the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (1997), the Arms Trade Treaty (2013), the Protocol against the Illicit Manufacture of and Trafficking in Firearms, Their Parts and Components and Ammunition (2001), and the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials (with Annex) (1997), and to the obligations they impose on States to prohibit absolutely, or to restrict, transfers of arms. Each of these treaties applies to transfers to non-State entities. Reference has also been made to customary international law prohibitions on transfers of arms arising, for example, in relation to the duty to prevent genocide, that apply to transfers to non-State entities. International criminal law (discussed in section C.3 below) also applies to natural persons involved in arms transfers. States Parties to relevant treaties are also required to apply national laws and regulations on arms transfers to non-State entities within their jurisdiction.

2. Binding Security Council Resolutions concerning Traffic in Arms to Specified Individuals and Other Non-State Entities

27 In addition to the obligations and oversight under UNSC Res 1540 (2004) referred to above, the Security Council has decided, by a number of resolutions commencing with UNSC Res 1267 (1999) ([15 October 1999] SCOR 54th Year 148) and including, for example, UNSC Res 1822 (2008) ([30 June 2008] SCOR [1 August 2007–31 July 2008] 170), that all States must take measures 'with respect to Al-Qaida, Usama bin Laden and the Taliban, and other individuals, groups, undertakings, and entities associated with them'. Such measures include preventing

> the direct or indirect supply, sale, or transfer, to these individuals, groups, undertakings and entities from their territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related materiel of all types including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned and technical advice, assistance, or training related to military activities.

28 UNSC Res 2170 (2014) (15 August 2014) extends these measures to designated individuals affiliated with 'Islamic State in Iraq and the Levant … and Al Nusrah Front'. The Security Council has, inter alia, established a committee to oversee compliance with the obligations created by these resolutions. This UNSC Res 1267 (1999) committee maintains a list of those that are to be subjected to such measures. Measures to suppress arms trafficking have been imposed in respect of terrorism more generally and have been overseen by the Counter-Terrorism Committee established by the Security Council to implement obligations imposed under UNSC Res 1373 (2001) ([28 September 2001] SCOR [1 January 2001–31 July 2002] 291) and subsequent resolutions.

3. International Criminal Responsibility

29 Individuals can be held responsible under international criminal law in certain situations for the supply of arms that are used in the commission or attempted commission of genocide, war crimes, or crimes against humanity. This form of culpable assistance in the commission of international crimes was recognized as early as the war crimes trials following World War II, where the owner and general manager of a firm that supplied Zyklon B gas used in concentration camps in occupied Poland were found guilty for knowingly and voluntarily providing material assistance to acts of genocide (then charged as a war crime) (see *Law Reports of Trials of War Criminals* [1947] vol. I, 93 at 102). Modern forms of complicity in international criminal law are captured primarily under aiding and abetting liability (in customary international criminal law and Art. 25 (3) (c) Rome Statute of the International Criminal Court ('ICC')) or under the broader residual form of accessorial liability contained in Art. 25 (3) (d) Rome Statute concerning any other contribution to the commission or attempted commission of a crime by a group acting with a common purpose.

30 In respect of aiding and abetting liability, a person will be responsible for procuring or providing arms where such conduct assists, encourages, or lends support to the perpetration of a specific crime and has a substantial effect upon the perpetration of the crime, and the person procuring or providing the arms had knowledge that the arms would assist in the commission of the crime. In *Prosecutor v Semanza*, a former *bourgmestre* was found guilty by the International Criminal Tribunal for Rwanda ('ICTR') of aiding and abetting war crimes (and for the separate crime of complicity in genocide) for his distribution of weapons to the Interahamwe, 'the very instruments that assured the commission of the genocidal massacre' (see *Trial Judgment* [15 May 2003] at paras 225, 431–5, 531–5). There is, however, a recent controversy concerning aiding and abetting liability at customary international law that is worth noting. In 2013, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ('ICTY') in *Prosecutor v Perišić* overturned the conviction of the Chief of Staff of the Yugoslav Army for aiding and abetting the crimes of the Army of the Republika Srpska ('VRS') through the provision of weapons, ammunition, and other types of support, because his assistance was not 'specifically directed towards assisting' the crimes of the VRS (see *Appeals Judgment* [28 February 2013] at paras 17, 25–36, 43). This requirement of 'specific direction'—which, despite being framed as part of the *actus reus*, operates to turn the *mens rea* knowledge requirement into intent—was drawn from the language of an earlier ICTY decision (*Prosecutor v Tadic [Appeal Judgment]* [15 July 1999] at para. 229), which had been repeated in other decisions of the ad hoc international criminal tribunals, but which had not, until *Perišić*, been

the basis for altering the requirements of aiding and abetting liability. This development in *Perišić* was criticized as introducing a new element not required by customary international criminal law by the Appeals Chamber of the Special Court for Sierra Leone in *Prosecutor v Taylor*, which upheld a conviction for aiding and abetting liability for the provision of weapons by the Liberian President to the RUF during the Sierra Leonean civil war (see *Appeal Judgment* [26 September 2013] at paras 471–481). *Perišić* was followed by a subsequent ICTY trial judgment (*Prosecutor v Stanišić and Simatović [Trial Judgment]* [30 May 2013]) but then departed from in 2014 by the ICTY Appeals Chamber in *Prosecutor v Šainović* (see *Appeals Judgment* [23 January 2014]). The issue now appears to be settled after the Appeals Chamber in *Stanišić and Simatović*, by majority, followed *Šainović* in finding that aiding and abetting does not require that the assistance be specifically directed to the commission of a crime (*Prosecutor v Stanišić and Simatović* (Appeals Judgment) [9 December 2015]). This preserves the scope of aiding and abetting liability for those who procure or provide arms to perpetrators of international crimes.

31 In respect of Art. 25 (3) (d) ICC Statute, a person will be responsible if that person makes a significant contribution to the commission or attempted commission of a crime within the ICC's jurisdiction by a group of persons acting with a common purpose, and the person is at least aware that his or her conduct contributes to the activities of the group. The Pre-Trial Chamber has explicitly considered that 'arms dealers' can satisfy all the requirements of Art. 25 (3) (d) (see *Prosecutor v Mbarushimana [Decision on the Confirmation of Charges]* [16 December 2011] at fn 681). In *Prosecutor v Harun and Ali Kushayb*, the Pre-Trial Chamber held that there were reasonable grounds to believe that Harun and Ali Kushayb were criminally responsible under Art. 25 (3) (d) for, inter alia, promising to deliver and in fact delivering arms to the Janjaweed for the commission of war crimes and crimes against humanity (see *Decision on the Prosecution Application under Article 58 (7) of the Statute* [27 April 2007] at paras 85, 88–9, 105–7).

4. National Law Enforcement

32 Many States have established national standards and procedures to assess whether to authorize, and to regulate, international transfers of arms. These standards and procedures often require consideration of whether proposed arms transfers will be consistent with international legal obligations. States Parties to the Arms Trade Treaty (2013) are required to establish national control systems in relation to arms transfers (including ammunition/munitions, parts and components, and brokering) (Art. 5). The New Zealand Government has sponsored the development of a 'Model Law to assist in identifying and translating [Arms Trade Treaty] commitments into national legislation'. The Arms Trade Treaty provides that '[e]ach State Party shall take appropriate measures to enforce national laws and regulations that implement the provisions of … [the Arms Trade Treaty]' (Art. 14). The Treaty also requires that '[e]ach State Party shall take appropriate measures to regulate, where necessary and feasible, the transit or trans-shipment under its jurisdiction of conventional arms covered … [by the Treaty] through its territory in accordance with relevant international law' (Art. 9). Coastal State Parties to the Arms Trade Treaty therefore appear to be obliged to regulate foreign flagged vessels transiting, for example, their territorial seas subject, however, to the right of innocent passage. More generally, difficulties arise in the enforcement of national standards required by relevant treaties and other rules of international law against persons who are outside the territory of the State. The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (2001), and the regional treaties referred to above generally address these enforcement issues through provisions on → extradition and cooperation, including through international organizations such as INTERPOL (INTERPOL has also entered cooperative agreements with the United Nations). The Arms Trade Treaty includes specific provisions on international cooperation and assistance (Arts 15 and 16).

