Protection of civilians *jus post bellum*

In search of a normative framework *jus post bellum* for effective, purposive, and sustainable protection of civilians in United Nations peace operations

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Abstract

The protection of civilians is vital to the creation and maintenance of peace and security. Peace operations have become the primary tool for the United Nations (UN) Security Council to fulfil its task of maintaining and restoring international peace and security, while the task of protection has become the *raison d'être* of peace operations. Yet, UN guidance on protection still lacks sufficient details to enable effective, purposive and sustainable protection. Most importantly, there is a lack of legal guidance, which likely has contributed to uncertainty on how to deliver on the protection mandate in field realities. This, in turn, has resulted in both inadequate protection, and protection approaches that risk undermining long-term aims.

This thesis contributes to both the enhancement of legal clarity on the task to protect civilians and the enablement of effective, purposive, and sustainable protection of civilians. It does do by identifying a normative framework for protection that is specifically designed for post-conflict, transitional environments. The primary research question asks: Can law guide peace operations in providing effective, purposive and sustainable protection of civilians in transitional environments, and if so, how?

The research finds that although the protective nature and function of the law that is applicable in armed conflicts— International Humanitarian Law (IHL)—, enables effective protection against the most serious threats, namely those stemming from armed conflicts, it does little to contribute to sustainable peace and security. International Human Rights Law (IHRL), on the contrary, is insufficient to counter the most serious threats present in transitional environments, but contributes to successful transitions to peace and security. As a result, it is argued that, to deliver on the aims pursued, a regime specifically designed for transitional settings is both warranted and required.

The research shows that IHL and IHRL provide different forms of protection. While IHRL contains obligations to take positive action to protect civilians, the protection afforded civilians under IHL is merely indirect, offered primarily through restrictions on force rather than positive obligations to protect. The positive obligations entailed in IHRL resemble the protection mandate afforded peace operations, whereas the ambitions reflected in the mandate to protect is poorly mirrored in IHL.

It is suggested that while IHRL should be afforded primacy, field realities in transitional environments dictate that IHL cannot be entirely disregarded as a protective regime. Key to adequate protection, thus, is a purposive dividing line between IHL and IHRL. A dividing line specifically designed for transitional environments is crucial to enable effective and sustainable protection of civilians.

Towards that aim, it is submitted that a distinction between non-international armed conflicts to which Common Article 3 (CA3) of the Geneva Conventions and customary international law apply, and those to which also Additional Protocol II (APII) of the Geneva Conventions apply, contributes to enhancing protection of civilians in complex environments. The difference in severity characterised by the CA3 and APII thresholds, it is further submitted, warrants a difference in the temporal and geographical scope of application of the IHL rules on conduct of hostilities. To ensure successful transitions, it is also suggested that having different thresholds for application of IHL is warranted for situations of a *resumption* of the original conflict, and the *rise* of a new armed conflict.

To my loving and beloved father.

Thank you for your endless love, support, and encouragement.

You are with me always.

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Abbreviations

ACHR	American Convention on Human Rights
API	Additional Protocol I to the Geneva Conventions
APII	Additional Protocol II to the Geneva Conventions
DFS	Department of Field Support
DPKO	Department for Peacekeeping Operations
DR Congo	Democratic Republic of the Congo
ECommHR	European Commission of Human Rights
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GCI	Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 12 August 1949 (Geneva Convention I)
GCIV	Convention (IV) Relative to the Protection of Civilian Persons in Time of War (12 August 1949) (Geneva Convention IV)
HRC	United Nations Human Rights Council
HR Committee	United Nations Human Rights Committee
NIAC	Non-international armed conflict
IAC	International armed conflict
IACtHR	Inter-American Court of Human Rights
IACommHR	Inter-American Commission of Human Rights
ICC	International Criminal Court
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross

ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
MINUSCA	Mission multidimensionnelle intégrée des Nations Unies pour la stabilisation en Centrafrique (United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic)
MONUSCO	Mission de l'Organisation des Nations unies pour la stabilisation en République démocratique du Congo (United Nations Organisation Stabilization Mission in the DR Congo
NATO	North Atlantic Treaty Organisation
NIAC	Non-international armed conflicts
OLA	United Nations Office of Legal Affairs
PCIJ	Permanent Court of International Justice
RoE	Rules of engagement
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNAMID	United Nations— African Union Hybrid Operation in Darfur
UNMISS	United Nations Mission in South Sudan
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties
WWII	World War II

Section I: *Introduction*

1. Introduction of research

This year of writing, 2019, marks the 20th anniversary of the introduction of the first explicit task to protect civilians in United Nations (UN) peace operations. Peace operations have emerged as the primary means for the Security Council to fulfil its task to maintain or restore international peace and security. Since the introduction of the explicit task to protect civilians, it has arisen to being the *raison d'être* of peace operations, which reflects the centrality of protection in the quest for sustainable peace and security. Despite twenty years in the making, however, peace operations still struggle both to determine what protection means in practice, and how to ensure effective protection in the field.

Part of the answer to effective, adequate and sustainable protection can be found in law. Central to protection engagements is the use of force, and critical to adequate use of force for protection purposes in both short- and long-term perspectives, in turn, is law. Yet, remarkably little attention has been paid to the field of law in developing policies and guidelines for UN peace operations. Not surprisingly, then, peace operations struggle with the question of how they are to fulfil the tasks assigned to them. This lack of legal cohesion and clarity is particularly apparent regarding the task to protect civilians, which has been called the 'impossible mandate'.[1] Most troubling is that guidance on the use of force has been heavily influenced by International Humanitarian Law (IHL), applicable only in armed conflicts, while the parameters entailed in International Human Rights Law (IHRL) have been insufficiently incorporated.

Furthermore, guidance does not account for the different legal environments in which protection takes place, resulting in insufficient and legally flawed guidance on protection.[2] This is a particular concern considering the trend to authorize peace operations to adopt more robust postures in the execution of their tasks. As this research reveals, the aim and purpose sought in the respective legal frameworks of IHL and IHRL differ, and as a result, attention to the nature and function of law, and identifying a purposive dividing line between them, is key to ensuring adequate contributions toward sustainable peace.

[1] United Nations (UN) Department for Peacekeeping Operations (DPKO), Draft DPKO/DFS Operational Concept on the Protection of Civilians in UN Peacekeeping Operations, (not dated) online: http://www.peacekeeping.org.uk/wp-content/uploads/2013/02/100129-DPKO-DFS-POC-Operational-Concept.pdf (accessed 2 December 2014).
[2] See further in Chapter 4.

Peace operations also operate in environments that lack legal clarity, which complicates the identification of coherent legal guidance for peace operations, generally, and for the task of protecting civilians, specifically.

1.1. Background

In the post-Cold War era, the vast majority of conflicts have taken place within the territory of a state, between government forces and rebel groups or between such groups. Since the warring parties in such conflicts all too often make use of the presence of civilians as shields, or attack civilians as a method of war, civilians have been increasingly battered by war. The realization of this increased victimisation of civilians in contemporary conflicts has resulted in extensive norm-building regarding the protection of civilians threatened by conflict.[3] In particular, the norm *to protect* has been clearly manifested since the end of the 1990s, and the year 1999 marks a significant shift in the global security agenda towards a focus on the protection of civilians. The year 1999 also marks a clear comeback for the United Nations (UN) on the international scene through peace operations. Recent decades have also witnessed an evolution of peace operations from mere responses to aggression, to multifaceted strategies for prevention, mediation, reconciliation and reconstruction aimed at enabling durable peace.[4]

Transitional environments are, notably, complex and characterised by high levels of violence, and a complicating factor is that violence may be transformed as a result of changes in the local contexts following the deployment of military troops and police into the conflict area. This has been shown to alter incentives of local actors, and to encourage them to seek alternative and hidden ways to affect the terms of the peace and the allocation of resources.[5] In other words, violence of an armed conflict character transforms into other types of violence, primarily criminal violence, as a result of altered dynamics in the local context. This complicates the quest for adequate responses to violence in transitional environments, and the complexity is amplified by the fact that the security vacuum that often follows an armed conflict has also been shown to attract various forms of violence, including violence related to organized crime.

Organized crime thrives in conflict-affected environments due to institutional weakness of the state in enforcing laws. Such crime various forms and may have a parasitic or symbiotic relationship with the

[3] Lisa Hultman. 'UN peace operations and protection of civilians: Cheap talk or norm implementation?' (2012) 50(1) Journal of Peace Research, 61.
[4] Gregory Fox, 'Navigating the Unilateral/ Multilateral Divide' in Carsten Stahn, Jennifer Easterday and Jens Iversen (eds), *Jus Post Bellum- Mapping the Normative Foundations* (First edn, Oxford University Press 2014), 244.
[5] See further in Astri Suhrke and Mats Berdal (eds), *The Peace in Between: Post-War Violence and Peacebuiling* (Routledge 2012) and Marina Caparini, 'UN Police and the Challenges of Organized Crime', *SIPRI Discussion Paper* (Stockholm International Peace Research Institute 2019).

state, which, if not adequately addressed, risks infiltrating governmental institutions and processes so that crime and corruption become integral parts of the state structure.[6] Organized crime also has both local and transnational dimensions and may have links to armed conflicts, since proceeds from illicit economies are frequently the means for armed groups to sustain themselves and their warfighting capability. Beyond this, organized crime also poses a risk to post-conflict transition and, in the longer term, to governance and development in conflict affected countries. As a result, legacies of both war economies and organised crime continue to undermine peacebuilding efforts.[7] Adequate response to all forms of violence thereby constitutes a core prerequisite for the fulfilment of both protection objectives and enabling sound contributions to sustainable peace in conflict-prone environments.

To contribute toward sustainable peace and security, protection engagements must thus address relevant threats, ensure effective combating, and contribute towards sustainable results. Still, peace operations struggle to provide protection that is both adequate and sustainable. The failure of peace operations to take sufficient action to ensure adequate protection has received a great deal of attention, and is frequently understood as a result of not knowing what they are authorised to do, and not knowing how to protect.[8] Little attention, however, has been afforded the issue of peace operations' applying excessive force in the execution of their tasks. Excessive force violates human rights, and as such, constitutes a driver of conflict.[9] Nevertheless, concerns have recently been voiced[10] regarding the long-term consequences of the robust and militarised approaches to security and protection adopted by the Intervention Brigade in the UN peace operation in DR Congo.[11] There is consequently a need to identify an effective, yet both purposive and sustainable balance between engaging in robust protection engagements in armed conflicts, to which IHL applies, and protection engagements guided by IHRL.

While there is little controversy surrounding the applicability of IHL to the conduct of peace operations to the extent that they engage in an armed conflict as combatants,[12] the relevance of IHRL is more contested. Commentators often address the question of the applicability of IHL in relation to

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[6] See Marina Caparini, 'UN Police and the Challenges of Organized Crime' *, SIPRI Discussion Paper* (Stockholm International Peace Research Institute 2019).
[7] ibid.
[8] See Holt, Victoria, Taylor, Glyn and with Kelly, Max. 'Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges' (Independent study, United Nations Department for Peacekeeping Operations; Independent study commissioned by UN DPKO and UNOCHA 2009) , 204.
[9] Kjersti Skarstad, 'Human Rights Violations and Conflict Risks: A Theoretical and Empirical Assessment' in Cecilia Marcela Bailliet and Kjetil Mujezinovic Larsen (eds)*, Promoting Peace Through International Law* (Oxford University Press 2015) 133, 142.
[10] See Rachel Sweet, Militarising the Peace: UN Intervention Against Congo's 'terrorists' rebels (*Lawfareblog,* Foreign Policy Essay 2 June) https://www.lawfareblog.com/militarizing-peace-un-intervention-against-congos-terrorist-rebels#> accessed 14 June 2019.
[11] See further herein in Chapter 4.2.
[12] See further in Chapter 3.4 which addresses the application and applicability of IHL to peace operations.

the conduct of peace operations, whereas the question of the applicability of IHRL is often merely related to issues of sanctions, human rights in armed conflict, humanitarian assistance or procedural rights.[13] Unfortunately, the applicability of IHRL to the conduct of peace operations is often afforded merely cosmetic attention.

In order to ensure adequate protection of civilians in complex transitional environments, there is consequently a dire need to enhance legal clarity both in relation to the authority to use force, and the limitations and regulations of such authority. Such enhancement would enable peace operations to provide protection that is not only effective and purposive, but constitutes a contribution towards, rather than an undermining of, the long-term aim of sustainable peace and security.

1.2. Aim, purpose and contribution of this research

This research aims at contributing to enhanced legal clarity on protection in transitional environments by identifying a normative framework for protection of civilians *jus post bellum*. While much effort has been afforded the identification of guidance and policy instruments on the protection of civilians, very little attention has been afforded the law of protection, which has resulted in legally incoherent, and sometimes legally flawed guidance on protection. Lack of legal clarity has often resulted in the failure of peace operations to protect civilians when needed, as well as in the adoption of protection approaches that go beyond the limitations of applicable law.[14] Both the lack of action, which results in insufficient and inadequate protection, and the application of means and methods of questionable legality, result in protection engagements that are inadequate, at best, and, at worst, undermine long-term peace efforts.

Thereby, legal uncertainty undermines both the ambition to ensure adequate and effective protection, and the attainment of the ultimate aims pursued, namely sustainable peace and security. To remedy this, and to enhance legal clarity in transitional environments, the primary research question addressed here is therefore

> *Can law guide peace operations in providing effective, purposive, and sustainable protection of civilians in transitional environments, and if so how?*

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[13] See for example Michael Bothe, 'Human rights law and international humanitarian law as limits for Security Council action' in Robert Kolb and Gloria Gaggioli (eds)*, Research handbook on Human Rights and Humanitarian law* (Research Handbooks in International Law, Edward Elgar Publishing 2013) 371.

[14] A recent example of guidance that goes beyond relevant law is the so called 'Cruz-report', which addresses the use of force in peace operations. See Lieutenant General (Retired) Carlos Alberto dos Santos Cruz, *Improving Security of United Nations Peacekeepers: We need to change the way we are doing business*, 19 December 2017. Available online: https://peacekeeping.un.org/sites/default/files/improving_security_of_united_nations_peacekeepers_report.pdf (accessed latest 30 April 2019).

In order to answer the primary research question, it is necessary to address the protective nature and function of the relevant law. By identifying how law protects civilians through IHL and IHRL respectively, and how the protective regimes contribute towards sustainable peace and security, this research identifies a normative framework for protection of civilians *jus post bellum* which, it is submitted, contributes to legally cohesive guidance on protection of civilians in transitional environments. Thereby, this research also contributes to a furthering of the development of a legal framework *jus post bellum* specifically designed to enable legal clarity in complex transitional environments.

Furthermore, the legal frameworks applicable to protection engagements *jus post bellum* and in peace operations environments, namely IHL and IHRL, pursue different aims. While IHL enables effective combating of the most serious threats, IHRL provides sustainable solutions to security. As a result, the legal frameworks contribute to different forms of protection. Security threats present in transitional environments entail both threats stemming from armed conflicts, and threats that are of a criminal, law enforcement character. Protection engagements in complex, transitional environments therefore need to include approaches guided by both IHL and IHRL. Thus, this research finds that the value of enhancing legal clarity in transitional environments is not merely of a legal nature. Legality, rather, contributes to ensuring effectiveness, adequacy and sustainability in protection engagements.

This research therefore contributes to both legal clarity in transitional environments— through a furthering of the development of *jus post bellum* as a distinct legal framework separate both from *jus ad bellum* and *jus in bello*— and enhanced effectiveness, adequacy, and sustainability in protection engagements.

1.3. Theoretical approach

This research is underpinned primarily by a positivist notion of law. The central idea of legal positivism is that the validity of law lies in its formal legal status rather than its normative basis or content. Under a positivist understanding of law, there is thus an important distinction to make between law and morality. Legal positivism posits that law is understood as a set of legal norms formulated and established (posited) by humans in a legal way. Non-legal norms, on the contrary, are understood as statements on how something ought to be, or ought to be done. In seeking to identify a *de lege ferenda* normative framework for protection of civilians *jus post bellum*, this research is underpinned by a firm distinction between *lex lata* (law as it is) and *de lege ferenda* (law as it should be), which, it is submitted, underscores the value of the research.

Positivism is here also understood as a unified system of rules,[15] and as influenced by the understanding of 'law as integrity', which according to Dworkin establishes that law should be interpreted so as to create a cohesive whole.[16] There is also, it is submitted, an important distinction to make between the process of creation of law, the implementation of law, and law as it is. It is recognized that law does not derive from the institutions that enforce it, but rather from political processes that may result in the creation of law, but exist independently of it.[17]

International law, in turn, is perceived here as a system of law, in which different parts share common aims, such as peaceful coexistence among states. However, the positivist approach to law adopted in this research does not subscribe to the notion that states are only bound by international law to the extent they have actively consented to it. Rather, it is held that international law cannot serve the purposes it must serve in a contemporary world unless it has 'escaped the straitjacket of state-by-state consent'. As observed by Dworkin, such an understanding of law, which holds that law applies only to those who agree with it, seems to undermine its jurisprudential foundation.[18]

This interpretation draws on the form of positivism epitomised by Hart, who offers an important separation of law from moral principles and political ideologies. Further drawing on Hart, another important theoretical stance of this research is that law is not independent of its context. Law can allow for moral and political considerations as part of providing context to law, but formal sources of law remain the core of international legal discourse.[19] This modern positivistic approach to law and international law allows for adaptation to new developments in international relations,[20] and enables consideration of both moral and political aspects in interpreting the law. In particular, this approach permits consideration of both the aim and purpose of law, as well as its context, in the interpretation and development of law *jus post bellum*.

This research is also underpinned by an objective teleological interpretation of international law, in which the intention of the legal system as a whole guides the understanding of the law in contemporary contexts. The theoretical foundations, function, and legal context of the law are held as important in identifying its relevance and adequate meaning in contemporary contexts. The understanding that the objective of the legal system in its entirety guides the understanding of the law,

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[15] Hans Kelsen, *Pure Theory of Law* (Fifth edn, 2008). See also Bruno Simma and Andreas L. Paulus. 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93(2) The American Journal of International Law 302, 304..

[16] Ronald Dworkin, *Law's Empire* (Harvard University Press 1986).

[17] Eric J. Scarffe. 'A New Philosophy for International Law and Dworkin's Political Realism' (2016) 29(1) Canadian Journal of law and jurisprudence 194.

[18] Ronald Dworkin. 'A New Philosophy for International Law' (2013a) 41(1) Philosophy and Public Affairs, 7.

[19] H. L. A. Hart, Joseph Raz and Penelope A. Bulloch, *The concept of law* (3rd ed. / introduction by Leslie Green. edn, Oxford University Press 2012), 307-308.

[20] Bruno Simma and Andreas L. Paulus. 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93(2) The American Journal of International Law 302, 307.

results in the view that the interpretation of the respective rules entailed in the legal framework is capable of adaptation to changing realities, while the objective and fundamental values of the legal system remain largely unaltered. Many of the rules of a legal system, thus, cannot be understood in isolation from other provisions. This suggests that combining the objective teleological interpretation of law with a systemic interpretation maintains internal coherence, while at the same time ensuring coherence to the object and purpose of the law. A teleological/ purposive interpretation of relevant law is held as most suitable for the purpose of identifying a normative framework that correlates with the aims pursued *jus post bellum.*

1.4. Methodology: *Jus post bellum* as a methodological framework for the protection of civilians in peace operations

This research is placed within the methodological framework of *jus post bellum*. *Jus post bellum* is aimed specifically at addressing the complex environments and time periods of transitions from armed conflict to sustainable peace. It is, as such, particularly well-suited to guide the identification of relevant law in such situations. The need for a legal framework specifically addressing the time period between armed conflict and peace is also increasingly apparent with a changing reality of both peace and war. The classical peace/ war dichotomy has lost its *raison d'être* with the outlawing of war and the blurring of the boundary between conflict and peace, which are characterised by, for example, the asymmetric nature of contemporary conflicts.[21]

However, the legal framework of *jus post bellum* is still in its cradle. There is currently no uniform agreement on its content, and interpretations differ on the potential usefulness of a *jus post bellum* framework. Some emphasise the temporal elements of *jus post bellum*, while others focus on its functional dimensions.[22] Those emphasising a temporal dimension tend to highlight the nexus between *jus post bellum* and the preceding conflict (*jus in bello*). The functional stance, on the other hand, highlights the nexus with peace, and tends to view the term *jus* in *jus post bellum* as an aspiration rather than as a description of the framework.[23]

De Brabandere has identified two main interpretations of *jus post bellum:* the first focuses on the legal holder of obligations in the post-conflict phase, and relates to the question of which actor can/ should

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[21] Carsten Stahn, 'Jus Post Bellum: Mapping the Discipline(s)' in Carsten Stahn and Jann K. Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (T.M.C Asser Press 2008), 99-100.

[22] Iverson, Jens, "Transitional Justice, Jus post Bellum and International Criminal Law: Differentiating the Usages, History and Dynamics", Jus post Bellum Project, Grotius Centre for International Legal Studies, Law Faculty, University of Leiden, Netherlands (2013), online: http://ijtj.oxfordjournals.org/content/early/2013/09/06/ijtj.ijt019.full?keytype=ref&ijkey=0mBrtYhTKAtLLJ9 (accessed 28 January 2014).

[23] ibid.

be involved in post-conflict reconstruction and what post-conflict reconstruction is relating to.[24] A second category views *jus post bellum* as an interpretive framework to address post-conflict situations. This understanding, according to de Brabandere, is a normative rather than systemic notion, 'which encapsulates the laws or rules applicable in the transitory phase from conflict to peace'. It is thus understood as a framework that contains substantive legal rules governing transitions from war to peace, as well as the interplay between these rules. As per this understanding, *jus post bellum* would constitute a third distinct and relatively independent legal framework from the established *jus ad bellum* and *jus in bello* frameworks.[25]

There seems to be little disagreement, however, that *jus post bellum* would come into play in the transition period between armed conflict and peace, and that its ultimate aim is to enable sustainable peace. *Jus post bellum* thereby shares both the temporal context of the time period between armed conflict and peace and the primary aim and purpose of peace operations: to create conditions that are conducive to sustainable peace and security. *Jus post bellum* can thereby be understood as an overarching normative framework aimed at identifying applicable laws in a particular place (post-conflict environment) and at a particular time (transitions from conflict to sustainable peace). Under such understanding, *jus post bellum* is of value to the present research in offering a basis for analysis framed around the legal context and the ultimate aim and purpose of law.

For the purpose of the present research, *jus post bellum* can be perceived as a sub-category of international law. Under a functional understanding of such category, *jus post bellum* can serve the purpose of ordering and coordinating the interplay between different laws that apply during the time period of transition from war to peace. Thereby, *jus post bellum* can enable greater legal clarity on the activities of peace operations, and thus guide how peace operations are to deliver on their mandates.

This research adopts a normative understanding of *jus post bellum* specifically aimed at addressing post-conflict transitional environments, and that encapsulates the laws applicable in the transitory phase *jus post bellum,* and is thus understood here as a framework that contains substantive legal rules governing transitions from war to peace, as well as the interplay between these rules. The research draws on both temporal and functional notions of *jus post bellum,* and aims at identifying the laws applicable to each situation, and, thus, identifying a normative legal guidance for the protection of civilians in UN peace operations.

Enhanced legal clarity, enabled through a *jus post bellum* normative framework, can empower strategic coherence, and thereby better the prospects of achieving conditions conducive to sustainable

[24] Eric De Brabandere, 'The Concept of Jus post Bellum in International Law- a normative critique' in Carsten Stahn, Jennifer S. Easterday and Jens Iversen (eds), *Jus post Bellum- Mapping the Normative Foundations*, OUP (2014), 126.
[25] ibid.

peace. Thus, there are several reasons why *jus post bellum* as a normative framework has the potential of adding significant value to the development of guidance for the protective tasks of peace operations. Firstly, a legal framework specifically addressing the post-conflict period enables a distinction between negative peace, understood as the absence of war, and positive peace, understood as sustainable peace and security through extensive protection of human rights. This corresponds with what is sought via the aim and purpose of peace operations and highlights the fact that transitioning from conflict to sustainable peace constitutes a process that is neither linear nor follows a specific course.

Secondly, to further the process towards positive peace, *jus post bellum* as a normative framework enables attentiveness to the specific legal requirements in each given time and place. Thereby, *jus post bellum* also highlights the necessity of providing protection in different legal contexts, as well as against threats that are related to an armed conflict and those of a law enforcement nature. Thirdly, and as a result, *jus post bellum* aids in reversing the current state-centric approach to security and protection in peace operations, and enables a shift to an individual-centred protection strategy, focusing on the rights and needs of individuals.

Finally, as a fourth contribution, *jus post bellum*, which this thesis proposes to reconceive as an effective legal framework for protection of civilians, also aids in identifying and legally categorising threats to both national and individual security. It is submitted that such an effort to reconceive the normative structure of *jus post bellum* can facilitate the identification of the appropriate rules on means and methods that peacekeepers can employ in their protection engagements, and thus enable them to deliver on mandates and expectations to provide effective and adequate protection.

1.5. Sources, scope and limitations of the research

This research draws on sources of international law as stated in Article 38 (1) of the Statute of the International Court of Justice (ICJ), namely (a) international conventions, whether general or particular; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; and (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[26]

Further, the scope of the research has been limited both temporally and materially. Temporally, it has been limited to the period between armed conflict and peace. It thus includes *jus ad bellum* only to the extent that it is necessary to identify the nature, scope, and limitations of peace operations' mandates.

[26] Statute of the International Court of Justice, Article 38(1).

The scope of the research has also been limited to peace operations operated by, or through, the United Nations. Other multinational operations conducted through regional organisations, such as the African Union or NATO, have thereby been excluded. Further, it has been restricted to focusing on peace operations authorized as enforcement operations under Chapter VII of the UN Charter.

In seeking to identify a normative framework for protection *jus post bellum*, the research has also been limited to addressing the law relevant to state actors. It has therefore not been concerned with the legal obligations of non-state actors. Finally, the scope has been narrowed to identifying legal guidance as derived from international law; as a consequence, domestic law relevant to protection engagements has been excluded.

1.6. Definitions

In this research, the term *peace operation* is used in reference to peace operations authorised by the Security Council, irrespective of whether the operation has been mandated under Chapter VI or VII of the UN Charter. No terminological distinction is thus made between the terms *peacekeeping*, *peace enforcement* and *peace operations*. The reason for this approach is that the law that applies to protection engagements in peace operations is dependent solely on field realities. The terminology of peacekeeping and peace enforcement has sometimes been used to determine relevant law, which both undermines adequate attention to relevant law and confuses the legal reality of peace operations.

In addition, the term *peacekeeper* is used to distinguish the actors involved in a peace operation (military, police, and civilian staff) from the organisation; here, the term is not limited to military actors, but includes police and civilian staff.

In IHL, the term *use of force* refers to the use of physically violent means, while non-kinetic means are generally excluded from the concept. However, in law enforcement contexts, the same term sometimes entails coercive but not necessarily kinetic force. For the purpose of clarity, the term 'use of force' is defined here as the use of physical violence, and as a consequence, it is differentiated from other forms of coercive measures, such as restriction of movement, and confiscation of property for investigative purposes, etc.

1.7. Outline

This thesis is structured in six sections. Section One encompasses an introductory chapter (Chapter 1), which offers the background of the research project, its aim and purpose, scope and limitations, and its theoretical and methodological stance. Section Two consists of three chapters. Chapter 2 provides a brief description of the legal foundation of peace operations, thus placing the research into its legal

context. Chapter 3, in turn, presents an analysis of how law applies to peace operations, while Chapter 4 offers a description of the authority to protect civilians provided in Security Council resolutions, which guide the identification of scope and the limitation of the legal analysis of protection.

Section Three provides a legal foundation for a protection regime *jus post bellum* and consists of four chapters. First, an introduction to the protective legal regimes IHRL and IHL is offered in Chapters 5 and 6, respectively. Chapter 7 concludes Section Three by delivering an account of the identification and classification of armed conflicts, which in turn informs the identification of relevant law in relation both to peace operations and *jus post bellum*.

Section Four consists of two chapters and addresses the protective nature and function of law, via a focus on the regulation of conduct. Chapters 8 and 9 offer a comparative analysis of the protective nature and function of IHRL and IHL, respectively, as detailed in the regulation of the use of force as entailed in IHRL, and in the regulation of the conduct of hostilities and law enforcement obligations as entailed in IHL. The section thus constitutes the foundation for the identification of a normative regime for protection *jus post bellum*.

Section Five posits a protective regime specifically designed for transitional environments through special attention to the law of occupation: in Chapter 10, as integral to the law of international armed conflicts and, in Chapter 11, to the law of non-international armed conflicts. Chapter 12 conceives the law on states of emergency, integral to IHRL, as offering a valuable bridge between IHL and IHRL in transitional environments, and thus particularly well suited, as a protective regime, for protection engagements *jus post bellum*.

Section Six, finally, concludes the thesis by offering a normative framework that, it is submitted, enables effective, purposive, and sustainable protection of civilians *jus post bellum*.

Section II: *International legal foundations of United Nations peace operations*

2. International law and the legal foundations of peace operations

In the absence of a standing UN force, as envisioned under Articles 43-47 of the UN Charter, peace operations arose as a form of intervention during the Cold War,[27] and largely as a response to the failure of the collective security system envisaged in the Charter.[28]

There is, notably, no specific law that applies to peace operations. It is widely recognised that peace operations, as subsidiary organs of the UN, hold the same status as the UN,[29] and are as such bound by law to the same extent. Peace operations have also evolved from having the primarily military task of separating warring parties, to incorporating a complex combination of military, police and civilian actors working towards common overarching goals.[30] Those goals are today centred on the protection of human rights and are long-term; they are to contribute to creating conditions conducive to sustainable peace and security.

Although it has become a truism that human rights law plays a vital role in sustainable peace, and therefore represents a crucial element of *jus post bellum*, the exact scope and content of human rights law *jus post bellum* is not yet clear.[31] The legal position and development of peace operations has also been characterised by *ad hoc* and *ex post facto* rationalisations, as well as a gap between theory and practice.[32] This has arguably contributed to a lack of adequate legal guidance for peace operations, and in particular in relation to the task to protect civilians.

It is of value to note that, as opposed to the doctrine of *Responsibility to Protect*,[33] the task of protecting civilians in peace operations constitutes a *jus in bello*, or as argued here, a *jus post bellum* exercise, necessitating identification of the application and applicability of IHL and IHRL to

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[27] Scott Sheeran and Catherine Kent, 'Protection of Civilians, Responsibility to Protect, and Humanitarian Intervention: Conceptual and Normative Interaction' in Haidi Willmot and others (ed), *Protection of Civilians* (Oxford University Press 2016), 35.

[28] Scott Sheeran, 'Human Rights and Derogation in Peacekeeping: Addressing a Legal Vacuum Within the State of Exception' in Evan J. Criddle (ed), *Human Rights in Emergencies* (ASIL Studies in International Legal Theory, Paperback edn, Cambridge University Press 2017) 205, 209.

[29] Kjetil Mujezinovic Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (Cambridge studies in international and comparative law, Cambridge University Press 2014), 112.

[30] Ray Murphy. 'UN Peacekeeping in the Democratic Republic of the Congo and the Protection of Civilians' (2016) 21(2) Journal of Conflict and Security Law 209, 211.

[31] See Sylvia Maus. 'Jus post Bellum á la United Nations? Human rights, UN peace operations and the creation of international law' (2014) 32(4) Wisconsin International Law , 695. See also Ray Murphy. 'UN Peacekeeping in the Democratic Republic of the Congo and the Protection of Civilians' (2016) 21(2) Journal of Conflict and Security Law 209, 210.

[32] Scott Sheeran, 'Human Rights and Derogation in Peacekeeping: Addressing a Legal Vacuum Within the State of Exception' in Evan J. Criddle (ed), *Human Rights in Emergencies* (ASIL Studies in International Legal Theory, Paperback edn, Cambridge University Press 2017) 205, 209.

[33] For reasons of limitation, the doctrine of Responsibility to Protect has been excluded from the present research. It suffices to note here that since the Outcome document of 2005 did not include the in the ICISS report suggested element of 'responsibility to rebuild', the doctrine was largely limited to *responding* to threats, which primarily falls within the *jus ad bellum* framework. See further in United Nations General Assembly (UNGA), 2005 World Summit Outcome, A/Res/60/1.

protection engagements. Peace operations also largely operate in the intersection between armed conflict and peace, making the identification of applicable law particularly demanding. Applicable law is also located at the intersection of different bodies of law, such as the UN Charter, IHRL and IHL, international institutional law, the law of immunities, and international law on state responsibility.[34] Furthermore, law has been applied in *ad hoc* and *ex post facto* manner to peace operations, resulting in their having an underdeveloped legal regime. Notwithstanding these challenges, however, the identification of relevant law is crucial to ensure engagements that are both effective in addressing existing security challenges and sustainable in the long term, enabling solid contributions towards the creation of conditions that are conducive to sustainable peace and security.

Contemporary peace operations are also afforded mandates that authorize them to engage as combatants in armed conflicts.[35] Such broad authority, ranging from engaging as combatants in an armed conflict, to ensuring security and protection of civilians through transitions and creating conditions that are conducive to sustainable peace, makes attention to applicable law, and to the complex legal reality of today's peace operations, all the more pressing in the planning, organisation and execution of mission objectives. For the law of protection to be properly understood, however, peace operations must first be placed into the context of the foundational principles of international law, such as state sovereignty.

2.1. State sovereignty, jurisdiction and peace operations

States are endowed with rights and obligations under international law. These derive from a variety of sources, including treaties, customary law and general principles of law. International law, notably, is a territorial system, and one of its cardinal concepts is state sovereignty, which is generally considered to contain the exclusive rights of a state to control its territory and structure its functions. A key element of sovereignty in a legalistic sense is that of *exclusivity of jurisdiction*, and a central element of exclusive jurisdiction is state monopoly on the legitimate use of force.

In international law, the term *jurisdiction* generally refers to the lawful power of a state to exercise its authority and power by means of executive, legislative and judicial action.[36] Although the Permanent

[34] Scott Sheeran, 'Human Rights and Derogation in Peacekeeping: Addressing a Legal Vacuum Within the State of Exception' in Evan J. Criddle (ed)*, Human Rights in Emergencies* (ASIL Studies in International Legal Theory, Paperback edn, Cambridge University Press 2017) 205, 209.

[35] See for example UN Security Council (UNSC) res 2098 (2013), which tasked the peace operation in DR Congo to establish an Intervention Brigadem to 'carry out targeted offensive operations' (…) 'in a robust, highly mobile and versatile manner' (…) and 'neutralise' armed groups.

[36] Gro Nystuen and Stuart Casey-Maslen (eds), *The Convention on Cluster Munitions: A Commentary* (Oxford Commentaries on International Law, Oxford University Press 2010), 257. See also Malcolm N Shaw, *International Law* (Cambridge University Press, 7th edn, 2014) 1−2, James Crawford (ed), *Brownlie's Principles of Public International Law* (Oxford

Court of International Justice (PCIJ) has famously held that a state's 'title to exercise jurisdiction rests in its sovereignty',[37] there is no uniform understanding of the definition of the term *jurisdiction.* As observed by Lubell, the use of the term *jurisdiction* varies, with most discussions of the concept occurring in the context of criminal jurisdiction,[38] where the concern is for the competence to create and enforce laws. Despite the lack of a generally accepted definition, the concept of jurisdiction is primarily considered to be territorial[39] and taking on three different forms: *prescriptive* jurisdiction, affording the state the right to create, amend, or appeal, legislation; *enforcement* jurisdiction, affording the state the power to enforce the laws through police and prosecutors, who arrest suspects and investigate crimes; and *adjudicative* jurisdiction, which entails the exercise of judicial functions, such as to hear and decide matters.[40]

Jurisdictional rights thus entail an authority to exercise jurisdiction inside its territory without any specific rule permitting it. Such powers of the state within its territory are limited only by the existence of a prohibiting rule in international law. However, as established herein,[41] states are also afforded jurisdictional powers in certain extraterritorial settings, which raises the question of the form of jurisdiction that can arise extraterritorially. Lubell observes that extraterritorial legislative authority is to a degree accepted based on *nationality* (a national abroad can be a subject of jurisdiction); *passive personality* (jurisdiction over acts in which the victim was a national); the *protective principle* (jurisdiction over acts abroad that affect state security), and jurisdiction over certain international crimes, such as war crimes.[42] This suggests that jurisdiction— in some form— exists extraterritorially.[43] It is of essence to note, however, that the forms of jurisdiction exemplified are contained in the *legislative* aspect of jurisdiction, and that *enforcement jurisdiction* is an entirely different matter, and is generally considered as prohibited in extraterritorial settings.[44] Notably, when the question of extraterritorial jurisdiction is discussed, it is rarely clear which form of jurisdiction is being addressed. Although jurisdiction outside a state's territory is disputed,[45] it can convincingly be

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University Press, 2012), 203–4, 456–86: 'a state's competence under international law to regulate the conduct of natural and juridical persons', at 456.

[37] *S.S. Lotus* (Fr. v. Turk.) (1927), PCIJ Reports, Series A, No. 10 (Sept. 7), 15.

[38] Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford Monographs in International Law, Oxford University Press 2010), 208.

[39] See *Bankovic and Others v Belgium and 16 Other States*, European Court of Human Rights (ECtHR), Grand Chamber Decision as to the admissibility of Application no. 52207/99, 12 December 2001, available on http://hudoc.echr.coe.int para 59.

[40] Cedric Ryngaert, *Jurisdiction in International Law* (Oxford Monographs in International Law, 2nd edn, Oxford University Press 2015), 9-10.

[41] See Chapter 5.3 addressing extraterritorial jurisdiction.

[42] Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford Monographs in International Law, Oxford University Press 2010), 208.

[43] ibid, 208-209.

[44] ibid, 209.

[45] See ICJ, '*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo'*, Advisory Opinion of 22 July 2010. See Judge Simma's declaration in relation to the named opinion at 478, in which Judge Simma

held that, as the first principle of the *Lotus* case dictates, states cannot exercise enforcement jurisdiction outside their territory unless there is a permissive rule in international law that allows it.[46]

The task of protecting civilians, including through the use of force, as entailed in the wording 'with all necessary means', undeniably constitutes a form of enforcement action that normally falls within the enforcement jurisdiction of states, and would, consequently, be prohibited unless a rule of international law permitted it. A Security Council resolution, mandating a peace operation under Chapter VII of the UN Charter, may be considered to constitute such permission. However, the consequences of Security Council decisions mandating peace operations are limited to *jus ad bellum*, which means that the law that regulates the implementation of the tasks authorised, and the conduct of peace operations generally, must be found in the law that applies to the specific situation *jus in bello*, or as argued here, in *jus post bellum*.

As observed herein, under IHRL, jurisdiction can arise as a result of control over territory or individuals.[47] When such jurisdiction arises, it is important to assess what form of jurisdiction that entails. As observed by Milanovic, however, the *travaux préparatoires* of the International Covenant on Civil and Political Rights (ICCPR) offers no guidance as to the meaning of the term *jurisdiction* in extraterritorial settings, nor whether it refers to control over territory, authority and control over individuals, or something else entirely.[48] It is therefore not clear what criteria need to be established for extraterritorial human rights obligations that arise as a result of extraterritorial jurisdiction, or what form of jurisdiction that entails. There can be little doubt, however, that the task to protect civilians afforded peace operations is a function that normally falls within enforcement rather than legislative jurisdiction. As a result, the notion of extraterritorial jurisdiction must be distinguished both from the notion of sovereignty and from other aspects of jurisdiction, such as legislative jurisdiction or national jurisdiction based on nationality, passive personality or the protective principle.

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voiced concerns regarding the court's interpretation of restrictions on the independence of states, and held that such independence cannot be presumed because of the consensual nature of the international legal order". Although this aspect of jurisdiction falls outside the scope of the present research, it may be of value to note that Simma argued that this strict binary approach of 'what is not prohibited is permitted' stems from an outdated, 19th century positivist approach that is excessively differential towards State consent. Simma's criticism was that in determining whether the unilateral declaration was in accordance with applicable international law, the court equated an absence of a prohibition with the existence of a permissive rule – it held that what is not prohibited is *ipso facto* permitted. Nor, according to Simma, did the court search for permissive rules – i.e. the court did not assess whether unilateral declarations of independence could be tolerated or permitted under international law in certain circumstances.

[46] See *S.S. Lotus* (Fr. v. Turk.) (1927), PCIJ Reports, Series A, No. 10 (Sept. 7), para 45. The Lotus case held that 'Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.'

[47] See further in Chapter 5.3.

[48] Marko Milanovic, *Extraterritorial application of human rights treaties: Law, Principles and Policy* (Oxford Monographs in International Law, Paperback edn, Oxford University Press 2013), 225-226.

This is essential to observe, not least due to the explicit requirement to maintain respect for the host state's sovereignty in implementing Security Council decisions in peace operations. In other words, the activities undertaken by state actors in peace operations must be clearly differentiated from the sovereign powers and interests of the contributing state. This is also confirmed by the International Law Commission (ILC), which held, in its report on the Responsibility of International Organisations, that:

> A United Nations peacekeeping force established by the Security Council or the General Assembly is a subsidiary organ of the United Nations. Members of the military personnel placed by member states under United Nations command although remaining in their national service are, for the duration of their assignment to the force, considered international personnel under the authority of the United Nations and subject to the instructions of the force commander. The functions of the force are exclusively international and **members of the force are bound to discharge their functions with the interest of the United Nations only in view**. The peacekeeping operation as a whole is subject to the executive direction and control of the Secretary-General, under the overall direction of the Security Council or the General Assembly as the case may be.[49]

Members of national forces are bound, consequently, to discharge their duties with only the interest of the United Nations in view. In other words, it is the peace operation's purpose that must guide any identification and prioritization of tasks and how they are fulfilled. Contributing states cannot, thereby, discharge their duties in a manner that is aimed at the contributing state's own national security; this underscores the importance of distinguishing between the rights of states that arise with sovereignty, and the rights and obligations arising as a result of jurisdiction.

Consequently, the sovereign rights of states, as well as their exclusive jurisdictional authority, must be considered in the determination of the purpose, nature, and scope of the mandate afforded peace operations, as well as continuously in its implementation. This is to ensure that peace operations do not violate host-state sovereignty in their execution of Security Council decisions. This places strict restrictions on the states contributing to peace operations, in that the tasks authorized must be performed in a manner that falls within the scope of the mandate, and with an aim to fulfil the purposes of the peace operation.

Sometimes, however, there is a tendency to equate, or at least connect, jurisdiction with sovereignty. On the issue of formation of an Interim Government of Iraq, the Security Council declared, in resolution 1546, that:

> (…) by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty.[50]

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[49] International Law Commisson (ILC), 'Responsibility of International Organisations: Comments and observations received from international organisations', 25 June 2004, UN doc A/CN.4/545, 27. Emphasis added.
[50] UNSC res 1546 (2004), para 10.

The Security Council thereby notably equated the multinational force with an occupying power. The preceding resolution, 1483 (2003), recognized the existence of an occupation, but did not *create* an occupation.[51] Of significance here, though, is the assumption that the occupation resulted in a (temporary) transferral of sovereignty.

Sheeran similarly argues that in relation to peace operations, sovereignty is fully or partially transposed to the UN, regional organisations or coalitions of states. He correctly observes that an armed patrol exercising the function of maintaining law and order inevitably exercises public powers that are normally associated with the powers of a state.[52] Sheeran contends, however, that the contemporary concept and context of sovereignty therefore engages with human rights obligations that are extraterritorial or non-territorial. It is thus obvious, he holds, that the relevant sovereignty is augmented and fragmented as well as somewhat unhinged from territoriality.[53] Rather than viewing human rights obligations as stemming from actual functions performed, he seems to attach such powers to peace operations through a transferral of sovereignty from the host state to the peace operation. As support for this, he contends that the power of peace operations is legal, since it derives either from a Security Council authorisation or from host state consent; as a result, he contends, the power of a peace operation should be understood as multiple or alternative sovereigns, *de facto* sovereigns, or primary and secondary sovereigns.[54] Sheeran thereby seems to assume – mistakenly, in this author's opinion – that the *jus ad bellum* legality of performing functions that normally fall within the sovereignty of states results in a transferral of sovereignty. He also notes that conventional conceptions of sovereignty struggle to account for international peace operations, and that even in cases of augmented or competing power, the sovereign is not traditionally understood as capable of fragmentation. He notes, as an example, that sovereignty limits the rights and duties of an occupying power under IHL.[55]

What the example of the law of occupation highlights, however, is the fact that regardless of the capability of the sovereign, sovereign rights remain. As observed by Milanovic, Article 43 of the Hague Convention (applicable to situations of occupation) is designed precisely to prevent occupiers from modifying the laws of the occupied territory.[56] As similarly observed in an expert meeting on the law of occupation, an occupation does not imply a transfer of sovereign title, but results in a

[51] Adam Roberts. 'The end of Occupation: Iraq 2004' (2005) 54(1) International and Comparative Law Quarterly 27, 32.
[52] Scott Sheeran, 'Human Rights and Derogation in Peacekeeping: Addressing a Legal Vacuum Within the State of Exception' in Evan J. Criddle (ed)*, Human Rights in Emergencies* (ASIL Studies in International Legal Theory, Paperback edn, Cambridge University Press 2017) 205, 220.
[53] ibid, 220.
[54] ibid, 221.
[55] ibid, 221.
[56] Marko Milanovic, *Extraterritorial application of human rights treaties: Law, Principles and Policy* (Oxford Monographs in International Law, Paperback edition, Oxford University Press 2013), 225.

temporary transfer of authority and acts of governance, such as the maintenance of law and order.[57] Thereby, loss of capability on the part of the host state to exercise control over territory or sovereign powers does not result in a delegated form of sovereignty onto an occupying power.[58] The argument that sovereignty is fully or partially transposed to the UN is consequently highly questionable.

Milanovic offers a remedy to the issue by detaching *title* from *jurisdiction*. He argues that when a state exercises physical control over territory outside its borders, mere lack of sovereignty is not an excuse for denying the applicability of a human rights treaty. In particular, according to Milanovic, this is so because treaties do not refer to title, but to jurisdiction over territory.[59] Under such an understanding, a distinction between jurisdiction and sovereignty can be envisioned, in particular in extraterritorial settings.

A separation between jurisdiction and sovereignty suggests that a peace operation, even when performing functions of governmental character under Chapter VII, does not subsume the sovereign authority of the host state. Further, the distinction between *jus in bello* and *jus ad bellum* in international law dictates that the *jus ad bellum* legality of a peace operation is not related to the notion of sovereignty. Under the notion and recognition of *popular sovereignty*,[60] in which sovereign powers attach to the population rather than to the government of a state, the existence of a capable and willing government is not a prerequisite for the existence of sovereign rights.

Therefore, in distinguishing between sovereign powers and jurisdiction obtained through control or authority in extraterritorial settings; and between legislative and enforcement jurisdiction, the better view, it is submitted here, is that the powers authorised to peace operations result in neither sovereign authority nor legislative jurisdiction. Rather, it contains an authority to exercise *enforcement powers* temporarily and within the limitations stipulated in the Security Council resolution, and as a result, to the extent the peace operation exercises sufficient control or authority, or impacts individuals through its actions,[61] it also places human rights obligations onto states contributing to peace operations.[62]

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[57] Tristan Ferraro, *Expert meeting: Occupation and other forms of administration of foreign territory* (International Committee of the Red Cross , 2012), 116.
[58] See further in Chapter 10.
[59] Marko Milanovic, *Extraterritorial application of human rights treaties: Law, Principles and Policy* (Oxford Monographs in International Law, Paperback edn, Oxford University Press 2013), 60.
[60] It is beyond the limitations of this research to address the concept of sovereignty and popular sovereignty in full. It suffices to note here that popular sovereignty is commonly associated with democratic statehood. For an account of democracy and popular sovereignty, see for example Robert Post, 'Democracy, Popular Sovereignty and Judicial Review' (1998) 86(3) California Law Review.
[61] See further in Chapter 5.4 herein addressing an emerging approach to extraterritorial human rights obligations.
[62] See furher on the application and applicability of IHRL to peace operations in Chapter 3.3.

2.2. The UN Charter, peace operations and international law

Another foundational aspect of the law of peace operations is the UN Charter. Although there is no reference to peace operations in the Charter, peace operations authorized under Chapter VII are generally considered to fall within the ambit of Article 42 of the Charter.

Notably, both the UN and peace operations are obligated to act in accordance with the Charter. Legally speaking, the UN Charter is a treaty. It is generally accepted that the rules on interpretation of treaties as reflected in the Vienna Convention on Law of Treaties (VCLT) apply to the Charter. Of particular value to this research is the observation that Article 31 of VCLT stresses the importance of the textual environment by suggesting a wide understanding of the term 'context',[63] which is taken to include the entire text, including its preamble and annexes, and thus, informs the interpreter of the object and purpose of the treaty.[64] This understanding is further reflected in the work of the ICJ and in relation to constituent treaties. The Court has adopted a rule of interpretation that refers to the text as a whole, including the context and objectives. In its *Advisory Opinion on the Use of Nuclear Weapons in Armed Conflict*, the ICJ observed:

> (…) [F]rom a formal standpoint, the constituent instruments of international organisations are multilateral treaties, to which the well-established rules of treaty interpretation apply. But they are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, inter alia, to their character which is conventional and at the same time institutional; the very nature of the organisation created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties.[65]

The ICJ has thus moved towards a preference for textual over original intent approach for interpretation.[66] In interpreting the Charter, it is important to consider the Charter in its entirety, as well as the aims and purposes sought through it. Accordingly, it can be convincingly held that the Charter is to be interpreted so as to enable the UN to reach its objects and purposes.[67]

A central starting point for identifying the legal foundations and law of peace operations is the prohibition of interference in the domestic affairs of states articulated in article 2(4) and 2(7) of the Charter. Article 2(4) holds that:

> All Members shall refrain in their international relations from the threat or use of force against the

[63] Vienna Convention of the Law of Treaties (VCLT), article 31.
[64] Stefan Kadelbach, 'Interpretations of the Charter' in Bruno Simma and others (ed), *The Charter of the United Nations: A Commentary* (Oxford Commentaries on International Law, Vol 1, Oxford University Press 2012) 71, para 11.
[65] *Legality of the use by a state of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, para 19.
[66] See also Stefan Kadelbach, 'Interpretations of the Charter' in Bruno Simma and others (ed), *The Charter of the United Nations: A Commentary* (Oxford Commentaries on International Law, Vol 1, Oxford University Press 2012) 71, para 11.
[67] ibid, 33.

> territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.[68]

Article 2(7) of the UN Charter further dictates a limitation on that prohibition. It holds:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; *but this principle shall not prejudice the application of enforcement measures under Chapter VII.*[69]

Intervention in matters that are 'essentially within the domestic jurisdiction of any state' is consequently not prohibited if conducted as an enforcement measure under Chapter VII. Thereby, mandates adopted under Chapter VII of the UN Charter, while constituting a legal intervention in a sovereign state pursuant a Security Council decision, do not legally require consent from the host state. However, as will be noted here in Chapter 2.3 below, there are important limitations both to the authority of the Security Council and to such enforcement measures.

2.3. Scope and limitation of the Security Council's authority

The Security Council, a principal organ of the United Nations, is a political organ with limited competence.[70] Article 24 of the UN Charter identifies the power and responsibility of the Security Council. It holds that:

> In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf (...) In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.[71]

The authorisation afforded the Security Council means that member states have given up part of their sovereign rights and transferred that right to the Security Council. The mandate of the Security Council, however, is neither comprehensive nor of a legal nature. Its powers are limited to the maintenance of international peace and security,[72] and it is important to note, as Lowe *et al* do, that the powers of the Security Council derive from the Charter: not from member states.[73]

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[68] UN Charter, article 2(4).
[69] UN Charter, article 2(7). Emphasis added.
[70] Michael C. Wood. 'The Interpretation of Security Council Resolutions', (1998) Max Planck Yearbook of United Nations Law 73, 77. See also *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, (1949), ICJ Reports 174, 179
[71] UN Charter, article 24.
[72] Stefan Kadelbach, 'Interpretations of the Charter' in Bruno Simma and others (ed)*, The Charter of the United Nations: A Commentary* (Oxford Commentaries on International Law, Vol 1, Oxford University Press 2012) 71, para 56.
[73] Vaughan Lowe and others (ed), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (Oxford University Press 2008), 35.

With few exceptions, its power is limited to functions relating to the maintenance of international peace and security, which the members of the UN have conferred upon it as its primary responsibility. Within this limited field, however, the members have granted broad powers to the Security Council.[74] Its authority is detailed in Article 39 of the UN Charter, which holds that:

> 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 in accordance with Articles 41 and 42, to maintain or restore international peace and security.[75]

The peaceful means available to the Security Council to fulfil its role, such as diplomacy, sanctions and instructions to states involved in disputes, are articulated in Chapter VI of the Charter. The Security Council has also been endowed with authority to decide on coercive measures in order to maintain or restore international peace and security. Such enforcement powers are specified in Chapter VII of the Charter. Article 41 of the UN Charter details that:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.[76]

Provided that the Security Council considers that measures not involving the use of armed force articulated in Article 41 would be inadequate, Article 42 of the UN Charter authorizes the Security Council to take:

> (…) such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.[77]

Although, as noted, there is no reference to peace operations in the UN Charter, it has become generally accepted that the authorization of a peace operation under Chapter VII of the Charter falls within the ambit of Article 42 as ‘operations by air, sea, or land forces’.

When mandated under Chapter VII of the UN Charter, thus, peace operations are launched in response to a situation that the Security Council, as per its role and authority articulated in Article 39, has determined constitutes a threat to international peace and security. The ability of the Security Council to take action to maintain or restore international peace and security was not made dependent on state acceptance. The mandate afforded the Security Council to decide on enforcement measures

[74] Michael C. Wood. 'The Interpretation of Security Council Resolutions' (1998) Max Planck Yearbook of United Nations Law 73, 77.
[75] UN Charter, article 39.
[76] ibid, article 41.
[77] ibid, article 42.

under Chapter VII of the UN Charter, which legally speaking does not require consent by the state in question, would normally constitute an infringement on the sovereign rights of a state. Such authority is, importantly, afforded only to the UN Security Council, and it is of essence to note that the authority is predicated on the existence of a threat to international peace and security. One fundamental limitation on the powers of the Security Council is consequently that any action must be deemed justified as being for the purpose of maintaining international peace and security.[78]

The notion of *threat to international peace and security* was traditionally interpreted as a state-centred concept, focusing on inter-state conflicts. This understanding originated from the principle of non-interference in domestic affairs of sovereign states specified in Article 2(4) of the Charter.[79] Importantly, however, there are no limits to the authority provided for in Article 39 of the Charter. Proposals to define the term *threats to international peace and security* during the drafting of the Charter were defeated,[80] and consequently the Council was and is authorised to determine when a situation that amounts to a threat to international peace and security has arisen. It is authorised to determine that a threat internal to a specific state, as well as general threats, such as terrorism, constitute threats to international peace and security.[81]

The Security Council has also slowly modified its perspective on its powers, and a new interpretation of 'threat to the peace' has evolved.[82] During the Cold War, human rights abuses were only occasionally dealt with by the Council, whereas today, threats to or violations of human rights frequently result in its taking action, as well as invocation of Chapter VII powers. Atrocities and violations of IHRL have increasingly been considered to constitute threats to international peace and security,[83] which reflects a recognition of the potential destabilizing effects of such scenarios on neighbouring states. As a result, humanitarian reasons may suffice today for determining the existence of a threat to international peace and security.[84] Furthermore, organised crime has more frequently

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[78] Michael Bothe, 'Human rights law and international humanitarian law as limits for Security Council action' in Robert Kolb and Gloria Gaggioli (eds), *Research handbook on Human Rights and Humanitarian law* (Research Handbooks in International Law, Edward Elgar Publishing 2013) 371, 377.
[79] Scott Sheeran and Catherine Kent, 'Protection of Civilians, Responsibility to Protect, and Humanitarian Intervention: Conceptual and Normative Interaction' in Haidi Willmot and others (ed), *Protection of Civilians* (Oxford University Press 2016), 34.
[80] Vaughan Lowe and others (ed), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (Oxford University Press 2008), 35.
[81] ibid.
[82] Stefan Kadelbach, 'Interpretations of the Charter' in Bruno Simma and others (ed), *The Charter of the United Nations: A Commentary* (Oxford Commentaries on International Law, Vol 1, Oxford University Press 2012) 71, para 58. For analysis of the Security Council's interpretation of the concept of 'threat to the peace' see Inger Österdahl, *Threat to the Peace: The Interpretation by the Security Council of Article 39 of the UN Charter* (Coronet Books Inc. 1998).
[83] Scott Sheeran and Catherine Kent, 'Protection of Civilians, Responsibility to Protect, and Humanitarian Intervention: Conceptual and Normative Interaction' in Haidi Willmot and others (ed), *Protection of Civilians* (Oxford University Press 2016), 34.
[84] Stefan Kadelbach, 'Interpretations of the Charter' in Bruno Simma and others (ed), *The Charter of the United Nations: A Commentary* (Oxford Commentaries on International Law, Vol 1, Oxford University Press 2012) 71, para 58.

been recognised as a threat to international peace and security, and thus as a challenge facing UN peace operations.[85] Thereby, particularly after the end of the Cold War, the understanding of which threats can fall within the ambit of the notion of *international peace and security* has been expanded.

Of importance to note here is that 'a threat to international peace and security' is not to be equated to an armed conflict. The enforcement powers of the Security Council are not limited to responding to situations that amount to armed conflicts.[86] The legal contexts of contemporary peace operations, rather, are complex, and may entail both situations that legally amount to armed conflicts, and situations that fall outside such a definition. Furthermore, as per recent mandates that authorise peace operations to engage in robust, proactive measures aimed at eliminating armed groups,[87] the functions that peace operations engage in may be of such nature that they constitute participation in an armed conflict, to which the legal framework of IHL consequently applies, and which further complicates the legal landscapes of contemporary peace operations. However, irrespective of tasks, engagements cannot by default be equated to engagement in an armed conflict even if the situation that resulted in the launch of a peace operation amounts to one.

It is of particular importance to observe that the authorisation of enforcement measures under Chapter VII has *jus ad bellum* consequences only.[88] The exception from the non-intervention principle in authorising measures under Chapter VII therefore does not suggest that the implementation of enforcement measures in the field is not regulated by law. In conducting its operations, on the contrary, peace operations must abide by relevant law, and continuously limit their operations to the *jus ad bellum* authority provided by the Security Council, and thus balance the sovereignty of the host state with the mandate afforded.

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[85] Arthur Boutellis and Stephanie Tiélès, 'Peace Operations and Organised Crime: Still Foggy?' in Cedric de Conig and Mateja Peter (eds), *United Nations Peace Operations in a Changing Global Order* (Palgrave MacMillan 2018) 168, 171.
[86] There seems to be some confusion in regard to the legal effects of the terms 'enforcement action', and 'enforcement operations', in analyses of peace operations. It suffices to note here that Chapter VII of the UN Charter authorises the Security Council to act in response to threats to international peace and security irrespective of the consent of the territorial state on whose territory the operation is taking place. Therefore, the term *enforcement* relates to the lack of legal requirement to obtain consent from the host state, and thus, neither the Chapter VII authorisation nor the term *enforcement* are determinative of the law that applies to, and regulates, the operation.
[87] Such as in UNSC res 2098 (2013), authorising the Intervention Brigade in MONUSCO to engage in activities aimed at eliminating armed groups through proactive robust action.
[88] Marco Sassòli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (online edn, Oxford Scholarship Online 2011), 5.

3. Applicability of law to peace operations

The UN is a subject of international law, and as such, holds rights and obligations under international law.[89] As subsidiary organs of the UN, peace operations are bound to the same extent as the organisation. Law can consequently be applicable to peace operations either as a result of legal obligations of the states contributing to peace operations, or through the legal obligations of the organisation itself. International organisations, such as the UN, are not states and therefore cannot become parties to treaties restricted to state parties. However, international organisations may be bound by IHL and IHRL because their internal law says so, or because customary law binds both states and international organisations.[90]

This Chapter shows that the UN, including the Security Council, is not unbound by law, and that peace operations, as subsidiary organs, are equally bound by applicable law. This Chapter also reveals that Security Council decisions mandating peace operations have *jus ad bellum* consequences only, and as a result, such decisions have no impact on the determination of law applicable to the conduct of peace operations. IHL is applicable to peace operations to the extent they engage as parties in an armed conflict. IHRL, further, is applicable to peace operations either as general principles of law or customary law, through the inclusion of IHRL in the UN Charter, or through requirements entailed in Security Council resolutions. In addition, as revealed in Chapter 5, IHRL can be applicable to contributing states through extraterritorial obligations arising as a result of extraterritorial jurisdiction or activities that impact individuals.

3.1. The Security Council and law

As observed by Whittle, the Security Council is in many ways a unique institution in that it exercises legislative, judicial and executive powers, and operates with few legally binding checks and balances. As a result, the Security Council has been held to be 'unbound by law'.[91] Such a lack of restrictions, however, is contested by most. In the *Namibia* Advisory Opinion, the ICJ clearly affirmed that the Security Council powers are 'bound by the standards of the Charter',[92] and the International Criminal Tribunal for the former Yugoslavia (ICTY) has similarly confirmed that the Security Council is

[89] *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, (1949), ICJ Reports 174, 179.
[90] Marco Sassòli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (online edn, Oxford Scholarship Online 2011), 60.
[91] Devon Whittle. 'The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action' (2015) 26(3) The European Journal of International Law , 671.
[92] *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, ICJ Reports 1971, 16 et seq. See also Alexander Orakhelashvili. 'The Acts of the Security Council: Meaning and Standards of Review' (2007) 11 Max Planck Yearbook of United Nations Law 143, 144.

subjected to 'certain constitutional limitations, however broad its powers', that the powers 'cannot go beyond the limits of the jurisdiction of the Organisation', and that 'neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law)'.[93]

Wood has also importantly observed that although the Council has some attributes of a legislature, it would be misleading to hold that it can act as such. Rather, according to Wood, the Council imposes obligations on states in connection with particular situations or disputes.[94] He convincingly argues that the Security Council may impose obligations, which under Article 103 of the Charter may prevail over other treaty obligations, it may reaffirm and apply existing rules, and it may depart from, or override them in particular cases. It does not, however, have the power to lay down new rules of general application. Wood concludes that the Security Council is not a judicial organ. Nor does it exercise quasi-judicial functions in any real sense. However, like the General Assembly, it does have the power, in certain circumstances and in connection to specific situations, to establish judicial or quasi-judicial organs such as the International Criminal Tribunal for Rwanda (ICTR) and the ICTY. [95]

Many commentators also note the limitations on the powers of the Security Council. Lamb, for example, notes that even though the Security Council may enjoy a high degree of political discretion, in particular concerning its Chapter VII powers, its powers are not unlimited.[96] Brownlie, referring to Bowett, similarly notes that since the Council is bound by the purposes and principles of the organisation, it cannot act arbitrarily nor unfettered by any restraints.[97]

Article 2(4) of the UN Charter obliges the Council to act 'in accordance with the Purposes and Principles of the United Nations'. An obligation to act in accordance with international law is not explicitly set out in the Charter,[98] which raises the question of the meaning and content of the 'purposes and principles' of the Charter.[99] The extensive reference to human rights in the Charter results in the conclusion that the most reasonable position is that the purposes and principles must be

[93] *Prosecutor v. Dusko Tadić aka 'Dule'* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995, para 28.
[94] Michael C. Wood. 'The Interpretation of Security Council Resolutions' (1998) Max Planck Yearbook of United Nations Law 73, 78.
[95] ibid.
[96] Susan Lamb, 'Legal Limits to the United Nations Security Council Powers' in Guy Goodwin-Gill and Stefan Talmon (eds), *The reality of International Law* (Oxford University Press 1999), 365.
[97] Ian Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (The Hague Academy of International Law, Martinus Nijhoff Publishers 2012), 218. See also D. Bowett, *The law of international institutions* (4th edn, University of Cambridge. Published under the auspices of The London Institute of World Affairs 1982).
[98] Vaughan Lowe and others (ed), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (Oxford University Press 2008), 35-36.
[99] See further in Chapter 3.3.2 on the purposes and principles.

held to be founded on IHRL and the rule of law, and that an obligation to abide by law necessarily follows.

Furthermore, there are implied limitations on the power of the Security Council that derive from a systemic interpretation of the Charter. As noted, the Charter is to be interpreted as a whole. This means, for example, that the purposes and principles of the organisation, articulated in Article 1, must be taken into account in interpreting the respective articles.[100] As a result, the organs of the organisation, including the Security Council, cannot be understood as having powers that permit it to violate the principles it was created to protect.[101] Consequently, as also submitted by Lamb, neither the text nor the spirit of the UN Charter conceives the UN Security Council as unbound by law.[102]

De Wet similarly suggests that the omission to include the terms justice and international law in relation to coercive measures should be understood as a mechanism for enabling the Security Council to deviate from international law when acting in the interest of international peace and security, but that it was not meant to free the Security Council from the obligation to respect international law when adopting enforcement measures under Chapter VII.[103] De Wet thereby incorporates an important distinction between *jus ad bellum* and *jus in bello* in her argumentation. Under such an understanding, the Security Council is authorised to deviate from international law in the resort to force, but not in how it conducts itself in maintaining international peace and security in field realities.[104]

The distinction between *jus ad bellum* and *jus in bello* is rarely addressed in relation to the regulation of peace operations, but is nonetheless important to observe, in particular in relation to peace operations authorized under Chapter VII. As already noted, Security Council resolutions have *jus ad bellum* effects only in that they authorize specific acts in order to restore or maintain international peace and security. They have no bearing, however, on the law that applies to the conduct of peace operations in the execution of their mandated tasks.

Further emphasizing the importance of distinguishing between *jus ad bellum* and *jus in bello* authority is the fact that as the powers of the Security Council increase with the expanding notion of international peace and security, so do calls for the Security Council to ensure adherence to

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[100] See also Michael Bothe, 'Human rights law and international humanitarian law as limits for Security Council action' in Robert Kolb and Gloria Gaggioli (eds), *Research handbook on Human Rights and Humanitarian law* (Research Handbooks in International Law, Edward Elgar Publishing 2013) 371, 372.
[101] ibid, 373.
[102] Susan Lamb, 'Legal Limits to the United Nations Security Council Powers' in Guy Goodwin-Gill and Stefan Talmon (eds), *The reality of International Law* (Oxford University Press 1999), 366.
[103] Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Studies in International Law, Hart Publishing 2004), 187.
[104] Dinstein seemingly makes a similar distinction between the *jus ad bellum* and *jus in bello* authority of the Security Council when he argues that neither state sovereignty nor the principle of non-intervention limits the power of the Security Council. See Yoram Dinstein, *War, Aggression and Self-defence* (Fourth edn, Cambridge University Press 2009b), 89.

international law in its actions.[105] Having established that the Security Council is not unbound by law, the next necessary step in identifying the legal requirements of peace operations is to undertake an interpretation and legal characterization of Security Council resolutions that mandate peace operations.

3.2. The legal character of Security Council resolutions

A Security Council resolution adopted in the exercise of the Council's responsibilities is in itself neither a treaty nor legislation. It may, however, constitute a legally-binding authority to do what would otherwise be illegal in international law.[106] Put differently, a peace operation mandated under Chapter VII of the UN Charter may contain tasks that would violate the host state's sovereign rights unless the tasks had been authorised by the Security Council. Identifying the legal scope, limitations, and parameters of Security Council resolutions, and the rights and obligations that follow such authorisation, is thus essential to ensure that the peace operation does not go beyond its authority in the implementation of its tasks.

The existence of legal constraints on the Security Council dictates, as Wood concludes, that Security Council resolutions are not legislation. Neither are they judgments, and many are not intended to have legal effects.[107] Security Council resolutions may broadly be divided between those that take the form of recommendations, and those that impose obligations on member states or authorise action that would otherwise be unlawful.[108] Resolutions authorising peace operations under Chapter VII fall within the latter category, since such interventions on sovereign territory would, without authorisation from the Security Council, be unlawful.

Orakhelashvili holds that the only authoritative source for interpretation of Security Council resolutions lies in the 1969 VCLT which has consolidated a distinction between the general rule of interpretation (embodied in Article 31 of VCLT) and supplementary methods of interpretation (embodied in Article 32).[109] However, interpreting Security Council resolutions differs from interpretation of ordinary treaties. In assigning meaning to resolutions, interpretations must first, as observed by Wood, consider both the political background of the issue at hand, and the related Council action. Second, interpretations must consider and understand the Security Council's role

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[105] Elena Katselli. 'Holding the Security Council Accountable for Human Rights Violations' (2007) 1 Human Rights & International Legal Discourse 301, 301.
[106] See *Abdi Ali Hameed Al-Waheed (appellant) v Ministry of Defence* (Respondent) and Serdar Mohammed (Respondent) v Ministry of Defence (Appellant) Judgment 17 January 2017, UKSC 2, para 25.
[107] Michael C. Wood. 'The Interpretation of Security Council Resolutions' (1998) Max Planck Yearbook of United Nations Law 73, 79.
[108] ibid, 79.
[109] Alexander Orakhelashvili. 'The Acts of the Security Council: Meaning and Standards of Review' (2007) 11 Max Planck Yearbook of United Nations Law 143, 151.

under the Charter of the United Nations, its working methods, and the way its resolutions are drafted.[110] The principal judicial authority on the interpretation of Security Council resolutions is found in the ICJ *Namibia* case from 1971. The Advisory Opinion in Namibia held that:

> The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effects. In view of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussion leading to it, the Charter provisions invoked, and in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.[111]

The Court was not dealing with interpretation in general terms, but specifically addressed the question of the binding effects of Security Council resolutions. In emphasising the necessity of regard for the terms of the resolution, and the discussion leading up to it, the Court seemed to emphasise a teleological approach to interpreting resolutions.

As Orakhelashvili observes, there are political aspects of interpreting the powers of the Security Council, but the interpretation of a treaty, such as the UN Charter, is an inherently legal exercise.[112] In the view of Orakhelashvili, regardless of whether the VCLT applies formally, or by analogy, to Security Council resolutions,[113] its principles of interpretation apply.[114] Interpretation of Security Council resolutions must vary, however, according to the nature of the specific resolution. As noted by Wood, the great majority of resolutions deal with a particular situation or dispute, and in these cases it is necessary to have a full knowledge of the political background and the involvement of the entire Council in order to interpret its resolutions.[115]

It is also necessary to have some understanding of how resolutions are drafted. Wood observes that with few exceptions, there is no input from the UN Secretariat, including its Office of the Legal Counsel.[116] Further, there is no standard procedure for drafting resolutions. In particular, there is no institutional mechanism to ensure that resolutions are well drafted. Legal input, as further observed by Wood, must usually come from delegations.[117]

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[110] Michael C. Wood. 'The Interpretation of Security Council Resolutions' (1998) Max Planck Yearbook of United Nations Law 73, 74.
[111] Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion of 21 June 1971, ICJ Reports 1971, 53.
[112] Alexander Orakhelashvili. 'The Acts of the Security Council: Meaning and Standards of Review' (2007) 11 Max Planck Yearbook of United Nations Law 143, 156.
[113] ibid. Orakhelashvili refers to T. Franck, Recourse to Force, 2001, and the review on it in ICLQ 52 (2003), 827-829.
[114] Alexander Orakhelashvili. 'The Acts of the Security Council: Meaning and Standards of Review' (2007) 11 Max Planck Yearbook of United Nations Law 143, 157.
[115] Michael C. Wood. 'The Interpretation of Security Council Resolutions' (1998) Max Planck Yearbook of United Nations Law 73, 79.
[116] ibid, 80.
[117] ibid.

Wood, writing in 1998, identified five stages of drafting a resolution that are equally valid today. First, one delegation often takes the initiative to drafting a specific resolution. This delegation usually prepares a first draft and maintains control over the draft throughout the stages. The draft is then discussed as an unofficial text, often in informal settings such as working groups such as 'Friends of Georgia' or 'Friends of UN police'. The next step is the sharing of the text with other members of the Security Council. After preliminary discussions, member states seek instructions from their respective capitals. The fourth step is a detailed paragraph-by-paragraph discussion by all Council members, resulting in a series of new drafts. Finally, the draft is circulated as an official Council document, first 'in blue' (nearly final form) or by the President of the Council. The text may be amended again before the adoption at a formal Council meeting.[118]

As is revealed by the description of this process, most of the preparatory work and the negotiating history leading up to the adoption of a resolution is informal and not available to the public. Indeed, much of the discussions may be privy to only a few of the Council members. Legal input, as further observed by Wood, is often haphazard despite the need for legal input at each stage of the drafting process.[119] If Sweden's participation in the Security Council as a non-permanent member (2017-2018) is any indication of standard procedures for the inclusion of legal perspectives in the drafting process, the inclusion of legal expertise is often decided upon by non-legal experts, resulting in the incorporation of legal advice in a highly *ad hoc* manner and to an often insufficient extent.[120]

As noted by Wood, this drafting process has implications for the interpretation of Security Council resolutions. Resolutions cannot be interpreted as if they were domestic legislation, or even in the same way as treaties. Unlike treaties, most paragraphs in resolutions are not intended to create rights and obligations binding on states.[121] The requirements on legislation to be consistent, concise, precise, and unambiguous are not mirrored in Security Council resolutions, which are often vague, long-winded, and ambiguous. As observed, they are also often drafted by non-lawyers, in haste and under considerable political pressure, with a view to securing the unanimity of the Council, which often leads to deliberate ambiguity and presumably harmless superfluous material. The standard practice often used when the Council intends to create mandatory provisions is to include the wording, 'acting

[118] Michael C. Wood. 'The Interpretation of Security Council Resolutions' (1998) Max Planck Yearbook of United Nations Law 73, 81. Having taken part in drafting processes of Security Council resolutions as an employee of the Swedish Ministry of Justice during Sweden's non-permanent membership of the Security Council 2017-2018, the present author can confirm this description of the drafting process as still valid today.
[119] Michael C. Wood. 'The Interpretation of Security Council Resolutions' (1998) Max Planck Yearbook of United Nations Law 73, 81.
[120] Personal experience working at the Swedish Ministry of Justice during the period Sweden was a non-permanent member of the UN Security Council (2017-2018).
[121] Michael C. Wood. 'The Interpretation of Security Council Resolutions' (1998) Max Planck Yearbook of United Nations Law 73, 81.

under Chapter VII of the UN Charter', and use the word 'decides' for each mandatory paragraph. This practice, however, is neither commonly known, nor consistently applied.[122]

Furthermore, the Preamble may offer some guidance as to the object and purpose of the resolution. However, there is often no conscious effort to ensure that the object and purpose of each operative paragraph is reflected in the Preamble, and it is sometime used as a dumping ground for proposals or statements that are not acceptable in the operative paragraphs. In addition, resolutions are not self-contained, but rather part of a series that can only be understood as a whole.[123] This was noted in the *Namibia* case, in which the Court held that the resolutions relating to the case had 'combined and cumulative effects'.[124]

Consequently, interpreting Security Council resolutions requires, much like the interpretation of the Charter, a comprehensive approach that takes into account various instruments describing the issue addressed in the resolution, as well as the drafting process and the evolution of both the issue and the negotiations. The challenge reflected in the lack of preparatory documentation must also be considered. Placed into the context of peace operations, it can be deduced that the specific contextual reality of the conflict addressed needs to guide the interpretation of the mandate of a peace operation. Thereby, the existence of an armed conflict in the mission area, together with the specific mandate to use all necessary means for the protection of civilians, may feed into the determination of the applicability of IHL to protection engagements. Further, the purposes and principles of the UN Charter guide the aim to be sought through the peace operation, which determines the object and purpose of the resolution.