D. General Assessment and Conclusions

33 International legal regulation of traffic in arms during the 20th century was fragmented. The uncertainty regarding obligations under general international law, the absence of coherence in treaty obligations, and the opposition to movement beyond soft law instruments, for example, in relation to small arms and light weapons, all contributed to the failure to prevent humanitarian catastrophes in conflicts around the world.

34 The 21st century has witnessed significant developments, which have enhanced the potential coherence of international legal regulation of traffic in arms. The UN Security Council in Resolution 2117 (2013) ([26 September 2013] SCOR [1 August 2013–31 July 2014] 275) formally 'recogniz[ed] … the significance and central role of … the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition; the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects; and the International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons, as crucial instruments in countering the illicit transfer, destabilizing accumulation and misuse of small arms and light weapons'. In the same resolution, the Security Council also formally 'acknowledg[ed] the adoption of the Arms Trade Treaty … and … the important contribution it can make to international and regional peace, security and stability, reducing human suffering and promoting cooperation'. The Arms Trade Treaty (2013) has the potential to make an important contribution by connecting existing, but previously fragmented, legal regulation in a more coherent manner. Support from the major arms-exporting States remains critical. That the United States and Russia are members of the Wassenaar Arrangement and that the permanent five members of the Security Council voted in favour of Resolution 2117 provides grounds for guarded optimism. Widespread adherence to the Arms Trade Treaty and good faith implementation of its obligations offer the potential for an effective response to arms trafficking, which is a major cause of regional and global insecurity, human rights abuses, and under-development.

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Asymmetric Warfare

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A. Concept

1 Asymmetries in warfare include asymmetry of power, means, methods, organization, values, and time (Pfanner 151). Asymmetry can be participatory, technological, normative, doctrinal, or moral (Schmitt 16). In that sense, wars have always been characterized by at least one form of asymmetry. For instance, any armed conflict involving the United States will by definition be asymmetric because of the technological superiority of the United States → armed forces. The same holds true for any armed conflict involving → non-State actors—be they partisans, resistance fighters, rebels, or terrorists. Moreover, a belligerent may employ methods, strategies, or tactics not envisaged and aiming at the enemy's vulnerabilities. This is not a novel phenomenon but an intrinsic characteristic of any war (see von Clausewitz Book 3 Chapters 9 and 10).

2 It therefore seems that the term 'asymmetric warfare'—by no means a legal term of art—is nothing but a description of a fact of life. In this context, it is, however, important to remember that warfare, especially in Western societies, is perceived as armed hostilities predominantly under State control and between → combatants in which civilians and → civilian objects are largely spared from violence and destruction (→ Civilian Population in Armed Conflict). From the outset of its development in the middle of the 19th century the modern law of armed conflict, or international humanitarian law (→ Humanitarian Law, International), has been based on that approach. To a certain extent the law of armed conflict recognizes, or implicitly accepts, the different forms of asymmetry. Still, its underlying concept is that of symmetric warfare insofar as the use of force is limited to lawful targets (→ Military Objectives) and that the parties to the conflict will abide by its rules, and be it only because they expect their opponent to act accordingly (→ Reciprocity). The development of the law of armed conflict has resulted in abolishing the prevalence of → military necessity over considerations of humanity (*Kriegsräson geht vor Kriegsmanier*; → Humanity, Principle of) by establishing an operable balance between the two, without making warfare impossible (Dinstein [2004] 16–20).

3 This approach has been, still is, and will be, challenged by the conduct of hostilities in contemporary armed conflicts that are characterized by an increasingly structured and systematic deviation from the law governing the conduct of hostilities. There is a growing 'tendency for the violence to spread and permeate all domains of social life. This is because in asymmetrical warfare the weaker side uses the community as a cover and a logistical base to conduct attacks against a superior military apparatus' (Münkler 20). In asymmetric warfare

> the weaker party, recognizing the military superiority of its opponent, will avoid open confrontation that is bound to lead to the annihilation of its troops and to defeat. Instead it will tend to compensate for its inadequate arsenal by employing unconventional means and methods and prolonging the conflict through an undercover war of attrition against its well equipped enemy (Pfanner 153).

As a consequence, there is always a considerable danger that the law of armed conflict will be neglected by all parties to the conflict because its effectiveness and efficiency is, to a certain extent, dependent upon reciprocity or, as formulated by Hersch Lauterpacht: 'it is impossible to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side

would benefit from rules of warfare without being bound by them' (at 212).

4 In sum, the term asymmetric warfare may be understood to apply to armed hostilities in which one actor/party endeavours to compensate its military, economic, or other deficiencies by resorting to the use of methods or means of warfare that is not in accordance with the law of armed conflict, or with other rules of public international law. It is important to stress that the motives or strategic goals of asymmetric warfare, while important to understand, are irrelevant from a legal point of view.

B. Law of Armed Conflict

5 Many of the atrocities committed during World War II were justified as legitimate responses to the conduct of asymmetric warfare by the respective opponent (→ Reprisals). For example, partisan attacks lead to the killing of hostages and other innocent civilians or to the wanton destruction of villages in territory occupied or under the control of the German Wehrmacht (see *Trial of German Major War Criminals [Judgment]* 229 *et seq*; → Collective Punishment; → Occupation, Belligerent). The law of armed conflict has been progressively developed in order to eliminate such conduct in future armed conflicts. On the other hand, the law of armed conflict has almost never been modified with a view to compensate technological dissimilarities between the parties to the conflict. For example, the United Kingdom continuously endeavoured to outlaw → submarines as means of → naval warfare because they posed a considerable threat to its superior surface forces (→ Submarine Warfare). Those efforts were in vain. Since the law of armed conflict accepts technological asymmetries they do not justify a modification of the law.

6 Hence, the law of armed conflict accepts asymmetries in warfare, be they technological or doctrinal, and it reacts to such asymmetries only if there is a necessity of preserving minimum standards of humanity or of 'alleviating as much as possible the calamities of war' (see Declaration Renouncing the Use in Time of War of Explosive Projectiles under 400 Grammes Weight). Moreover, the law of international armed conflict aims at maintaining the public character of warfare by indirectly reserving the right to harm the enemy to a limited group of actors (→ Belligerency).

1. Equal Application of the Law of Armed Conflict

7 The law of armed conflict applies to every situation amounting to an armed conflict (→ Armed Conflict, International; → Armed Conflict, Non-International), irrespective of the political or strategic goals pursued and irrespective of the legality of the resort to armed force by either of the belligerents. Therefore, in principle, moral or normative asymmetries are irrelevant although they may have a considerable political and strategic impact.

8 In its preamble, the → Geneva Conventions Additional Protocol I (1977) ('Additional Protocol I') provides that

> the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.