3.3. Applicability of international human rights law to peace operations

Protection of human rights forms one of the major aims and purposes of the United Nations,[125] and, as a result, is at the very core of the organisation in its entirety and in particular through its primary executive means: peace operations. Peace operations, as observed above, are to embark on their tasks with the aim of the Charter in mind. Consequently, protecting human rights, and abiding by IHRL in doing so, is central to fulfilling the tasks authorized. The Security Council also attaches vital importance to promoting justice and the rule of law, including respect for human rights, as an

[122] Michael C. Wood. 'The Interpretation of Security Council Resolutions' (1998) Max Planck Yearbook of United Nations Law 73, 82.
[123] ibid, 86-87.
[124] *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, Advisory Opinion of 21 June 1971, ICJ Reports 1971, 51.
[125] Chaloka Beyani, 'The Legal Premises for the International Protection of Human Rights' in Guy Goodwin-Gill and Stefan Talmon (eds), *The Reality of INternational Law* (Oxford University Press 1999) 21, 24.

indispensable element for lasting peace'.[126] Such an understanding underscores the centrality of IHRL in protection engagements generally, and in relation to the use of force for protection purposes specifically.

Human rights also constitute an established and central part of peace operations policies. The UN policy on *Human Rights in Peace Operations and Political Missions*, for example, observes that the protection and promotion of human rights are essential to achieve and maintain peace, and that – with due regard to the specific mandate of each operation – due attention to their human rights aspects is instrumental to the success of the operations.[127] Even in the absence of human rights provisions in mandates, it is declared, 'international human rights law is paramount and obligations stemming from it shall be an integral part of the normative framework governing UN peace operations and political missions.'[128]

The importance of adhering to human rights law in the implementation of Security Council resolutions and by peace operations has also been widely recognized in general instruments. Secretary General Kofi Annan, in his report *In Larger Freedom*, noted that:

> Since the rule of law is an essential element of lasting peace, United Nations peacekeepers and peacebuilders have a solemn responsibility to respect the law themselves, and especially to respect the rights of the people whom it is their mission to help.[129]

Annan also made a direct connection between protection of human rights, and peace and security by holding the protection of human rights as a prerequisite for effective efforts to enable peace and security. Kofi Annan held that:

> Human rights are as fundamental to the poor as to the rich, and their protection is as important to the security and prosperity of the developed world as it is to that of the developing world. **It would be a mistake to treat human rights as though there were a trade-off to be made between human rights and such goals as security or development**. We only weaken our hand in fighting the horrors of extreme poverty or terrorism if, in our efforts to do so, we deny the very human rights that these scourges take away from citizens. **Strategies based on the protection of human rights are vital for both our moral standing and the practical effectiveness of our actions**.[130]

To paraphrase Annan's words, there are no short-term benefits from acting outside applicable law, since the long-term goals would be undermined in the process. Attention to law, thus, is not only required to ensure legality in conduct. It is also central to ensuring effective contributions towards

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[126] UN Security Council (UNSC), Statement by the President of the Security Council, S/PRST/2006/28, 22 June 2006, 1.
[127] United Nations Office of the High Commissioner of Human Rights, 'Human Rights in United Nations Peace Operations and Political Missions' in Department of Peacekeeping Operations, Department of Political Affairs and Department of Field Support (eds), Ref. 2011.20 (2011), para 5.
[128] ibid, para 12-13, 6.
[129] UN Secretary General, 'In Larger Freedom: Towards Development, Security and Human Rights for All', A/59/2005, 2005), para 113.
[130] ibid, para 140. Emphasis added.

sustainable peace. This was echoed in a presidential statement, in which the President of the Security Council reaffirmed the organisation's commitment to international law. The presidential statement also reflected a perception of causation between adherence to international law and peace, and identified a role of international law for both the Security Council and international peace and security by stating:

> The Security Council reaffirms its commitment to the Charter of the United Nations and international law, which are indispensable foundations of a more peaceful, prosperous and just world. The Council underscores its conviction that international law plays a critical role in fostering stability and order in international relations and in providing a framework for cooperation among States in addressing common challenges, thus contributing to the maintenance of international peace and security.[131]

Much like the report, *In Larger Freedom*, the presidential statement seems to offer an account of international law as a peacemaker. As a result of the extensive inclusion of references to human rights in UN instruments, there can be no doubt that, as a matter of policy, protection of human rights, and thus IHRL, is a fundamental premise of peace operations. Determining applicability of IHRL as a matter of *law*, however, is a more complex exercise.

Also, adherence to IHRL in peace operations is not a given. Verdirame, for example, suggests that the UN has at times violated human rights in the course of its operations.[132] An analysis of the UN guidance instruments on the use of force for protection of civilians in UN peace operations conducted for this research similarly concludes that IHRL has been insufficiently incorporated into UN guidance and policy instruments. Guidance on protection and the use of force is rather largely construed on the foundations, logic, rhetoric and aim entailed in IHL.[133] As a result, the risks are apparent that the UN,

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[131] UNSC, Presidential statement, 'Strengthening international law: rule of law and maintenance of international peace and security', S/PRST/2006/28 (2006).

[132] Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians*, Cambridge University Press (2011), 35.

[133] For reasons of limitation, a thorough analysis of the guidance instruments on protection has been excluded here. Analysis of the guidelines and policies on the protection of civilians reveal that law is insufficiently incoporated into guidance on protection. Furthermore, the UN has adopted an actor oriended approach to guiding peace operations in the task to protect, and fail to relate the role of the respective actors to the roles of other actors in the protection of civilians. Moreover, guidance directed at military actors has a point of departure, logic, reasoning, and aims that reflect those of the IHL framework, whereas reference to, and parameters of, the IHRL framework are largely limited to the policies and guidelines directed at police actors. Guidance instruments also lack reflection of the distinct nature of protection afforded in traditional military contexts and through (democratic) policing. These shortfalls, importantly, constitute serious flaws that ultimately risk undermining, rather than supporting, effective protection of civilians in the field. See United Nations Department for Peacekeeping Operations/ Department for Field Support, 'Protection of Civilians: Implementing Guidelines for Military Components of United Nations Peacekeeping Missions' (Approved by Hervé Ladsous, USG DPKO 13 February 2015, DPKO/DFS reference no to be provided PBPS edn 2015b); United Nations Department for Peacekeeping Operations/ Department for Field Support, 'DPKO/ DFS Policy: The Protection of Civilians in United Nations Peacekeeping Operations' (United Nations 2015a); United Nations Department for Peacekeeping Operations/ Department for Field Support, *The role of United Nations police in protection of civilians* (2017.12, 2017a); United Nations Department for Peacekeeping Operations/ Department for Field Support, *Use of Force by Military Components in United Nations Peacekeeping Operations* (2016.24, 2017b); United Nations Department for Peacekeeping Operations/ Department for Field Support, *Policy on Authority, Command and Control in United Nations Peacekeeping Operations* (2008.4, 2008); United Nations Office of the High Commissioner of Human Rights, 'Human Rights in United Nations Peace Operations and Political

in aiming to protect civilians effectively, violates human rights by the manner in which peace operations engage in protection activities through the use of force, and thereby undermines the long-term aims sought. This highlights the importance of (re)considering the relevance of IHRL in developing guidance for peace operations generally, and in relation to protection specifically.

As observed by Mégret, IHRL should draw on the same sources in the same way as general international law.[134] Like international law in general, the primary sources of IHRL are found in treaties, custom and general principles of law.[135] IHRL can thus apply to peace operations either through the obligations of the organisation, or through obligations that fall on the contributing states extraterritorially, or both.

3.3.1. General principles and customary law as sources of human rights obligations of peace operations

The ICJ has confirmed that international organisations, including the UN, are bound by general principles of law and customary international law, as well as by their constitutions. The Court held that:

> (…) International organisations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.[136]

Notably, 'general rules of international law' can be divided into customary international law and general principles of law.[137] The principles of necessity and proportionality guiding the use of force in peacetime law enforcement can be held to constitute general principles of law, and as a result, an *international law of law enforcement* can be held to exist, and as such make IHRL applicable to peace operations.[138]

The United Nations Office of Legal Affairs (OLA), further, has affirmed that customary law obliges the UN to 'uphold, promote and encourage respect for human rights, international humanitarian law and refugee law'.[139] Many scholars similarly adopt the interpretation that the UN is bound by

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Missions' in Department of Peacekeeping Operations, Department of Political Affairs and Department of Field Support (eds)*, Ref. 2011.20* (2011).

[134] Frédéric Mégret. 'International Human Rights Law Theory' (2010) Social Science Research Network (SSRN) , 20.

[135] The sources of international law are detailed in article 38(1) of the ICJ Statute.

[136] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion 1980, ICJ (Dec. 20), para 37.

[137] Ai Kihara-Hunt, *Holding UNPOL to Account* (International Humanitarian Law Series, Brill Nijhoff 2015), 329.

[138] See further herein in Chapter 8.1.

[139] UN Office of Legal Affairs (OLA), Letter dated 1 April 2009 from UN Office of Legal Affairs to the UN Department of Peacekeeping Operations, available in *UN army told not to join Congo in operation*, New York Times, 9 December 2009. Available at: https://www.nytimes.com/interactive/projects/documents/united-nations-correspondence-on-peacekeeping-in-the-democratic-republic-of-the-congo#p=1 (accessed 9 November 2018).

international law to the extent it has acquired customary status.[140] However, as observed by Larsen, irrespective of an organisation's obligations, member states will maintain their obligations under international law.[141] Thereby, IHRL can apply to peace operations through either the human rights obligations entailed in general principles or in customary law applicable to the organisation, or through extraterritorial obligations applicable to participating member states, or both.[142]

3.3.2. The UN Charter and 'principles and purposes' as sources of human rights obligations

Less recognised as a source of human rights obligations is the UN Charter. As observed by the ICJ, the object and purpose of the organisation is a testament to the source and scope of the legal obligations of the organisation. The ICJ held that:

> Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organisation must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.[143]

The UN Charter, thereby, constitutes an important source for determining the legal obligations of the UN. As observed by Wolfrum, the United Nations purposes, as detailed in Article 1, and principles defined in Article 2, are both supplemented by the Preamble of the Charter.[144] The Preamble declares that the purpose of creating the UN was to 'save succeeding generations from the scourge of war', to 'reaffirm faith in fundamental human rights', and 'to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained',[145] while the Charter is to be interpreted so as to enable that aim.[146] The promotion and protection of human rights is thus a central purpose of the organisation, and the preservation of peace has quite fittingly been held to be the 'purpose of all purposes'.[147]

Article 1 of the UN Charter provides a first convincing account of the centrality of international law in the work of the organisation. It holds:

> The Purposes of the United Nations are: 1. To maintain international peace and security, and to that end: to take 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, and to bring about by peaceful means, **and in conformity with the principles of justice and international**

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[140] Ai Kihara-Hunt, *Holding UNPOL to Account* (International Humanitarian Law Series, Brill Nijhoff 2015), 329.
[141] Kjetil Mujezinovic Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (Cambridge studies in international and comparative law, Cambridge University Press 2014), 90.
[142] See further on extraterritorial human rights obligations of states in Chapter 5.3.
[143] Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, (1949), ICJ Reports 174, 180.
[144] Rudiger Wolfrum, 'Purposes and Principles, Article 1' in Bruno Simma and others (ed), *The Charter of the United Nations: A Commentary* (Oxford Commentaries on International Law, Vol I edn, Oxford University Press 2012), para 2.
[145] UN Charter, Preamble.
[146] See further in Chapter 2.2 addressing the UN Charter.
[147] Rudiger Wolfrum, 'Purposes and Principles, Article 1' in Bruno Simma and others (ed), *The Charter of the United Nations: A Commentary* (Oxford Commentaries on International Law, Vol I edn, Oxford University Press 2012), para 5.

> **law**, adjustment or settlement of international disputes or situations which might lead to a breach of the peace . . .[148]

Article 1 also laid the foundations for defining human rights standards, and for establishing an international system for monitoring the protection of human rights. Article 1(3) states that the aim and purpose of the organisation is:

> (…) to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and **in promoting and encouraging respect for human rights** and for fundamental freedoms for all without distinction as to race, sex, language, or religion (…)[149]

Such international system for protection of human rights cannot function, notably, unless states accept that obligations apply extraterritorially. As observed by Skogly, 'if member states of the United Nations claim that human rights obligations are uniquely territorial, this would disregard the principle of international cooperation in Article 1.'[150]

Furthermore, the Security Council is, as per Article 24 of the UN Charter, obligated to act in accordance with the purposes and principles of the Charter.[151] Peace operations, as subsidiary organs of the UN, are equally bound. The responsibility of the Security Council to abide by IHRL in fulfilling its task to maintain and restore international peace and security has also been recognized in case law. In *Behrami v France*, for example, the ECtHR noted that:

> '(…) [T]he primary objective of the UN is the maintenance of international peace and security. While it is equally clear that ensuring respect for human rights represents an important contribution to achieving international peace (see the Preamble to the Convention), the fact remains that the UNSC has primary responsibility, as well as extensive means under Chapter VII, to fulfil this objective, notably through the use of coercive measures. The responsibility of the UNSC in this respect is unique and has evolved as a counterpart to the prohibition, now customary international law, on the unilateral use of force.[152]

The ECtHR, similarly, in relation to interpreting Security Council resolution 1546 and its relation to Article 103 of the UN Charter, held that it is necessary to have regard for the purposes for which the UN was created. The ECtHR detailed that:

> (…) In addition, the Court must have regard to the purposes for which the United Nations was created. As well as the purpose of maintaining international peace and security, set out in the first sub-paragraph of Article 1 of the Charter of the United Nations, the third sub-paragraph provides that the United Nations was established to 'achieve international cooperation in ... promoting and

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[148] UN Charter, article 1. Emphasis added.
[149] ibid.
[150] Sigrun I. Skogly, 'Extraterritoriality- Universal Human Rights without Universal Obligations?' in Sarah Joseph and Adam McBeth (eds)*, Research Handbook on International Human Rights Law* (Paperback edn, Edward Elgar Publishing 2014) 71, 77.
[151] UN Charter, Article 24(2).
[152] *Agim Behrami and Bekir Behrami v France* and application no 78166/01 by *Ruzhdi Saaramati v France, Germany and Norway*, European Court of Human Rights, Grand Chamber Decision as to the admissibility of Application no 17412/01 (2 May 2007), para 148.

> encouraging respect for human rights and for fundamental freedoms'.[153]

The Court further observed that Article 24(2) of the Charter requires the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, must 'act in accordance with the Purposes and Principles of the United Nations'. The Court argued that, as a result:

> In interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights.[154]

It was importantly concluded that:

> In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to [sic] intend States to take particular measures which would conflict with their obligations under international human rights law.[155]

Thereby, as per the interpretation of the ECtHR, so long as it is not explicitly declared otherwise, peace operations are to assume that they are under an obligation to adhere to IHRL in the execution of their tasks.

Article 55(c) of the UN Charter, further, articulates the link between respect for, and observance of human rights and peaceful and stable societies. Article 55 holds:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> (…) **universal respect for, and observance of, human rights** and fundamental freedoms for all without distinction as to race, sex, language, or religion.[156]

Although it is essential, the declaration that the ensuring of respect for human rights represents an important contribution to achieving sustainable peace nonetheless begs the question as to *which* human rights obligations are binding on the organisation and on the Security Council. But, as Akande contends, 'unless one ignores the Charter there ought to be no doubt that the Council is bound by human rights law'.[157]

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[153] *Al-Jedda v United Kingdom*, Application no 27021/08, European Court of Human Rights, Judgment of 7 July 2011, para 102.
[154] ibid.
[155] ibid.
[156] UN Charter, article 55(c).
[157] Dapo Akande, The Security Council and Human Rights: What is the role of Art. 103 of the Charter? (*European Journal of International Law Talk,* ejiltalk) https://www.ejiltalk.org/the-security-council-and-human-rights-what-is-the-role-of-art-103-of-the-charter/> accessed 8 May 2018, 2.

This understanding seems to be accepted by most, although some argue to the contrary. Lowe et al, for example, hold that 'adherence to international law is not among the purposes and principles set out in the Charter.'[158] Many others, however, argue that an underlying assumption is that IHRL is integral to the purposes and principles of the Charter, and through the specific reference to the obligation to promote respect for and observance of human rights and fundamental freedoms for all reflected in Article 55.[159] The supporting argument is that human rights can only be promoted if the organisation itself respects human rights. This, thus, reinforces the understanding that human rights obligations are characteristically embedded in UN operations generally.[160] The OLA has confirmed this position, and has held that the UN takes the position that the Charter provides an obligation to 'uphold, promote and encourage respect for human rights'.[161]

The UN Charter's compatibility with, and emphasis on, human rights and humanitarian values suggests that the Security Council is required to measure its responses against (applicable) legal criteria. Indeed, as observed by Gardam, to consider the purposes and principles of the Charter as merely words of exhortation allows for dangerous leeway of choice for an unrepresentative body such as the Security Council.[162] Therefore, it is submitted here that an obligation of peace operations to respect IHRL in their operations is integral to the purposes and principles of the Charter.

This interpretation could be further strengthened, plainly, by the developing notion of impact-based extraterritorial human rights obligations, in which a distinction between negative and positive obligations can be envisioned. While negative obligations to respect human rights in the execution of mandated tasks can be held to be entailed in the Charter, determining the existence of positive obligations is less clear. The rise of jurisdiction may, however, as a result of control over territory or individuals, also give rise to positive obligations to protect human rights.[163]

3.3.3. Security Council mandates as a source of legal obligations of peace operations

Another ground for legal obligations of peacekeepers under the Charter is the inclusion of human rights obligations in Security Council mandates. Such inclusion often stipulates that 'while carrying out their mandate', peace operations should act in full compliance with applicable human rights law

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[158] Vaughan Lowe and others (ed), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (Oxford University Press 2008), 36.
[159] Ai Kihara-Hunt, *Holding UNPOL to Account* (International Humanitarian Law Series, Brill Nijhoff 2015), 327.
[160] ibid, 328.
[161] UN Office of Legal Affairs (OLA), Letter dated 1 April 2009 from UN Office of legal affairs to the UN Department of peacekeeping operations, available in *UN army told not to join congo in operation*, New York Times, 9 December 2009. online: https://www.nytimes.com/interactive/projects/documents/united-nations-correspondence-on-peacekeeping-in-the-democratic-republic-of-the-congo#p=1 (accessed 9 November 2018).
[162] Judith G. Gardam, 'Legal Restraints on Security Council Military Enforcement Action', Michigan Journal of International Law 17(2) (1996), 321.
[163] See further in Chapter 5.3 on a possibly emerging notion of impact-based human rights obligations and extraterritorial human rights obligations.

and refugee law.[164] The Security Council has thereby determined an obligation of peacekeepers to act in accordance with applicable law. If the Security Council decides on such approach while acting under Chapter VII of the UN Charter, such determination is also binding on all states.[165]

In conclusion, the question of whether the Security Council and peace operations are bound by international law, including IHRL, must be answered in the affirmative. The sources of such legal obligations can be found in the Charter itself, in general principles of law, in customary international law, and through explicit requirements entailed in Security Council resolutions. IHRL obligations can also arise through extraterritorial human rights obligations of participating states.

Although the need for efficient action implies that the Security Council has a wide discretion *jus ad bellum* in deciding how to make use of the enforcement measures provided for in Chapter VII of the Charter,[166] the authority of the Security Council cannot be held to entail a right to violate the very principles the organisation is intended to protect. Considering the long-term aims of peace operations, it is thereby important to note the distinction between the *jus ad bellum* authority to *resort* to measures stipulated in Security Council resolutions, and the legal requirements of implementing such decisions. The challenge is to identify a legal framework that is adequate for these complex transitional environments, and that enables addressing a range of threats spurred by a wide array of drivers, and in a manner that is both effective in the short term and sustainable in the long term. Developing a normative framework specifically aimed at addressing these realities *jus post bellum* is therefore decidedly warranted.

3.4. Applicability of IHL to peace operations

While there are still a few commentators who argue that IHL is not applicable to peace operations, it appears well settled today that IHL applies to UN peace operations whenever the conditions for its application are fulfilled.[167] The activities of peace operations are thus regulated by either IHL, IHRL, or both.

As noted by the International Committee of the Red Cross (ICRC) in its 2016 Commentary on the Geneva Conventions, there is no provision in IHL that precludes states or international organisations

[164] See for example UNSC res 2149 (2014), para 42.
[165] See further on the legal character of Security Council resolutions in Chapter 3.2.
[166] Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Studies in International Law, Hart Publishing 2004), 184.
[167] Katarina Grenfell. 'Perspective on the applicability and application of international humanitarian law in the UN context' (2013) 95(891/892) International Review of the Red Cross 646.

from becoming parties to an armed conflict if the conditions for applicability of IHL are met.[168] The ICRC held:

> By virtue of the strict separation between *jus in bello* and *jus ad bellum* addressed above, the applicability of humanitarian law to multinational forces, just as to any other actors, depends only on the circumstances on the ground, regardless of any international mandate given by the UN Security Council and of the designation given to the Parties potentially opposing them. This determination will be based on the fulfilment of specific legal conditions stemming from the relevant norms of humanitarian law, i.e. common Article 2(1) for international armed conflict and common Article 3 for non-international armed conflict. The mandate and the legitimacy of a mission entrusted to multinational forces fall within the province of *jus ad bellum* and have no effect on the applicability of humanitarian law to their actions.[169]

Arguments that hold that the question of applicability of IHL to peace operations hinges on the mandate are consequently invalid. As Sassòli notes, the mandate has mere *jus ad bellum* consequences.[170] The law regulating the activities of peace operations, on the contrary, is a *jus in bello* question. As noted in the quote above, a strict separation between *jus ad bellum* and *jus in bello* is important to maintain. As a result, the question of the legal effects of a Security Council decision, and the question of the law that is applicable once peace operations are engaged in theatre, are two separate questions that should be kept distinct. Mere deployment of a peace operation onto a sovereign state's territory, even when authorised as an enforcement operation under Chapter VII of the Charter, consequently, does not give rise to the applicability of IHL.

It has also been argued that law applies differently to peace operations or states involved in a multinational operation under UN Security Council mandate. For example, EU states have asserted that while engaged in aerial bombardment combat activities, their forces were not combatants. Rather, these states claimed that their pilots were 'experts on mission', protected under the 1946 Convention on the Privileges and Immunities of the United Nations.[171]

In its 2016 commentary, the ICRC noted, importantly, that nothing in the Geneva Conventions implies that conditions for their applicability differ when multinational forces – including those under UN command and control – are involved in an armed conflict.[172] Therefore, there is no support in existing law for the argument that there is or should be a higher threshold of violence for the

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[168] International Committee of the Red Cross (ICRC), *Commentary on the First Geneva Convention, 2016,* online*:* https://ihl-databases.icrc.org/ihl/full/GCI-commentary (accessed latest 12 August 2019), para 245.
[169] ibid.
[170] Marco Sassòli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts' in Orna Ben-Naftali (ed)*, International Humanitarian Law and International Human Rights Law* (online edn, Oxford Scholarship Online 2011), 5.
[171] Marco Sassòli, 'Ius ad Bellum and Ius in Bello-- The separation between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare: Crucial or Outdated?' in Michael N. Schmitt and Jelena Pejic (eds)*, International Law and Armed Conflict: Exploring the Faultlines* (Koninklijke Brill BV 2007) 241, 260.
[172] ICRC, *Commentary on the First Geneva Convention, 2016,* online*:* https://ihl-databases.icrc.org/ihl/full/GCI-commentary (accessed latest 12 August 2019), para 247.

applicability of IHL when multinational forces under UN command and control are involved in military action based on a UN Security Council mandate. Neither is there any support in law for the contention that an operation operating under a UN mandate but not under UN command and control, even if conducted with the sole aim of protecting civilians and re-establishing international peace and security, would result in the operation not being involved in an armed conflict. The ICRC held that:

> Under existing law, the criteria for determining the existence of an armed conflict involving multinational forces are the same as those used for more 'classic' forms of armed conflict. Requiring a higher intensity of hostilities to reach the threshold of armed conflict involving multinational armed forces is neither supported by general practice nor confirmed by *opinio juris.* Therefore, a determination as to whether multinational forces are involved in an international or non-international armed conflict, or not involved in an armed conflict at all, should conform to the usual interpretation of common Articles 2 and 3, also when acting on the basis of a mandate of the UN Security Council.[173]

The ICRC further noted that once a peace operation has become engaged in an armed conflict, it is of essence to identify whether troop-contributing states, the international organisation, or both, have become parties to the conflict. It was further held that when a multinational operation is conducted by states that are not subject to command and control of an international organisation, the respective individual states become parties to the armed conflict.[174]

More complex, however, is the situation when multinational forces are under the command and control of an international organisation. In such a situation, the rules on the attribution of state responsibility can be utilised in order to identify where the responsibility lies. Under such an interpretation, the issue will depend on whether the effective control over the military operations lies with the organisation or the participating state. Notably, however, command and control arrangements vary from one operation to another and from one international organisation to another. A case-by-case approach is required in order to determine which entity has effective or overall control over the military operations, and consequently who should be considered a party to the armed conflict.[175]

However, in relation to today's peace operations, the challenges are more complex than that. The combat tasks mandated the Intervention Brigade in the UN Organisation Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) raises questions regarding whether it is possible to distinguish between different actors in a peace operation. Arai-Takahashi suggests that the members of MONUSCO who have tasks that fall short of combat operations would be classified as civilians under IHL.[176] However, distinguishing UN military actors taking part in hostilities from military

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[173] ICRC, *Commentary on the First Geneva Convention, 2016,* online*:* https://ihl-databases.icrc.org/ihl/full/GCI-commentary (accessed latest 12 August 2019), para 247.
[174] ibid.
[175] ibid, para 250-252.
[176] Yutaka Arai-Takahashi. 'The intervention brigade within the MONUSCO. The legal challenges of the applicability and application of IHL' (2015) 13 Questions of International Law .

actors of the same organisation undertaking non-combat functions would be difficult if not impossible for the opposing party. Therefore, as Arai-Takahashi also suggests, it is more reasonable to hold that the entire military contingent of a peace operation that takes part in hostilities is to be considered as bound by IHL. Thereby, the entire military force would be targetable, and permitted to use force under IHL.[177] This, however, raises serious concerns about the suitability and possibility of the UN force to perform other tasks than combat in situations in which part of the military contingent is engaged in an armed conflict.[178]

The remaining reluctance to recognize the applicability of IHL on peace operations at times seems to be based on the idea that the UN, representing 'the good side' should not be held to the same rules as the 'enemy'.[179] At the same time, there is also reluctance among military actors to recognize their obligation to abide by IHRL in their operations.[180] An interpretation denying the applicability of IHL, and at the same time denying the relevance of IHRL, would result in a *carte blanche* for peace operations in how they fulfill their assigned tasks. Indeed, the legal environments of peace operations are oftentimes exceptionally complex and difficult to navigate, but the legal complexity can never permit a *carte blanche* for any actor. *What* peace operations do, and *how* they do it, is always regulated by law. The question which legal framework applies is determined solely based on the situation on the ground. Holding peace operations accountable to the applicable law is important for at least three reasons; to maintain legitimacy and credibility of the United Nations and international law; to foster abidance of the law of war in the conduct of warfare; and last but not least, to strengthen the protection of individuals' rights by recognizing the applicability of IHRL in all situations. The relationship between IHL and IHRL in armed conflicts thereby becomes central to the question of how peace operations can best pursue their objectives.[181]

There are primarily two internal UN instruments that address the applicability of IHL to peace operations: the *1994 Convention on the Safety of the United Nations and Associated Personnel* (hereafter the Safety Convention) and the *Secretary General Bulletin on Observance by United Nations Forces of International Humanitarian Law (*hereafter *the Bulletin).*

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[177] Yutaka Arai-Takahashi. 'The intervention brigade within the MONUSCO. The legal challenges of the applicability and application of IHL' (2015) 13 Questions of International Law.
[178] See further in Chapter 4.2.
[179] See Marco Sassoli, arguing along the same line in Marco Sassòli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts' in Orna Ben-Naftali (ed)*, International Humanitarian Law and International Human Rights Law* (online edn, Oxford Scholarship Online 2011), 5
[180] Personal experience of the present author from having taken part in a team at the Swedish Defence Research Agency tasked to respond to a an official report of the government of Sweden relating to the law regulating the use of force by Swedish military forces participating in international peace operations (ref no SOU 2011:76).
[181] See further in Chapter 13 addressing the dividing line between IHL and IHRL *jus post bellum*.

3.4.1. The Safety Convention

The Safety Convention addresses the question of immunity of UN peace operations. It is a treaty and is as such binding on ratifying states. Article 7 provides the details on the protection afforded members of peace operations. It holds that:

> 1. United Nations and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate.
>
> 2. States Parties shall take all appropriate measures to ensure the safety and security of United Nations and associated personnel. In particular, States Parties shall take all appropriate steps to protect United Nations and associated personnel who are deployed in their territory from the crimes set out in Article 9.
>
> 3. States Parties shall cooperate with the United Nations and other States Parties, as appropriate, in the implementation of this Convention, particularly in any case where the host State is unable itself to take the required measures.[182]

The core of the Convention is thus the prohibition against making UN personnel the object of attack, and preventing them from discharging their duties. Article 9 further requires states to ensure that such acts against UN personnel are criminalized in national legislation.

Article 2(2) limits the scope of application of the Convention, and is of particular importance to the present research. It holds that:

> This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.[183]

The Safety Convention seems to limit the applicable scope of the Convention to peace operations that have *not* been mandated under Chapter VII of the UN Charter, and that are not engaged in an armed conflict against organized armed 'forces'. Most importantly, however, the wording 'engaged as combatants against organized armed forces and *to which the law of international armed conflict applies'*[184] raises a number of questions. As a result of this wording, some argue that the Safety Convention only cancel the protection of peacekeepers in *international* armed conflicts.[185] The draft convention, however, did not differentiate between typologies of conflicts. It was also worded in a

[182] UN, Convention on the Safety of the United Nations and Associated Personnel (1994), article 7.
[183] ibid, article 2(2).
[184] Emphasis added.
[185] Noam Lubell. 'Challenges in applying human rights law to armed conflict' (2005) 87(860) International Review of the Red Cross.

manner that would have made it applicable to all peace operations mandated by the UN Security Council.[186]

Another challenge, as observed by Sassòli, is that the Safety Convention basically prohibits attacks on UN personnel and makes such attacks crimes that must be prosecuted by all states. As such, he further notes, the Convention is incompatible with the law of international armed conflict.[187] It is not, however, incompatible with the law of non-international armed conflicts (NIAC). In NIACs, and as a result of the asymmetric relationship between the territorial state and non-state actors, armed groups engaged in an armed conflict against the territorial state can be prosecuted as per domestic law for engaging in such conflict.[188]

Thereby, as also concluded by Dinstein, when a peace operation is engaged in an armed conflict against armed groups, such conflict is classified as non-international in character,[189] and it can be held that the Safety Convention applies to such scenario, and violence against the peace operation can be held as prohibited in line with the criminalization of engagement in NIACs in domestic legislation.[190]

3.4.2. The SG Bulletin on Observance by United Nations Forces of International Humanitarian Law

Moreover, the Secretary General's *Bulletin on Observance by United Nations Forces of International Humanitarian Law* (hereafter the *Bulletin*)[191] merits attention. The *Bulletin* is binding on members of UN forces in the same way as other instructions issued by the Secretary-General in his capacity as 'commander in chief' of UN operations.[192] However, the *Bulletin* is only applicable to operations under the command and control of the UN, and not to UN-authorised operations conducted under national or regional command and control.[193] Many contributing states, however, preserve a right to

[186] UN General Assembly (UNGA), 'Question of responsibility for attacks on United Nations and Associated personnel and Measures to Ensure that Those Responsible for such Attacks are Brought to Justice, New Zealand: Proposal for a draft convention on responsibility for attacks on United Nations personnel, A/C.6/48/L.2, 6 October 1993. Artcle 2 in the proposal stipulates that "This Convention shall apply in respect of (a) persons deployed by the Secretary General to participate in a United Nations operation, and includes (i) military persopnnel; (ii) police personnel; (iii) associated civilian personnel.

[187] Marco Sassòli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (online edn, Oxford Scholarship Online 2011), 44.

[188] See further on IHL in Chapter 6 herein.

[189] See further on classification of armed conflicts involving a peace operation in Chapter 7.5.

[190] Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014), 94.

[191] UN Secretary General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law (6 August 1999), UN Doc ST/SGB/1999/13.

[192] Daphna Shraga. 'UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage' (2000) 94(2) American Journal of International Law 406, 409.

[193] ibid, 408.

command their national forces in UN peace operations, which raises questions on the parameters of command and control, and thus on the legal responsibility for operations.[194]

The *Bulletin* holds that IHL is applicable to UN forces 'when in situations of armed conflict they are engaged therein as combatants, to the extent and for the duration of their engagement'.[195] As opposed to civilians who directly participate in hostilities, combatants do not regain protection when their engagement in hostilities ceases. The *Bulletin*, however, suggests that UN forces benefit from protection similar to that of civilians who directly take part in hostilities. A literal reading of the *Bulletin* thereby suggests that UN forces benefit from a different scope of protection than other parties to a conflict, which would violate the long-standing principle of equality of belligerents in IHL, which is firmly rooted in both conventional and customary IHL.[196]

The *Bulletin* further holds that the fundamental principles and rules of IHL:

> (…) are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.[197]

This may be read as suggesting that IHL is applicable in *enforcement* operations. Under the understanding that enforcement operations are those mandated under Chapter VII of the UN Charter, this suggests that IHL would apply *en bloc* to such operations. This perception has also been expressed in an international forum,[198] and reflected, problematically, in some written reports.[199] As noted herein, the applicability of IHL is contingent solely on the factual existence of an armed conflict and to the parties of the conflict. Therefore, the applicability of IHL to peace operations is dependent on the engagement of the peace operation in an armed conflict as combatants.

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[194] The legal parameters on command and control, as well as issues related to responsibility and accountability are beyond the scope of this research.

[195] UN, 'Secretary General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law' (6 August 1999), UN Doc ST/SGB/1999/13, section 1(1).

[196] See Vaios Kouitroulis. 'And Yet It Exists: In Defence of the 'Equality of Belligerents' Principle' (2013) 26(2) Leiden Journal of International Law 449, 449.

[197] UN, 'Secretary General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law' (6 August 1999), UN Doc ST/SGB/1999/13, section 1(1). Emphasis added.

[198] The statement that IHL applies to peace operations mandated under Chapter VII of the Charter was articulated by a speaker in the 2018 Challenges Forum, Stockholm, in which this author participated.

[199] One such document is the so called 'Cruz-report', which addresses the use of force in peace operations. See Lieutenant General (Retired) Carlos Alberto dos Santos Cruz, *Improving Security of United Nations Peacekeepers: We need to change the way we are doing business*, 19 December 2017. Available online: https://peacekeeping.un.org/sites/default/files/improving_security_of_united_nations_peacekeepers_report.pdf (accessed latest 30 April 2019). The Cruz report is frequently referenced in relation to needed changes in UN peace operations, which indicates a possibly increasing perception of the relevance and validity of IHL en bloc to UN peace operations. See for example United Nations Security Council, *Protection of civilians in armed conflict* (Report of the Secretary General S/2018/462, 2018), para 34-37, in which the report, in addition to highlighting the important role of peace operations, also underscores the importance of the so called 'Cruz-report' for improving protection performance.

The *Bulletin* also suggests that IHL is applicable to peace operations 'when the use of force is permitted in self-defense'.[200] Since enforcement action and self-defense are separated by the term *or*, which separates the two situations, the wording suggests that IHL is applicable to both (or either) enforcement actions and self-defense situations independently of each other. This is also problematic, since self-defense situations do not necessarily give rise to an armed conflict.[201]

[200] UN, 'Secretary General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law' (6 August 1999), UN Doc ST/SGB/1999/13, section 1, para 1.1.
[201] See further in Chapter 9.2.

4. Security Council mandates to protect civilians

A primary instrument for defining the task of protecting civilians is the Security Council's issuance of resolutions that authorise peace operations to engage in the task of protection. Although some argue that the language often used by the Security Council is explicit, clear, and narrow, [202] this research reveals that mandates on protection are not uniform and rarely clear enough to outline the necessary parameters for implementing protection tasks.

The first explicit mandate to protect civilians was afforded the peace operation in Sierra Leone (UNAMSIL) in 1999. UN Security Council resolution 1270 authorised the mission as follows:

> Acting under Chapter VII of the Charter of the United Nations, decides that in the discharge of its mandate UNAMSIL may take the necessary action to ensure the security and freedom of movement of its personnel and, within its capabilities and areas of deployment, to afford protection to civilians under imminent threat of physical violence, taking into account the responsibilities of the Government of Sierra Leone and ECOMOG [the Economic Community of West African States Monitoring Group].[203]

The language used in resolution 1270, notably limiting the scope of protection to *imminent* threats of *physical violence*, and to *areas of deployment* and *within capabilities*, set a precedent that has been used in many subsequent resolutions.

This Chapter shows that mandates to protect civilians entail tasks that legally are categorised both as traditional warfighting roles falling within the ambit of IHL, and as law enforcement functions regulated by IHRL. But mandates are anything but uniform. Some mandates authorise a general authority to provide protection to civilians. Other mandates limit the protection to threats of physical violence, and yet a third category limits such authority to threats of physical violence that is *imminent*. In addition, some mandates seemingly assume protection activities to be primarily aimed at, or even limited to, situations of armed conflict or threats emanating from armed conflicts. It is also submitted that contemporary mandates to protect, adopted under Chapter VII and authorised to use 'all necessary means', which is generally accepted as permitting the use of force, can be held to constitute tasks of an executive character. This observation sheds light on the legal character of the protection task, which aids in identifying relevant law for protection engagements in peace operations.

[202] Haidi Willmot and Scott Sheeran. 'The Protection of civilians mandate in UN peacekeeping operations: reconciling protection concepts and practices' (2013) 95(891/892) International Review of the Red Cross, 535.
[203] UNSC res 1270 (1999), para 14.

4.1. Contemporary protection mandates

As observed by Holt *et al*, the interpretation of the concept of protection in peace operations has been influenced by the understanding of the concept in the humanitarian and human rights communities, and as a consequence, the mandate has been interpreted more broadly in the UN Department for Peacekeeping Operations (DPKO) and Department of Field Support (DFS) *Operational Concept on the Protection of Civilians* than the narrow wording of Security Council mandates suggests.[204]

The DPKO/ DFS Operational Concept, notably, has been replaced by the DPKO/ DFS policy *The Protection of Civilians in United Nations Peacekeeping* (hereafter the policy on protection), but the key features of the three tiers identified in the Operational Concept remain, namely (i) protection through political process; (ii) protection from physical violence; and (iii) establishment of a protective environment.[205] Holt *et al* argue that as a consequence, the protection of civilians mandate has somewhat of a dual conception. While it is described narrowly in Security Council resolutions as physical protection from imminent violence, the concept is actually perceived in broader terms, as entailing a wide range of activities in the implementation of the mandate.

It is worth noting that many mandates today include functions relating both to traditional, negative notions of peace, such as separation of forces, preventing violence, and monitoring troop withdrawals,[206] and to a more positive notion of peace and security, as the authority to 'monitor and investigate human rights abuses and violations',[207] 'ensure security',[208] 'promote and protect human rights',[209] and functions relating to maintenance of law and order, public order management, restoring security and stable environment,[210] and protection of human rights.[211] These latter functions, especially, go beyond protection from imminent physical violence, and entail threats that do not

[204] See Holt, Victoria, Taylor, Glyn and with Kelly, Max. 'Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges' (Independent study, United Nations Department for Peacekeeping Operations; Independent study commissioned by UN DPKO and UNOCHA 2009), 534- 535.
[205] See United Nations Department for Peacekeeping Operations/ Department for Field Support, 'DPKO/ DFS Policy: The Protection of Civilians in United Nations Peacekeeping Operations' (United Nations 2015a).
[206] Kjetil Mujezinovic Larsen, 'United Nations Peace Operations and International Law: What Kind of Law Promotes What Kind of Peace?' in Cecilia Marcela Bailliet and Kjetil Mujezenovic Larsen (eds), *Promoting Peace Through International Law* (Oxford University Press 2015) 299, 307.
[207] See UNSC res 2155 (2014), para 4(b).
[208] See UNSC res 1990 (2011), para 4(f).
[209] See UNSC res 2164 (2014), para 13(c)(iv).
[210] See for example 'United Nations Peacekeeping Operations: Principles and Guidelines' (2008) (the Capstone doctrine), 19.
[211] See for example UNSC res 1509 (2003), para 3 (m), which holds that the peace operation is tasked 'to ensure an adequate human rights presence, capacity and expertise within UNMIL to carry out human rights promotion, protection, and monitoring activities. See also UNSC res 2211 (2015) para 6 (b) in which the Security Council acts under Chapter VII of the UN Charter, and details that the peace operations shall pursue stabilization through the establishment of functional, professional, and accountable state institutions, including security institutions, in conflict-affected areas, and through strengthened democratic practices that reduces the risk of instability, including adequate political space, promotion and protection of human rights and a credible electoral process.

necessarily stem from, nor are connected to, armed conflicts. Such functions are also not limited to the contexts of armed conflicts. The policy on protection also contends that protection of civilians mandates is a manifestation of the international community's determination to prevent the most serious violations of international human rights, humanitarian, and refugee law and that they should be implemented in both the letter and spirit of these legal frameworks.[212] The protection mandate is thus complementary to and reinforces the mission's mandate to promote and protect human rights. The policy also submits that the promotion and protection of human rights goes beyond the right to life and physical integrity and includes a wide range of civil, political, economic, social and cultural rights.[213]

Thereby, regardless of the scope of the protection mandate specifically, mandates entail aspects of protection that legally fall both within both traditional military 'warfighting' roles, the traditional law enforcement paradigm, and civilian roles in protection. This scope of protection, arguably, reflects both an aim to prevent armed conflicts and to create an environment resembling the notion of positive peace. Identifying what each task entails, and how these different but related tasks correspond to each other, is important in order to enable a common and comprehensive approach to security and protection in peace operations.

Mandates also differ regarding the mandate to use *all necessary means*, which generally is understood as permitting the use of force. Some mandates authorize all necessary means to 'carry out its mandate',[214] whereas other mandates limit such authority to certain tasks.[215] Mandates to protect civilians from physical violence, however, entail an authority to use all necessary means, and the task is thus afforded an authorization to use force up to and including lethal force for the purpose of protecting civilians.

The authority to use force to protect civilians is also, as noted, often limited to *imminent threats of physical violence*. The threat of physical violence, however, is not always conditioned on the temporal notion of *imminence*. UN guidelines also hold that the term *imminent* does not imply a requirement that violence is guaranteed to happen in the immediate or near future, or is being carried out. Rather, they hold that a threat is considered imminent 'as soon as the mission has reasonable belief that a

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[212] UN DPKO/ DFS, 'DPKO/ DFS Policy: The Protection of Civilians in United Nations Peacekeeping Operations' (United Nations 2015), para 17, footnote no 16. See also OHCHR/DPKO/DPA/DFS Policy on Human Rights in Peace Operations and Political Missions (2011).

[213] See United Nations Department for Peacekeeping Operations/ Department for Field Support, 'DPKO/ DFS Policy: The Protection of Civilians in United Nations Peacekeeping Operations' (United Nations 2015), para 17. See also United Nations Office of the High Commissioner of Human Rights, 'Human Rights in United Nations Peace Operations and Political Missions' in Department of Peacekeeping Operations, Department of Political Affairs and Department of Field Support (eds)*, Ref. 2011.20* (2011).

[214] See UNSC res 2164 (2014).

[215] See UNSC res 2155 (2014).

potential aggressor has the *intent* and *capacity* to inflict physical violence'.[216] Such interpretation expands the permissible scope of legitimate use of force beyond the absolute necessity requirements of IHRL, and transforms it to resemble the status-based targeting entailed in IHL. This thus blurs the legal parameters of the use of force in different legal contexts, and risks undermining adherence to relevant law in protection engagements.[217]

Furthermore, the authority to use all necessary means is often understood as connected to a Chapter VII authorization, which, legally speaking, means that host state consent is not required to fulfil the tasks.[218] The mandate for the MONUSCO mission authorised in 2014, however, distinguished between Chapter VII authorization and the authorization to use all necessary means. Security Council resolution 2147 provided a Chapter VII authorization that is broader than the authorization to use all necessary means, which raises the question of how peace operations should fulfil a mandate that, although authorized under Chapter VII, does not entail an authority to use the means necessary to do so. Under Chapter VII, the Security Council identified that the mission shall have the task to ensure:

> Stabilization through the establishment of functional, professional, and accountable state institutions, including security institutions, in conflict-affected areas, and through strengthened democratic practices that reduces the risk of instability, including adequate political space, promotion and protection of human rights and a credible electoral process.[219]

The task to protect human rights, consequently, was authorised under Chapter VII, but lacked an authority to use all necessary means, which suggests that the peace operation was not authorised to engage in activities aimed at protecting human rights that required the use of force or coercion. In paragraph 4, while still acting under Chapter VII, the Security Council declared that it:

> Authorizes MONUSCO, in pursuit of the objectives described in paragraph 3 above, to take all necessary measures to perform the following tasks;
>
> (a) Protection of civilians
>
> (i) Ensure, within its area of operations, effective protection of civilians under threat of physical violence, including through active patrolling, paying particular attention to civilians gathered in displaced and refugee camps, humanitarian personnel and human rights defenders, in the context of violence emerging from any of the parties engaged in the conflict, and mitigate the risk to civilians before, during and after any military operation (…).[220]

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[216] UN DPKO/ DFS, 'Protection of Civilians: Implementing Guidelines for Military Components of United Nations Peacekeeping Missions' (Approved by Hervé Ladsous, USG DPKO 13 February 2015, DPKO/DFS reference no to be provided PBPS edn 2015b), 15. See also United Nations Department for Peacekeeping Operations/ Department for Field Support, 'DPKO/ DFS Policy: The Protection of Civilians in United Nations Peacekeeping Operations' (United Nations 2015a), footnote no 14.

[217] See further in Chapter 8 and 9 on the parameters of the regulation of the use of force in IHRL and IHL respectively.

[218] See further in Chapter 2.2 on Chapter VII authorizations.

[219] UNSC res 2147 (2014), para 3(b).

[220] UNSC res 2147 (2014), para 4.

Tasks related to protection, such as stabilization and the promotion and protection of human rights, were thus authorised under Chapter VII, but lacked an authority to use all necessary means. The protection of civilians mandate, in turn, was both authorised under Chapter VII and afforded an authority to use all necessary means, but was seemingly limited to threats related to, or emanating from armed conflicts through the wording 'in the context of violence emerging from any of the parties engaged in the conflict'.

The resolution further stipulated in para 4(a)(iii) that the peace operation shall:

> Work with the Government of the DRC to identify threats to civilians and implement existing prevention and response plans and strengthen civil-military cooperation, including joint-planning, **to ensure the protection of civilians from abuses and violations of human rights** and violations of international humanitarian law, including all forms of sexual and gender-based violence (…).[221]

This paragraph entails a broader scope of protection of human rights, but is seemingly limited to supporting the Government of the DR Congo in ensuring protection of civilians from violations of human rights. Yet, it was authorized with a mandate to use all necessary means. It is thus not entirely clear whether the mandate included a stand-alone authority, independent of the engagement of the government of the DR Congo, to use force to protect civilians from a broader scope of human rights violations, even if limited to physical violence, than that emanating from the violence used by parties to an armed conflict. In other words, it is not clear whether the mandate entailed a law enforcement role to ensure security for individuals and to protect a broader scope of human rights, through the use of force if necessary, than entailed by protection from threats emanating from armed conflicts.

The mandate authorizing the peace operation in South Sudan (UNMISS) seemingly provided a different certification. Both UNSC resolution 2155 (2014) and the later resolution, 2459 (2019), hold that the Security Council:

> (…) Decides that the mandate of UNMISS shall be as follows, and authorizes UNMISS to use all necessary means to perform the following tasks:
>
> (a) Protection of civilians:
>
> (i) To protect civilians under threat of physical violence, irrespective of the source of such violence, within its capacity and areas of deployment, with specific protection for women and children, including through the continued use of the Mission's Child Protection and Women Protection Advisers (…).[222]

Acting under Chapter VII, the Security Council authorised the peace operation to use all necessary means to protect civilians 'under threat of physical violence, irrespective of the source of the threat'.

[221] UNSC res 2147 (2014), para 4 (a) (iii). Emphasis added.
[222] UNSC res 2155 (2014), para 4(a)(i) and UNSCR 2459 (2019), para 7(a)(i).

Thus, the mandate was seemingly not limited to authorising protection from threats emanating from armed conflicts.

The Security Council went even further in its authorisation of the peace operation in Mali in 2014. Acting under Chapter VII of the UN Charter, UNSC resolution 2164 authorised the mission to use all necessary means to carry out its mandate. The resolution further detailed, under the rubric 'security, stabilisation and protection of civilians', that the peace operation should;

> (i) In support of the Malian authorities, to stabilize the key population centres, notably in the North of Mali, and, in this context, to deter threats and take active steps to prevent the return of armed elements to those areas;
>
> (ii) To protect, without prejudice to the responsibility of the Malian authorities, civilians under **imminent threat of physical violence** . . .[223]

Notably, stabilisation of population centres and a focus on deterring threats and preventing the return of armed elements seemingly reflects a state-centred, military type of security, aimed primarily at preventing the recurrence of armed conflict. The task to protect civilians, however, was not so specific, and apparently was thus not limited to threats emanating from armed conflict. The lack of specificity, however, may be cause for confusion and result in differing understandings of which specific threats civilians are to be afforded protection from. In particular, the limitation entailed in the preceding paragraph's wording, 'prevent the return of armed elements', can result in the understanding that the task to protect civilians is similarly limited to protection from military types of threats.

The authority to protect civilians under Chapter VII and through all necessary means results in the conclusion that the protection of civilians mandate constituted a stand-alone authority, which was independent of the consent and engagement of the Malian authorities. The mandate, still acting under Chapter VII, and still under an authority to use all necessary means, further detailed an authority 'to assist the Malian authorities in their efforts to promote and protect human rights'.[224] The combination of an authority to use all necessary means, yet limiting the authority to assist the Malian authorities, is somewhat contradictory. Legally speaking, as noted herein, a Chapter VII authority to use all necessary means has the result that the tasks authorised are not conditioned on the approval or engagement of the host state authority.[225] It is thus not entirely clear whether the mandate authorised the promotion and protection of human rights as a stand-alone authority, or whether it was conditioned on the engagement and approval of the Malian authorities.

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[223] UNSC res 2164 (2014), para 13(a)(i) and (ii). Emphasis added. UNSC res 2364 (2017) contains similar wording and structure, but omitted the term 'imminent' in relation to protection of civilians. See para 20(c).
[224] UNSC res 2164, para 13(c)(iv).
[225] See further in Chapter 2.2 on Chapter VII authority.

Further, the mandate authorised the mission:

> (…) to monitor, help investigate and report to the Council and publicly, as appropriate, on any abuses of human rights or violations of international humanitarian law committed throughout Mali and to contribute to efforts to prevent such violations and abuses.[226]

To investigate 'any abuses of human rights' primarily constitutes a law enforcement task. Nonetheless, the reference to 'abuses of human rights' lacks the legal terminology entailed in the later formulation addressing 'violations of international humanitarian *law'*. This may indicate a difference in the perception of the nature of the frameworks referred to, and that the protection is divorced from IHRL.

In a subsequent resolution extending the mandate of the peace operation in Mali, the requirement of *imminence* was removed from the protection mandate. Acting under Chapter VII, resolution 2364 authorises the peace operation, under the rubric 'protection of civilians and stabilization, including against asymmetric threats', to use all necessary means to protect civilians 'under threat of physical violence'.[227]

The resolution authorizing the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA), in turn, entailed a notion of *phased* and *sequenced* mandates[228] as suggested in the so called Hippo report.[229] The task to protect civilians against threats of physical violence was authorized 'without prejudice to the primary responsibility' of the Central African Republic authorities',[230] and thus constituted a stand-alone authority that entailed a right to use all necessary means, including the use of force up to and including lethal force. It is worth noting that the resolution entailed language similar to that of the 2013 authorization of an Intervention Brigade in MONUSCO. The wording *proactive deployment,* and *a mobile and flexible posture* resembles the authorization of an entirely new form of protection mandate afforded the peace operation in DR Congo in 2013.

[226] UNSC res 2164, para 13(c)(v).
[227] UNSC res 2364 (2017), para 20 (c)(i). Notably, the inclusion of the term 'asymmetric threats' seemingly brings the nature of non-international armed conflicts, characterised by asymmetric relationships between parties of the conflict, into the protection agenda.
[228] UNSC res 2301 (2016), para 31.
[229] See High-Level Independent Panel on Peace Operations, *Uniting our strengths for peace-- politics, partnerships and people (Hippo-report)* (2015).
[230] UNSC res 2301 (2016), para 33(a)(j).

4.2. A new generation of protection mandates: protection through warfare?

In 2013, the Security Council, through resolution 2098, thoroughly strengthened the protection mandate for the peace operation in DR Congo. The Council, acting under Chapter VII of the UN Charter, decided:

> (…) that MONUSCO shall, for an initial period of one year and within the authorized troop ceiling of 19,815, on an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping, include an "Intervention Brigade" consisting inter alia of three infantry battalions, one artillery and one Special force and Reconnaissance company with headquarters in Goma, under direct command of the MONUSCO Force Commander, with the responsibility of neutralizing armed groups as set out in paragraph 12 (b) below and the objective of contributing to reducing the threat posed by armed groups to state authority and civilian security in eastern DRC and to make space for stabilization activities (…).[231]

It is worth noting that the mandate authorized the Intervention Brigade to *neutralize* armed groups, and that the objective described is twofold. The paragraph details that the objective is to contribute to 'reducing the threat posed by armed groups to state authority and civilian security'. The threats to be addressed, thereby, were limited to those posed by 'armed groups', but such threats can be directed against both 'state authority' and 'civilian security'. Consequently, the aim was both to preserve the security of the state, and that of individuals.

The task to protect civilians was further specified in paragraph 12(a):

> Authorizes MONUSCO, through its military component, in pursuit of the objectives described in paragraph 11 above, to take all necessary measures to perform the following tasks, through its regular forces and its Intervention Brigade as appropriate;
>
> (a) Protection of civilians
>
> (i) Ensure, within its area of operations, effective protection of civilians under imminent threat of physical violence, including civilians gathered in displaced and refugee camps, humanitarian personnel and human rights defenders, in the context of violence emerging from any of the parties engaged in the conflict, and mitigate the risk to civilians before, during and after any military operation;[232]

The term *neutralize* was further defined in paragraph 12(b), 'Neutralizing armed groups through the Intervention Brigade'. It holds that:

> In support of the authorities of the DRC, on the basis of information collation and analysis, and taking full account of the need to protect civilians and mitigate risk before, during and after any military operation, carry out **targeted offensive operations** through the Intervention Brigade referred to in paragraph 9 and paragraph 10 above, either unilaterally or jointly with the FARDC, in a robust, highly mobile and versatile manner and in strict compliance with international law, including international humanitarian law and with the human rights due diligence policy on UN-support to non-UN forces (HRDDP), to prevent the expansion of all armed groups, neutralize

[231] UNSC res 2098 (2013), para 9.
[232] UNSC res 2098 (2013), para 12(a).

> these groups, and to disarm them in order to contribute to the objective of reducing the threat posed by armed groups on state authority and civilian security in eastern DRC and to make space for stabilization activities;[233]

The Security Council has thus authorized the peace operation to engage in targeted offensive operations. *Targeted* and *offensive* operations are arguably forms of engagement permitted under the IHL regulation of conduct of hostilities. They are not, however, concepts that can be held to be reflected in the stricter regulation on the use of force entailed in IHRL. The paragraph seemingly takes note of the war-fighting nature of the authority provided by noting that the neutralisation was to take place in strict compliance with 'international law, including international humanitarian law and the human rights due diligence policy'.[234] The reference to the due diligence policy rather than IHRL is telling of the purpose of the Intervention Brigade to engage in armed conflict, and to which IHL rather than IHRL applies to the conduct.

Furthermore, the authorization to *neutralize* was not limited to a specific identified group. The authorization, rather, permitted the MONUSCO Intervention Brigade to offensively target any 'armed group' that posed a threat to state authority or civilian security. In other words, the Intervention Brigade was authorized to go to war. Notably, the ultimate aim, as stipulated by the mandate, was to protect civilians. To engage in warfare for the purpose of protecting civilians differs from the traditional purpose and aim of the IHL framework. IHL is constructed around an intention to minimize harm to civilians in the conduct of war. IHL consequently enables parties to an armed conflict to fight a war in a manner that protects civilians. Notably, to fight a war *in a manner* that protects civilians is an entirely different enterprise than to fight a war *for the purpose* of protecting civilians.

Resolution 2098 specifies that the mandate afforded the Intervention Brigade is on 'an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping'. However, similar wording can be found, for example, in subsequent resolutions, such as UNSC resolution 2387, mandating the peace operation in Central African Republic, which was authorised to effectively respond to threats to the civilian population while maintaining a proactive deployment, and a 'mobile, flexible and robust posture'.[235] Similarly, the resolution mandating the peace operation in

[233] UNSC res 2098 (2013), para 12(b).
[234] The Human Rights Due Diligence Policy addresses support by United Nations entities to non-United Nations entities, and requires that such support does not enable or result in grave violations of international law. The Human Rights Due Diligence Policy, consequently, does not stipulate requirements of adherence to human rights law in the targeted offensive operations authorised in UNSC res 2098. See UNGA/UNSC, Identical letters dated 25 February 2013 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council, A/67/775—S/2013/110, 5 March 2013.
[235] UNSC res 2387 (2017), para 42 (a)(ii).

Mali in 2016 requested the mission to 'move to a more proactive and robust posture to carry out its mandate'.[236]

The UN has thereby moved in a direction of authorising peace operations to engage in protection activities that may amount to participation in armed conflicts. This may reflect a trend towards understanding the protection mandate as including warfighting, which underscores the importance of distinguishing between ensuring sufficient protection of civilians in the engagement of an armed conflict and engaging in an armed conflict for the purpose of protecting civilians. Most important, perhaps, is the observation that even when a peace operation is authorised to engage in an armed conflict for the purpose of protecting civilians, protection needs are not limited to threats stemming from armed conflicts. Protection, rather, must necessarily address threats of a law enforcement character in order to enable transitions from violent conflict to peace. As is further shown herein,[237] the legal framework applicable to combat has limited protective scope and identifies different aims and purposes from those of IHRL. As a result, the legal framework of IHL has limited protective scope, and is, as such, of limited value in the pursuit of sustainable peace.[238] Lack of attention to threats of different legal character would thus risk leaving security gaps that ultimately undermine the successful transition from conflict to peace.

In conclusion: some mandates authorise a general authority to provide protection to civilians. Other mandates limit the protection to threats of physical violence, and yet a third category limits such authority to threats of physical violence that are *imminent*. In addition, some mandates seemingly assume protection activities to be aimed primarily at, or even limited to, situations of armed conflict or threats emanating from armed conflicts. Mandates also frequently authorise tasks that are related to the specific protection mandate, such as maintenance of law and order, provision of security or stability, or investigation into alleged violations of human rights under Chapter VII and an all necessary means mandate, which raises the question of how these interrelated protective tasks correlate. Notably, threats of physical violence can arise both inside and outside armed conflicts and can emanate from both armed conflicts and criminal elements. Similarly, maintenance of law and order is a traditional law enforcement task, but is also a requirement placed on military actors in the context of armed conflict through the law of occupation.

[236] UNSC res 2295 (2016), para 18.
[237] See further in Chapters 6 and 9.
[238] See further in Chapter 9.1.3.

4.3. Chapter VII and 'all necessary means': Reappraising the executive character of mandates

Security Council decisions adopted under Chapter VII of the Charter constitute a determination that the measures authorized are necessary in order to restore or maintain international peace and security. Measures adopted under Chapter VII, notably, do not legally require host state consent. Most peace operations today are afforded mandates, or part of mandates, under Chapter VII of the UN Charter and are permitted to use 'all necessary means'. The term 'all necessary means' is generally accepted as entailing the use of force, up to and including lethal force.[239]

Several functions afforded peace operations today, such as maintenance of law and order and protection of civilians, can be legally classified as normally falling within the exclusive *enforcement jurisdiction* of sovereign states. As observed herein, exercising enforcement jurisdiction extraterritorially is prohibited unless a rule of international law specifically allows it.[240] Such authority can be held as being granted through a Security Council decision acting under Chapter VII of the UN Charter. A Chapter VII authorisation coupled with an authorisation to use 'all necessary means' in functions that can be legally categorised as falling within the notion of *enforcement jurisdiction*, such as protection of civilians, maintenance of law and order, and stabilization, bolsters the conclusion that contemporary mandates authorises peace operations to fulfil functions of an *executive character*. Such executive functions must be distinguished from the notion of *executive mandates*, a term most commonly used in reference to the peace operations in Kosovo and East Timor,[241] which are arguably better described as having been tasked to perform functions of a transitional governmental authority rather than mere executive functions.[242] Mandates entailing such functions, thereby, can be held to authorise the peace operation to perform functions that normally fall under the exclusive jurisdiction of the sovereign.

The legal characterisation of contemporary mandates as falling within the enforcement jurisdiction of states, so that peace operations are authorised to act in the place of the sovereign for the specified

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[239] Scott Sheeran, 'The Use of Force in United Nations Peacekeeping Operations' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in United Nations Peacekeeping Operations* (Oxford University Press 2015), 368.

[240] See further in Chapter 2.1.

[241] See for example Sofia Sebastian, *The Role of Police in UN Peace Operations: Filling the gap in the protection of civilians rom physical harm* (Stimson Center Civilians in Conflict Policy Brief no 3 , 2015), 9. Sebastian argues that since the time of the experiences in Kosovo and East Timor, executive mandates have rarely been authorised as a result of political sensitivity about host-state overeignty and the operational challenges associated with this kind of mandate (…). Sebastian, problematically, also argues (on page 10 of the named report) that in the absence of an interim executive mandate, host-state cooperation remains a legal requirement, which highlights the need to clarify the relevant law in relation to contemporary mandates.

[242] For a thorough account of transitional administration, see Carsten Stahn, *The Law and Practice of International Territorial Administration: Versaille to Iraq and Beyond* (Cambridge Studies in International and Comparative Law, CUP 2010).

purposes, clarifies the legal character of the protection task, which aids in identifying the relevant law of protection, and the scope of legal obligations. Central to this characterisation of contemporary mandates, notably, is the distinction between sovereignty and jurisdiction.[243]

[243] See further in Chapter 2.1.

Section III: *An introduction to the law of protection under* jus post bellum

5. International Human Rights Law under *jus post bellum*

A central premise of international human rights law (IHRL) is that protection of human rights leads to more peaceful societies.[244] Part of the justification of human rights has thus been their perceived ability to promote both domestic and international peace,[245] which makes them particularly central to the quest for sustainable peace *jus post bellum*.

This chapter reveals that the nature and function of IHRL correlates with the aim to enable conditions that are conducive to sustainable peace and security integral to *jus post bellum* as well as with the aims pursued in the protection tasks in UN peace operations. Further, the special character of IHRL, coupled with its sharing its aim and purpose with *jus post bellum* and protection in peace operations, suggests that IHRL should be afforded primacy in guiding protection engagements *jus post bellum* and in peace operations. As a result, IHRL is key to enabling peace operations to deliver on their main mandated task: to create conditions that are conducive to sustainable peace and security.

5.1. The special character of IHRL reinforces its centrality for protection under *jus post bellum*

While the theory of human rights is riddled with perspectives from different disciplines,[246] there seems to be a general agreement on the special character of IHRL. International law was created by, between, and for states. Its cardinal concept was state sovereignty, and the typical source of obligation was state voluntarism. As opposed to human rights, international norms thus emerged from consent between equals, under a contractual model and entailing obligations based on reciprocity. Individuals, in this perspective, were merely objects of international law, at best subjected to unintended benefits from the regulation of the relation between states.[247] The reciprocal function of international law resulted in rights and obligations being closely tied together, since rights arose with the existence of corresponding obligations. International law is thus traditionally state-centric in nature and operates primarily at a horizontal level, between equals.

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[244] Kjersti Skarstad, 'Human Rights Violations and Conflict Risks: A Theoretical and Empirical Assessment' in Cecilia Marcela Bailliet and Kjetil Mujezinovic Larsen (eds), *Promoting Peace Through International Law* (Oxford University Press 2015) 133. See also Barbara von Tigerstrom, *Human Security and International Law: Prospects and Problems* (Studies in International Law, Hart Publishing 2007); Commission on Human Security, *Human Security Now* (, 2003); Edward Newman. 'A Human Security Peace-Building Agenda' (2011) 32(10) Third World Quarterly ; Report of the Advisory Group of Experts for the 2015 Review of the United Nations Peacebuilding Architecture, *The Challenge of Sustaining Peace*, 29 June 2015.

[245] Kjersti Skarstad, 'Human Rights Violations and Conflict Risks: A Theoretical and Empirical Assessment' in Cecilia Marcela Bailliet and Kjetil Mujezinovic Larsen (eds), *Promoting Peace Through International Law* (Oxford University Press 2015) 133, 133.

[246] Frédéric Mégret. 'International Human Rights Law Theory' (2010) Social Science Research Network (SSRN), 2.

[247] ibid.

IHRL has challenged this fundamental character of international law by making individuals subjects of international law, and by introducing a different nature and function of law on the international arena through an asymmetric and non-reciprocal character of law. IHRL proclaims and enforces certain fundamental guarantees for individuals against the state,[248] and thereby operates on a vertical axis, between obligation-holders and right-holders.[249]

The special character of IHRL has also been recognised by the ICJ in the *Advisory opinion on the Genocide Convention*, in which the Court distinguished between ordinary treaties and those of a humanitarian or human rights character.[250] The object and purpose of the convention, thereby, is a 'high purpose', which, seemingly, is understood as being reflected in the provisions entailed in the convention. This seems to suggest a preference for a teleological interpretation of the treaty. Further, each provision is seen as contributing towards an overarching aim both on its own and in correlation with the other provisions.

A similar idea to that of the ICJ was voiced by the European Commission of Human Rights (ECommHR) in 1961. The Commission held that the obligations undertaken by the contracting parties are essentially of an objective character, designed to protect the fundamental rights of individual human beings from infringement by the parties rather than to create subjective and reciprocal rights between the parties themselves.[251] Further, the Inter-American Court of Human Rights (IACtHR) has similarly held that modern human rights treaties are 'not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting states'. The Court concluded that their object and purpose is the 'protection of the basic rights of individual human beings irrespective of the nationality', and held that states can be:

> (…) deemed to submit themselves to a level of order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.[252]

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[248] Frédéric Mégret. 'International Human Rights Law Theory' (2010) Social Science Research Network (SSRN) , 2.
[249] Ibid. See also Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interactions with International Human Rights Law* (Martinus Nijhoff Publishers 2009), 407.
[250] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion May 28, 1951, ICJ Reports 15, 23. The Court held that 'In such Convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties'.
[251] See Frederic Mègret, 'The Nature of International Human Rights Obligations' in Daniel Moeckli, Sandesh Sivakumaran and Sangeeta Shah (eds), *International Human Rights Law* (Oxford University Press 2010), 6 (page of article preceding named chapter in book). Mègret refers to *Austria v Italy*, (Pfunders case) App 488/60 (1961) 4 Yearbook 116 EComHR, at 138.
[252] *The Effect of Reservations on the Entry into Force of the American Convention* (Arts 74 and 75), Advisory Opinion OC-2/82, IACtHR, Series A, no.2 (24 September 1982), 29-30. See also Frederic Mègret, 'The Nature of International Human Rights Obligations' in Daniel Moeckli, Sandesh Sivakumaran and Sangeeta Shah (eds), *International Human Rights Law* (Oxford University Press 2010), 7 (page of article preceding named chapter in book).

The wording that states can be deemed to submit themselves to a 'level of order' through human rights treaties for the 'common good' suggests that human rights law is perceived as a form of constitutional order in the relationship between states and individuals. The Courts' statements also suggest that human rights norms have a superior hierarchical position in relation to other norms, and in recognising that obligations are not in relation to other states, but towards individuals, the Court also underlines the non-reciprocal and asymmetric nature of IHRL.

International law and human rights law also differ in their formation. International law matured slowly through customary practices, often codified by treaty, and emphasising state obligations. Human rights law, on the contrary, emerged through an ideology of rights. It is primarily codified in declarations, and worded in broad terms, while its focus, as opposed to traditional international law, is the individual.[253]

The reason for treating the state differently from other entities in IHRL is, according to Verdirame, that it holds a unique power in both qualitative and quantitative sense. The state is singled out as the main (albeit not the only) duty holder because it alone has the power to enforce rights and punish wrongs.[254] This, notably, has several similarities to the authority of peace operations, in particular in relation to the task to protect civilians. When peace operations are tasked to protect civilians, a sovereign usually has lost the ability or is lacking in will to do so. As such, the peace operation fulfils an obligation that normally falls on the sovereign state. Thereby, much like a sovereign, a peace operation may be the sole actor that possesses the power and capacity – and the legitimacy, following the Security Council mandate – to provide protection. However, as is shown herein, there are good reasons to distinguish between the authority that is afforded peace operations and the notion of sovereignty.[255]

Further, as importantly noted by Mègret, human rights law, although often presented as against the state, also serves to legitimize state roles.[256] This adds to the importance of observing the requirements of IHRL in the pursuit of mission objectives, since adherence to IHRL, arguably in a transparent and accountable manner, also contributes to (re-) establishing state legitimacy. This, in turn, is essential in order to make stability and security inside states sustainable.

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[253] Frederic Mègret, 'The Nature of International Human Rights Obligations' in Daniel Moeckli, Sandesh Sivakumaran and Sangeeta Shah (eds), *International Human Rights Law* (Oxford University Press 2010), 2 (page of article preceding named chapter in book).
[254] Guglielmo Verdirame, 'Human rights in political and legal theory' in Scott Sheeran and Sir Nigel Rodley (eds), *The Routledge Handbook of International Human Rights Law* (Routledge 2013), 45.
[255] See further in Chapter 2.1, addressing sovereignty, jurisdiction, and peace operations.
[256] Frederic Mègret, 'The Nature of International Human Rights Obligations' in Daniel Moeckli, Sandesh Sivakumaran and Sangeeta Shah (eds), *International Human Rights Law* (Oxford University Press 2010), 24 page of article preceding named chapter in book).

This special, non-reciprocal character of IHRL dictates that the rights of individuals are not conditioned on the existence of state obligations. As a result, arguably, obligations and rights, although related, can be held to be largely identified through separate processes, with obligations and rights functioning, at least to an extent, independently of each other. In other words, rights can be seen as either independent or determinative of state obligations, which, if accepted as the nature and function of IHRL, would inform how IHRL can apply to the protection of civilians in peace operations. Such a distinction could contribute to enhanced protection of civilians in transitional environments by not conditioning directives on protection on the existence of obligations.

Such an understanding would be particularly beneficial to protection ambitions in situations where the question of extraterritorial state obligations further complicates the legal parameters of protection. This is of value in the search for legal guidance for effective, purposive and sustainable protection of civilians in complex transitional environments. Specifically, in extraterritorial situations, where state obligations are less clear than within territorial jurisdictions,[257] and in transitional environments in which the scope of human rights may fluctuate with changing security conditions, the distinction between the identification of rights and the identification of obligations may be particularly valuable in ensuring adequate protection of civilians.

This emphasizes the importance of affording particular attention to the nature and function of IHRL in determining whether and how IHRL applies to the conduct of peace operations. Understanding rights as separate from state obligations can be held as both compatible with and entailed in the possibly developing notion of *impact-based* identification of extraterritorial IHRL obligations. Such an impact-based approach identifies obligations based on the impact that actions have on individuals, and thus reverses the point of departure from a state-centric to an individual-centred approach to the identification of relevant human rights.[258] Such a reversal, from identifying obligations of states to identifying relevant rights afforded to individuals, can enable a much needed shift to an individual centred approach to protection of civilians in peace operations. Such an approach is particularly appropriate considering the universal character of human rights.

5.2. The universality of human rights and the distinction between positive and negative obligations

Human rights are widely accepted as being of a universal character, applying equally to all human beings everywhere. The Universal Declaration of Human Rights (UDHR) also treats human rights

[257] See further in Chapter 2.1 on territorial, legislative and enforcement jurisdiction.
[258] See further in Chapter 5.4.

holistically, as an indivisible structure of rights in which each right is augmented by others.[259] The 1993 Vienna Declaration holds that 'all human rights are universal, indivisible, interdependent and interrelated',[260] and it states, in its first operative paragraph, that the universal nature of these rights and freedoms is 'beyond question'.[261] The norms entailed in UDHR are also enshrined in the two international human rights covenants; the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These three instruments provide the norms for the global human rights regime commonly referred to as the International Bill of Rights.[262]

Universality claims can be of a legal, political, ethical and ideological nature. Legally speaking, human rights are universal, in the sense that they have been accepted by almost all states as establishing obligations that are legally binding.[263] Despite existing cultural, political, and economic diversity, there is near universal agreement on both the existence and the substance of internationally recognised human rights. There are no systematic patterns of geographic deviation. Although the ratification rates are somewhat lower in Asia than in other parts of the world, the substantial majority of states in regional, religious and political groupings are parties to most of these treaties.[264] Donnelly also importantly observes that while human rights are universal, they are neither absolute, timeless, nor unchanging. Quite the contrary, he holds, any conception of human rights is historically specific and contingent.[265]

A related view is that rights are both pre-legal and legal. Under such an understanding, rights are recognized by law but exists independently of it, and some rights are viewed as hierarchically superior and have some sort of supra legal status. This view, according to Mégret, is associated internationally with human rights as *jus cogens* and *erga omnes*.[266]

It has been questioned, however, whether universal rights can exist without universal human rights obligations. As observed by Skogly, universalism has been rather one-sided in that it concerns rights, but not obligations. While all individuals everywhere are considered to hold the same rights, the

[259] Jack Donnelly, *Universal Human Rights in Theory and Practice* (Third edn, Cornell University Press 2013), 31.
[260] *Vienna Declaration and Programme of Action*, Adopted by the World Conference on Human Rights, Vienna 25 June 1993, article 5.
[261] ibid, para 1.
[262] Sarah Joseph and Joanna Kyriakakis, The United Nations and Human Rights in Sara Joseph and Adam McBeth (eds) Research Handbook on International Human Rights Law, 2010 Edward Elgar Publishing, 3.
[263] Jack Donnelly, *Universal Human Rights in Theory and Practice* (Third edn, Cornell University Press 2013), 94.
[264] ibid, 94-95.
[265] ibid, 1.
[266] Frédéric Mégret. 'International Human Rights Law Theory' (2010) Social Science Research Network (SSRN), 7.

obligation holders (normally states) do not hold obligations to all individuals everywhere.[267] Further, whether obligation holders can be held accountable has generally been held to depend not only on the state's action, but also on where the action takes place and/ or the nationality of the victims of violations.[268] This underscores the value of distinguishing between rights and obligations in the IHRL framework.