The principle of equal application of the law of armed conflict is customary in character and, as far as international armed conflicts are concerned, not limited to the rules and principles serving a genuinely humanitarian purpose. This means that the alleged aggressor, as well as the alleged victim of aggression, are equally bound by the law of armed conflict. It also means that they are entitled to make full use of that law by employing the entire spectrum of methods and means of warfare not prohibited under that law (→ Warfare, Methods and Means). This may, in theory, be different if there has been an authoritative decision by the UN Security Council identifying one party to the conflict as having resorted to an illegal use of force under the UN Charter (→ Peace, Breach of; → Use of Force, Prohibition of). However, if there has been no such determination the right of belligerents to choose methods and means of warfare is not limited by the *ius ad bellum*. It is only limited by the *ius in bello* (Art. 22 Regulations concerning the Laws and Customs of War on Land annexed to the 1907 Hague Convention IV respecting the Laws

and Customs of War on Land ['Hague Regulations'] and Art. 35 (1) Additional Protocol I). This also holds true for a resort to armed force authorized or mandated by the UN Security Council. As emphasized in the 1999 UN Secretary-General's Bulletin, the 'fundamental principles and rules of international humanitarian law … are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement' (UN Secretary-General's Bulletin of 6 August 1999 on Observance by United Nations Forces of International Humanitarian Law Sec. 1.1).

9 Moreover, the causes for a resort to armed conflict have no impact on the scope of applicability of the law of armed conflict. There have been allegations that military operations aiming at the protection of human rights are governed by stricter legal limitations than 'regular' armed conflicts (Thürer 11). → State practice, eg in the context of the → Kosovo Campaign, provides no sufficient evidence that such allegations have a basis in the existing law.

10 Other normative asymmetries may have an impact on the law of armed conflict. Such normative asymmetries occur if the parties to an international armed conflict are not bound by the same treaties. As in general international law, treaties of the law of armed conflict only apply to States Parties unless a State not party to a given treaty expressly accepts and applies it (see, eg, Art. 6 1907 Hague Convention IV; Art. 96 (2) Additional Protocol I). Such declaration absent, the hostilities will only be governed by customary international (humanitarian) law (→ Customary International Law). However, treaties do not become inapplicable if members of an alliance or of a combined military operation are not bound by the same treaties. The ensuing problems for inter-operability are often solved by a 'matrix' solution. This means that the force commander will entrust those units with a given task whose States are not bound by certain treaty restrictions. The legality of such conduct has been recognized by Art. 21 (3) Convention on Cluster Munitions which provides:

> Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.

Finally, States may differ on the interpretation of a treaty they are equally bound by, or of a rule of customary international humanitarian law. Again, the problem of inter-operability is very often solved by either national caveats or by other procedural safeguards like the 'matrix' solution.

2. Actors

11 It is one of the characteristics of asymmetric warfare that the 'dividing line between combatants and civilians … is consciously blurred and at times erased' (Pfanner 153). This inevitably results in attacks against the civilian population and individual civilians or even in conduct amounting to—prohibited—perfidy. Such conduct is far from new. The existing law of armed conflict is based on the experience of past armed conflicts and it has, in principle, preserved the general distinction between protected civilians on the one hand and persons who, either as combatants or as members of organized armed groups or as civilians, take a direct part in hostilities on the other hand (see also → Civilian Participation in Armed Conflict; → Protected Persons.)

(a) International Armed Conflict

12 Art. 43 (2) Additional Protocol I provides: 'Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains …) are combatants, that is to say, they have the right to participate directly in hostilities'. This provision may not be misunderstood as being constitutive for the right of taking belligerent measures. Rather, it emphasizes the special legal status combatants enjoy under the law of international armed conflict. As a consequence, combatants may not be prosecuted and punished for their conduct (unless it amounts to a war crime) and they are entitled to prisoner of war status when captured by the enemy (→ Prisoners of War). This presupposes that they have distinguished themselves properly, by a fixed distinctive sign or a uniform, and carried their arms openly.

13 Under the law of international armed conflict, there is no prohibition of making use of persons other

than members of the regular armed forces. However, such persons only enjoy combatant immunity and prisoner of war status if they are members of → militias or volunteer corps forming part of the regular armed forces or if they are members of other militias or voluntary corps, including organized → resistance movements, that belong to a party to the conflict and that fulfil the conditions laid down in Art. 4 (A) (2) Geneva Convention relative to the Treatment of Prisoners of War ('Geneva Convention III'; → Geneva Conventions I–IV [1949]). These provisions are a consequence of the experience of World War II. However, in view of the strict conditions prisoner of war status and combatant immunity continue to be limited to a rather small group of actors in international armed conflicts.

14 Art. 44 (3) Additional Protocol I is also to be considered an adaptation of the law of armed conflict to the changed realities of war (Sandoz paras 1697 *et seq*). While Art. 44 (3) Additional Protocol I does not reflect customary international law, it needs to be stressed that the scope of applicability of this provision is limited to situations dealt with in Art. 1 (4) Additional Protocol I ('internationalized' armed conflicts; Ipsen 89 *et seq*). Still, it extends a certain degree of protection to members of organized armed groups (→ Guerrilla Forces) who deliberately decide to disregard the minimum requirements set out in this provision (Oeter 59–61).

15 It follows from the foregoing that persons directly participating in the hostilities who neither qualify as combatants nor as members of any of the other privileged groups do not enjoy combatant immunity or, when captured by the enemy, prisoner of war status. As far as civilians are concerned, this has been expressly recognized by Art. 51 (3) Additional Protocol I: 'Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities'. The exact meaning and scope of the concept of direct participation in hostilities is far from settled (Melzer [2009] 41–68). The same holds true with regard to the legal status of a civilian directly participating in hostilities. Some continue to consider them as civilians protected under the Geneva Convention relative to the Protection of Civilian Persons in Time of War ('Geneva Convention IV') who may, however, be attacked (for such time they are directly participating in hostilities) and punished for their conduct (Melzer [2009] 65–85). Others consider them 'unlawful combatants' who are not protected by either Geneva Convention IV or Geneva Convention III (Dinstein [2007] 149; see → Combatants, Unlawful).

16 Accordingly, the law of international armed conflict provides a rather elaborated set of rules responding to participatory asymmetry and offering an operable solution to most of the problems encountered in recent international armed conflicts. While there is no prohibition of entrusting non-combatants with the commitment of acts harmful to the enemy, persons not enjoying combatant immunity but directly participating in hostilities must be aware that they enjoy no protection under the law of armed conflict beyond the minimum standards laid down in Art. 75 Additional Protocol I and in common Art. 3 Geneva Conventions I–IV. Hence, members of organized armed groups that do not belong to a party to the conflict but who directly participate in the armed hostilities do not pose an insurmountable problem. Either they are to be considered civilians directly taking part in the hostilities who, for the duration of their direct participation, are liable to attack and who may be prosecuted after capture, or the organized armed group they belong to is a party to a non-international armed conflict that exists side by side with the international armed conflict. Then, the members of such a group, at least if and as long as they perform a 'continuous combat function' within the organized armed group (Melzer [2009] 16 and 33–6), are legitimate targets who neither enjoy combatant immunity nor prisoner of war status after capture.

(b) Non-International Armed Conflict

17 Non-international armed conflicts are asymmetric by nature, especially if regular armed forces are engaged in hostilities against organized armed groups. Since, however, the concept of 'combatant' does not apply to non-international armed conflicts the applicable law is not built on the legal status of the actors. It is important to note in this context that the very existence of a non-international armed conflict presupposes that there exists at least one organized armed group engaging in armed hostilities against the government or against another organized armed group. Hence, members of an organized armed group do not qualify as civilians. This is widely accepted. However, there is one unresolved issue relating to those members

of an organized armed group who do not perform a continuous combat function. While some prefer to consider them civilians (Melzer [2009] 20–40) others are unwilling to differentiate according to an individual's function within the group (Dinstein [2007] 149). The least common denominator is that members of an organized armed group performing a continuous combat function in a non-international armed conflict do not enjoy general protection but are liable to attack. Of course, the State party to a non-international armed conflict is not prevented from prosecuting them after capture under its domestic criminal law.

18 In non-international armed conflict civilians enjoy general protection. However, they may lose that protection if they deliberately decide to take a direct part in the hostilities. Accordingly, Art. 13 (3) → Geneva Conventions Additional Protocol II (1977) provides: 'Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities'. This is declaratory for customary international law (Henckaerts and Doswald-Beck [ed] Rule 6).

3. Principle of Distinction, Proportionality, Precautions in Attack

(a) Principle of Distinction

19 Asymmetric actors in armed conflict either deliberately disregard the principle of distinction or they endeavour to incite their opponent to act in violation of that 'intransgressible' (*Legality of the Threat or Use of Nuclear Weapons [Advisory Opinion]* para. 79) principle of the law of armed conflict (see also → Indiscriminate Attack).

20 The principle has two implications. On the one hand, it obliges combatants and members of organized armed groups to distinguish themselves from the civilian population. On the other hand, it obliges the parties to the conflict at all times to distinguish between the civilian population and combatants, including members of organized armed groups, and between civilian objects and military objectives, Art. 48 Additional Protocol I.

21 The law of armed conflict provides a rather clear response to any form of asymmetric warfare that aims at blurring the principle of distinction—be it by way of disguising as civilians, be it by abusing civilian objects for military purposes, be it by direct attacks against the civilian population or individual civilians. In this context it may be recalled that a civilian object becomes a lawful target if, by its use, location, or purpose, it makes an effective contribution to the enemy's military action and if its destruction or → neutralization offers a definite military advantage. Still, the problems in practice subsist. If it is not feasible to identify enemy combatants or members of enemy organized armed groups because they appear to be civilians, a decision not to attack may result either in suicide or, even worse, in—prohibited—direct attacks against the civilian population. Of course, combatants who do not distinguish themselves properly when engaged in hostilities do not enjoy combatant immunity or prisoner of war status when captured (Geiß 764). While they may be prosecuted for their conduct this is by many operators considered an insufficient response to their practical problems.

(b) Proportionality

22 As already seen in the context of 'human shields', the law of armed conflict does not prohibit attacks that result in the incidental loss of civilian life, injury to civilians, or damage to civilian objects. Such 'collateral damage' is in violation of the law of armed conflict only if it is excessive (in contrast to 'extensive') in relation to the concrete and direct military advantage anticipated, Art. 51 (5) (b) Additional Protocol I. In view of that prohibition and in view of the media's attention to any civilian losses in armed conflict, an asymmetric actor will either seek to prompt the opponent to cause excessive collateral damage or to make the public believe that an attack has been disproportionate. Especially systematic violations of the principle of distinction entail the considerable risk that the opponent applies different standards for the assessment of → proportionality. 'If such tactics are systematically employed for a strategic purpose, the enemy may feel a compelling and overriding necessity to attack irrespective of the anticipated civilian casualties and damage' (Geiß 766).

23 Still, the prohibition of excessive collateral damage is clear. Considerations of military necessity do, of course, play an important part, especially with regard to the determination of the anticipated military advantage. However, military necessity as such does not justify a deviation from well-established humanitarian standards of the law of armed conflict (Rogers 4).

(c) Precautions

24 Asymmetric actors will in many cases deliberately act contrary to their obligation to take feasible precautions in attack, especially by abusing civilians or civilian objects as shields or by transferring military objectives into densely populated areas. Despite the obvious illegality of such conduct the opponent will be prevented from attack if the attack is to be expected to result in excessive collateral damage. Here the law of armed conflict itself introduces an element of asymmetry by privileging illegal conduct.

25 Another problem exists with regard to the obligation of the attacker to do everything feasible to limit attacks to lawful targets and to avoid, and in any event to minimize, excessive collateral damage, Art. 57 (2) Additional Protocol I. It would go too far to conclude that parties to a conflict disposing of advanced weapons systems are under an absolute obligation to only make use of sophisticated and highly discriminating weapons. The fact that such weaponry is available does not necessarily mean that less sophisticated weapons may not be employed any longer. Sophisticated and advanced weapons are considerably expensive and they may, therefore, be reserved for attacks on more important targets. It may not be left out of consideration, however, that

> advanced militaries are held to a higher standard—as a matter of law—because more precautions are feasible. As the gap between 'haves' and 'have-nots' widens in 21st century warfare, this normative relativism will grow. In a sense, we are witnessing the birth of a capabilities-based IHL regime (Schmitt 42).

The consequence is that the standard of feasibility, to a certain extent, privileges the weaker side of an armed conflict and thus adds another form of normative asymmetry in armed conflict.

4. Methods and Means of Warfare

(a) Means of Warfare

26 The law of armed conflict and → arms control law (both increasingly merging to a single regime) provide a well-established set of rules that either prohibit the use of certain weapons or that restrict their use in certain circumstances. In asymmetric warfare the weaker party may be inclined to disregard such prohibitions or restrictions and to justify a deviation with the superiority of the respective opponent (Geiß 758). Moreover, as pointed out by the → International Committee of the Red Cross (ICRC), 'it is evident that if one Party, in violation of definite rules, employs weapons or other methods of warfare which give it an immediate, great military advantage, the adversary may, in its own defence, be induced to retort at once with similar measures' (Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts 83). In other words, the misuse of weapons will, as a rule, invite belligerent reprisals. However, such justifications have no basis in the existing law. The fact that a party to an armed conflict is confronted with a superior enemy does not justify the use of means of warfare whose use is prohibited under the law of—international or non-international—armed conflict. Therefore, the threat of imminent defeat is no sufficient ground for resorting to the use of prohibited means of warfare.

27 Unfortunately, the → International Court of Justice (ICJ), in its *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, has ruled that the use of nuclear weapons 'would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law', unless the 'very survival of a State would be at stake' (at 266; → Nuclear Weapons Advisory Opinions). It is obvious that this ruling may be abused for justifying a violation of the rules and principles of the law of armed conflict. It needs to be emphasized, however, that the ICJ's finding has no basis in the law of armed conflict. If at all, the survival argument may be of relevance for the *ius ad bellum*.

(b) Methods of Warfare

28 The asymmetric character of an armed conflict does not justify the use of methods of warfare prohibited under the law of armed conflict. Therefore, starvation of civilians as a method of warfare, or to order that there shall be no survivors, is prohibited under all circumstances (Arts 40 and 54 (1) Additional Protocol I, Art. 23 (d) Hague Regulations; Henckaerts and Doswald-Beck [eds] Rules 46 and 53).

29 One feature of asymmetric warfare are suicide bombings, another is the use of 'human shields'. With regard to the former it is important to note that the law of armed conflict does not prohibit suicide attacks unless they are conducted by resort to → perfidy (Schmitt 32). This is different with regard to the use of

'human shields'. Art. 51 (7) Additional Protocol I, that reflects customary international law, prohibits the use of the 'presence or movements of the civilian population or individual civilians … to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations' (see also Art. 28 Geneva Convention IV). The law of armed conflict provides a possible—though not undisputed—solution for coping with the issue of 'human shields' by distinguishing between voluntary and involuntary human shields. Civilians, whatever their motives, voluntarily serving as human shields may be considered as taking a direct part in hostilities who, for the duration of such participation, lose their protected status under the law of armed conflict. Accordingly, voluntary human shields are targetable and they are not included in the estimation of incidental injury when assessing proportionality (Dinstein [2008] 193). Against allegations to the contrary, involuntary human shields maintain their status as civilians (Schmitt 27). Accordingly, attacks against a shielded military objective will be prohibited if the incidental losses among the involuntary human shields are excessive in relation to the concrete and direct military advantage anticipated (Art. 51 (5) (b) Additional Protocol I). However,

> the appraisal of whether civilian casualties are excessive in relation to the military advantage anticipated must make allowances for the fact that, by dint of the large (albeit involuntary) presence of civilians at the site of the military objective, the number of civilian casualties can be expected to be higher than usual (Dinstein [2008] 193).