Also of value to note here is that state obligations are both positive and negative in nature. As confirmed in Human Rights Committee (HR Committee) General Comment 31, an authoritative pronouncement on interpretation of the ICCPR,[269] states are obliged to both refrain from violating rights (negative obligations) and take positive action to ensure protection of rights (positive obligations).[270]

Furthermore, IHRL entails a 'triad of obligations' to *respect*, *protect*, and *fulfil*, and, sometimes, to *promote*.[271] These levels of obligation have been explained in the Maastricht Guidelines, in which it is held that the obligation to *respect* requires states to refrain from interfering with the enjoyment of rights. The obligation to *protect* requires states to prevent violations of such rights by third parties, and the obligation to *fulfil* requires states to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of rights.[272] Although the focus of the instrument is on violations of economic, social, and cultural rights, it is held that 'like civil and political rights', economic, social and cultural rights impose three different types of obligations on States to respect, protect and fulfil. The triad of obligations is thereby seemingly viewed as stemming from civil and political rights. According to the UN Committee on Economic, Social and Cultural Rights, further, the same levels apply to extraterritorial (international) obligations.[273]

These different forms of obligations are also visible in the debate on the protection of civilians in peace operations, where calls are increasingly made for an obligation to take positive action to ensure protection.[274] Indeed, the mandate to protect civilians resembles the positive obligations entailed in

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[267] Sigrun I. Skogly, 'Extraterritoriality- Universal Human Rights without Universal Obligations?' in Sarah Joseph and Adam McBeth (eds)*, Research Handbook on International Human Rights Law* (Paperback edn, Edward Elgar Publishing 2014) 71, 71.
[268] ibid, 71-72.
[269] See Frederic Mègret, 'The Nature of International Human Rights Obligations' in Daniel Moeckli, Sandesh Sivakumaran and Sangeeta Shah (eds)*, International Human Rights Law* (Oxford University Press 2010), chapter 17.
[270] United Nations Human Rights Committee (hereafter HR Committee), 'General comment no. 31, The nature of the general legal obligation imposed on States Parties to the Covenant'*,* CCPR/C/21/Rev.1/Add.13, (2004).
[271] Malgosia Fitzmaurice, 'Interpretation of Human Rights Treaties' in Dinah Shelton (ed)*, The Oxford Handbook of International Human Rights Law* (Paperback edn, Oxford University Press 2015) 740, 566.
[272] Masstricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26 (1997), Guideline no. 6.
[273] The UN Committee on Economic, Social and Cultural Rights refers to extraterritorial obligations as 'international obligations'.
[274] See for example Holt, Victoria, Taylor, Glyn and with Kelly,Max. 'Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges' (Independent study, United Nations Department for

IHRL. Calls for positive obligations to protect civilians underscores the importance of paying attention to the legal parameters of protection activities. The distinction between negative and positive human rights obligations is thus of value to observe in relation to extraterritorial state action and can clarify the scope and limitation of human rights obligations that arise extraterritorially, which therefore makes the distinction of value to this research. This in particular in light of the increasing centrality of the use of force for protection purposes in peace operations.

5.3. Extraterritorial human rights obligations

The resurgence of human rights in the post-Cold War era is characterized by an ambition to prescribe how sovereigns should behave towards their populations. As a result, as noted by Mègret, IHRL is part of redefining the concept of sovereignty.[275] As both the nature and function of human rights law reveal, however, bringing human rights onto the international arena and making it part of international law was not without challenges. When human rights lawyers sought to internationalize human rights in the middle of the 20th century, they had to draw, for lack of alternatives, on the existing body of international law. Only public international law could bind states 'from above'. Thus, international law was the only available means to transform human rights to IHRL, to redefine state sovereignty, and to place human rights at centre stage of international relations.[276]

The UDHR constituted the basis for the development of international, regional and national human rights instruments, [277] but, apart from claiming human rights as a 'common standard' that all nations, all individuals and every organ of society shall strive to 'secure their universal and effective recognition and observance',[278] it failed to dictate its scope of application. Unlike other treaties that followed the UDHR, the ICCPR refers to 'within its territory' as well as to 'subject to it's jurisdiction'. Article 2 of the ICCPR holds that:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.[279]

Peacekeeping Operations; Independent study commissioned by UN DPKO and UNOCHA 2009). See also The Kigali Principles on the Protection of Civilians, Kigali, Rwanda, 28-29 May 2015, and UNGA, Office of Internal Oversight Services, *Evaluation of the implementation and results of the protection of civilians mandates in United Nations peacekeeping operations* (United Nations General Assembly A/68/787, 2014) accessed 28 June 2017.

[275] Frédéric Mégret. 'International Human Rights Law Theory' (2010) Social Science Research Network (SSRN) , 13.

[276] Frederic Mègret, 'The Nature of International Human Rights Obligations' in Daniel Moeckli, Sandesh Sivakumaran and Sangeeta Shah (eds)*, International Human Rights Law* (Oxford University Press 2010), 2 (page no of article preceeding named chapter in book)

[277] Michael O'Boyle and Michelle Lafferty, 'General Principles and Constitutions as Sources of Human Rights Law' in Dinah Shelton (ed)*, The Oxford Handbook of International Human Rights Law* (Paperback edn, Oxford University Press 2015) 194, 195.

[278] UDHR, Preamble.

[279] ICCPR, article 2.

The reference to 'within its territory and subject to its jurisdiction' has given rise to the question whether the Covenant applies outside the territorial boundaries of states. A textual interpretation of the Covenant clearly suggests, through the use of the word 'and', a conjunctive interpretation, indicating that the treaty only applies to situations both occurring in the territory of a state, and within its jurisdiction. The UN HR Committee, however, envisages the two as disjunctive, meaning that the treaty applies *either* within the jurisdiction, *or* within the territory of the state.[280] Arguably, a conjunctive reading of the ICCPR would be more grammatically correct, but a disjunctive understanding is more attuned to the aim and purpose of the treaty,[281] which highlights the variance in understanding of the scope of the ICCPR provided for by different interpretive methods, such as textual and teleological interpretations.

A disjunctive reading of the scope of application, notably, gives rise to the question of how jurisdiction, and thus human rights obligations, can arise outside a state's territory. Milanovic also notes that a comprehensive analysis of the *travaux préparatoires* of the ICCPR reveals that the originalist argument, claiming that the treaty was never intended to apply extraterritorially,[282] is not convincing. However, rather than presenting clarity, he holds, the *travaux préparatoires* merely offers confusion and is unclear as to the treaty's territorial scope of application.[283] The HR Committee has concluded that a state party must respect and ensure the rights laid down in the Covenant to 'anyone within their power or effective control'. It has also been held, notably and in relation to peace operations, that this applies to state parties acting outside their territories:

> (…) regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent to a state party to an international peacekeeping or peace-enforcement operation.[284]

Case law has progressively established[285] strong support for the contention that IHRL obligations can extend to areas that are under the effective control of the state.[286] Case law has also given rise to two

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[280] UN HR Committee, *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 10. See also Corduba Droege. 'Elective affinities? Human rights and humanitarian law' (2008) 90(871) International Review of the Red Cross , 510.
[281] Marko Milanovic, *Extraterritorial application of human rights treaties: Law, Principles and Policy* (Oxford Monographs in International Law, Paperback edn, Oxford University Press 2013), 223.
[282] An originalist interpreation is an interpretive model that holds the original intent of the treaty as determinative of its meaning.
[283] Marko Milanovic, *Extraterritorial application of human rights treaties: Law, Principles and Policy* (Oxford Monographs in International Law, Paperback edn, Oxford University Press 2013), 224-225.
[284] UN HR Committee, General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 10.
[285] *Loizidou v. Turkey*, Preliminary Objections, 40/1993/435/514, Council of Europe: European Court of Human Rights, 28 November 1996, para 52. See also *Al-Skeini and Others v. United Kingdom*, Application no. 55721/07, Council of Europe: European Court of Human Rights, 7 July 2011, para 74.
[286] Noam Lubell. 'Challenges in applying human rights law to armed conflict' (2005) 87(860) International Review of the Red Cross , 739.

models of determining extraterritorial human rights obligations: the *spatial model* based on control over territory, and the *personal model*, based on control over individuals. The ICJ addressed the issue of the territorial scope of application of the ICCPR in its *Advisory Opinion on the Wall case*. The Court maintained that the wording of Article 2 of the ICCPR can be interpreted as covering only individuals who are both present within a state's territory and subject to a state's jurisdiction. It can, also, as further noted, be understood as covering both individuals present within a state's own territory, and those outside that territory, but subject to its jurisdiction.[287] The Court concluded that the ICCPR is applicable to the acts of state organs outside its territory in the exercise of its jurisdiction, which includes occupied territory.[288]

Other human rights treaties are as equally divergent as the case law related to ICCPR. The ECHR, notably, expressly dictates human rights obligations as a result of jurisdiction. Article 1 of ECHR states:

> The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.[289]

Despite different wordings of the treaties, the Inter-American Commission on Human Rights (IACommHR) and the European Court of Human Rights (ECtHR) seem to have adopted similar views on the scope of application of human rights treaties. The IACommHR holds that physical control over territory is not necessary in order for a state to exercise jurisdiction.[290] In the *Bankovic case*, although the ECtHR held that a state must exercise effective control over territory by being physically present in order to have jurisdiction,[291] in the *Issa case* the Court altered its interpretation.[292] This alteration was later confirmed by the 'personal control' test developed in *Pad and Others v Turkey*, in which the Court argued that:

> (…) a State may be held accountable for violations of the Convention rights and freedoms of persons who are in the territory of another State which does not necessarily fall within the legal space of the Contracting States, but who are found to be under the former State's authority and

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[287] *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004, para 108.
[288] ibid, para 110-111.
[289] European Convention on Human Rights (ECHR), article 1.
[290] *Armando Alejandre Jr, Carlos Costa, Mario de la Pena and Pablo Morales v Cuba*, IACommHR, Report no 86/99, Case 11.589, 29 September 1999, para 25.
[291] *Bankovic and Others v Belgium and 16 Other States*, European Court of Human Rights (ECtHR), Grand Chamber Decision as to the admissibility of Application no. 52207/99, 12 December 2001, para 71.
[292] *Issa and others v Turkey*, ECtHR, Application no 31821/96, Judgment, Strasbourg, 16 November 2004, para 71, in which the Court held that 'a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State' and that '[a]ccountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory'.

> control through its agents operating – whether lawfully or unlawfully – in the latter State.[293]

This resembles the argument made by the IACommHR in the *Alejandre case*, where the IACommHR held that when state agents, whether military or civilian, exercise power and authority over persons outside national territory, the state's obligation to respect human rights continues.[294]

As observed by Milanovic, the embracing of the personal model has grown in recent jurisprudence after *Bankovic*. Having adopted a strictly spatial, territorial model in *Bankovic*, he notes, the ECtHR soon found itself faced with cases in which such model would have resulted in unacceptable results.[295]

The standard of the spatial model of determining jurisdiction and human rights obligations through a test of overall effective control was set in *Loizidou v Turkey*, in which the Court held that:

> (…) although Article 1 (art. 1) sets limits on the reach of the Convention, the concept of "jurisdiction" under this provision is not restricted to the national territory of the High Contracting Parties. According to its established case-law, for example, the Court has held that the extradition or expulsion of a person by a Contracting State may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention […]
>
> (…) the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration. [296]

Prior to addressing the parameters of the term *control* in establishing applicability of IHRL, it is first important to take note of the fact that in this context, control refers to *factual*, or *de facto* control rather than a legal *right*.[297] This functional approach is characterised by the fact that it is the reality of each given situation that is determinative of the applicable law, rather than the legal status of the actors involved. The approach thereby resembles that of the law of occupation and the *jus in bello*, in which the applicability of law is deliberately not dependent of the lawfulness of the use of force *jus ad bellum*.

As argued by Milanovic, the applicability of IHRL should similarly not be dependent on the lawfulness of the actions taken.[298] Milanovic further concludes that case law sets the threshold for

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[293] *Pad and Others v Turkey*, ECtHR, Decision as to the admissibility of application No 60167/00, 28 June 2007, para 53.
[294] *Armando Alejandre Jr, Carlos Costa, Mario de la Pena and Pablo Morales v Cuba*, IACommHR Report no 86/99, Case 11.589, 29 September (1999), para 25.
[295] Marko Milanovic, *Extraterritorial application of human rights treaties: Law, Principles and Policy* (Oxford Monographs in International Law, Paperback edn, Oxford University Press 2013), 183.
[296] *Loizidou v. Turkey*, 40/1993/435/514, Council of Europe: European Court of Human Rights, 23 February 1995, available at: https://www.refworld.org/cases,ECHR,402a07c94.html (accessed 11 May 2019), Para 62.
[297] Marko Milanovic, *Extraterritorial application of human rights treaties: Law, Principles and Policy* (Oxford Monographs in International Law, Paperback edn, Oxford University Press 2013), 135.
[298] Marko Milanovic, *Extraterritorial application of human rights treaties: Law, Principles and Policy* (Oxford Monographs in International Law, Paperback edn, Oxford University Press 2013), 135..

effective control relatively high, and submits that the ECHR is an 'all or nothing' package, which requires that the threshold is set high enough for a state to exercise control that is sufficient for all the rights in the treaty to be secured. The degree of control must thus be such as to allow for states to comply with the obligation to secure all rights entailed in the treaty.[299] Such a high threshold is arguably not suitable for *jus post bellum* environments, in which protection of human rights progressively contributes to successful transitions from conflict to sustainable peace, but where the reality of the post-conflict environment dictates that it is not feasible to expect a state acting extraterritorially to fulfil all human rights. Field realities and the requirements for enabling transition from violent conflict to sustainable peace thus warrants an approach *jus post bellum* that permits distinguishing between negative and positive obligations. This is particularly essential, arguably, in relation to identifying guidance on the task of protecting civilians in transitional environments.

Further, and of particular importance to this research, is the expansive interpretation of the right to life posited in General Comment 36 (2018). The HR Committee recognises the supreme status of the right to life, and that no derogation is permitted, even in situations of armed conflict or public emergencies. It is held that the right should not be interpreted narrowly, and that it concerns the entitlement to be free from acts or omissions that are intended to, or may cause unnatural or premature death, 'as well as to enjoy a life with dignity.'[300]

It is detailed that:

> The duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. These general conditions may include high levels of criminal and gun violence, pervasive traffic and industrial accidents, degradation of the environment, deprivation of land, territories and resources of indigenous peoples, the prevalence of life threatening diseases, such as AIDS, tuberculosis or malaria, extensive substance abuse, widespread hunger and malnutrition and extreme poverty and homelessness (…).[301]

Under the interpretation that the scope of the right to life as detailed in General Comment 36 arise extraterritorially as a result of the rise of extraterritorial jurisdiction, the obligations go beyond 'threats of physical violence' as stipulated in many Security Council protection mandates. As a result, there may be a disparity between the extent of state obligations that arise extraterritorially as a result of factual jurisdiction, and the authority provided the peace operation by the Security Council. In addressing the regulation of protection activities in peace operations, it is consequently essential to clarify the legal nature of the tasks authorised, and how they relate to the sovereign and jurisdictional

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[299] Marko Milanovic, *Extraterritorial application of human rights treaties: Law, Principles and Policy* (Oxford Monographs in International Law, Paperback edn, Oxford University Press 2013), 141.
[300] UN HR Committee, General Comment 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36, 30 October 2018, para 2 and 3.
[301] ibid, para 26.

rights of the host state. Apart from recognising the sovereignty of the host state in Security Council resolutions, this matter is rarely afforded more than cosmetic attention in relation to peace operations. It is crucial, however, to address the potential disconnect between the *jus ad bellum* authority provided peace operations, and the scope of obligations that arise as a result of factual extraterritorial jurisdiction in the field.

While the extensive interpretation of the right to life reflected in General Comment 36 is welcome from a protection perspective, it may constitute a challenge from both the perspective of derogations[302] and that of extraterritorial jurisdiction. This is the case not least in light of the legal status of the right to life, often considered, in its core element, to be of *jus cogens* nature,[303] and as such hierarchically a superior norm in international law. While considered a positive development in relation to territorial jurisdiction, it may, rather, undermine the support for the notion of extraterritorial obligations that arises as a result of factual jurisdiction. The extensive obligations arising as a result of the interpretation of General Comment 36, if applied equally to extraterritorial settings, risks placing unrealistic burdens on states operating outside their territories, which, in turn, suggests that the credibility and relevance of law is at risk of being undermined. In order to safeguard against such a development, the obligations arising extraterritorially as a result of *de facto* jurisdiction can preferably be understood as different in scope than that entailed in territorial jurisdiction. Thus, distinguishing between positive and negative obligations may, as suggested herein, be essential in extraterritorial settings.

In conclusion, the approach to identifying extraterritorial applicability of human rights treaties is vulnerable to the fact that treaty ratification, and thus human rights treaty obligations, varies between states. There is a growing consensus, however, that international human rights obligations apply extraterritorially wherever a state exercises 'effective control' over territory or individuals. Yet, as observed by Gardbaum, the inherently universalistic nature of human rights as rights all humans have by virtue of being human, necessarily casts a shadow over the need to resolve issues such as extraterritorial application.[304] While determining extraterritorial obligations is of essence in relation to establishing accountability for violations, it is of lesser importance in the quest for legal guidance on protection activities in peace operations.

Human rights obligations can also arise, however, as a result of the existence of customary IHRL. While customary international law and general principles of law are applicable to all states, treaty

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[302] See further in Chapter 12.

[303] Christian Tomuschat, 'The Right to Life- Legal and Political Foundations' in Christian Tomuschat, Evelyne Lagrange and Stefan Oeter (eds)*, The Right to Life* (Martinus Nijhoff Publisher 2010), 5.

[304] Stephen Gardbaum, 'Human rights and International Constitutionalism'*, Ruling the World?: Constitutionalism, International Law and Global Governance* (Cambridge University Press 2009) 233, 256.

obligations must apply extraterritorially in order to bind states outside their territory. As noted, human rights treaties do not always determine its territorial scope, which raises the question of whether customary IHRL can apply extraterritorially in a way that differs from treaty obligations. Notably, while it is often repeated that customary international law is binding on all states,[305] analyses of the territorial scope of such obligations are more difficult to find, and interpretations seem to differ. Lubell, for example, submits that IHRL obligations can follow both from treaties and from customary IHRL.[306] He further argues that while positive obligations would lie primarily with the territorial state, the obligation to strive towards universal protection suggest that states are not permitted to violate human rights when acting extraterritorially. The fundamental notion of universality would be undermined, he holds, by claiming that states have no human rights obligations to individuals outside their jurisdiction. Lubell concludes that forcible measures that would violate customary IHRL would likely be in breach of customary law irrespective of territorial boundaries.[307] Lubell thereby, much like Milanovic, suggests a distinction in territorial scope between negative and positive IHRL obligations. Kretzmer similarly contends that legal norms that have obtained peremptory status, such as the right to life, are binding on states extraterritorially. He argues that as a consequence, a duty to respect the right to life, as opposed to *ensuring* that right, follows its agents wherever they operate.[308]

Extraterritorial customary IHRL obligations also have support in state practice. The US Operational Law Handbook from 2006 submits that if a specific human right falls within the category of customary international law, it should be considered a 'fundamental' human right, and if it has obtained customary status, it is likely considered binding on US state actors wherever such actors deal with human beings.[309]

Milanovic, however, argues that it is unlikely that states have assumed a more extensive approach to the scope of customary IHRL than they have to the territorial scope of treaty law.[310] Although Milanovic excludes customary human rights from his study, it is of value to observe here that an understanding that customary IHRL entails territorial limitations akin to those of treaties would result, in the perspective of peace operations, in the unfortunate reality that while the UN organisation is bound by customary international law, participating states would be bound only by those treaty

[305] See International Law Commission, Draft conclusions on identification of customary international law, with commentaries (2018), A/73/10, 123.
[306] Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford Monographs in International Law, Oxford University Press 2010), 235.
[307] ibid, 234.
[308] David Kretzmer. 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' (2005) 16(2) The European Journal of International Law, EJIL, 184-185.
[309] ibid, 235. See also John Rawcliffe and Jeannine Smith (ed), Operational Law Handbook (august 2006), International and Operational Law Department, the Judge Advocate General's Legal Center and School, Charlottesville Virginia 22903, 47
[310] Marko Milanovic, *Extraterritorial application of human rights treaties: Law, Principles and Policy* (Oxford Monographs in International Law, Paperback edn, Oxford University Press 2013), 3.

obligations that apply to them extraterritorially. Considering the separation between obligations and rights in IHRL, such an understanding would also deepen the divide between the rights of individuals, and the obligations of states acting extraterritorially.

A distinction between negative and positive obligations may be found, however, in a recently suggested and possibly developing model for determining extraterritorial human rights obligations that is guided by the impact of state action on individuals.

5.4. An emerging impact-based approach to extraterritorial human rights obligations?

Two models have thus far been used to establish human rights obligations in extraterritorial settings through the rise of jurisdiction: the *spatial model* based on effective control over territory, and the *personal model* based on power and authority over individuals.[311] The criteria for establishing extraterritorial jurisdiction has consequently to date largely been founded on notions of *control* and *authority*. However, with the recently adopted General Comment 36, a new approach to identifying human rights obligations, at least in relation to the rights to life and liberty, may be emerging. This possible development has the potential of bringing enhanced legal clarity to the protection of civilians while at the same time adequately serving the aim and purpose of both peace operations and *jus post bellum*. Thereby, the notion of impact-based human rights obligations may also contribute to more effective and sustainable peace efforts in transitional environments.

In General Comment 36, the HR Committee seems to have embraced a third model on the issue of extraterritorial human rights obligations in relation to the right to life, but without creating an exception to the requirement of jurisdiction. While recognising the established criteria of control and 'power' or authority to give rise to jurisdiction and human rights obligations, 'impact' is introduced as a criterion for determining human rights obligations, replacing the formulation in General Comment 31 of 'power over an individual'.[312] Thereby, focus is shifted from the position of the state actor to the rights of the individual.

In paragraph 63, the HR Committee adopts an 'impact approach' to the applicability of Article 6 of the ICCPR. It is held that:

> In light of article 2, paragraph 1, of the Covenant, a State party has an obligation to respect and to

[311] See Marko Milanovic, *Extraterritorial application of human rights treaties: Law, Principles and Policy* (Oxford Monographs in International Law, Paperback edn, Oxford University Press 2013). See also Daniel Møgster, Towards Universality: Activities Impacting the Enjoyment of the Right to Life and the Extraterritorial Application of the ICCPR (*EJIL Talk,* 27 November 2018) https://www.ejiltalk.org/towards-universality-activities-impacting-the-enjoyment-of-the-right-to-life-and-the-extraterritorial-application-of-the-iccpr/> accessed 30 November 2018.

[312] UN HR Committee, 'General comment no. 31, The nature of the general legal obligation imposed on States Parties to the Covenant', CCPR/C/21/Rev.1/Add.13, (2004), para 10.

> ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the State, **whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner.** (…).[313]

Firstly, in distinguishing between 'all persons who are within its territory', and 'all persons subject to its jurisdiction', the HR Committee adopted a firm disjunctive interpretation of whether the criteria 'within territory' and 'subject to jurisdiction' in ICCPR are cumulative or disjunctive. Secondly, it introduces an *impact model* for identifying extraterritorial human rights obligations whereby *actions that impact* an individual's right to life give rise to jurisdiction. Impact, notably, is thus entailed in the notion of jurisdiction.

Also, in specifying that obligations arise as a result of impact on individuals, there is seemingly an inherent distinction between negative and positive obligations in the impact model, and the personal model of determining jurisdiction is thereby arguably widened to entail any act a state engages in extraterritorially and that impacts individuals in a direct and reasonably foreseeable manner.

It is further recognised that the impact model is not limited to military operations and can as such entail law enforcement activities and other activities that impact an individual in a 'reasonably foreseeable manner'. In other words, the only requirement for Article 6 to be applicable to the conduct is that there is an 'impact', and that it is reasonably foreseeable. Although the term 'impact' requires further definition and clarification, it is reasonable to assume that many of the tasks afforded peace operations, in particular the protection of civilians, can be held to fall within the scope of the impact approach envisioned by the HR Committee.

Notably, in his influential work on extraterritorial application of human rights treaties, Milanovic similarly suggests a model of identifying extraterritorial obligations that entails a distinction between the duty to *respect* and the duty to *secure* human rights, and which resembles the 'impact' model suggested in General Comment 36. Milanovic holds that while the duty to *secure* and *ensure* entails both negative and positive obligations, there is no reason that a state would not be responsible for breaches of the negative duty to respect human rights even if the state is not exercising jurisdiction in the spatial or personal sense.[314] In other words, Milanovic distinguishes between negative and positive obligations of states in extraterritorial settings, and suggests that, while a state is always obligated to refrain from violating human rights in actions taken extraterritorially, a state cannot be held to be

[313] UN HR Committee, General Comment 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36, 30 October 2018, para 63. Emphasis added.
[314] Marko Milanovic, *Extraterritorial application of human rights treaties: Law, Principles and Policy* (Oxford Monographs in International Law, Paperback edn, Oxford University Press 2013), 209.

obligated to take positive actions to protect unless the state exercises either spatial or personal jurisdiction.

While positive obligations would arise with spatial or personal jurisdiction, negative obligations would arise, under Milanovic's interpretation, in situations that merely impact an individual, and as such, negative human rights obligations would consequently arise extraterritorially irrespective of jurisdiction. Milanovic's model of interpretation of extraterritorial human rights obligations would consequently be territorially bound only in relation to the obligation to secure and ensure rights. The obligation to respect human rights, on the contrary, would be territorially unbound.[315]

Milanovic's model thereby differs from that suggested in General Comment 36. While the HR Committee suggests that impacting an individual's right to life gives rise to jurisdiction, Milanovic's model distinguishes jurisdiction from human rights obligations in holding that impact alone gives rise to obligations without necessitating jurisdiction. While it is not clear what threshold the HR Committee and Milanovic envision in their respective models, the point of departure for both models in determining obligations to refrain from violating human rights in extraterritorial settings, is when the action taken impacts an individual. In focusing on the impact on individuals, both approaches would thereby reverse the point of departure for determining human rights obligations from a state-centric to an individual-centred approach. It would also, as observed by Milanovic, require a radical rethinking of the Strasbourg approach, as well as the approach adopted by other human rights bodies, albeit to a lesser extent.[316]

As observed by Møgster, however, although the term *impact* has been absent in earlier statements on Article 2(1) of ICCPR, that does not necessarily mean that it is inconsistent with the interpretation already determined.[317] As observed, the HR Committee has long established a distinction between the notion of territory and that of jurisdiction in its interpretation of Article 2(1).[318]

Further, General Comment 36 details an obligation to protect individuals from threats stemming from third parties. It is held that:

> States parties must respect the right to life and have the duty to refrain from engaging in conduct resulting in arbitrary deprivation of life. **States parties must also ensure the right to life and exercise due diligence to protect the lives of individuals against deprivations caused by persons or entities, whose conduct is not attributable to the State**. The obligation of States parties to respect and ensure the right to life extends to **reasonably foreseeable threats and life-**

[315] Marko Milanovic, *Extraterritorial application of human rights treaties: Law, Principles and Policy* (Oxford Monographs in International Law, Paperback edn, Oxford University Press 2013), 210.
[316] ibid, 211.
[317] Daniel Møgster, Towards Universality: Activities Impacting the Enjoyment of the Right to Life and the Extraterritorial Application of the ICCPR (*EJIL Talk,* 27 November 2018) https://www.ejiltalk.org/towards-universality-activities-impacting-the-enjoyment-of-the-right-to-life-and-the-extraterritorial-application-of-the-iccpr/> accessed 30 November 2018.
[318] ibid.

> **threatening situations** that can result in loss of life. States parties may be in violation of article 6 even if such threats and situations do not result in loss of life.[319]

Notably, the duty to refrain from engaging in activities that risk resulting in arbitrary deprivation of life speaks directly to the responsibility of contributing states to peace operations tasked to use force to protect civilians, and to the obligation to adhere to the applicable legal framework in such protection activities. This obligation seems to contain the negative obligation to refrain from violating rights in the course of conduct. The next sentence, however, obligating states to *ensure* the right to life, seemingly speaks more to the positive obligation following jurisdiction, to take positive action: that is, to protect individuals from deprivations caused by actors whose conduct is not attributable to the state. This obligation, thus, can be understood as directed both towards the territorial state, and to states engaged in extraterritorial activities when they exercise either spatial or personal jurisdiction. However, and importantly, states cannot be expected to do more than to refrain from violating human rights, if they do not have the tools to do so. Therefore, as Milanovic also argues, positive obligations should be limited to situations in which states exercise either spatial or personal jurisdiction.[320]

Under the interpretation that positive obligations to protect life arise with the form of jurisdiction that states can come to exercise in peace operations – provided that either spatial or personal jurisdiction exists – a legal obligation to take positive action to protect civilians may arise. As such, states contributing troops and police to peace operations may be held legally obligated to take positive action to protect civilians. Arguably, for such an interpretation to avoid undermining states' willingness to contribute to peace operations, it must also be weighed against the resources, capacity and capability of peace operations. The threshold for the control and authority criteria to give rise to spatial or personal jurisdiction, or the threshold used to identify human rights obligations as a result of impact on an individual, should therefore arguably not be set too low for a balance to be ensured between the willingness to contribute and the ability to deliver on human rights obligations.

In conclusion, an impact-based approach, imposing negative human rights obligations in relation to the right to life at all times, and positive obligations as a result of control and authority, has the potential of serving the realities of *jus post bellum* contexts and aims well. Since IHRL is asymmetrical in nature and function, and imposes obligations onto states, and rights onto individuals, the determination of the existence of human rights obligations may necessarily differ from the determination of the existence of rights. This is in particular the case in relation to extraterritorial settings, and even more so in relation to protection activities. Therefore, a model that identifies legal

[319] UN HR Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, Advance unedited version, CCPR/C/GC/36 (30 October 2018), para 7. Emphasis added.
[320] Marko Milanovic, *Extraterritorial application of human rights treaties: Law, Principles and Policy* (Oxford Monographs in International Law, Paperback edn, Oxford University Press 2013), 219.

obligations from the point of departure of the individual, such as the *impact model*, has the potential of ensuring more effective and thereby more sustainable protection than models taking state obligations as their point of departure.

Both the HR Committee and Milanovic, arguably, offers legally sound models for determining extraterritorial human rights obligations that enable a shift from a state-centric approach, to an approach that places the individual at centre stage. Such an approach also, importantly, enables different needs and the different impacts that certain actions may have on different groups in society to receive the attention that is necessary, which dictates a need for flexibility in protection and gendered protection strategies. Secondly, an impact-based approach also detaches the identification of rights from that of obligations; this better serves the nature, function, aim, and purpose of IHRL. Thereby, thirdly, an impact-based approach in relation to the right to life can remedy (i) some of the challenges posed by textual differences in different treaties, and (ii) the different extraterritorial obligations that consequently fall on different states contributing to peace operations.

A distinction between positive and negative obligations is also of value in relation to ensuring effective, purposive, and sustainable protection of civilians in peace operations. While not being held legally accountable for not being able to protect 'everyone all the time', under the interpretation that negative obligations apply all the time, peace operations would still be obligated to ensure that relevant human rights are respected in the implementation of their various tasks and functions. Obligations to take positive action to ensure protection, however, would be limited to situations in which the peace operations (or more correctly the contributing state in question) have obtained extraterritorial jurisdiction.

Thus, this would enable the enhancement, at least in part, of legal clarity on the law of peace operations, and in particular in relation to their task to protect civilians, which, as observed, constitutes a key task in the pursuit of enabling a transition from violence and conflict to sustainable peace and security. It can also enable better legal clarity on how IHRL connects to related legal frameworks, such as IHL and the law on states of emergency.

6. International Humanitarian Law under *jus post bellum*

As opposed to IHRL, IHL is symmetric in its nature and function. It is founded on the equality between parties, and thus operates on a horizontal axis. IHL is largely construed on the realities of, and the legitimate aims pursued in armed conflicts and it attempts to regulate warfare in a manner that protects civilians.

It is shown below that as a result of this character, IHL offers merely indirect protection of civilians through restrictions on the use of force, and the protection afforded is largely conditioned on the realities of warfare. In comparison to the protection afforded under IHRL, thereby, protection under IHL is limited. Further, while IHL enables means and methods that ensure effective protection against the most serious threats, the aims permitted to be pursued through IHL do little to further the quest for long-term peace in conflict affected environments. Yet, the complex and fluctuating security situation characterising transitional environments demand that IHL cannot be entirely disregarded as a protective regime under *jus post bellum*. However, it is essential to observe that when peace operations engage in an armed conflict, formally making IHL applicable to their conduct, they do so for the purpose of protecting civilians or to fulfil other mandated tasks. Fulfilling tasks assigned by the Security Council for the ultimate purpose of enabling sustainable peace and security contrasts with the aim inherent in the nature and function of IHL, premised on a balance between 'military necessity' and the notion of humanity. As a result, the applicable scope of IHL in peace operations must be interpreted with these differing goals in mind, which may necessitate an approach to the application of IHL that is specific to the context and aims pursued *jus post bellum* and in peace operations. A *jus post bellum* regime specific to transitional contexts is therefore both warranted and required to deliver on mandates and to contribute to the aims pursued.

6.1. Material scope of application of IHL

The applicability of IHL is triggered by the existence of an armed conflict. Whether an armed conflict exists, and by extension whether IHL applies in a specific situation, is assessed based on the criteria for armed conflict found in Common Article 2 (for international armed conflicts) and Common Article 3 (for non-international armed conflicts) of the Geneva Conventions.[321]

Since 1949, further, a functional approach to determining the applicable law to different situations of insecurity has been taken.[322] As noted in Chapter 5.3 above, a functional approach dictates that the

[321] ICRC, *International Humanitarian Law and the challenges of contemporary armed conflicts* (31st International Conference of the Red Cross and the Red Crescent 31IC/11/5.1.2, 2011), 7.
[322] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2014), 155.

factual situation, and thus the facts on the ground is determinative of which legal framework applies to a specific situation. This requires assessment of the legal realities on a case-by-case basis, and the factors to be considered differ between situations amounting to internal disturbances, and armed conflicts of international and non-international character respectively.[323]

6.2. Temporal scope of application of IHL

Peace operations respond to a variety of situations that may or may not legally amount to an armed conflict. Of great importance to this research, thereby, is the question of the temporal scope of application of IHL. The Fourth Geneva Convention (GCIV) stipulates that the convention shall cease to apply 'on the general close of military operations' or, in the case of occupied territory, the convention ceases to apply 'one year after the general close of military operations'.[324] The term 'general close of military operations' has been held to occur 'when the last shot has been fired', but as noted in the ICRC 1958 Commentary, there are a number of other factors to consider in determining when an armed conflict has ended.[325] It was concluded that in most cases, the general close of military operations is the final end of all fighting between parties concerned.[326] Notably, identifying the point in time when the fighting has ended is only possible after-the-fact, and the guidance offered is therefore of little value to the determination of when IHL has ceased to apply in field realities.

As observed by Milanovic, the factual and objective thresholds of modern IHL are fragmented. One can only speak of the end of application of international armed conflict (hereafter IAC), belligerent occupation and non-international armed conflict (hereafter NIAC) respectively. Furthermore, while some IHL rules apply at all times – including outside armed conflict and occupation (e.g. the obligations to disseminate IHL, mark cultural objects, etc.) – the application of others might have started with an armed conflict but need not have ended with the armed conflict (e.g. the obligation to investigate and prosecute grave breaches in an IAC). While the development of the substantive customary law of NIACs was frequently based on analogies to IACs, the structural differences between the two types of conflict may have bearing on the temporal scope of IHL's application and render such analogies more difficult.[327]

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[323] The identification and classification of international and non-international armed conflicts is further addressed in Chapter 7 herein.
[324] Convention (IV) Relative to the Protection of Civilian Persons in Time of War (12 August 1949) (Geneva Convention IV) (hereafter GCIV), article 6, and Additional Protocol I to the Geneva Conventions (API), article 3(b).
[325] ICRC Commentary of 1958 to Geneva Convention IV, online: https://ihl-databases.icrc.org/ihl/COM/380-600009?OpenDocument (accessed 6 march 2019). The term debellatio was taken to mean the end of an armed conflict that results in the occupation of the whole of the enemy's territory and the cessation of all hostilities
[326] ibid.
[327] See also Marko Milanovic. 'The end of application of international humanitarian law' (2014) 96(893) International Review of the Red Cross 163, 163.

An international armed conflict (IAC) would end with a general close of military operations, with no real likelihood of a resumption in hostilities. This would also terminate the application of the rules regulating the conduct of hostilities. Further, it would end any IHL-granted authority to detain combatants or civilians preventively purely on grounds of security.[328] The protective regime of IHL, however, continue to apply after the end of an IAC. Persons detained under IHL, for example, continue to enjoy the protections of IHL until their repatriation or release, including inter alia the right of access by the ICRC, even if IHL no longer authorizes their continued detention.[329]

Determining when a NIAC has come to an end is even more complicated. The ICTY has held that:

> (…) International humanitarian law applies from the initiation of [a noninternational armed conflict] and extends beyond the cessation of hostilities until … in the case of internal conflicts, a peaceful settlement is achieved. This approach has subsequently been affirmed in international case law and restated in other national and international sources. It is necessary to rely on the facts when assessing whether a non-international armed conflict has come to an end, or, in other words, a 'peaceful settlement' has been reached.[330]

Similarly, the Appeals Chamber in the *Kunarac* case submitted that the laws of war continue to apply until a 'general conclusion of peace' in international armed conflicts, and until a 'peaceful settlement' is achieved in the case of internal armed conflicts.[331]

The ICRC further observed that the determination that a NIAC has come to an end requires assessment of several criteria. First, a NIAC can cease through the dissolution of a party to the conflict through, for example, complete military defeat, or the demobilisation of a non-state party, even if sporadic violence by remnants of the party continue. However, with regard to a lesser degree of demobilisation, rendering it possible to regroup even after a lengthy period of time, it is not possible to determine that the conflict has ended as a result of the fact that one party has ceased to exist.[332] Secondly, relying solely on formal acts such as ceasefires or peace agreements is not sufficient and may lead to premature assumptions about the end of the conflict, and thus applicability of IHL, when, in fact, the conflict is continuing. Along the same line, a conflict may also cease

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[328] Marko Milanovic. 'The end of application of international humanitarian law' (2014) 96(893) International Review of the Red Cross 163, 174.
[329] See API, article 75(6).
[330] *Prosecutor v. Haradinaj et al. (Trial Judgment)*, IT-04-84-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 3 April 2008, para. 100. See also *The Prosecutor v. Jean-Paul Akayesu (Trial Judgement)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, para. 619; *The Prosecutor v. Nsengimana (Trial Judgment)*, ICTR-01-69-T, International Criminal Tribunal for Rwanda (ICTR), 17 November 2009, para. 92; and *Situation in the Democratic Republic of the Congo, in the case of the Prosecutor v. Thomas Lubanga Dyilo,* ICC-01/04-01/06, International Criminal Court (ICC), 14 March 2012, paras 533 and 548. It has also been reflected in State practice; see e.g. United Kingdom, Manual of the Law of Armed Conflict, 2004, para. 15.3.1; Council of the European Union, Independent International Fact-Finding Mission on the Conflict in Georgia, Report, Vol. II, 2009, pp. 299–300; Constitutional Case No. C-291-07, Colombia, Constitutional Court, Judgment, 2007, para. 1.2.1.
[331] *Prosecutor v. Kunarac et al*, ICTY, IT-96-23&23/1-A, Appeals Chamber, 12 June 2002, para 57.
[332] ICRC, *Commentary on the First Geneva Convention, 2016,* online*:* https://ihl-databases.icrc.org/ihl/full/GCI-commentary (accessed latest 12 August 2019), para 489.

without formal agreements.[333] Third, a lasting cessation of armed confrontations without real risk of resumption will undoubtedly constitute the end of a NIAC.[334] Fourth, a temporary pause in armed confrontations cannot be taken as ending a NIAC. The intensity of the violence may oscillate, but periods of calm are insufficient to determine the end of a NIAC. It was also noted that it is impossible to state in the abstract how much time needs to pass in order to determine with a degree of certainty that the situation has stabilized and equates to a peaceful settlement.[335] It is noted that:

> The classification of a conflict must not be a revolving door between applicability and nonapplicability' of humanitarian law, as this can lead to a considerable degree of legal uncertainty and confusion'. An assessment based on the factual circumstances therefore needs to take into account the often fluctuating nature of conflicts to avoid prematurely concluding that a non-international armed conflict has come to an end. In this regard, it is not possible to conclude that a non-international armed conflict has ended solely on the grounds that the armed confrontations between the Parties have fallen below the intensity required for a conflict to exist in the first place.[336]

To avoid a revolving door between the applicability and non-applicability of IHL, careful considerations and assessments are consequently required before it can be determined that a NIAC has come to an end. However, depending on the circumstances, it was further observed, a lasting absence of armed confrontations between the original parties of the conflict may indicate the end of a NIAC despite sporadic occurrence of violence.[337] In other words, sporadic acts of violence can thus both occur despite the end of a NIAC, and signal that the conflict has not ended. The specific circumstances in each given situation must therefore be carefully assessed, including, arguably, the nature of the continued violence. Such a determination can only be made through a full appraisal of all available facts, and it is not, notably, an exact science.[338]

Factors that may indicate that a situation has sufficiently stabilized to be able to consider that a NIAC has ended include: (i) the effective implementation of a peace agreement or ceasefire; (ii) declarations by the Parties, not contradicted by facts on the ground, that they definitely renounce all violence; (iii) the dismantling of special government units created for the conflict; (iv) the implementation of disarmament, demobilization and/or reintegration programmes; (v) the increasing duration of the period without hostilities; and (vi) the lifting of a state of emergency or other restrictive measures.[339]

The ICRC has further recently noted that, 'as with the initial existence of a non-international armed conflict, its end must be neither lightly asserted nor denied: just as humanitarian law is not to be

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[333] ICRC, *Commentary on the First Geneva Convention, 2016,* online*:* https://ihl-databases.icrc.org/ihl/full/GCI-commentary (accessed latest 12 August 2019), para 490.
[334] ibid, para 491.
[335] ibid, para 492.
[336] ibid, para 492. Footnote omitted.
[337] ibid, para 493.
[338] ibid, para 496.
[339] ibid, para 495.

applied to a situation of violence that has not crossed the threshold of a NIAC, it must also not be applied to situations that no longer constitute a NIAC.'[340] It is also preferable to not be too hasty in determining the end of a NIAC since a revolving door classification may lead to legal uncertainty and confusion.[341] Although some aspects of Common Article 3 of the Geneva Conventions (CA3) continue to apply, if necessary, even after the end of a NIAC— such as all persons deprived of their liberty or whose liberty has been restricted for reasons related to the conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons— shall enjoy the protection of Articles 5 and 6 of GCI until the end of such deprivation or restriction of liberty,[342] there is good reason to question the applicability of the full scope of IHL throughout the duration of CA3 conflicts.

It is important to note here that this interpretation of the temporal scope of application of IHL was a child of its time and undoubtedly informed by the reality that, when lacking applicability of IHL, a situation was not governed by international law at all. The interpretations of when an armed conflict has come to an end were therefore likely heavily influenced by an intention to extend rather than limit the protection offered by international law. However, this legal reality has changed in fundamental ways in recent decades with the rise and growth of IHRL, and with the increasing acceptance of IHRL obligations in extraterritorial settings.

Sassòli and Olson contend that since it is more difficult to determine the end of hostilities in a NIAC than in an IAC, it is reasonable to suggest that the application of the law of IAC applies to NIAC by analogy.[343] Analogy with the Fourth Geneva Convention could be founded on determination of the *lex specialis* according to the overall systemic purposes of the international legal order. This would, they hold, avoid internment of persons without review for the duration of the conflict.[344]

It may be of value, however, to distinguish certain aspects of IHL from other aspects. Notably, applying the same temporal application to permissive regimes (such as the rules on conduct of hostilities), as to restrictive regulations of articles 5 and 6, may undermine the protective ambitions of the law. In relation to determining the applicable scope of the rules on conduct of hostilities in NIAC, it may be more relevant to seek answers in other factors than in relation to the end of an armed conflict, as further analysis herein reveals. Extending the material and temporal scope of application

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[340] ICRC, *Commentary on the First Geneva Convention, 2016,* online*:* https://ihl-databases.icrc.org/ihl/full/GCI-commentary (accessed latest 12 August 2019), para 485.
[341] ibid, para 495.
[342] ibid, para 497-499.
[343] Marco Sassoli and Laura Olson. 'The Relationship between International Humanitarian and Human Rights Law Where it Matters: Admissible Killings and Internment of Fighters in Non-International Armed Conflicts' (2008) 90(871) International Review of the Red Cross , 624.
[344] ibid.

of IHL, as suggested by Sassòli and Olsen, would also, notably, reduce the protection afforded civilians in comparison to that afforded to them under IHRL.

6.3. Geographical scope of application of IHL

Although the Geneva Conventions are silent as to the geographical scope of international armed conflicts, the Court in *Tadić* held that its provisions suggest that at least some of the stipulations of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities. It was held that while some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited, other provisions, particularly those relating to the protection of prisoners of war and civilians, are not so limited.[345] This may suggest that a distinction in geographical scope of application of the Conventions' permissive and restrictive functions can be envisioned.

With respect to prisoners of war, the Court submitted that the Convention applies to combatants in the power of the enemy, and that it does not make any difference whether they are kept in the vicinity of hostilities. [346] Thereby, seemingly, the ICTY held that the regulation of the conduct of hostilities is geographically limited, while the protection of prisoners of war and civilians are not geographically limited to where hostilities take place. In the same vein, Geneva Convention IV protects civilians anywhere in the territory of the Parties. The ICTY further held that Conventions III and IV apply throughout the territories of the parties to the conflict, and that any other construction would substantially defeat the purpose of the Conventions.[347] The Court further argued that the fact that the beneficiaries of CA3 are those not taking part in hostilities indicates that the rules contained in the article apply outside the narrow geographical context of actual combat operations. It further noted that Additional Protocol II to the Geneva Conventions (APII), like CA3, provides protection to those not participating in hostilities, and that the provisions thereby reach beyond actual hostilities.[348]

The ICTY concluded, in para. 70, that:

> International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place

[345] *Prosecutor v. Dusko Tadić aka "Dule"* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995, paras. 68-69.
[346] ibid, para 68.
[347] ibid.
[348] ibid, para 69.

there.[349]

The reasoning in the conclusion, notably, is largely founded on the protective aspects of IHL rather than on the permissive nature and scope of the law. The law, however, contains both permissive and restrictive aspects. This highlights the need for a distinction between negative, or indirect protection (protection through prohibition of direct targeting and the function of proportionality) and direct protection (engagement in an armed conflict and the use of force for the purpose of protecting civilians), and raises the question of whether a different material and geographical scope of IHL can be envisioned in relation to positive (direct) protection engagements than to the geographical scope of IHL.[350] Although arguments holding that when it applies, the whole body of IHL applies[351] are prevalent, in relation to protection under *jus post bellum*, it is important to (re)consider the assumption that underlies such conclusions.

It is also possible that the territorial scope between CA3 and APII differs. While CA3 applies to armed conflicts in the territory of one of the high contracting parties, APII stipulates that it applies to armed conflicts that take place in a territory of a high contracting party between the party's armed forces and an armed group. Consequently, it may be concluded that while CA3 applies to armed conflicts as long as they originated in the territory of a party, the same cannot necessarily be concluded for APII conflicts.[352] As this research shows, distinguishing between CA3 and APII in relation to the geographical scope of application may contribute to legal clarification of the rules on protection under *jus post bellum*, in particular in relation to the regulation on the use of force and the identification of a dividing line between law enforcement and the conduct of hostilities.

[349] *Prosecutor v. Dusko Tadić aka 'Dule'* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995, ICTY IT-94, para 70.
[350] See further on the geographical scope of law in Chapter 6.3.
[351] See for example David Kretzmer. 'Rethinking the application of international humanitarian law in non-international armed conflicts' (2009) 42(1) Israel Law Review , 21.
[352] Jelena Pejic. 'The protective scope of Common Article 3: more than meets the eye' (2011) 93(881) International Review of the Red Cross, 201.

7. Identification and classification of armed conflicts

Armed conflicts differ in character, and as a consequence also in legal classification, and different law applies to different situations. Any attempt to identify the law that is relevant in armed conflicts must therefore start with an identification and classification of the armed conflicts. Despite suggestions, *de lege ferenda*, that the difference should be eliminated, the distinction between IAC and NIAC remains. IAC and NIAC are also the only two forms of armed conflict that exist, legally speaking. Consequently, every armed conflict is either international or non-international in nature.[353] Moreover, although interpretations differ, it can be convincingly held that there are different types of NIACs.[354]

Armed conflicts are also becoming increasingly complex in nature, and the drivers of conflicts are changing, [355] which further complicates the legal classification of differing categories of insecurity. As Boothby observes, there is a range of situations involving different degrees of conflict and of a different nature, which result in the regulation of conduct by different legal contexts and different legal regimes. At one extreme, he notes, there is a high-intensity, global, inter-state type of conflict, in which strategic interests, such as the continued existence of a state, are at stake. At the other end of the spectrum is a type of peace that is occasionally interrupted by criminal acts of violence that may or may not be driven by a common cause or purpose. In between these extremes lie a number of types of conflicts, armed or otherwise, which are regulated by subtly different legal regimes.[356]

Classifying conflicts along international/ non-international dividing lines is thus increasingly challenging. Moreover, distinguishing between different forms of NIACs, although subject to disagreement and debate, is also increasingly challenging as a result of these complex realities. For armed conflicts to be sufficiently distinguished from other situations of insecurity, and for them to be appropriately regulated by law, however, legal classification of situations of insecurity is key to enabling the protection civilians are entitled to in the most effective and sustainable way possible. Any classification, notably, must be made in good faith, and be based on the facts on the ground and the relevant criteria under humanitarian law.[357]

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[353] Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014), 1. See also ICRC *Commentary on the First Geneva Convention, 2016,* online*:* https://ihl-databases.icrc.org/ihl/full/GCI-commentary (accessed latest 12 August 2019, para 391.

[354] See e.g. *Prosecutor v Germain Katanga*, ICC-01/04-01/07, Trial Chamber II, Judgment pursuant to article 74 of the Statute 7 March 2014, para 1175. See also further in Chapter 7.2.

[355] See for example Michel Ben Arrous and Robert Feldman. 'Understanding contemporary conflicts in Africa: a state of affairs and current knowledge' (2013) 30(1) Defense and Security Analysis , 55. Arrous and Feldman argue that the conflicts that have broken out since the end of the Cold War appear to be different from conflicts in earlier eras, and that, in Africa, these conflicts are characterised by regionalization, privatization of violence, and extreme brutality.

[356] William H. Boothby, *The Law of Targeting* (First edn, Oxford University Press 2012), 43.

[357] ICRC, *Commentary on the First Geneva Convention, 2016,* online*:* https://ihl-databases.icrc.org/ihl/full/GCI-commentary (accessed latest 12 August 2019), para 214.

7.1. Identification and classification of an international armed conflict

An international armed conflict (IAC) exists whenever there is recourse to armed force between states.[358] The definition of IAC was crafted explicitly in order to replace the concept of *war* in classical international law,[359] and the primary treaty rules governing international armed conflicts are the 1907 Hague Conventions and the 1949 Geneva Conventions. As noted, there is no central authority under international law to identify or classify a situation as an armed conflict.[360] Common Article 2 of the Geneva Conventions defines an IAC. Article 2 holds:

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.[361]

As observed in the 2016 Commentary on the Geneva Conventions, '(…) the determination of the existence of an armed conflict within the meaning of Article 2(1) must be based solely on the prevailing facts demonstrating the *de facto* existence of hostilities between the belligerents.'[362] In the oft-cited commentary of 1958, Pictet similarly held that:

> Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to the human person as such is not measured by the number of victims.[363]

Both state practice and doctrine have since supported this interpretation, and it is also shared by a significant number of academic experts.[364] The definition of an international armed conflict, thus, presupposes an inter-state conflict between two equal sovereigns.[365] There is thus no requirement that the use of armed force reaches a certain level of intensity.[366] As observed by the ICRC and Gasser:

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[358] *Prosecutor v. Dusko Tadić aka "Dule"* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995, ICTY IT-94, para. 70.
[359] Marco Milanovic and Vidan Hadzi-Vidanovic, 'A taxonomy of armed conflict' in Nigel D. White and Christian Hendersen (eds)*, Research Handbook on International Conflict and Security Law* (Edward Elgar 2013) 256, 272.
[360] ICRC, *Commentary on the First Geneva Convention, 2016,* online*:* https://ihl-databases.icrc.org/ihl/full/GCI-commentary (accessed latest 12 August 2019, para 214.
[361] Geneva Conventions, Common Article 2.
[362] ICRC, *Commentary on the First Geneva Convention, 2016,* online*:* https://ihl-databases.icrc.org/ihl/full/GCI-commentary (accessed latest 12 August 2019, para 211.
[363] ICRC, Commentary on the Fourth Geneva Convention (1958), 20–21.
[364] ICRC, *Commentary on the First Geneva Convention, 2016,* online*:* https://ihl-databases.icrc.org/ihl/full/GCI-commentary (accessed latest 12 August 2019), para 238. See also Hans-Peter Gasser, 'International Humanitarian Law: An Introduction' in Hans Haug (ed)*, Humanity for All: The International red Cross and the Red Crescent Movement* (Henry Dunant Institute, Geneva 1993), 510–511.
[365] Marco Milanovic and Vidan Hadzi-Vidanovic, 'A taxonomy of armed conflict' in Nigel D. White and Christian Hendersen (eds)*, Research Handbook on International Conflict and Security Law* (Edward Elgar 2013) 256, 273.
[366] ICRC, *Commentary on the First Geneva Convention, 2016,* online*:* https://ihl-databases.icrc.org/ihl/full/GCI-commentary (accessed latest 12 August 2019), para 236.

> (…) any use of armed force by one State against the territory of another, triggers the applicability of the Geneva Conventions between the two States. (…) It is also of no concern whether or not the party attacked resists. (…) As soon as the armed forces of one State find themselves with wounded or surrendering members of the armed forces or civilians of another State on their hands, as soon as they detain prisoners or have actual control over a part of the territory of the enemy State, then they must comply with the relevant convention.[367]

As noted by the ICRC, the interpretation that the wording *between two states* requires simultaneous involvement of at least two opposing states would exclude from the scope of application the unilateral use of force by one state against another, and would, as such be too narrow and against the object and purpose of the Geneva Conventions.[368] Therefore, according to the interpretation submitted by the ICRC, the fact that a state unilaterally uses force against another state suffices to qualify the situation as an IAC. Similarly, the non-consensual deployment of armed forces onto the territory of another state could constitute an IAC, even when not met by resistance.[369]

The ICRC further contends that the use of armed force directed solely against the territory of a state, its civilian population or civilian objects, including its infrastructure, would give rise to an IAC. The targets, as per the ICRC definition, do not need to be part of the executive authority of the state, nor is it conditioned on the attack's being directed against the government in place. As a result, any attack against the territory, population or the military or civilian infrastructure constitutes a resort to armed force against the state.[370] Thereby, it is not the transnational nature of the hostilities that determine the existence of an IAC, but, notably, the identity of the participants.[371] In other words, an international armed conflict requires that the conflict takes place between two or more sovereign states.[372]

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[367] See ICRC, How is the Term 'Armed Conflict' Defined in International Humanitarian Law?, Opinion Paper (March 2008), online: https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf (accessed latest 4 February 2019), in which reference is made to Hans-Peter Gasser, 'International Humanitarian Law: An Introduction' in Hans Haug (ed)*, Humanity for All: The International red Cross and the Red Crescent Movement* (Henry Dunant Institute, Geneva 1993), 510-511.

[368] See further in ICRC, *Commentary on the First Geneva Convention, 2016,* online*:* https://ihl-databases.icrc.org/ihl/full/GCI-commentary (accessed latest 12 August 2019), para 222- 223.

[369] ibid, para 223.

[370] ibid, para 224.

[371] As observed in the in ICRC, *Commentary on the First Geneva Convention, 2016,* online*:* https://ihl-databases.icrc.org/ihl/full/GCI-commentary (accessed latest 12 August 2019), para 221: 'Under Article 2(1), the identity of the actors involved in the hostilities – States – will therefore define the international character of the armed conflict. In this regard, statehood remains the baseline against which the existence of an armed conflict under Article 2(1) will be measured.'

[372] Marco Milanovic and Vidan Hadzi-Vidanovic, 'A taxonomy of armed conflict' in Nigel D. White and Christian Hendersen (eds)*, Research Handbook on International Conflict and Security Law* (Edward Elgar 2013) 256, 274.

7.2. Identification and classification of non-international armed conflicts

While IHL initially developed primarily in relation to armed conflicts between states, NIACs have become the predominant form of armed conflict in recent years. The NIAC concept remained largely undefined until 1995, when the ICTY elaborated on the concept in *Tadić*, and defined a NIAC as:

> (…) protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.[373]

This definition has been held to have obtained customary status and has been repeatedly used in subsequent case law.[374]

The realities of post-conflict environments and the aims pursued in peace operations and *jus post bellum* dictate that the differentiation between situations that fall below the threshold of NIAC, and situations that legally fall within the ambit of IHL, is of utmost significance to this research.[375] Identifying the dividing line separating a violent situation of internal disturbances from the 'lowest' CA3 level is also the most challenging.[376] Identifying such a dividing line between IHRL and IHL is nevertheless key to enabling effective, purposive and sustainable protection of civilians in transitional environments, and thus also for the identification of a normative framework *jus post bellum*.

Historically, violence occurring within the sphere of a state was divided into three categories; *rebellion*, *insurgency*, and *belligerency*. Although internal violence was generally excluded from the ambit of international law, this was not an absolute rule. The need to regulate violence within a state through international law grew primarily out of a recognition that the violence may affect third states.[377] Rebellion thus referred to situations of short-lived insurrection against the authority of a state,[378] was considered to be of limited duration, and that could be easily suppressed by the government. The violence and the actors were accordingly subject solely to domestic law.[379] When a

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[373] *Prosecutor v. Dusko Tadić aka 'Dule'* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995, ICTY IT-94, para.70

[374] See *Prosecutor v. Haradinaj et al. (Trial Judgment)*, IT-04-84-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 3 April 2008; *Prosecutor v. Limaj et al. (Trial Judgment)*, IT-03-66-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 30 November 2005, para 84; *The Prosecutor v. Jean-Paul Akayesu (Trial Judgement)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, para 619; and *Prosecutor v. Boskoski and Tarculovski (Trial Judgment)*, IT-04-82-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 July 2008, para 175.

[375] The question of legal classifiction of an armed conflict involving a peace operation is further addressed in Chapter 7.5. It suffices to note here that the interpretation adopted in this research is that an armed conflict between a peace operation and a non-state armed group is classified as a NIAC.

[376] See the *Tablada case*, Inter-American Commission on Human Rights (IACommHR), Case 11.137 Juan Carlos Abella, November 18 1997, OEA/Ser.L/V/II.98 doc. 6 rev. 13 April 1998, para 153.

[377] Marco Milanovic and Vidan Hadzi-Vidanovic, 'A taxonomy of armed conflict' in Nigel D. White and Christian Hendersen (eds)*, Research Handbook on International Conflict and Security Law* (Edward Elgar 2013) 256, 262.

[378] Anthony Cullen, *The Concept of Non-International Armed Conflict in Intenational Humanitarian Law* (Cambridge Studies in International Law, Cambridge University Press 2010), 8.

[379] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2014), 9.

rebellion survived suppression, it changed in status into one of *insurgency*. Insurgency was thereby expected to be more sustained and substantial than rebellion, and characterized by serious violence that was both temporally and geographically extended, and which included larger numbers of participants.[380]

Belligerency, finally, required *de facto* political organisation of the insurgents that possessed sufficient character, population and resources to constitute, if left to itself, a state among nations. The belligerent group was thus expected to be reasonably capable of discharging the duties of a state, and to act in accordance with the rules and customs of war.[381] Belligerency thereby required that the insurgency group had acquired capabilities and features similar to those of a state. It was consequently not until the violence resembled that of a war between two states that the laws of war became applicable to violence occurring inside a state in classical IHL. Notably, all types of unrest were categorized based on the *intensity* of the violence.[382] Intensity, consequently, is a long-standing element in the legal classification of violence.

Prior to the adoption of the Geneva Conventions in 1949, attempts were made to define the concept of NIAC and to thereby move away from the subjective identification of such armed conflicts through recognition of belligerency. This development grew out of a realization that internal war could be just as devastating as international wars. However, the state system was strong, and the willingness of states to sacrifice sovereignty for the expansion of the reach of international law was limited.[383]

There are primarily two legal instruments that regulate NIACs today; CA3 and APII. These instruments provide different criteria for application, which has resulted in extensive debate on the definition of NIACs as well as the threshold for, and scope of application of relevant law.

Note should also be taken of the Rome Statute of the International Criminal Court (ICC), which contemplates two separate situations of NIAC. The first type regulated in Article 8(2)(c) of the Rome Statute is the incorporation of CA3. On the other hand, the second genre described in Article 8(2)(e) provides the situation of NIAC that is similar to the one covered by the APII, albeit there is significant broadening of its material scope of application. In view of this, for states parties to the Geneva Conventions of 1949, the APII and to the ICC Statute, it may be seriously asked if one might now have to contemplate three potentially different thresholds for NIAC: (i) conflicts regulated solely by CA3 and customary international law; (ii) conflicts also regulated by APII and (iii) conflicts that give

[380] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2014), 9. See also Anthony Cullen, *The Concept of Non-International Armed Conflict in Intenational Humanitarian Law* (Cambridge Studies in International Law, Cambridge University Press 2010), 10-11.
[381] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2014), 9-10.
[382] ibid, 9.
[383] ibid, 156.

rise to the application of the war crimes regime stipulated in article 8(2)(f) of the ICC statute. It is, however, also possible to argue that the ICC statute has extended the applicable scope of APII, and that consequently there are merely two different thresholds today: CA3 and the extended scope of APII reflected in the ICC statute.

7.2.1. Common Article 3 of the Geneva Conventions (CA3)

The creation of Common Article 3 (CA3) was a first attempt at regulating NIACs systematically instead of arbitrarily through the recognition of belligerency.[384] CA3 holds:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions
>
> (1) Persons taking no 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, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (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;
>
> (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> (2) The wounded and sick shall be collected and cared for.
>
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
>
> The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
>
> The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.[385]

The mere inclusion of the term *armed conflict* in CA3 indirectly distinguishes situations of internal disturbances not amounting to armed conflicts from situations that do. Thereby, although not

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[384] Marco Milanovic and Vidan Hadzi-Vidanovic, 'A taxonomy of armed conflict' in Nigel D. White and Christian Hendersen (eds), *Research Handbook on International Conflict and Security Law* (Edward Elgar 2013) 256, 268. For a thorough account of the terms *rebellion*, *insurgency* and *belligerency*, see Anthony Cullen, *The Concept of Non-International Armed Conflict in Intenational Humanitarian Law* (Cambridge Studies in International Law, Cambridge University Press 2010).
[385] Geneva Conventions, Common Article 3.

expressly stated, *intensity* is an intrinsic criterion entailed in CA3 that is necessary in order to differentiate between a NIAC and internal violence, such as riots and internal disturbances. CA3 thus serves two functions: it provides both a threshold for application of the law of NIAC and protection primarily to those who have fallen into the hands of the enemy. CA3 also introduced three major changes in IHL. Firstly, it applied IHL to situations that previously had been within the territorial state's sole concern. Secondly, it applied the framework to non-state actors, and thirdly, it gave the ICRC a mandate to engage with the parties of the conflict.[386]

As the Geneva Conventions have gained universal ratification, there can be no doubt that CA3 has obtained customary status in international law; as such, it is applicable to all armed conflicts and parties to conflicts, and to new states as they emerge in the international arena.[387] Although the *treaty* rules of the humanitarian law of NIAC are still more rudimentary than those applicable to IAC,[388] the development of jurisprudence, the influence of IHRL, and in particular the implications of the ICRC study on customary IHL, have brought the law of NIAC closer to that of the law of IAC.[389] As a result of this growing body of customary international law, the gap in legal regulation of IAC and NIAC has been narrowing in recent decades.[390] In NIAC, however, CA3, integral to the universally ratified Geneva Conventions, remains the core provision that applies to all NIAC and all states. As observed by the ICRC in its 2016 commentary:

> (…) Common Article 3 remains the core provision of humanitarian treaty law for the regulation of non-international armed conflicts. As part of the universally ratified 1949 Geneva Conventions, it is the only provision that is binding worldwide and governs all non-international armed conflicts. In comparison, Additional Protocol II is not universally ratified and its scope of application is more limited, without, however, modifying common Article 3's existing conditions of application.[391]

Thus, despite recent developments in customary and case law, CA3 remains a first threshold for the application of IHL and is thereby key to identifying a dividing line between situations of internal disturbances and NIACs.

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[386] David Kretzmer. 'Rethinking the application of international humanitarian law in non-international armed conflicts' (2009) 42(1) Israel Law Review, 37.
[387] Marko Milanovic and Vidan Hadzi-Vidanovic, 'A taxonomy of armed conflict' in Nigel D. White and Christian Hendersen (eds), *Research Handbook on International Conflict and Security Law* (Edward Elgar 2013) 256, 269.
[388] Marco Sassoli and Laura Olson. 'The Relationship between International Humanitarian and Human Rights Law Where it Matters: Admissible Killings and Internment of Fighters in Non-International Armed Conflicts' (2008) 90(871) International Review of the Red Cross , 601.
[389] Marco Sassoli and Laura Olson. 'The Relationship between International Humanitarian and Human Rights Law Where it Matters: Admissible Killings and Internment of Fighters in Non-International Armed Conflicts' (2008) 90(871) International Review of the Red Cross , 602.
[390] William H. Boothby, *The Law of Targeting* (First edn, Oxford University Press 2012), 429.
[391] ICRC, *Commentary on the First Geneva Convention, 2016,* online*:* https://ihl-databases.icrc.org/ihl/full/GCI-commentary (accessed latest 12 August 2019), para 354.

The Court in the *Haradinaj* case identified a number of criteria for establishing a sufficient level of intensity to give rise to an armed conflict. The number, intensity and duration of confrontations, the types of weapons and other military equipment used, the number and calibre of munitions fired, the number of individuals and types of forces participating, the number of casualties, the extent of material destruction, and the number of civilians fleeing the combat zone were all held as relevant criteria for establishing a level of intensity sufficient to give rise to a NIAC.[392] It is important to note that, just as in the case of the level of organisation, these criteria are not an exhaustive list, but mere examples of relevant criteria in the assessment of intensity.[393]

The Court in the *Boskoski* case likewise identified that elements relevant for determining the existence of a NIAC entail the number of people involved, the duration of the violence and the type of weapons used.[394] It is also noteworthy that many of the elements, such as calibre, extent of destruction, and types of participating forces seem to refer to a military type of means and methods, which may suggest that a force that resembles traditional military force and practices would be indicative of a sufficient level of intensity to give rise to a NIAC.

Further, the definition of NIAC posited in *Tadić*, notably, entailed the notion of *protracted* violence, which raises the question of what protracted violence is, and how it relates to the intensity requirement in CA3. *Protractedness*, although usually indicative of a temporal aspect, does not necessarily relate to duration. As observed by Kleffner, case law has transformed the notion of protractedness to entail intensity rather than duration of violence.[395] The Court in the *Limaj* case noted, and based its decision on, criteria that had been used in previous Court decisions for the determination of whether a sufficient level of intensity had been reached. One such criterion was that of 'the spread of clashes over territory and over a period of time'.[396] Both duration and geographical reach of violence, in other words, may be indicative of a sufficient level of intensity.

Subsequent case law similarly confirms that duration is one of many parts that can make up a sufficient level of intensity in order to give rise to the existence of an armed conflict.[397] It was detailed in *Mrksic et al* that *duration* is a form of intensity. It held that:

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[392] ICRC, *Commentary on the First Geneva Convention, 2016,* online*:* https://ihl-databases.icrc.org/ihl/full/GCI-commentary (accessed latest 12 August 2019), para 354. See also similar assessment in *Prosecutor v. Mrksic et al. (Trial Judgment)*, IT-95-13/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 27 September 2007, paras 407-408.
[393] See further below on the notion of *organisation* in Chapter 7.2.2.
[394] *Prosecutor v. Boskoski and Tarculovski (Trial Judgment)*, IT-04-82-T, International Criminal Tribunal for the former Yugoslavia (ICTY), Trial Chamber II decision, IT-04-82-T, 10 July 2008, para 208.
[395] Jann K. Kleffner. 'The legal fog of an illusion: Three Reflections on "Organisation and "Intensity" as Criteria for the Temporal Scope of the Law of Non-International Armed Conflict' (2019) 95 International Law Studies, Stockholm Center for International Law 161
[396] ICTY Prosecutor v Limaj, Case no IT-03-66-T, Judgement (Trial Chamber), 30 November 2005, para 90.
[397] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2014), 167-168.

> Relevant for establishing the intensity of a conflict are, inter alia, the seriousness of attacks and potential increase in armed clashes, their spread over territory and over a period of time, the increase in the number of government forces, the mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and if so whether any resolutions on the matter have been passed.[398]

In the *Haradinaj* case, further, the ICTY noted that the criterion of *protractedness* had been used primarily for the purpose of establishing a sufficient level of intensity rather than the duration of the fighting.[399] A similar conclusion was reached by the ICC in the *Gombo* case in 2016, in which it was observed that protractedness has generally been addressed within the framework of *intensity*.[400]

Moreover, it may be that violence of short duration but high intensity, and violence of long duration but low intensity can result in the rise of an armed conflict.[401] As observed by Vité, the practice of the ICTY reveals that in terms of NIACs the threshold is reached every time protracted armed violence occurs,[402] and that the protractedness must be assessed against the yardstick of both the intensity of the violence and the organisation of the parties.[403]

It can be concluded that although duration is an aspect that is relevant for the determination of a sufficient level of intensity, duration is not a separate criterion under CA3. As a result, duration alone is not sufficient for establishing the existence of an armed conflict.[404] It is further submitted that the intensity threshold entailed in both CA3 and APII can be understood to indicate that it is not feasible to combat the threat within the confines of the law enforcement paradigm. Such an understanding of the intensity requirement would leave no gap between situations regulated by IHRL and situations amounting to a NIAC. However, it is not purposeful, as sometimes suggested, to allow such determination on the basis of the actor assigned to address the situation.[405] Rather, as per the

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[398] *Prosecutor v. Mrksic et al. (Trial Judgment)*, IT-95-13/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 27 September 2007, para 407.
[399] *Prosecutor v. Haradinaj et al. (Trial Judgment)*, IT-04-84-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 3 April 2008, para 49.
[400] *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Trial Chamber III, Judgment pursuant to Article 74 of the Statute, 138 (21 March 2016), para 139.
[401] Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012), 53.
[402] Vité refers to ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 70. See also ICTY, *Prosecutor v. Mucˇic et al*. (Cˇ elebˇ ci Camp), Case No. IT-96-21, Judgment (Trial Chamber), 16 November 1998, para 184, and Sylvain Vité. 'Typology of armed conflicts in international humanitarian law: legal concepts and actual situations' (2009) 91(873) International Review of the Red Cross , 76.
[403] Sylvain Vité. 'Typology of armed conflicts in international humanitarian law: legal concepts and actual situations' (2009) 91(873) International Review of the Red Cross, 76.
[404] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2014), 167.
[405] See for example discussions in an expert meeting in Gloria Gaggioli, Expert meeting, The use of Force in Armed Conflicts: interplay between conduct of hostilities and the law enforcement paradigms (International Committee of the Red Cross, 2013), 12.

functional approach to determining the applicable law, the nature of the violence is determinative of the applicable legal regime governing the situation.[406]

Where exactly the threshold for a sufficient level of intensity lies, however, is debated. Dinstein holds that the level of violence not amounting to a NIAC seems to be settled by law. He refers to APII, determining that the treaty does not apply to 'internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of similar nature'.[407] He notes that the named formula is repeated in ICC statute, and other treaties, and concludes that violence may be large-scale and rife, and may inflict incalculable human fatalities or colossal damage to property, but will not constitute an armed conflict as long as the events are sporadic and isolated. In other words, as long as the situation remains uncoordinated or is not sustained over a period of time, the violence does not constitute an armed conflict.[408] Dinstein thereby argues for a relatively high threshold for the rise of a NIAC.

Sivakumaran, on the contrary, suggest a lower threshold for the rise of a NIAC. He rejects suggestions that CA3 operates in situations equivalent to civil war or belligerency, and holds that CA3 applies to situations below the belligerency threshold and to situations of *insurgency*.[409] The IACommHR similarly noted, in the *Tablada* case, that the existence of large-scale and generalised hostilities is not required for CA3 to apply. Neither does it require a situation comparable to 'civil war', according to the IACommHR.[410] Much like Sivakumaran, the IACommHR thereby suggests a low threshold for the rise of a NIAC.

There is consequently no agreement on where exactly the intensity threshold lies, and several elements may contribute to the determination of whether an armed conflict exists. As a result, the determination must be made on a case-by-case basis, and against the backdrop of each specific scenario. It is reasonable to suggest that the intensity requirement entailed in CA3 is comparable to the intensity requirement reflected in the term *insurgency* in classical international law. Also, under the interpretation that CA3 brings with it the applicability of the rules on conduct in hostilities entailed in IHL,[411] a key element for determining where the threshold lies should arguably be the issue of whether the situation can reasonably be contained within the law enforcement paradigm.

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[406] See also Kenneth Watkin. 'Controlling the use of force: A role for human rights norms in contemporary armed conflict' (2004) 98(1) American Journal of International Law , 8.
[407] See Additional Protcol II, article 1(2).
[408] Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014), 21.
[409] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2014), 161-162.
[410] Inter-American Commission on Human Rights, Case 11.137 Juan Carlos Abella, November 18 1997, OEA/Ser.L/V/II.98 doc. 6 rev. 13 April 1998, para 152. See also Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2014), 162.
[411] See further in Chapter 9 on the regulation of conduct.

7.2.2. Additional Protocol II (APII)

At the time of the adoption of CA3, it constituted the sum of all existing law regulating NIACs. It soon became apparent, however, that further regulation was needed.[412] Additional Protocol II to the Geneva Conventions (APII) was born as a result of this recognition, and provides a definition of its material scope of application in Article 1(1):

> This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply 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.[413]

Obviously, a feature common for both CA3 and APII is that at least one of the parties to the conflict must be a non-state actor.[414] As known, when determining its scope of application, the APII requires an armed opposition group to be organised (organisation), to have a command structure, exercise sufficient control over territory to carry out sustained and concerted military operations, and capacity to implement APII as criteria for its applicability. It thereby has a more restrictive scope of application than CA3 and applies only when a state is engaged in an armed conflict against non-international actors. This approach was a compromise to allow for the creation of more specific rules on NIACs.[415] APII thereby has a higher threshold, and consequently a smaller scope of application than CA3.