30 Sometimes, especially if they do not act overtly, the distinction between involuntary and voluntary human shields will not provide an operable solution in practice, because it may be impossible to determine whether a person has deliberately and freely decided to serve as a human shield. Moreover, the law of armed conflict may not prohibit a proportionate attack against a shielded lawful target but it will prove a most difficult task to defend the death of a considerable number of civilians politically. In asymmetric warfare the weaker party often consciously and systematically turns to the practice of using human shields in order to exploit the political and moral dilemma the attacker will find himself in. The law may offer a solution. However, that will, in most cases, not assist in overcoming the said dilemmas.

31 Finally, some States respond to asymmetric threats by resorting to → targeted killing[s] of individuals suspected of being involved in unlawful attacks against government forces, civilians, or civilian objects. It must be borne in mind that under the law of armed conflict there is no general prohibition of targeted killings. If the respective individual qualifies a lawful military target, especially as a member of an organized armed group (performing a continuous combat function) or a civilian directly participating in hostilities, he or she may be attacked. While some authors maintain that there is an obligation to rather capture than kill the individual if that proves to be a feasible alternative (for an in-depth analysis see Melzer [2008] 394–419), this position does not reflect the law of armed conflict as it currently stands.

5. Need for Reform of the Law of Armed Conflict?

32 Some doubts have been expressed whether asymmetric warfare 'could still be grasped by and measured against the concept of military necessity, for the complexities and intangibility of such scenarios escape its traditionally narrow delimitations' (Geiß 770). Especially non-State actors deliberately and systematically deviating from well-established standards of the law of armed conflict and, thus, induce their opponents to re-emphasize considerations of military necessity that may result in either a more liberal interpretation of the law of armed conflict, or in its irrelevance, because it is considered an unfair obstacle to the success of military operations in armed conflict.

33 Of course, reciprocity is an important factor for the continuing effectiveness of the law of armed conflict. If one party to an armed conflict deliberately and systematically disregards its rules and principles in order to achieve a military or political advantage, the opponent's readiness to continue to comply with the law may steadily decrease. There are, however, solutions to the problem. On the one hand, the law of armed conflict is flexible enough to respond to an asymmetric actor's conduct. While it is true that such responses put a heavier burden on the law-abiding party to the conflict, the values underlying the law of armed conflict and the achievements of the past 150 years should not be given up too easily. Moreover, the emergence of → international criminal law has added a further and powerful

enforcement mechanism for ensuring compliance with the law of armed conflict. On the other hand, it is well perceivable that non-State actors will understand that, despite their inferiority in arms and military technology, they will ultimately profit from compliance with the law of armed conflict unless they deliberately choose to be considered ordinary or war criminals. Nevertheless, there is no doubt that the growing asymmetries in warfare have the potential of shaking the very bases of the law of armed conflict. This, however, does not mean that there is a need for an adaptation of the law to the 'new realities' of armed conflict (Schaller 29–31).

C. Situations not Governed by the Law of Armed Conflict

34 It is true that, at present, we are witnessing a privatization and demilitarization of war (Münkler 15–21). Moreover, so-called 'transnational wars' (ibid. 20) often do not fulfil the rather strict criteria for the applicability of the law of armed conflict. Therefore, the law of armed conflict is inapplicable to those situations of asymmetric warfare, eg transnational → terrorism and the 'Global War on Terror', not amounting to an international or non-international armed conflict. On the other hand, terrorists employ methods and means that have so far been reserved to regular armed forces and governments increasingly make use of their armed forces in order to counter the terrorist threat. By policy, not by law, some governments instruct their armed forces to apply the law of armed conflict in counterterrorism operations. This practice by its very nature has not resulted in widening the scope of applicability of the law of armed conflict. Only at first glance does this practice seem to be guided by prudence. Of course, armed forces are trained in the application of the law of armed conflict. Moreover, it is quite convincing to argue that in case of doubt compliance with the law of armed conflict puts the armed forces on the safe side, especially when it comes to the use of methods and means of warfare. However, the law of armed conflict will never be applied in its entirety and considerations of military necessity that may be justified in counterterrorism operations could all too easily have negative repercussions on the law of armed conflict when applied in situations of armed conflict proper. At the same time, most States whose armed forces are engaged in counterterrorism operations reject an application of the law of armed conflict and either rely on the right of → self-defence or they additionally accept the application of human rights to such operations. This, however, does not contribute to legal clarity either. The right of self-defence is far too vague than to provide operable solutions to the problem of the legality of the use of force (eg targeted killings, see Melzer [2008] 222–39) or of other measures taken against terrorists. Human rights, of course, limit the exercise of jurisdiction vis-à-vis individuals. However, their unmodified application to counterterrorism operations rather than providing the necessary answers privileges the terrorists who are not deterred by the threat of criminal prosecution. It is, therefore, necessary for States to agree on international standards and criteria that specifically apply to counterterrorism operations. Such standards and criteria absent the armed forces entrusted with countering the terrorist threat will in most cases operate in a legal vacuum, at least in an intolerable legal grey area.

D. Concluding Remarks

35 Asymmetric warfare clearly constitutes a challenge to the international legal order and to its underlying values. While it does not justify a deviation from well-established rules and principles of the law of armed conflict it is necessary to strengthen that law by offering incentives, especially to non-State actors, to comply with that law if it is applicable *ratione materiae*. This finding does not relieve States from their obligation vis-à-vis their armed forces to clarify the applicable law for situations not amounting to an international or non-international armed conflict. Moreover, governments ought to scrupulously scrutinize and evaluate the challenges posed by asymmetric warfare, take the necessary measures, and reduce their vulnerabilities. Vulnerabilities—whatever their nature—will always be an interesting target for asymmetric actors, be they weaker enemies, or be they terrorists.

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Autonomous Weapon Systems

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A. Definition

1 Autonomous Weapon Systems ('AWS'), sometimes referred to as Lethal Autonomous Robots ('LAR'),

Lethal Autonomous Weapon Systems ('LAWS'), or 'killer robots', are unmanned weapon systems ('UMS') that do not depend on human input immediately prior to or during their use. This includes two corollary elements: AWS are not specifically programmed to engage an individual object or person and have discretionary decision-making capabilities.

2 For conceptual purposes UMS can be classified into three different categories that exist on a spectrum spanning from systems with full human control to those with greater levels of autonomy: remotely operated systems, automated systems, and systems that operate autonomously. This differentiation allows for a distinction between existing weapon systems and AWS (see also → Warfare, Methods and Means). In the case of the former, human operators are more closely tied into the decision-making process. It should be kept in mind that a weapon system can potentially be operated in more than one operational mode and indeed in all three. Each category raises different legal questions and implicates different ethical and political considerations.

3 The above-mentioned differentiation finds reflection in, for example, the definitions of the US Department of Defense ('DoD') (defining, among other terms, 'autonomous weapon system', 'human-supervised autonomous system', and 'semi-autonomous weapon system') or Human Rights Watch (dividing robotic weapons into three categories: 'Human-in-the-Loop Weapons', 'Human-on-the-Loop Weapons', and 'Human-out-of-the-Loop Weapons'), both of which were released in 2012. Both sets of definitions echo, but are not commensurate with, the distinction preferred here (and also used by the → International Committee of the Red Cross [ICRC]) between remotely operated, automated, and autonomous systems.