The inclusion of the term *military operations* indicates that APII does not apply to just any form of serious violence but is limited to a military type force. This may suggest that the intensity threshold is higher in APII than in CA3. While merely intrinsic in CA3, the intensity requirement is explicitly spelled out in Article 1(2) of APII, which details the material scope of application of APII. Article 1(2) holds that:

> This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.[416]

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[412] Marko Milanovic and Vidan Hadzi-Vidanovic, 'A taxonomy of armed conflict' in Nigel D. White and Christian Hendersen (eds), *Research Handbook on International Conflict and Security Law* (Edward Elgar 2013) 256, 285.
[413] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (herefter APII), 8 June 1977, article 1(1).
[414] Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012), 51.
[415] Noelle Quénivet, 'Applicability Test of Additional Protocol II and COmmon Article 3 from Crimes in Internal Armed Conflicts' in Derek Jinks, Jackson N. Maogoto and Solon Solomon (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies* (Asser Press 2014), 35.
[416] APII, Article 1(2).

It is often held that it is 'generally accepted' that Article 1(2) of APII also applies, as a matter of analogy, to CA3 conflicts,[417] and it is generally accepted that the threshold, which excludes internal disturbances, is applicable also to CA3.[418] Under such interpretation, which is the one adopted here, the intensity criterion is the same in both CA3 and APII.

The term *other organized armed groups* entailed in Article 1(1), further, deserves detailed attention. The word 'other' distinguishes this category from 'dissident armed forces'. Dissident armed forces may be military units that have broken away from the governmental armed forces.[419] In addition, the term 'armed' reveals a requirement that the group is using some form of violence and weapons, which primarily distinguishes these groups from non-violent opposition groups. A capacity to use lethal *or* destructive cyber-attacks, may, notably, count as being armed according to Dinstein.[420] This interpretation is supported by the recent ICRC Commentary on the Geneva Conventions.[421]

The material scope of application of APII may be understood as demanding a specific organisational character of the armed group. That is also largely how case law has interpreted the notion of *organisation*. Three aspects of organisation thus emerge: (i) responsible command, (ii) control over territory, and (iii) capability to carry out sustained and concerted military operations. Such an understanding of the term *organised* suggests that the non-state actor possesses organisation and capability similar to that of the armed forces of states, and can thus be understood as similar to the term *belligerency* in classical international law.[422]

The ICTY developed the interpretation of what the term *organised* entails in the *Haradinaj* Judgment, which identified a number of factors of relevance. The Trial Chamber held that:

> As for armed groups, Trial Chambers have relied on several indicative factors, none of which are, in themselves, essential to establish whether the "organisation" criterion is fulfilled. Such indicative factors include the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements

[417] Marco Milanovic and Vidan Hadzi-Vidanovic, 'A taxonomy of armed conflict' in Nigel D. White and Christian Hendersen (eds)*, Research Handbook on International Conflict and Security Law* (Edward Elgar 2013) 256, 286.
[418] ICRC, Opinion Paper, "How is the term "Armed Conflict" Defined in International Humanitarian Law?, March 2008, online: https://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm (accessed 17 December 2014), 3
[419] Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014), 40.
[420] ibid, 42.
[421] See further in ICRC, *Commentary on the First Geneva Convention, 2016,* online*:* https://ihl-databases.icrc.org/ihl/full/GCI-commentary (accessed latest 12 August 2019), para 436-437.
[422] See further in the introduction of Chapter 7.2.

such as cease-fire or peace accords.[423]

The requirement of control of territory, notably, is linked to an ability to perform sustained and concerted military operations. Textually, this seems to indicate that there is no requirement of actual sustained and concerted military operations, but rather merely an *ability* to perform in such way.

The Court in *Boskoski* also held that the identity of the persons engaged or the unit to which they belong is relevant to establish whether the acts were violent acts by an organised armed group or rather disorganised expressions of violence not associated with the armed group.[424] It may be of essence in this context to make a firm distinction between the 'identity of the persons engaged', and the nature of the violence that the individuals engaged are capable of. While an organisational structure of a group may indicate that the group has a capacity to use force of a nature and level that reaches the threshold of intensity, the identity or character of the group cannot as the sole criterion establish the applicability of IHL.

The criterion of organisation also suggests that the fighting must be of a collective nature rather than random and carried out by individuals.[425] In the *Haradinaj* case, the Court went even further, and held that a level of organisation was required in order to confront the other party *with military means*.[426] The Court thereby seems to have assumed that *military means* are required in order to give rise to an armed conflict. Thereby, it is questionable whether other types of organized armed violence, such as low-intensity or small calibre force that is often used in connection to organized and transnational crime, could reach the necessary threshold and give rise to a NIAC.

The ICTY summed up its legal position on the issue of organisation in the *Boskoski et al* case in 2008. It identified 5 constituent elements for establishing a sufficient level of control; chain of command, military capacity, logistical abilities, internal discipline and the ability to 'speak with one voice' in for example political negotiations and in concluding peace agreements.[427] Other indications of organisation and control have been held to entail elements such as existence of a command structure,

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[423] *Prosecutor v. Haradinaj et al. (Trial Judgment)*, IT-04-84-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 3 April 2008, para 60.
[424] *Prosecutor v. Boskoski and Tarculovski (Trial Judgment)*, IT-04-82-T, International Criminal Tribunal for the former Yugoslavia (ICTY), Trial Chamber II decision, IT-04-82-T, 10 July 2008, para 208.
[425] In the Delilac case, the Trial Chamber held that when differentiating a NIAC from domestic unrest, focus should be on the organisation of the parties and on the protracted extent of the violence. See Trail Chamber Judgement, IT-96-21-T, 16 November 1998, para 184.
[426] *Prosecutor v. Haradinaj et al. (Trial Judgment)*, IT-04-84-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 3 April 2008, para 60.
[427] *Prosecutor v. Boskoski and Tarculovski (Trial Judgment)*, IT-04-82-T, International Criminal Tribunal for the former Yugoslavia (ICTY), Trial Chamber II decision, IT-04-82-T, 10 July 2008, para 199- 203. See also Report prepared by the International Committee of the Red Cross, 28th International Conference of the Red Cross and Red Crescent, Geneva, 2 to 6 December 2003, at 19 (referring to "armed forces or armed groups with a certain level of organisation, command structure and, therefore, the ability to implement international humanitarian law.") See also Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014), 44.

uniforms, discrete roles and responsibilities with different entities, ability to uphold external relations such as negotiations with outside parties, etc., also constitute indicators of organisation.[428] In the *Limaj* case, the Court identified similar criteria as indicative of and relevant for assessing whether a level of organisation was sufficient: the existence of headquarters, designation of zones of operation, and the ability to procure, transport, and distribute arms.[429]

This suggests a requirement for the armed group's possessing a structure and capabilities similar to those of the armed forces of states. In 2012, however, the ICTY reasoned in the *Haradinaj* retrial judgement that the organisational criterion does not require that the armed group is organised as the armed forces of a state, but that the leadership of the group must, 'as a minimum, have the ability to exercise some control over its members so that the basic obligations of common Article 3 of the Geneva Conventions may be implemented.'[430] In the *Haradinaj* retrial, it was also quite confusingly held that:

> The jurisprudence of the Tribunal has established that armed conflict of a non-international character may only arise when there is protracted violence between governmental authorities and organised armed groups, or between such groups, within a State. While an armed group must have "some degree of organisation", the warring parties do not necessarily need to be as organized.[431]

The contention that a NIAC can *only* arise when protracted violence is between governmental authorities *and* organised armed groups, firstly, suggests a cumulative understanding of the criteria of intensity and organisation. Secondly, the statement that an armed group must have 'some degree of organisation' but not necessarily 'be organized', is ambiguous, and it is not clear how the two are perceived to differ in practical terms. Similar to earlier case law, however, the factors to take into account in determining organisation were held to fall into five groups: (i) factors that signal the existence of a command structure, (ii) factors that indicate an ability to conduct organized operations, (iii) factors that indicate logistics, (iv) factors relevant to internal discipline and an ability to uphold basic requirements under CA3, and (v) factors indicating an ability to 'speak with one voice'.[432]

While a number of factors can indicate a sufficient level of organisation to give rise to the applicability of APII, it can be concluded that the criterion of organisation relates to the character of the parties of the conflict and requires certain organisational structures in order to enable specific military capabilities. It thereby differs in significant ways from the criterion of intensity, which relates only to the nature of the violence employed.

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[428] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2014), 170-171.
[429] ICTY *Prosecutor v Limaj*, Case no IT-03-66-T, Judgement (Trial Chamber), 30 November 2005, para 90.
[430] *Prosecutor v. Haradinaj et al.,* International Criminal Tribunal for the former Yugoslavia (ICTY), Public Judgment with Confidential annex, Trial Chamber II, IT-04-84bis-T, 29 November 2012, para 393.
[431] ibid (footnote omitted).
[432] ibid, para 394.

Furthermore, while there is no controversy about the customary status of CA3,[433] the situation is very different regarding APII. There are arguments holding that most – if not all – of the rules entailed in APII have developed into customary law. As a result, this argument holds, although treaty law distinguishes between CA3 and APII, the development of the rules of APII into customary law may have resulted in it extending its applicable scope to CA3 conflicts. In support of this argument, it is noted that the ICRC study on customary law did not distinguish between CA3 and APII in its conclusion that most rules of IAC are also applicable in NIAC.[434]

APII may also seem to constitute the *lex specialis* of CA3. However, *lex specialis* does not apply when the special law might frustrate the purpose of law, or where the parties have intended otherwise.[435] The material scope of APII is likely to frustrate the purpose of CA3 by introducing the additional criterion of organisation of parties. APII clearly grants autonomous application to CA3, and therefore *lex specialis* cannot be applied.[436] As a result, the material scope of APII does not replace that of CA3. Despite arguments to eliminate the disparity between CA3 and APII, the fact that the ICC statute maintained the distinction[437] provides testimony to the continued existence of a distinction between the two thresholds.[438] CA3 consequently continues to apply in all NIACs irrespective of the application of the more narrow scope of APII.[439]

The conclusion, therefore, is that APII and CA3 results in the existence of two different forms of NIACs. Moreover, the distinction made between the two instruments in the ICC statute confirms the interpretation that CA3 and APII give rise to two distinct forms of NIACs; one to which CA3 and customary law applies, and one to which APII also applies.

7.2.3. The ICC Statute- a third threshold?

It might be suggested that the ICC statute identifies a third threshold for the existence of a NIAC. This argument is based on the fact that Article 8(2)(f) of the statute holds that Article 8(2)(e), which deals with war crimes other than those against CA3, applies where there is a resort to 'protracted armed

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[433] See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, ICRC, Cambridge University Press, 2005 (hereinafter "ICRC Customary IHL Study") and International Committee of the Red Cross (ICRC), *Commentary on the First Geneva Convention, 2016,* online*:* https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC (accessed latest 12 September 2019).

[434] See Marko Milanovic and Vidan Hadzi-Vidanovic, 'A taxonomy of armed conflict' in Nigel D. White and Christian Hendersen (eds)*, Research Handbook on International Conflict and Security Law* (Edward Elgar 2013) 256, 286.

[435] ILC, Report of the Commission to the General Assembly on the work of its fifty-eighth session, 2006, vol II, part two, A/CN.4/Ser.A/2006/Add.1 (Part 2), 179,

[436] Noelle Quénivet, 'Applicability Test of Additional Protocol II and COmmon Article 3 from Crimes in Internal Armed Conflicts' in Derek Jinks, Jackson N. Maogoto and Solon Solomon (eds)*, Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies* (Asser Press 2014), 39.

[437] See article 8(2)(d) and article 8(2)(f) of the ICC Statute.

[438] Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014), 39-40.

[439] ibid, 8.

violence between governmental authorities and organized armed groups or between such groups'.[440] The ICC statute thereby seemingly combines the two different thresholds of CA3 and APII, creating a possible third threshold for the existence of an armed conflict.

However, while it is not clear from the wording of the ICC statute that it intended to create a different threshold of application, as also argued by Akande, the wording also does not do so. The wording is seemingly taken from the *Tadić* case, which attempted to identify the type of conflicts that would fall within the scope of application of CA3.[441] Akande therefore argues that the statute is better held as merely stating the relevance of protracted violence in assessing intensity for the purpose of establishing an existing armed conflict.[442]

The better understanding, it is hence submitted, is that Article 8(2)(e) of the ICC Statute merely expands the material scope of APII by including conflicts between non-state actors in its field of application. As a result, Article 8(2)(e) does not create a third threshold for NIAC. Rather, it can be held that the ICC statute extends the application of APII to conflicts between non-state armed groups, and that as a consequence, two thresholds for determining the existence of a NIAC exists: CA3 and the extended version of APII reflected in the ICC statute.

7.3. Differentiating between CA3 and APII conflicts: enhancing legal clarity and advancing prospects for effective, purposive and sustainable protection under *jus post bellum*

As CA3 and APII reveal, *intensity* of violence and *organisation* of parties are crucial to determining the existence of a NIAC. As observed herein, these criteria are distinct, and can be held to identify different thresholds for NIACs. The definition of NIAC posited in *Tadić,* however, entails elements seemingly stemming from both CA3 and APII, which raises questions relating to the distinction between the CA3 and APII thresholds.

As opposed to APII, however, CA3 does not entail a textual requirement of *organisation*. Some hold that a requirement of a sufficient level of organisation of the armed group is inherent in CA3,[443] and others contend that customary law has supplemented the criteria determining the material scope of application of CA3 by adding the criteria of *organisation* and *duration* of hostilities. It has also been

[440] ICC, Statute, Article 8(2)(e) and 8(2)(f). See also Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012), 56.
[441] Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012), 56.
[442] ibid.
[443] Marco Milanovic and Vidan Hadzi-Vidanovic, 'A taxonomy of armed conflict' in Nigel D. White and Christian Hendersen (eds), *Research Handbook on International Conflict and Security Law* (Edward Elgar 2013) 256, 284.

held that case law as well as customary law shows that in order to be a party to an armed conflict, the non-state actor must hold a certain level of organisation and command structure.[444]

These 'twin criteria' for determining the existence of a NIAC have been repeatedly confirmed in case law, and in domestic as well as international courts, including the ICC,[445] which suggest that law has developed so as to require that both criteria be fulfilled for a NIAC to exist. By the same token, the ICRC study on customary IHL fails to recognize the different forms of NIACs. Instead, they refer to all criteria entailed in both CA3 and APII. It is not clear whether that was a deliberate stand on behalf of the ICRC, or if they rather opted to not investigate the matter further. States, however, have made a distinction between the application of APII and CA3. Both Canadian and British military manuals, for example, make a distinction between the two.[446] The United Nations has also made explicit reference to different types of NIAC, although a growing number of resolutions do not distinguish between these two types of conflicts.[447] There are thus a significant number of actors that mix criteria from the different legal instrument in the definition of a NIAC, which certainly complicates both the definition and the determination of the criteria that give rise to a NIAC.

The Commentary of 1987, however, reveals that the intention of the drafters of APII was to maintain the distinction between CA3 and APII. APII endeavoured to meet three concerns: (i) to establish the upper and lower thresholds of NIAC; (ii) to provide the elements of a definition; (iii) to ensure that the achievements of CA3 would remain intact.[448] It was held that:

> the ICRC draft endeavoured to keep intact the achievements of common Article 3 by providing that the conditions of application of that article would not be modified. Keeping the conditions of application of common Article 3 as they are, and stipulating that the proposed definition will not apply to that article, meant that the Protocol was conceived as a self-contained instrument, additional to the four Conventions and applicable to all armed conflicts which comply with the definition and are not covered by common Article 2. Keeping the Protocol separate from common Article 3 as intended to prevent undercutting the scope of Article 3 itself by laying down precise rules. In this way common Article 3 retains an independent existence.[449]

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[444] See Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012), 51

[445] See *Prosecutor v. Thomas Lubanga Dyilo* , ICC-01/04-01/06, Judgment Trial Chamber I, International Criminal Court (ICC), 14 March 2012; *Prosecutor v Germain Katanga*, ICC-01/04-01/07, Trial Chamber II, Judgment pursuant to article 74 of the Statute 7 March 2014, para 1185-1187; *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Trial Chamber III, Judgment pursuant to Article 74 of the Statute, (21 March 2016), para 138.

[446] Noelle Quénivet, 'Applicability Test of Additional Protocol II and COmmon Article 3 from Crimes in Internal Armed Conflicts' in Derek Jinks, Jackson N. Maogoto and Solon Solomon (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies* (Asser Press 2014), 41-42.

[447] ibid, 42.

[448] See Commentary of 1987 of APII, Material field of application, para 4451, available online: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=15781C741BA1D4DCC12563CD00439E89 (accessed 11 July 2019).

[449] See Commentary of 1987 of APII, Material field of application, para 4454, available online: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=15781C741BA1D4DCC12563CD00439E89 (accessed 11 July 2019).

A main concern in the drafting of APII was the observation that the lack of definition of NIAC had resulted in a tendency of states to deny the existence of an armed conflict on their territory. States were reluctant to allow international law to expand into what had been the sole concern of the sovereign. Lacking applicability of IHL, international law would not constrain states in their addressing internal matters. The preference of states, thus, was to minimize the applicable scope of IHL.[450] The evolution of IHRL, however, has largely reversed that trend. Today, states are more inclined to claim the applicability of IHL since it affords states greater leeway and less strict control mechanisms than IHRL, and is as such viewed as a preferable legal regime in complex, demanding environments,[451] which merits closer attention to the threshold(s) giving rise to a NIAC. Thereby, attention to the relation between the intensity and organisational criteria in identifying the existence of a NIAC is also warranted.

While a cumulative approach to the intensity and organisational criteria would at first glance seem preferable from a protection perspective, since it would raise the threshold of applicability of IHL, it may in reality reduce the protective scope of the law. From a protection perspective, it is essential that the threshold giving rise to a NIAC should not be set too low, making the less protective regime of IHL applicable to situations that could feasibly be controlled within the IHRL framework. It is equally important, however, that the threshold is not set too high, either, so as to leave both a legal and a protection gap between situations that entail intense violence that cannot reasonably be effectively addressed within IHRL and those situations to which IHL applies. Recognizing the distinct thresholds of CA3 and APII could ensure a sufficiently broad application of IHL while at the same time preventing the more permissive and less protective rules of IHL to venture into the realm of IHRL contexts.

As the present analysis of the criteria of organisation and intensity reveals, the two criteria are distinct. While intensity of violence can be interpreted in many different ways,[452] the criterion is related only to the nature of the violence. The organisational criterion, on the contrary, is most often understood as primarily focusing on the character of the parties of a conflict. Despite the distinct character of the criteria and the textual distinction between CA3 and APII, it is often claimed that intensity *and* organisation are the two key criteria for determining the existence of a NIAC. This suggests that a cumulative approach is needed, requiring both intensity and organisation for a NIAC to exist, and consequently for IHL of NIAC to be applicable.

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[450] See similar argument in Kevin Jon Heller, 'The Use and Abuse of Analogy in IHL' in Jens Ohlin (ed), *Theoretical Boundaries of Armed Conflict & Human Rights* (Cambridge University Press, Forthcoming 2015 2015), 8.
[451] See further in Chapter 12.1.
[452] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2014), 168.

Despite the differentiation between CA3 and APII thresholds, distinction between CA3 and APII is thus not always made in the determination of the existence of a NIAC. It is rare that commentators expressly consider the relation between the distinct criteria reflected in CA3 and APII, but assumptions on the relation between the two are often implicit in their reasoning. The ILA, for example, has held that there is a 'common understanding' among the international community that organisation and intensity are the two minimal criteria necessary in order to identify an armed conflict and distinguish it from 'non-armed conflicts or peace'.[453] The ICRC has similarly stated that the two criteria of intensity and organisation are indispensable for classifying a situation as a NIAC.[454] The same position was put forward in an ICRC opinion paper, which held that due to the need of the non-state actor to be considered a party to the conflict, there is also a need for the parties to have a certain level of organisation, including a command structure, and an ability to sustain military operations.[455]

Dinstein argues along similar lines and holds that establishing the existence of an armed conflict require fulfilment of the criteria determined in CA3 as well as those used by ICTY and ICTR, namely the modicum of *organisation* of any party to the conflict, *protracted* violence and *intensity* of fighting.[456] Sivakumaran seems to support Dinstein's position, by arguing that the *Tadić* decision encapsulated 'core elements of a definition that had been recognized for decades and centuries earlier.'[457] Although Sivakumaran does not explicitly hold that the criterion of organisation has obtained customary status, he seems to imply as much. Other commentators are more explicit, and argue that there is widespread agreement among scholars, and with the ILA, that the definition of NIAC in the ICTY *Tadić* case reflects customary international law.[458]

While in academic doctrines both criteria are considered prerequisites for the existence of a NIAC, some case law distinguishes between CA3 and APII conflicts. In *Akayesu*, a clear distinction was made between NIAC governed by CA3 and those also governed by APII. It was held that:

> (…) [A] clear distinction as to the thresholds of application has been made between situations of international armed conflicts, in which the law of armed conflicts is applicable as a whole, situations of non-international (internal) armed conflicts, where Common Article 3 and Additional Protocol II are applicable**, and non-international armed conflicts where only Common Article**

[453] International Law Association, Final Report on the Meaning of Armed Conflict in International Law, The Hague Conference, Use of Force (2010), 2.
[454] ICRC, *International Humanitarian Law and the challenges of contemporary armed conflicts* (31st International Conference of the Red Cross and the Red Crescent 31IC/11/5.1.2, 2011), 8.
[455] ICRC, Opinion Paper, "How is the term "Armed Conflict" Defined in International Humanitarian Law?, March 2008, online: https://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm (accessed 17 December 2014), 3.
[456] Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014), 20-21.
[457] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2014), 166.
[458] Kevin Jon Heller, 'The Use and Abuse of Analogy in IHL' in Jens Ohlin (ed)*, Theoretical Boundaries of Armed Conflict & Human Rights* (Cambridge University Press, Forthcoming 2015), 24.

3 is applicable (…).[459]

The clear distinction between CA3 and APII NIACs were further elaborated on. It was noted that:

> The distinction pertaining to situations of conflicts of a non-international character emanates from the differing intensity of the conflicts. Such distinction is inherent to the conditions of applicability specified for Common Article 3 or Additional Protocol II respectively. Common Article 3 applies to "armed conflicts not of an international character", whereas for a conflict to fall within the ambit of Additional Protocol II, it must "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". Additional Protocol II does not in itself establish a criterion for a non-international conflict, rather it merely develops and supplements the rules contained in Common Article 3 without modifying its conditions of application.[460]

Indicated in the reasoning of *Akayesu* is the understanding that while CA3 is intended to regulate situations of certain levels of internal violence that cannot be effectively countered through law enforcement engagements, APII clearly positions itself in a scenario of greater severity than mere intense violence by requiring that the source of the violence possess capabilities of a military nature. A cumulative approach may create a protection gap where law enforcement approaches may prove insufficient to effectively deal with the violence, even though the organisational criterion is not fulfilled, or cannot be sufficiently established, for IHL to be considered applicable. CA3 and APII thereby address situations of different severity.

It is consequently of significant practical value to distinguish between the intensity and organisational criteria in determining the existence of a NIAC. To the extent that the criterion of organisation entailed in APII is understood as requiring something other than a specific intensity of violence, applying the material scope of APII per analogy to CA3 is questionable considering the different situations contemplated by CA3 and the APII. If one agrees with the interpretation according to which a CA3 conflict permits application of the IHL rules on conduct of hostilities, which are more permissive than in the context of law enforcement, a cumulative approach to determining the existence of a NIAC may frustrate the purpose of CA3. This is because it undermines the protection intended for situations where serious violence is detected, but where the character of the perpetrators cannot be established as sufficiently organized.

A distinction between CA3 and APII thresholds is therefore of value in the quest for responses to violence that are both effective and adequate for the circumstances in complex environments. For protection purposes, the better interpretation is that CA3 and APII give rise to distinct forms of NIAC. As also stated in *Akayesu*, NIACs governed solely by CA3 arise as a result of intense violence

[459] *The Prosecutor v Jean-Paul Akayesu*, ICTR-96-4-T, Judment 2 sept 1998, para 601. Emphasis added.
[460] ibid, para 602.

superseding internal disturbances, but the criterion of organisation entailed in APII is distinct from the CA3 conflict, and gives rise to a second type of NIAC.[461] For the purpose of maximizing protection, and in addition to dictating different thresholds, CA3 and APII may also be considered to necessitate a different material scope of application of IHL.[462]

7.4. Internationalization of a non-international armed conflict

A NIAC may transform into a conflict of international character under specific circumstances, and interpretations differ in relation to such internationalisation of an armed conflict. Akande observes three different approaches for determining internationalization of a NIAC available. The first approach holds the question of whether the non-state armed group belongs to a state as key for an internationalization to take place. The test is different from that of state responsibility, and an armed group would belong to (and thus fight on behalf of) a state even without state control over the group if there is a *de facto agreement* between the state and the group. Tacit agreement is one example of such *de facto* agreement that would result in the group's belonging to the state, and thus for the conflict to become international rather than non-international in character. A state would therefore be held responsible for the acts committed by an armed group through a test that is looser than the test under the law of state responsibility.[463] A second approach for determining internationalization of an armed conflict does not hold the overall control test as derived from general international law. Rather, it suggests that the test for determining such state responsibility is rooted in IHL.[464]

The third approach, and the one to be preferred according to Akande, is that suggested by Judge Shahabuddeen in his separate opinion in the *Tadić* case, in which he holds that the determinative question is whether a foreign state has used force against another state. Shahabuddeen held that since an armed conflict requires the use of force, the determination of the existence of an armed conflict hinges on a state using force against another state.[465] Such an interpretation maintains the legal rules determining the classification of armed conflicts. In short, an international armed conflict exists when armed force between two (or more) states takes place.

Key to all these interpretations, notably, is the use of force by an intervening state or a peace operation for them to become party to an armed conflict. The ICRC, however, has proposed an

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[461] International Criminal Tribunal for Rwanda, *The Prosecutor v Jean-Paul Akayesu*, ICTR-96-4-T, Judment 2 sept 1998, para 601.
[462] See further in Chapter 13 on a potential distinction in material scope of application.
[463] Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012), 60-61.
[464] ibid, 61.
[465] *Prosecutor v Tadić, Judgment Appeals Chamber 15 July 1999* (ICTY) 155 para 17. See also Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012), 62.

approach to determining the applicability of IHL to third states that intervene in an armed conflict that takes place on another state's territory in a way that does not require the use of force.[466] The main legal effect of this 'support-based approach' is that the intervening power becomes a new party to the pre-existing NIAC, without requiring the hostilities between this power and its enemy to reach the intensity threshold.[467] The understanding is that the foreign intervention would not alter which part of IHL is applicable, but merely extend the *ratione personnae* to the intervening power, regardless if that entails a state, a coalition of states or a multinational force, including peace operations conducted by international organisations.[468] Applied to peace operations, this may result in the interpretation that IHL applies by default when peace operations deploy into an area in which a NIAC exists between the host state and a non-state armed group.

7.5. Classifying an armed conflict involving a peace operation

On the question of the legal classification of an armed conflict involving a peace operation, the predominant view seems to be that when a multinational force engages in an armed conflict in support of the government forces of the affected state (such as in the case of the UN engagement in DR Congo), the character of the conflict does not change, and any existing NIAC remains non-international in nature. If, however, the multinational force engages in hostilities against the government forces (such as in the case of Libya), the armed conflict between the multinational force and the government forces is international in nature.[469]

Ferraro, coming to the same conclusion regarding peace operations engaging in an armed conflict against a non-state actor, provides a legal reasoning behind that conclusion. He argues that any legal classification must pay attention to both sides of a conflict, and refrain from concluding that a conflict is international only through the participation of an international force.[470] He also holds that the argument of such 'internationalisation' is not likely the preferable conclusion according to the host state, since the application of the law of international armed conflict would give rise to prisoner of

[466] Tristan Ferraro. 'The ICRC's legal position on the notion of armed conflict involving foreign intervention and on determining the IHL applicable to this type of conflict' (2015) 97(900) International Review of the Red Cross 1227,
[467] R. van Steenberghe and P. Lesaffre. 'The qualifications of armed conflicts and the 'support-based approach': Time for an appraisal: The ICRC's 'support-based approach': A suitable but incomplete theory' (2019) Questions of International Law , 5.
[468] Tristan Ferraro. 'The ICRC's legal position on the notion of armed conflict involving foreign intervention and on determining the IHL applicable to this type of conflict' (2015) 97(900) International Review of the Red Cross 1227, 1244. See also footnote no 49 on named source.
[469] See Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014), 94. See also Tristan Ferraro. 'The applicability and application of international humanitarian law to multinational forces' (2013) 95 International Review of the Red Cross.
[470] Tristan Ferraro. 'The applicability and application of international humanitarian law to multinational forces' (2013) 95 International Review of the Red Cross, 598.

war status for the members of the non-state group, which would undermine any prosecution of those individuals under domestic law.[471]

Ferraro also points to the error in a literal interpretation of the Safety Convention, which results in the inaccurate conclusion that any conflict in which a peace operation is engaged is international in nature. On the contrary, he holds, the negotiating history of the Safety Convention reveals that some participants wanted to include NIACs within the scope of its application,[472] which demonstrates that the interpretation that peace operations could be engaged in a NIAC was actually raised in the drafting of the Convention.

One main objective sought through this support-based approach is to better the protection of civilians. The presumption of enhanced protection is underpinned by the assumption that IHRL would not be applicable to the intervening state due to the requirement of effective control in order to give rise to IHRL obligations.[473] That assumption, however, warrants closer scrutiny.

The nature of the support provided by the intervening power is, notably, pivotal in the ICRC's theory,[474] and it is therefore of value to consider the different purposes underlying the launch of a peace operation into an unstable or conflictive environment on the one hand, and, on the other, the intervention of third states or a coalition of states in support of a state engaged in a NIAC on its territory. While the intervention of third states can be assumed to be aimed at providing such support to the territorial state that legally amounts to participation in the NIAC, the situation is different when launching a peace operation. A peace operation is not primarily aimed at offering such support or engaging in an armed conflict. The primary aim of peace operations, rather, is to stabilize the security situation, provide protection to civilians and ultimately strengthen conditions that are conducive to sustainable peace and security. Therefore, the support-based approach would risk expanding the perceived applicability of IHL to the conduct of peace operations, and thus reinforce the (seemingly increasing) war-fighting approach to peace operations.

In conclusion, it is submitted here that the fragmented support-based approach suggested by the ICRC, in which relevant law is determined based on the nature of the relationship between the belligerents,[475] will have little impact on the applicability of the rules on conduct of hostilities, since it

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[471] Tristan Ferraro. 'The applicability and application of international humanitarian law to multinational forces' (2013) 95 International Review of the Red Cross, 598.
[472] ibid.
[473] R. van Steenberghe and P. Lesaffre. 'The qualifications of armed conflicts and the 'support-based approach': Time for an appraisal: The ICRC's 'support-based approach': A suitable but incomplete theory' (2019) Questions of International Law , 8.
[474] ibid, 6.
[475] According to the view of the ICRC, when different types of actors are involved in an armed conflict, the rules of IHL applicable to them will vary depending on the nature of the relationship between them. When a state is involved in an armed conflict against another state, the rules of IAC appply. When a state is involved in an armed conflcit against non-

is generally recognized that these rules apply to NIAC as a matter of customary law.[476] The approach does not, however, contribute to legal clarity on the dividing line between the law enforcement paradigm that primarily stems from IHRL and the rules on conduct of hostilities entailed in IHL in complex environments. The approach also risks expanding IHL into situations in which IHRL would better serve the long term aims. Rather than seeking to simplify the methodology of determining the applicability of IHL, more effort is needed in determining the dividing line between IHRL and IHL.

The better understanding, it is submitted here, is that IHL only applies to a peace operation to the extent they are engaged in an armed conflict, irrespective of any pre-existing NIAC in the mission area. To the extent that a peace operation engages in an armed conflict, that conflict should be classified as NIAC if the conflict takes place between a peace operation and a non-state armed group. If, on the other hand, a peace operation engages in an armed conflict against another state, whether that is the territorial state or a third state, that conflict is to be classified as international in nature.

state actors, that conflict is goverened by the rules of NIAC. As such, an intervention by a third state does not by default trigger the applicability of the law of IAC, but will depend on whom the intervening state's involvment is against in an armed conflcit. See Tristan Ferraro. 'The ICRC's legal position on the notion of armed conflict involving foreign intervention and on determining the IHL applicable to this type of conflict' (2015) 97(900) International Review of the Red Cross 1227, 1241-1242.

[476] Tristan Ferraro. 'The ICRC's legal position on the notion of armed conflict involving foreign intervention and on determining the IHL applicable to this type of conflict' (2015) 97(900) International Review of the Red Cross 1227, 1247.

Section IV: *The protective nature and function of law: Towards a normative framework for effective, purposive and sustainable protection under* jus post bellum*:*

8. The protective nature and function of International Human Rights Law

The aim of this research, as noted, is to identify a normative framework for effective, purposive and sustainable protection in post-conflict, transitional environments. To achieve that objective, the protective nature and function of law is of quintessential centrality. This section will therefore seek to identify the protective nature and function of IHL and IHRL. The analysis informs the determination of the relevance and adequacy of the respective legal frameworks as protective regimes *jus post bellum*, and guides the identification of a relevant and purposeful interplay between the frameworks in complex contexts where both are formally applicable, but where the application of the respective frameworks has profoundly different long-term consequences.

Prima facie, it can be held that both IHL and IHRL are aimed at protecting individuals under different circumstances.[477] It is important to note, however, as Lindroos does, that the two areas of law have specific and distinct aims and normative scopes.[478] The protective nature and function of law is largely premised on the regulation on the use of force entailed in the respective frameworks. Since the task to protect civilians primarily focuses on the right to life and physical integrity, guidance for protection engagements similarly needs to be centred on the rules regulating the use of force. The rules on targeting and detention are also the only spheres in which IHL and IHRL appear to conflict.[479] For the purpose of identifying a normative framework *jus post bellum* to enhance the protection of civilians, the identification of the protective nature and function of law is therefore centered on the regulation of the use of force in IHL and IHRL, respectively.

8.1. Regulation of the use of force in IHRL

As correctly and importantly observed by the Special Rapporteur on extrajudicial, summary and arbitrary executions, the human rights system cannot be effective in the absence of security, and in some cases, without the use of force.[480] Determining the parameters of the regulation of the use of force is therefore key to ensuring security and effective protection of human rights. Also, as observed in an expert meeting on the use of force, armed forces are increasingly expected to conduct law enforcement operations in order to maintain or restore public security and law and order in,

[477] See Anja Lindroos. 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis' (2005) 74(1) Nordic Journal of International Law , 44.
[478] ibid.
[479] Marco Sassoli and Laura Olson. 'The Relationship between International Humanitarian and Human Rights Law Where it Matters: Admissible Killings and Internment of Fighters in Non-International Armed Conflicts' (2008) 90(871) International Review of the Red Cross 599.
[480] United Nations Human Rights Council (UN HRC), *Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions on the right to life and the use of force by private security providers in law enforcement contexts* (United Nations General Assembly A/HRC/32/39, 6 May 2016), 51.

particularly in NIAC and situations of occupation.[481] The regulation of the use of force under IHRL has traditionally been limited to domestic legislation. However, as observed by the Geneva Academy on International Humanitarian Law and Human Rights, one may refer today to the *international law of law enforcement*.[482]

8.1.1. International law of law enforcement

IHRL provides the overarching framework for the international law of law enforcement, but much of the detail of that body of law in relation to the regulation of the use of force is found in a combination of customary rules and two general principles of law, namely necessity and proportionality.[483] The principle of precaution has emerged, however, as a third principle of relevance in the regulation of police use of force in recent decades. Although primary focus is here afforded the principles of necessity and proportionality, it is valuable to briefly note that precaution requires police authorities to plan and conduct operations so as to minimise the risk of injury.[484] The precautionary principle was first introduced in IHRL contexts by the ECtHR in its landmark *McCann* case, in which it was held that it is necessary to assess whether the operation was planned and controlled '(…) so as to minimise, to the greatest extent possible, the recourse to lethal force'.[485]

Many of the international rules on law enforcement were first codified and elaborated on in the 1979 *Code of Conduct for Law Enforcement Officials* (hereafter the *Code of Conduct*) and the 1990 *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (hereafter the *Basic Principles*).[486] The instruments apply explicitly to acts of any organ of the state when using force in law enforcement contexts. In other words, irrespective of which actor (police or military) is afforded law enforcement roles and tasks, actors are to abide by the rules contained in the instruments.[487]

Both the ECtHR and the IACtHR have cited the 1990 *Basic Principles* as authoritative statements on international rules governing the use of force in law enforcement.[488] In addition, General Comment 36

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[481] Gloria Gaggioli, *Expert meeting, The use of Force in Armed Conflicts: interplay between conduct of hostilities and the law enforcement paradigms* (International Committee of the Red Cross , 2013), 2.
[482] Geneva Academy of International Humanitarian Law and Human Rights, 'The Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council' , *Academy In-Brief No 6* (2016), 5.
[483] Stuart Casey-Maslen and Sean Connolly, *Police Use of Force under International Law* (Cambridge University Press 2018), 79.
[484] ibid.
[485] *Case of McCann and Others v the United Kingdom* (application no 18984/91)., Council of Europe, the European Court of Human Rights, Judgment, Strasbourg 27 September 1995, para 194. See also Stuart Casey-Maslen and Sean Connolly, *Police Use of Force under International Law* (Cambridge University Press 2018).
[486] Geneva Academy of International Humanitarian Law and Human Rights, 'The Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council' , *Academy In-Brief No 6* (2016), 5. See also Stuart Casey-Maslen and Sean Connolly, *Police Use of Force under International Law* (Cambridge University Press 2018), 79-80.
[487] Stuart Casey-Maslen and Sean Connolly, *Police Use of Force under International Law* (Cambridge University Press 2018), 81.
[488] See *Benzer v Turkey*, Former Second Section, European Court of Human Rights (ECtHR), Judgment, App no 23502/06, 12 November 2013 (as rendered final on 24 March 2014), para 90; and *Cruz Sánchez et al v Peru*, Inter-American Court of

on the right to life makes explicit reference to both the *Basic Principles* and the *Code of Conduct*, and holds that all law enforcement operations should comply with these instruments.[489] As a result, although the rules entailed in these instruments were not incorporated in a treaty, many of the rules are widely accepted as reflecting binding international law.[490] As similarly noted in an expert meeting held by the ICRC, the law enforcement paradigm derives from the notion of social contract, and as such, basic law enforcement principles can be considered as general principles of law in the sense of Article 38(1)(c) of the ICC Statute.[491] The international law of law enforcement is thus made up of a body of international law derived from a combination of customary rules and general principles of law.