4 Remotely operated systems—referred to as 'semi-autonomous systems' by the DoD and systems with a 'human in the loop' by Human Rights Watch ('HRW')—have existed for a considerable period of time. Their increased use since around the year 2000, specifically in the context of → targeted killing, has been the centre of attention in public and academic debate. Such systems are directed by human operators remotely, sometimes at close distance, sometimes via satellite link. They exist as airborne, naval, and land-based systems.

5 Automated systems are referred to as 'human-supervised autonomous systems' by the US DoD and as 'human in the loop' systems by HRW. Once deployed, they can operate without human input. However, their operation is contingent on the programming of specific information (such as coordinates of a specific target) either prior to or during their deployment. Modern examples include automated sentry guns, cruise missiles, and defensive anti-missile systems (→ Missile Warfare). Surveillance systems also often operate in an automated fashion.

6 In contradistinction to the two previous categories, autonomous weapon systems, referred to by the same designation by DoD and by HRW as 'human-out-of-the-loop weapon[s]', do not require human input immediately prior to or during their deployment. Properly understood, the term autonomy refers to two characteristics that set AWS apart from either remotely operated or automated systems: first, the ability to operate independently and engage targets without being programmed to specifically target an individual object or person, and second, the capability to make discretionary decisions. Thus, AWS have the capability to react, independently, to a changing set of circumstances without necessitating the interference of a human operator. Neither the DoD definition nor that of HRW contains these important elements.

B. History

7 Attempts to create greater distance—both physical and psychological—between parties to a conflict have existed since the beginning of combat. First, unsuccessful efforts to develop an unmanned naval system capable of carrying ordnance were undertaken by Nikola Tesla towards the end of the 19th century. Subsequent developments included unmanned airborne and land-based systems that were designed to deliver ordnance after covering a certain distance or to operate through a cable mechanism. However, none of these UMS saw widespread use in combat.

8 Subsequent technological innovations, including the Global Positioning System ('GPS') and advances in telecommunications (→ Telecommunications, International Regulation) allowed the operation of UMS at ever greater distances. This led to the invention and use of remotely operated → unmanned aerial

vehicles ('UAVs') in combat operations for purposes of intelligence, surveillance, targeting, and reconnaissance ('ISTR') and as decoys in the early 1980s. Later developments saw the expansion of the use of armed UAVs in combat operations. A vigorous debate has ensued in this context. The use of UAVs has proliferated not only with respect to the different roles UAVs have fulfilled, but also with respect to the number of UAVs currently in deployment.

9 The current development towards greater autonomy can be expected to continue in the future. This is true for both the military and the civilian realm. The introduction of systems with greater autonomy is currently underway as, depending on the definition, defensive weapon systems with autonomous capabilities are already being deployed (see eg missile defence systems).

10 Because of the real and perceived advantages of unmanned systems, the development towards AWS is likely to continue. Without prejudice to the veracity of the arguments made, the following are usually offered in favour of deploying AWS. It should be noted that some of these arguments do not pertain to AWS alone, but more generally to any unmanned military system. Arguments include increased military capabilities (conducting missions over longer periods of time with greater speed and precision in detecting and attacking targets, which can lead to a reduction in civilian casualties), decreased risk for a country's troops, the lack of susceptibility to physical limitations (such as exhaustion, pain, or hunger), the lack of susceptibility to psychological limitations (emotions such as fear and anger or the instinct for self-preservation), projected force multiplication (greater military capability with fewer personnel), and increased transparency (through the use of recording devices).

C. Legal Questions

1. State Responsibility

(a) Ius ad bellum

11 The use of AWS does not render an operation illegal under rules of *ius ad bellum*. While some authors debate the use of the predecessors of AWS, ie UAVs, in the context of combatting terrorist organizations as a matter of *ius ad bellum*, these contributions seem misguided. Whether a breach of a rule of *ius ad bellum* has occurred is a determination that is independent from the type of weapon that has been used and involves an analysis taking into account, inter alia, the following: existence of prior approval by the UN Security Council, → consent by the target State, or → self-defence (see also → Circumstances Precluding Wrongfulness).

(b) Human Rights Law

12 In the absence of an armed conflict, international → human rights law ('IHRL') is the applicable body of law. There remains discussion on the applicability of IHRL during times of armed conflict. If IHRL is applicable, Art. 6 → International Covenant on Civil and Political Rights (1966) ('ICCPR') or a largely concomitant rule in → customary international law prohibits the arbitrary deprivation of life. Unlike international humanitarian law ('IHL'; → Humanitarian Law, International), IHRL does not permit the targeting of an individual because of that person's status. Rather, the use of deadly force is only permissible if such action is unavoidable in the defence of another person from unlawful violence, if it meets the threshold of → proportionality under the applicable human rights regime (see also → Proportionality and Collateral Damage), and if it is planned, prepared, and conducted in a fashion that minimizes the use of lethal force, to the extent that this is possible. The conclusion to be drawn is that conducting lethal operations through AWS outside the context of armed conflict would be lawful only in the narrowest of circumstances. Measures involving the use of deadly force by way of, inter alia, UAVs have led to debates over a number of issues, including the geographical limits of armed conflicts and the use of targeted killings as opposed to trying to capture a suspected individual. In either case, IHRL sets stricter limitations to State action as compared to IHL.

13 As to the former, because of the concomitant applicability of the two bodies of law, arguments have been raised that during an armed conflict, lethal strikes would be illegal if there exists a reasonable possibility to capture the target. In addition, questions have been raised regarding the extent to which military actions are justified outside the territory of a State from whose territory an attack was planned or originated. Depending on the answer to those questions, IHRL with its stricter requirements applies rather than IHL, and problems arise as to the ability of programming qualitative assessments.

14 Given that a number of weapons that had initially been developed for military purposes have been deployed, sometimes in altered versions, for law enforcement purposes, it can be expected that AWS, lethal or non-lethal, will be similarly used in the future. The more stringent requirements of IHRL pertaining to necessity and proportionality make it an open question whether AWS would be able to comply with these requirements.

(c) International Humanitarian Law

15 Independent from the consideration under the *ius ad bellum* and IHRL, during an international or non-international armed conflict, operations involving AWS have to comply with the rules of IHL that apply to any weapons or weapon systems: These include the prohibition of superfluous injury or unnecessary suffering and the requirement to take precautions prior to attack, as well as the principles of discrimination and proportionality. These rules are either contained in treaty law or form part of customary international law, although their precise delineation is a matter of contention.

16 Under any of the definitions outlined above, AWS will have to be designed in a way that allows such systems to evaluate on an ex ante basis the situation with which they are confronted under the applicable rules of IHL or to make a determination that there is insufficient or unclear information and that it is therefore not permissible to proceed with a potential attack. Such evaluations are not only of a quantitative character, but also require qualitative assessments. For highly complex and dynamic environments such as urban warfare, making such determinations poses considerable technological challenges, especially given that the software upon which an AWS will be based will have to be programmed to allow such determinations to be made in the abstract. Moreover, in order for an AWS to analyse particular situations, it would require information on the broader context in which its actions take place. Some of the following is subject to a rapidly changing technological environment.

17 The prohibition of superfluous injury or unnecessary suffering, while widely debated, is based on the idea that attacks are to be limited to weakening an enemy and that human suffering is to be limited to the extent required by → military necessity. The requirement to take all feasible precautions in order to avoid collateral damage (see eg Art. 57 → Geneva Conventions Additional Protocol I [1977] ['AP I']) involves the obligation incumbent upon an attacking force to verify the target and use weapons and tactics that are designed either to avoid or, at least, to minimize civilian harm (→ Civilian Population in Armed Conflict). In this regard, some argue that AWS could have greater capabilities in collecting information prior to an attack as a result of their ability to remain in areas that would be too dangerous for humans and as a result of their potentially better sensoric capabilities. Similar to UAVs, supervisory functions for AWS must be designed in a way that does not disconnect operators too much from the adversary. Otherwise, in situations in which supervision must be exercised, the available information is presented in a way that may not permit an operator to exercise supervisory duties meaningfully. This challenge is exacerbated through the development of interconnected systems (often referred to as swarms) or in situations in which operators are responsible for the supervision of more than one AWS.

18 The principle of distinction, contained in its basic form in Art. 48 AP I, mandates that any military action must distinguish between → combatants and civilians, between persons that are → *hors de combat* and combatants, and between → military objectives and → civilian objects. This distinction between a person or an object that possesses a military character as opposed to a civilian character therefore is of crucial importance. Distinguishing between civilians and those that take a direct part in hostilities has been a challenge in the predominantly asymmetric conflicts of recent years. The presumption in any case must be that of a person having civilian status (ICRC 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' [2009]), although considerable debate continues as to the standard to be applied in ascertaining such status (*Prosecutor v Galić [Trial Chamber Judgment]* [5 December 2003] IT-98-29, paras 50 *et seq*; → Galić Case). It has been argued that evaluations pertaining to the principle of distinction are quantitative in nature and are thus more amenable to numerical determinations. While this is true for some (rather exceptional) targets, the large majority of potential targets, especially in complex

environments, require context-dependent evaluations that are not purely of a quantitative character, but require qualitative assessments. Programming software that complies with, for example, the distinction between uniformed soldiers and uniformed police officers can be considered to pose a relatively easy challenge. Complicating the issue further are recurring situations in modern conflicts in which combatants do not wear distinguishing insignia and/or in which civilians directly participate in hostilities, both of which categories must be distinguished from the civilian population. Finding abstract characteristics for such determinations has so far proven to be elusive. Reliance on conduct, characteristics, or connections with other individuals, as is the case with so-called 'signature strikes', is contrary to established targeting rules and contravenes the principle of distinction. The same would be true if such conduct were to be programmed into AWS software.

19 The principle of proportionality—contained in Art. 51 (5) (b) AP I—requires that beyond the need to minimize civilian damage, an attack is prohibited if the results would be excessive in relation to the anticipated military advantage, judged ex ante. Compared to the principle of distinction, the principle of proportionality is even less amenable to quantitative assessment as it almost invariably involves case-by-case judgements, often in complex, highly context-dependent, and rapidly changing circumstances. By its nature, it requires qualitative determinations. This is not only true for the assessment of the risks for civilians and civilian objects, but also for the evaluation of the military advantage that is being anticipated. AWS software would have to contain abstract designated values for persons and objects and would have to be able to properly adjust these values depending on the concrete and direct military advantage anticipated. Neither of these factors is necessarily static: the risk for civilians or civilian objects in the vicinity of a potential target is subject to change, as is concrete and direct military advantage, which depends on the development of operations on either side and the resulting military tactic and strategy that is subsequently employed. Given the different interpretations of the principle of proportionality already in place, it appears unlikely that it will be possible to agree on a quantifiable rule. Indeed, the very nature of the principle of proportionality appears to militate against such a development.

20 Finally, Art. 36 AP I requires State Parties to undertake legal reviews and to determine the legality of new weapons in the study, development, acquisition, or adoption of new weapons. In the context of AWS, this requires that such reviews be conducted not only at the procurement stage, but also throughout the development process of such systems. Such reviews need to take account of the normal or expected circumstances of a weapon system's use and how a weapon performs in the environments for which it is intended. Because of the greater degree of unpredictability of such systems and the inherent degree of discretion of AWS, there appears to be a greater onus on States wishing to deploy AWS to supervise the development of such systems.

2. Individual Criminal Responsibility

21 Conceptually, AWS raise a number of novel issues with respect to attributing → individual criminal responsibility. There are already divergent opinions over whether the actions of AWS could entail → command responsibility or direct responsibility. Some proponents have argued that since AWS will always adhere to the rules of IHL, the commission of criminal acts through AWS is improbable. Leaving aside, because of the lack of moral agency, the more fanciful idea of holding an AWS itself responsible, individuals involved in the process of developing and deploying AWS that could potentially be held accountable include: the software programmer, the military commander in charge of the operation, the military personnel that sent the AWS into action or those overseeing its operation, the individual(s) who conducted the weapons review, or political leaders. Under the rules of → international criminal law, military commanders can be held responsible for the behaviour of their military subordinates provided that the commander knew or should have known that a subordinate was about to commit a criminal act and did not prevent the act or failed to punish the offender. One proposal is to apply these rules in an analogous fashion to AWS. Because of the composite nature of AWS technology and operations, its complexity and the potential unpredictability of AWS behaviour in situations that have not been tested, it appears impossible to put commanders into a position to accurately predict AWS behaviour, given the autonomous nature of AWS. On that basis, the attribution of individual responsibility is difficult and

potentially impossible to establish. Other actors similarly may not have the requisite knowledge or technical expertise to evaluate the behaviour of an AWS. Some authors have therefore warned of the creation of a 'responsibility vacuum' or a 'system of organized irresponsibility'.

D. Evaluation

22 The introduction of AWS into future combat operations, a change that is likely to be incremental, signals a development that is of a qualitatively different nature than previous technological changes. Given the uncertain nature of technological development, it is important to underscore that the assessments made above are of a preliminary nature. Nevertheless, considerable discussion is warranted given the autonomous nature of such systems. Under IHL, questions concerning the ability to implement the principle of distinction or the principle of proportionality require affirmative answers before AWS can be deployed in combat operations. Similarly, deployment without sufficiently establishing responsibility mechanisms contravenes rules of IHL as well as international criminal law. Analogous questions arise in the IHRL context. Beyond these legal questions, AWS raise conceptual questions that concern neighbouring and interconnected disciplines such as ethical and political considerations.

23 International governmental organizations have only just begun to deal in a more comprehensive manner with the challenges that AWS pose, specifically during the 2014 and 2015 meetings of the contracting parties to 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. Views during these meetings diverged considerably, with some States expressing reservations about the regulation of AWS, while others advocate a more proactive stance, including a pre-emptive ban on the development and deployment of AWS.

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Belligerency

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A. Concept and Definition

1 Belligerency is the condition of being in fact engaged in war. A nation is deemed a belligerent even when resorting to war in order to withstand or punish an aggressor. A declaration of war is not required to create a state of belligerency. Through the application of the laws of war to civil wars, the doctrine challenges the State-centric model of international law, which goes back to the US civil war during which it was affirmed by the US Supreme Court in the 1862 *Prize Cases* and then codified in the 1863 → Lieber Code.

2 Traditionally, the doctrine of belligerency dealt with occurrences of civil war and other situations of belligerency where the threshold of hostilities is often insufficient for the application of the laws of armed conflict (→ Armed Conflict, International; → Armed Conflict, Non-International). There are four factual cumulative conditions that need to be fulfilled for a state of belligerency to exist: (i) existence of civil war beyond the scope of mere local unrest; (ii) occupation by insurgents of a substantial part of the territory of a State; (iii) a measure of orderly administration by the group in the area it controls; and (iv) observance of the laws of war by rebel forces, acting under responsible authority. A crucial question that premises the existence of a state of belligerency is whether the level of violence has exceeded a particular threshold, short of that required for the application of the laws of armed conflict but indicative of the potential escalation of violence in that direction.

3 A state of belligerency consists of an armed struggle, carried on between two political actors, each exercising *de facto* authority over persons within a determinate territory, and commanding an army prepared to observe the laws of war. It requires, then, on the part of insurgents a level of organization, governance capacity, and territorial control that resembles a government. They must act under the direction of this organized civil authority; merely an organized army would not be deemed sufficient to constitute a state of belligerency. All this must take place within the internationally recognized territory of the parent country.

B. Consequences of the Existence and Recognition of a State of Belligerency

4 A state of belligerency entails both benefits and responsibilities for insurgents, while affording → combatants and civilians affected by combat a broader set of protections than those granted to them in other types of internal conflict, including those that may not trigger the application of the laws of armed conflict. Belligerency rights were hinged on the recognition of the insurgents' belligerency by the State, at its will, with no obligation for the State to recognize belligerency even if the insurgents met the aforesaid factual criteria.

5 In a state of belligerency, third party States assume the obligations of neutrality (→ Neutrality, Concept and General Rules) regarding the internal conflict and

are obligated to treat both parties to the conflict as equals. Whilst recognized belligerents have the right to perform actions that are permitted to States at war, and may, for instance, institute a → blockade, a State is permitted to enforce a blockade only against vessels of States that have recognized a state of belligerency.

6 A third party State may recognize a condition of belligerency either by State action or by a formal declaration. Foreign nations may also declare neutrality during a state of belligerency and would thereby become entitled to the protection of the laws of neutrality. This means that the government will treat the hostilities as legitimate acts of warfare. A further consequence is that the nationals and legal subjects of the recognizing State would also be subject to the restrictions applicable to neutrals; for instance, those engaged in trade and commerce with one of the belligerent parties might be required to suspend such transactions.

7 At the same time, during a state of belligerency, an outside government may give formal diplomatic recognition to the belligerent group and could then give it military or economic aid, particularly in the case of → self-determination struggles, which are afforded special status in international law. Nevertheless, the law on counter-intervention, coupled with proposed limits on the quantity and type of assistance, moves in the direction of prescribing some limits on third-State intervention. In 2011, the Institut de Droit International stated, in relation to situations of internal disturbances and riots below the threshold of a non-international armed conflict, that '[m]ilitary assistance is prohibited when it is exercised in violation of the Charter of the United Nations, of the principles of non-intervention, of equal rights and self-determination of peoples and generally accepted standards of human rights and in particular when its object is to support an established government against its own population.'

8 The acts of recognizing a state of independence and recognizing a state of belligerency are governed by similar principles. Both are treated as conferring on an entity a status that affords it legal rights, which it would not have enjoyed absent that recognition. Thus, for some scholars, recognition of belligerency is a matter of granting privilege and legal entitlement. For instance, upon recognition of a state of belligerency, the revolutionary flag of the belligerent group will be recognized so that ships bearing it will be treated by foreign authorities as would States, which would grant them the right to obtain credit abroad, the enforcement of blockades, and the use of foreign ports. Some scholars have argued that while this would mean that a third State would be barred from providing arms to the government, it would not necessarily affect its right to provide arms to the insurgents.

9 The *de iure* or parent State is also affected by the consequences of the recognition of a state of belligerency and the acts of the belligerent group. Upon recognition of belligerency, the parent State is no longer responsible for the acts of the insurgents. The group may injure persons or destroy the property of neutral subjects by land or by sea, resulting in the insurgents' ability to attract responsibility in international law as a *de facto* government. This is a tremendous weight off the shoulders of the existing State; if the insurgent body dissolves, its responsibility for damage vanishes. A neutral State that has incurred injury will not, in such circumstances, be able to obtain redress. Others have held that recognition does not confer privilege, but rather an acknowledgment of an existing fact, which is made by a third State in the interests of its own subjects.

10 In sum, there are three sets of interests that are affected by the recognition of belligerency: those of the insurgent as regards neutrals; those of the parent State as regards neutrals; and those of the neutrals as affected by a state of war.

C. Historical Evolution of the Legal Rules

11 Although the distinctions between types of civil wars are long-standing precepts of international law, arguably the last time that the rules on belligerency were seriously applied was in the → American Civil War (1861–65). The recognition of a state of belligerency in this case caused the British to be neutral in the domestic American conflict and to aid neither the rebels nor the government. The same recognition brought US President Abraham Lincoln to acknowledge that captured Confederate soldiers should be afforded → prisoner of war status.

12 During the years 1869–79, the US government, despite pressure from → public opinion sympathetic to

the Cuban rebels fighting for independence from Spain, consistently refused to recognize belligerency, mainly because there was no organized insurgent government that could be dealt with as an independent political authority; one of the factual requirements for the existence of a state of belligerency. In other words, the relations between the parent State and the insurgents must have amounted, in fact, to a state of war in the sense of international law. At the time, it was deemed that fighting, even if fierce and protracted, does not alone constitute war, and hence does not establish a state of belligerency. There must be military forces acting in accordance with the rules and customs of war and, above all, a *de facto* political organization of the insurgents, sufficient in character and resources to resemble that of a State.

13 In contemporary civil wars, States have become less concerned, and have in most cases wholly abandoned the practice of formally declaring a state of belligerency. In fact, some scholars maintain that international practice has rendered the traditional doctrine of belligerency unsuited for the realities of modern civil wars. Others, however, object to this formalist position, claiming that the doctrinal principles of belligerency have been incorporated into the Geneva laws applicable to non-international armed conflict, taking on a different form.

14 The concept of belligerency is elaborated in the provisions of Art. 3 common to the → Geneva Conventions I–IV (1949) and → Geneva Conventions Additional Protocol II (1977) ('Additional Protocol II'). Yet, some scholars have maintained that, contrary to the intentions of the drafters, State practice has not abandoned the criterion of recognition by the parent State.

D. Current Legal Situation

15 The concepts of belligerency, → insurgency, and rebellion have had considerable influence on the contemporary law of armed conflict. International law traditionally applied to situations of internal conflict where the belligerency of insurgents is recognized. Contemporary international law requires that recognition of belligerency possesses the material characteristics of warfare between sovereign States. The conditions for recognition of belligerency were reiterated by the US Supreme Court in *Williams v Bruffy* (1877): 'When a rebellion becomes organized, and attains such proportions as to be able to put a formidable military force in the field, it is usual for the established government to concede to it some belligerent rights', so as 'to prevent the cruelties which would inevitably follow mutual reprisals and retaliations' (96 US 176, at 186).

16 The doctrine developed as a *sui generis* method of dealing with certain internal conflicts, to complement codified laws applicable to international armed conflicts. In addition to its high threshold and uncertain scope of application, the practice of recognition of belligerency is an inherently political act. The drafters of the Geneva Conventions replaced the term 'war' with the term 'armed conflict', automatically triggering the application of international humanitarian law once the factual criteria were met. This was intended to mitigate the problems that arose from the discretionary practice of recognition, which lent support to the interests of States at the cost of adherence to international law. Some scholars observe that the demise of the belligerency doctrine resulted from States resorting to the more flexible concept of insurgency.

17 The scope of application *ratione materiae* of contemporary international law of non-international armed conflict, enshrined in common Art. 3 Geneva Conventions I–IV and in their Additional Protocols, continues to be subject to varying interpretations. One school of thought maintains that its provisions should apply to an armed conflict not of an international character, which notably overlaps with the criteria of belligerency doctrine. The second school holds that common Art. 3 should apply as a minimum standard (→ Minimum Standards), implying that the higher standard of protection is upheld by the criteria that determine the existence of a state of belligerency. In most cases, given the development of customary international law, the practicalities of warfare will require belligerent parties to provide more than the minimum protection embodied by common Art. 3.

18 Some scholars have maintained that the applicability of Additional Protocol II questions the continuous viability of the doctrine of belligerency by prescribing a narrower and more stringent set of rules for the regulation of certain types of internal armed conflicts. The threshold required for Additional Protocol II's application *ratione materiae*, although higher than