Further, the UN Special Rapporteur on extrajudicial and summary executions has noted that states are under an obligation to adopt a clear legislative framework for the use of force by law enforcement or other individuals that complies with international standards, including the principles of necessity and proportionality.[492] However, definitions of the term *law enforcement* differ. The study group on the conduct of hostilities adopted a purposeful functional definition of law enforcement, and held that it is usually understood to refer to measures undertaken by the state with the aim to uphold law and order, security and the rule of law.[493] It was noted that such an understanding draws heavily on the notion of domestic law enforcement, which is based on a societal consensus on the state's monopoly on the use of legitimate force. Whether this is transferable to 'transnational' contexts, it was noted, requires further assessment. In particular, the question of whether there is a distinction between *peace enforcement* and *law enforcement* was raised.[494]

As noted herein, peace operations are afforded tasks of a law enforcement character, and similarly, armed forces fulfil law enforcement obligations in addition to combat operations in contemporary armed conflicts.[495] Consequently, in *jus post bellum* contexts where both frameworks may apply, there is a need to identify how the two frameworks differ in their regulation of force in order to ensure

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Human Rights (IAmCtHR), Judgment (Preliminary Objections, Merits, Reparation, and Costs), 17 April 2015, para 264. The Court refers to the 1979 Code of Conduct in the same paragraph.

[489] UN HR Committee, 'General Comment 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life' *, Advance unedited version* (CCPR/C/GC/36, 30 October 2018), para 13.

[490] Stuart Casey-Maslen and Sean Connolly, *Police Use of Force under International Law* (Cambridge University Press 2018), 80. See also Geneva Academy of International Humanitarian Law and Human Rights, 'The Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council' *, Academy In-Brief No 6* (2016), 5.

[491] Gloria Gaggioli, *Expert meeting, The use of Force in Armed Conflicts: interplay between conduct of hostilities and the law enforcement paradigms* (International Committee of the Red Cros, 2013), 12.

[492] Stuart Casey-Maslen and Sean Connolly, *Police Use of Force under International Law* (Cambridge University Press 2018), 81. See also Report of the Special rapporteur on extrajudicial, summary and arbitrary executions on the right to Life and the Use of Force by Private Security Providers in Law Enforcement Contexts, para 75.

[493] T. Gill, R. Heinsch and R. Geiss, *ILA Study Group 'The conduct of hostilities and international humanitarian law:challenges of 21st century warfare* (International Law Association Interim Report , 2014), 2.

[494] ibid, 4.

[495] ibid, 2.

appropriate adaption from a conduct of hostilities posture, to law enforcement methods. There is also a need to address the question of whether the law enforcement conducted in armed conflicts differ, or need to differ, from peace time law enforcement. Attention to the nature and function of the principles guiding the use of force in IHRL is thus first required.

8.1.2. Principles of (absolute) necessity and proportionality in IHRL

Much like IHL, the law of law enforcement has three main components: *necessity*, *proportionality* and *precaution*. These are binding on all states as general principles of law, and necessity and proportionality set limits on how and when force may be used lawfully during police operations.[496]

The *Basic Principles* dictate that law enforcement officials have a vital role in the protection of the right to life, liberty and security of the person, as guaranteed in the UDHR and reaffirmed in the ICCPR.[497] The Special Rapporteur, further, has observed that a relatively clear and coherent set of IHRL standards has been developed in respect of the use of lethal force by law enforcement officials.[498]

The *Basic Principles* dictate that:

> Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.[499]

Further in relation to the use of force in law enforcement, the *Code of Conduct* details that:

> Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.[500]

It is detailed in the commentary to the article that:

> (a) This provision emphasizes that the use of force by law enforcement officials should be exceptional; while it implies that law enforcement officials may be authorized to use force as is

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[496] Geneva Academy of International Humanitarian Law and Human Rights, 'The Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council' *, Academy In-Brief No 6* (2016), 6.
[497] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, Preamble.
[498] UN HRC, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns* (United Nations General Assembly A/HRC/17/28, 23 may 2011), para 18.
[499] Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 'Basic Principles on the Use of Force and Firearms by Law Enforcement Officials', Adopted in Havana, Cuba, 27 August to 7 September 1990 (1990). See also UN HRC, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns* (United Nations General Assembly A/HRC/17/28, 23 may 2011), para 56.
[500] United Nations Code of Conduct for Law Enforcement Officials, Adopted by General Assembly resolution 34/169 of 17 December 1979, article 3.

> reasonably necessary under the circumstances for the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders, no force going beyond that may be used.
>
> (b) National law ordinarily restricts the use of force by law enforcement officials in accordance with a principle of proportionality. It is to be understood that such national principles of proportionality are to be respected in the interpretation of this provision. In no case should this provision be interpreted to authorize the use of force which is disproportionate to the legitimate objective to be achieved.
>
> (c) The use of firearms is considered an extreme measure. Every effort should be made to exclude the use of firearms, especially against children. In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender. In every instance in which a firearm is discharged, a report should be made promptly to the competent authorities.[501]

Article 3 of the 1979 *Code of Conduct* thus stipulates that the use of force may only be used when strictly necessary, and the accompanying commentary dictates that any force should be *exceptional*. In other words, the use of force in law enforcement is the exception rather than the rule. The opposite, notably, and as is shown herein, is true for the use of force under the rules on conduct of hostilities in IHL, in which the use of force is permitted at all times against legitimate targets.[502]

The requirement of exceptionality also necessitates a *threat-based* assessment, demanding that each threat be gauged against the principle of necessity in each given situation. This also differs from the requirement entailed in the rules on conduct of hostilities under IHL, which does not require an assessment of the threat posed in each instance, but permits force against legitimate targets regardless of the threat posed at the time. The targetability of legitimate targets under IHL is thereby status-based rather than threat-based, which underscores the different points of departure in the regulation on the use of force in IHL and IHRL.

While the *Code of Conduct* thus specifies the basics of the authority to use force in law enforcement contexts, the *Basic Principles* further detail the parameters of the use of lethal force. Principle 5 requires restraint so that force is minimised, while principle 7 requires arbitrary deprivations of life to be punishable under the national criminal code.[503] Principle 9, further, details that firearms may be used only in 'self-defence or in the defence of others against the imminent threat of death or serious injury', and intentional lethal force only 'when strictly unavoidable in order to protect life'.[504] The principle of necessity under the law of law enforcement thus entails three integral duties; to use no

[501] United Nations Code of Conduct for Law Enforcement Officials, Adopted by General Assembly resolution 34/169 of 17 December 1979, commentary to article 3.
[502] See further herein on the targetability of combatants and civilians taking direct part in hostilities, as well as civilians holding continuous combat functions in Chapter 9.1 on the regulation of conduct in IHL.
[503] Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 'Basic Principles on the Use of Force and Firearms by Law Enforcement Officials', Adopted in Havana, Cuba, 27 August to 7 September 1990.
[504] ibid, principle 9.

force if possible; to use force only for a legitimate law enforcement purpose; and to use only the minimum force that is reasonable in the circumstances.[505]

The principle of non-use of force (and graduated force)[506] is closely related to the right to life and physical integrity, which is echoed in the *Basic Principles*, in which the obligation to use non-violent means if possible is reflected in principle 4.[507] As observed, the commentary on Article 3 of the *Code of Conduct* elaborates on the 'strictly necessary' criterion, and holds that force must be reasonably necessary and comply with the requirement of proportionality. It further states that the use of firearms is an extreme measure that is to be limited to exceptional circumstances where an offender puts up armed resistance or otherwise jeopardises the lives of others, and less extreme measures are not sufficient to restrain or apprehend the offender.[508] The Special Rapporteur importantly concludes that it is not the fact that someone suspected of a crime is to be arrested that is determinative of the legality of the use of firearms, but the threat to life posed by such an individual.[509]

The European Code of Police Ethics similarly provides that the police and all police operations must respect everyone's right to life.[510] This reflects the duty to assess the effects of any police operation on the individual it targets, which is also to be contrasted against the rules on targeting entailed in IHL. The instrument further details that force may only be used when strictly necessary, and to the extent required to obtain a legitimate objective.[511] It also specifies that the police must verify the legality of its operations,[512] and the use of force must always be considered an exceptional measure.[513] This highlights an important difference from the conduct of hostilities under IHL, in which the legality of force is presumed against legitimate targets.

The *Basic Principles* further detail that governments shall establish effective reporting and review procedures, and in cases of death or serious injury or other grave consequences, a detailed report shall be promptly sent to the competent authority responsible for review and judicial control.[514] Any use of

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[505] Stuart Casey-Maslen and Sean Connolly, *Police Use of Force under International Law* (Cambridge University Press 2018), 82.
[506] See further below on graduated force.
[507] Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 'Basic Principles on the Use of Force and Firearms by Law Enforcement Officials', Adopted in Havana, Cuba, 27 August to 7 September 1990, principle 4.
[508] Code of Conduct for Law Enforcement Officials, Adopted by General Assembly Resolution 34/169 on 17 December 1979 cl 34/169.
[509] United Nations General Assembly, *Report of the Special rapporteur on extrajudicial, summary and arbitrary executions* (United Nations General Assembly A/66/330, 30 August 2011), para 37.
[510] The European Code of Police Ethics, Recommendation (2001) 10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001 and Explanatory memorandum, Directorate General 1- Legal Affairs, para 35.
[511] ibid, para 37.
[512] ibid, para 38.
[513] ibid, commentary, 44
[514] Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 'Basic Principles on the Use of Force and Firearms by Law Enforcement Officials' , Adopted in Havana, Cuba, 27 August to 7 September 1990, para 22.

force resulting in death or serious injury, thus, must have a clear basis in law, and is to be investigated so as to confirm the legality, including the necessity and proportionality of the force applied. This also contrasts with the requirements under IHL. Moreover, the principles dictate that 'superior officers are held responsible if they know, or should have known, that law enforcement officials under their command are resorting, or have resorted, to the unlawful use of force and firearms, and they did not take all measures in their power to prevent, suppress or report such use.'[515]

8.1.3. Requirement of graduated force, proportionality and the notion of 'minimum use of force' in peace operations

A third critical element on the regulation of force under IHRL is that the force used must be necessary *in the circumstances*,[516] and no more than minimum force required in the circumstances may be applied.[517] The requirement of minimum use of force is a source of confusion in relation to the use of force in peace operations, and therefore deserves special attention here. Seemingly, it is often assumed that by applying minimal force, the force complies with legal requirements.[518] Since, as noted, the *purpose* for which force is permitted differs in IHL and IHRL, simply applying the notion of 'minimal force' is insufficient to shift from a conduct of hostilities paradigm to a law enforcement approach.

The Geneva Academy holds the requirement of minimum force as falling within the principle of necessity.[519] Similarly, the Special Rapporteur on extrajudicial, summary or arbitrary executions has held that where non-violent means prove ineffective or without promise of achieving the intended result, *necessity* requires that the level of force used should be escalated as gradually as possible.[520]

Under such an understanding, however, it can be difficult to differentiate the requirements of minimum and graduated force from the principle of proportionality. The Geneva Academy also notes that proportionality is sometimes confused with the duty to use minimum necessary force. While holding the requirement of minimum force as falling within the principle of necessity, the Geneva

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[515] Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 'Basic Principles on the Use of Force and Firearms by Law Enforcement Officials' *,* Adopted in Havana, Cuba, 27 August to 7 September 1990, para 24.
[516] Geneva Academy of International Humanitarian Law and Human Rights, 'The Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council' *, Academy In-Brief No 6* (2016), 6. Emphasis added.
[517] ibid, 7.
[518] See for example United Nations Department for Peacekeeping Operations/ Department for Field Support, 'DPKO/ DFS Policy: The Protection of Civilians in United Nations Peacekeeping Operations' (United Nations 2015), para 17. See also United Nations Department for Peacekeeping Operations/ Department for Field Support, *Use of Force by Military Components in United Nations Peacekeeping Operations* (2016.24, 2017), para 11. See also UN DPKO, Military Division, *Guidelines for the Development of Rules of Engagement (ROE) for UN Peacekeeping Operations* (2002), ref. MD/FGS/0220.0001, principle 7(g).
[519] Geneva Academy of International Humanitarian Law and Human Rights, 'The Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council' *, Academy In-Brief No 6* (2016), 7.
[520] UN HRC, *Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions on the right to life and the use of force by private security providers in law enforcement contexts* (United Nations General Assembly A/HRC/32/39, 6 May 2016), para 61.

Academy also quite contradictorily, but correctly in this author's view, asserts that proportionality comes into play once necessity has been met.[521] Notably, both the requirement of minimum and graduated force becomes relevant only once necessity has been established. Under the understanding that the principles of necessity and proportionality are distinct, and require distinct assessments, both the requirement to use minimum force towards the objective pursued, and to escalate force as gradually as possible to enable achieving that objective, require that a legitimate objective has been identified. Both requirements of minimum and graduated force would, as such, logically fall within a proportionality assessment.

Notably, the requirement of progressive force has also been elaborated on by the IACtHR under the principle of proportionality; it was held that the level of force 'must be in keeping with the level of resistance offered'.[522] As such, the level of force permitted was seen as a question of proportionality, which becomes relevant only once necessity has been established. The Court also determined that *absolute necessity* dictates that it must be verified whether other means are available. The Court concluded, firstly, that any use of force must abide by the principle of legality, and that even if the lack of force had resulted in the escape of the individuals in question, the use of lethal force is not permitted against individuals who do not represent a threat or real or imminent danger to the agents or to third parties. It was concluded that lacking such a threat, the situation did not amount to one of absolute necessity.[523] Similarly, despite the ECHR's permitting lethal force in case of an escape of an arrested individual,[524] the ECtHR has held that an escaping suspect may not be shot even if a failure to use lethal force may result in the escape of the fugitive.[525]

In light of the aim sought here, to guide protection engagements in field realities towards long-term aims of sustainable peace and security, the better understanding, it is submitted, is that the requirements of graduated and minimum force come into play once necessity towards a legitimate aim has been established. As such, minimum and graduated force are integral to a proportionality rather than a necessity assessment. By requiring distinct identifications of legitimate objectives pursued (necessity), and of the methods to achieve those objectives (proportionality), this understanding helps accentuate that the use of minimum force is not sufficient to shift from a conduct of hostilities posture, to the requirements of law enforcement. Such a shift, guided by legal criteria, is essential in

[521] Geneva Academy of International Humanitarian Law and Human Rights, 'The Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council' *, Academy In-Brief No 6* (2016), 9.
[522] See *Nadege Dorzema and others v Dominican Republic*, Inter-American Court of Human Rights, Judgment (merits, reparations and costs), 24 October 2012, para 85 (iii).
[523] ibid, para 85 (ii).
[524] ECHR, article 2(2)(b).
[525] *Nachova v Bulgaria,* ECtHR, Judgment (Grand Chamber) 6 July 2005, para 95.

complex environments to ensure protection that is both effective in the circumstances and sustainable in the long-term.

There is consequently an important distinction to be made between the question whether force is permitted as per the principle of necessity, and that of the proportionality of the force measured against the legitimate aim pursued. The most purposive interpretation of the requirement of minimum and graduated force, thus, is as a proportionality assessment that 'sets a maximum on the force that might be used to achieve a specific legitimate objective'.[526] Such a distinction helps ensure both legality and adequacy of force when applied. It also corresponds with the view articulated by the Special Rapporteur's report on the use of lethal force during arrest, in which it was noted that although the use of force is often perceived as the core of policing, a more purposive understanding is to view the lawful and appropriate use of force as a key tool of the state to protect the rights of the public and their right to life. Indeed, as noted, if the use of force is not applied in accordance with human rights norms, it may jeopardise the very rights it is meant to protect.[527] This highlights the difference between the principle of proportionality as entailed in IHRL and IHL respectively, as well as the different protective nature and function of IHRL and IHL, as is further shown below.

As observed by the Special Rapporteur, however, in a large number of states, the standards applicable to the general use of force are vague and loosely defined and do not provide clear guidance.[528] Where the term 'necessary force' is used in relation to the standards on the use of force, the meaning is often aligned with permissive implications of the international law term 'all necessary means' rather than with the restrictive interpretation required in order to ensure minimum force.[529] This may in part explain the frequent (mis)understanding of the term 'all necessary means' entailed in the mandates of peace operations as largely lacking restrictive elements.[530]

The Special Rapporteur concluded that when the *Code of Conduct* and the *Basic Principles* are revised,

> (…) [T]he overreaching principle in respect of the use of deadly weapons by law enforcement officials should be self-defence. Reference to arrest or riot control should be secondary and focused on implementation in those contexts. Another way of putting it would be to see the overriding norm as 'necessary measures of law enforcement to protect life'.[531]

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[526] Geneva Academy of International Humanitarian Law and Human Rights, 'The Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council' , *Academy In-Brief No 6* (2016), 8.
[527] United Nations General Assembly, *Report of the Special rapporteur on extrajudicial, summary and arbitrary executions* (United Nations General Assembly A/66/330, 30 August 2011), 1.
[528] UN HRC, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns* (United Nations General Assembly A/HRC/17/28, 23 may 2011), para 97.
[529] ibid, para 99.
[530] See further in Chapter 4.
[531] UN HRC, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns* (United Nations General Assembly A/HRC/17/28, 23 May 2011), para 139.

While there is merit to this suggestion, justifying the resort to, and use of lethal force, the notion of self-defence in peace operations may be more problematic than expected, as shown herein.[532] As a consequence, there is a need to highlight the distinct regulation of the use of force in IHL and IHRL, and to identify an effective, yet purposive dividing line between the two frameworks in relation to the use of force in peace operations. This is particularly essential in relation to the use of force for protection purposes to ensure engagements are both effective against the threat addressed and contribute sustainably towards long-term peace and security.

[532] See further in Chapter 9.2.

9. Protective nature and function of the paradigm of conduct of hostilities entailed in International Humanitarian Law

IHL applies only in situations that legally amount to armed conflicts, to the parties of that conflict, and to situations that are related to the conflict. Although the concept of protection is a central premise on which the legal framework of IHL was created, it is shown below that the nature and scope of protection of civilians is limited under IHL.

GCIV details specifics on the protection of civilians in time of war. It provides a general form of protection against certain consequences of armed conflicts by for example declaring certain establishments, such as hospitals and safety zones, illegitimate targets of military attack..[533] It also specifies the status and requirements in relation to treatment of protected persons, such as prohibition on coercion, torture, collective penalties, reprisals and the taking of hostages,[534] and identifies specific protection to be afforded in occupied territories.[535] As GCIV reveals, protection of civilians in IHL is indirect in that it is primarily centred around prohibitions.

Most notably, the protection afforded civilians in times of armed conflict is premised on the core principles that guide the conduct of hostilities; the principles of *distinction*, *precaution* and *proportionality*. These principles protect civilians from direct targeting, prohibit indiscriminate attacks, and require that any injury to civilians is not excessive in relation to the military advantage anticipated. In addition, the principle of military necessity constitutes an underlying premise of the whole body of IHL, resulting in the principle influencing all its rules and affecting considerations relating to the use of force. Thereby, although much of the development of IHL since the end of the twentieth century has focused on the protection of civilians (rather than soldiers), the protection afforded through IHL is limited to, and constrained by the realities of armed conflicts.

Even though the participation of peace operations in armed conflict must be considered rare, there is general agreement among most experts today that IHL applies to peace operations to the extent that they are engaged in armed conflict as combatants.[536] As observed by Melzer, IHL contains two fundamentally different standards on the use of force depending on whether the force forms part of hostilities or constitutes law enforcement operations. The standard that governs the use of force outside the conduct of hostilities forms part of the exercise of power and authority over persons

[533] GCIV, part II.
[534] GCIV, part III, section I.
[535] GCIV, part III, section III.
[536] This was also asserted in the Secretary General Bulletin, Observance by United Nations forces of international humanitarian law, ST/SGB/1999/13, in which it was held: 'The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants', para 1.1.

deprived of their freedom, combatants *hors de combat*, medical and religious personnel, and civilians. Thereby, in addition to regulating conduct of hostilities, IHL also contributes to the normative evolution of the shape and form of law enforcement in armed conflict situations.[537] This underscores both the necessary distinction between the regulation of conduct in hostilities and law enforcement operations, and the potential need for a distinction between law enforcement in armed conflict situations and peaceful conditions.

There are also indications that peace operations may increasingly be facing situations and tasks resulting in their becoming parties to armed conflicts. As discussed in Chapter 4, Security Council resolution 2098 (2013) mandated the UN operation in DR Congo to set up an Intervention Brigade and to engage in targeted offensive operations aimed at neutralizing armed groups.[538] Although it was specifically held that the Intervention Brigade was created 'on an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping',[539] it nonetheless represents a paradigm shift in the approach to peace operations, in particular in light of the subsequent resolutions with similar wordings afforded the peace operations in Mali[540] and the Central African Republic.[541] Despite recent calls for less ambitious mandates for peace operations and 'clear, focused, sequenced, prioritized and achievable mandates',[542] this suggests that peace operations may increasingly be tasked to engage as parties to armed conflicts. Consequently, it is of value to assess whether, and to what extent, the rules regulating conduct of hostilities in IHL can and should guide peace operations in their task to protect civilians.

9.1. Regulation of conduct of hostilities in IHL

As observed in an expert meeting on the use of force in armed conflict, 'in order to be covered by IHL, the use of force must take place in an armed conflict situation and must have a nexus with the armed conflict'.[543] The core rules regulating conduct of hostilities in armed conflicts are the principles of *distinction*, *proportionality*, and *precaution*.[544] The ICRC study on customary IHL identifies these

[537] Nils Melzer, *Targeted killing in international law* (Oxford monographs in international law, Oxford University Press 2008), 141. See further in Chapter 13.3 on the potential distinction between peacetime law enforcement and law enforcement in armed conflicts.
[538] United Nations Security Council resolution 2098, S/res/2098 (2013), para 12(b).
[539] United Nations Security Council resolution 2098, S/res/2098 (2013), para 9.
[540] UNSCR 2295 (2016).
[541] UNSCR 2301 (2016).
[542] See for example Alex Bellamy and Charles Hunt, *Benefits of Paring Down Peacekeeping Mandates Also Come With Risks*, International Peace institute, Global Observatory, March 15 2019.
[543] Gloria Gaggioli, *Expert meeting, The use of Force in Armed Conflicts: interplay between conduct of hostilities and the law enforcement paradigms* (International Committee of the Red Cross, 2013), 5.
[544] ICRC, Blogpost online: https://blogs.icrc.org/ilot/2017/08/13/main-ihl-rules-governing-hostilities/ (accessed latest 19 March 2019).

core principles as customary in nature, and as such applicable in both IAC and NIAC.[545] Furthermore, the prohibition against indiscriminate attack is defined as customary in nature,[546] as is the definition of military objectives.[547] The principles regulating conduct are also closely related to each other, and one principle cannot be properly understood in isolation from the others. Another principle of central importance is that of *military necessity*, which, it is submitted, can be understood as an underlying premise of all conduct in armed conflicts.

9.1.1. Terminology in relation to the regulation of conduct in IHL

As observed in this research, the terminology used in guidance instruments on protection is largely imported from IHL. For the purpose of enabling clarity on the regulation of conduct in IHL, therefore, some key terms that are frequently used in relation to armed conflicts and specifically in relation to the regulation of conduct of hostilities, namely *hostilities*, *hostile acts*, *military operations*, and *attacks* are addressed and clarified here.

The terms *armed conflict*, *hostilities and military necessity* are intrinsically linked to the paradigm of hostilities.[548] Although there is no express definition of the term *hostilities* available in positive international law, conventional IHL 'makes extensive use of the term, and contains numerous provisions specifically designed to regulate the conduct of hostilities.'[549] Longobardo similarly notes that despite frequent usage, IHL does not define the terms *act of hostility*, *hostilities* or *conduct of hostilities*.[550] The commentary to Additional Protocol I to the Geneva Conventions (API) defines *hostile acts* as 'acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces.'[551] APII further defines the term *hostilities* as 'acts of war that by their nature or purpose struck at the personnel and materiel of enemy armed forces', and the commentary noted preparations for, and returning from combat, are considered by some as entailed in the term 'hostilities'.[552] In the *Interpretive Guidance on Direct Participation in Hostilities*, in turn, the ICRC defined the term *hostilities* as the collective resort by the parties to means and methods of injuring the enemy.[553] Despite these definitional challenges, Longobardo contends that

[545] See ICRC Study on Customary IHL, rule 7, rule 14 and rule 15 respectively.
[546] See ICRC Study on Customary IHL, rule 11 and 12.
[547] ICRC Study on Customary IHL defines military objectives in rule 8 as In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
[548] Nils Melzer, *Targeted killing in international law* (Oxford monographs in international law, Oxford University Press 2008), 243.
[549] ibid.
[550] Marco Longobardo, *The Use of Armed Force in Occupied Territory* (Cambridge University Press 2018), 194.
[551] API, Commentary of 1987, online: https://ihl-databases.icrc.org/ihl/COM/470-750065?OpenDocument (accessed 26 February 2019), para 1942.
[552] ibid, para 4788.
[553] ICRC Interpretive Guidance on Direct Participation in Hostilites, 16.

there is a general consensus among scholars that an *act of hostility* is a resort to the means and methods of warfare, while the term *hostilities* refers to the sum of acts of hostility.[554]

Means of combat, further, are defined as 'the instruments used in the course of hostilities', specifically weapons, whereas, *methods* of combat are defined as the techniques or tactics for conducting hostilities.[555] Both terms, notably, are limited to the operations falling within the notion of conduct of hostilities. The commentary further notes that 'according to dictionaries, the term "military operations", which is also used in several other articles in the Protocol, means all the movements and activities carried out by armed forces related to hostilities.'[556] Further, the term *hostilities* seems to be similar to that of 'military operations'; prominent scholars have held these terms to be synonyms.[557]

Longobardo further observes that the term *hostilities* seems to be broader than the term 'attack'.[558] API Article 49(1) defines 'attacks' as acts of violence against the adversary, whether in offence or defence. Attacks, thereby, are narrower in scope than military operations.[559] As per the originalist interpretation reflected in the *San Remo Manual relating to Non-International Armed Conflicts* (hereafter the *NIAC Manual*), the Diplomatic Conference of Geneva 1949 agreed that the same meaning should be given the term attack in both protocols,[560] and the same understanding is therefore valid also for APII. This definition of the term attack, according to Longobardo, seems to be characterised by the restrictive element of 'violence' which is not present in every conduct that amounts to an act of hostility. As a result, he holds, not every *act of hostility* constitutes an 'attack' under IHL.[561]

It can be concluded that the term *military operation* does not necessarily entail the use of force, but can be held to entail all military activities taken for the purpose of furthering the war effort in armed conflicts. An *act of hostility*, in turn, is smaller in scope than military operations, and entails the use of force, while *attack*, finally, encompasses acts entailing the use of force in both offense and defence.

As is further revealed herein, the principles regulating conduct similarly have different scopes of application. While military operations are guided by the principles of military necessity and

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[554] Marco Longobardo, *The Use of Armed Force in Occupied Territory* (Cambridge University Press 2018), 195.
[555] Michael N. Schmitt, Charles Garraway and Yoram Dinstein, 'The Manual on the Law of Non-International Armed Conflict: With Commentary' (International Institute of Humanitarian Law 2006), 11.
[556] API, Commentary of 1987. Online: https://ihl-databases.icrc.org/ihl/COM/470-750065?OpenDocument para 1936.
[557] Marco Longobardo, *The Use of Armed Force in Occupied Territory* (Cambridge University Press 2018), 196. Longobardo refers to Melzer in *Targeted Killings* at 271-275.
[558] ibid.
[559] API, article 49(1).
[560] Michael N. Schmitt, Charles Garraway and Yoram Dinstein, 'The Manual on the Law of Non-International Armed Conflict: With Commentary' (International Institute of Humanitarian Law 2006), 8.
[561] Marco Longobardo, *The Use of Armed Force in Occupied Territory* (Cambridge University Press 2018), 196.

distinction, the principles of proportionality and precaution relates only to acts of hostility and attacks. This, as is shown below, affects the scope and nature of the protection afforded civilians.

9.1.2. The principle of distinction

The principle of distinction is the foundation on which the codification of the laws and customs of war rests. It is unique to IHL, and constitutes a cardinal reflection of the necessary balance between military necessity and humanity,[562] and was first explicit in the St Petersburg Declaration but was also indirectly entailed in the Hague Regulations.[563] The principle of distinction is now codified in Articles 48, 51(2) and 52(2) of API, to which no reservations have been made, and in Article 13(2) of APII. Article 48 of API states:

> In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.[564]

Article 13(2) of APII similarly states:

> The civilian population as such, as well as individual civilians, shall not be the object of attack.[565]

The principle of distinction thus dictates that combatants can be legally targeted in armed conflicts, whereas civilians are exempt from targeting. The protection afforded the civilian population and civilian objects, as per Article 48 of API, also applies at all times. The ICRC study on customary IHL notes that state practice establishes the principle of distinction as customary in nature,[566] and it is thus equally applicable in both IAC and NIAC. The rule also must be read in conjunction with the rule on prohibition of attack against individuals *hors de combat*, and the rule protecting civilians *unless and for such time as they take direct part in hostilities*.

The principle also, notably, speaks of civilians as both a collective and as individuals. While Article 48 speaks of the civilian population, Article 51(2) of API and Article 13(2) of APII specifies that 'the civilian population as such, as well as individual civilians' shall not be the object of attack. This is of value to observe in relation to protection since it indicates that protection is to be afforded the population both as a collective and as individual civilians. This can be held to reflect the need to

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[562] Yoram Dinstein, 'The principle of proportionality' in Kjetil Mujezinovic Larsen, Camilla Guldahl Cooper and Gro Nystuen (eds)*, Searching for a 'Principle of Humanity' in International Humanitarian law'* (First Paperback ed, edn, Cambridge University Press 2015) 72, 73-74.

[563] The Hague regulation, article 25, prohibits 'the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended', which, according to the ICRC study on Customary IHL, indirectly entails a requirement of distinction. See also ICRC, Customary Study, rule 1.

[564] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (API), 8 June 1977, article 48.

[565] APII, article 13(2).

[566] ICRC, Customary Study, rule 1.

enable protection both from threats of military nature, posed at the state or the population in its entirety, and threats posed to individuals.

It is important to note that the principle of distinction entailed in IHL is founded on the underlying logic that combatants are part of the military potential of the enemy and it is therefore always lawful to attack them for the purposes of weakening that potential. A specific and present threat is therefore not required for combatants to be targeted.[567] No specific justification, other than distinguishing combatants from civilians and civilian objects, is therefore required. Force against legitimate targets, in other words, is permitted by default, and restricted only by exception. This constitutes the main difference from the law on the use of force entailed in IHRL. A first requirement in identifying the parameters of the use of force in IHL, thus, is defining the notion of *combatant*.

9.1.2.1. Combatants and 'fighters'

The notion of *combatant* is defined in Article 43(2) of API, which holds that:

> Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.[568]

Notably, combatants are defined as members of armed forces. Numerous military manuals, official statements and state practice confirm this definition, including states that are not parties to API.[569] API thereby affords combatants a 'right to participate directly in hostilities'. It has also been argued, notably, that this 'right' is better understood as immunity from being prosecuted for engaging in hostile acts.[570]

Although the notion of *combatant* formally exists only in IAC, the term 'fighter' has frequently been used *in lieu* of the term combatant in the context of NIAC. The term 'fighter' has been defined as members of armed forces or dissident armed forces or other organized armed groups, or persons taking direct part in hostilities. The term *civilians* is also often defined in the negative as 'all those who are not fighters', and civilians who directly participate in hostilities are treated as 'fighters'.[571]

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[567] Marco Sassoli and Laura Olson. 'The Relationship between International Humanitarian and Human Rights Law Where it Matters: Admissible Killings and Internment of Fighters in Non-International Armed Conflicts' (2008) 90(871) International Review of the Red Cross , 606.
[568] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (API), 8 June 1977, article 43(2).
[569] See ICRC online: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule3 (accessed latest 20 March 2019).
[570] See Janina Dill, 'Towards a Moral Division of Labour between IHL and IHRL during the Conduct of Hostilities (Forthcoming in)' in Ziv Bohrer, Janina Dill and Helen Duffy (eds)*, The Law Applicable to Armed Conflicts* (Cambridge University Press, Maw Planck Trialogues on the Law of Peace and War), 8. Dill refers to Adil Ahmad Haque, *Law and Morality at War* (Oxford University Press, 2017), at 28.
[571] Michael N. Schmitt, Charles Garraway and Yoram Dinstein, 'The Manual on the Law of Non-International Armed Conflict: With Commentary' (International Institute of Humanitarian Law 2006), 4-5.

With the combatant status follows a duty to respect IHL, including to distinguish themselves from the civilian population. This is, notably, a prerequisite for enabling the required protection of civilians in armed conflicts. The practicalities of this obligation, however, are particularly troublesome in NIAC involving non-state armed groups. IHL does not explicitly prescribe that 'fighters' must distinguish themselves from the civilian population,[572] which raises concerns regarding the possibility of adhering to the principle of distinction in NIAC. Further, treaty law does not offer any guidance on targeting in NIAC. [573] The ICRC study on customary IHL holds that the term combatant in NIAC simply indicates persons who do not enjoy the protection against attacks afforded civilians. The study further contends that while members of armed forces can be considered combatants, state practice is not clear as to the situation of members of armed opposition groups,[574] and practice is ambiguous as to whether members of armed groups are to be considered civilians or combatants.[575] There is thus no clear-cut answer to the question of classification and targetability of 'fighters' in NIACs.

9.1.2.2. The concept of civilians

The concept of *civilians* is defined in Article 50 of API as persons who are not members of the armed forces.[576] The ICRC study on customary law noted that state practice establishes the rule as customary law, and as such applicable to NIAC, although practice is ambiguous as to whether members of armed groups are considered civilians or members of armed forces.[577] The definition as it exists in Article 50 of API is also contained in numerous military manuals, and is reflected in state practice.[578] The Study found no official contrary practice, but it is noted that some practice adds the condition that a civilian is a person who does not participate in hostilities, which reinforces the rule that a civilian that participates in hostilities loses the protection afforded civilians under IHL.[579]

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[572] Marco Sassoli and Laura Olson. 'The Relationship between International Humanitarian and Human Rights Law Where it Matters: Admissible Killings and Internment of Fighters in Non-International Armed Conflicts' (2008) 90(871) International Review of the Red Cross , 609.
[573] ibid, 608.
[574] ICRC Study on Customary Humanitarian Law, Rule 3, online: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule3 (accessed latest 19 August 2019).
[575] ibid, Rule 5, online: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule5 (accessed latest 17 August 2019).
[576] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (API), 8 June 1977, article, article 50.
[577] ICRC Study on Customary Humanitarian Law, rule 5, *Definition of civilians*. See https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule5 (accessed latest 11 February 2019).
[578] The ICRC Study on Customary IHL identifies that the definition is entailed in the military manuals of Argentina, Australia, Benin, Cameroon, Canada, Colombia, Croatia, Dominican Republic, Ecuador, France, Hungary, Indonesia, Italy, Kenya, Madagascar, Netherlands, South Africa, Spain, Sweden, Togo, United Kingdom, United States, and Yugoslavia. See also ICRC Study on Customary Humanitarian Law, rule 5, online: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule5 (accessed latest 11 February 2019).
[579] ICRC Study on Customary IHL, rule 5, online: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule5 (accessed 11 February 2019).

9.1.2.3. Direct participation in hostilities and continuous combat function

The protection afforded civilians is, as observed, conditioned on their not taking part in hostilities. Article 51(3) of API and Article 13(3) of APII define that civilians are immune from direct attack 'unless and for such time as they take direct part in hostilities'.[580] This rule is also reflected in many military manuals, [581] and the ICRC Study on Customary IHL establishes this rule as customary in nature,[582] making the rule equally applicable in IAC and NIAC.

While members of armed forces may be equated to combatants in NIACs, practice is not clear on whether members of armed groups are considered members of armed forces or civilians.[583] As observed, the law on targeting was developed for conventional warfare, in which it is assumed that a combatant can be distinguished from civilians, but this reality does not reflect that of today's asymmetric conflicts.[584]

A further challenge, as observed by the ICRC, is that a precise definition of the term *direct participation in hostilities* does not exist. The ICRC Interpretive Guidance, an authoritative statement on direct participation in hostilities, identified that in order to qualify as direct participation, individuals must engage in specific hostile acts that are carried out as part of the conduct of hostilities. The guidance further identified three cumulative elements for such acts to qualify as direct participation in hostilities: a threshold of harm, a direct causation, and a belligerent nexus. The act, thus, must be likely to adversely affect the military operations or military capacity of a party to the conflict, or inflict death, injury or destruction on persons or objects protected from direct attack. There must also be a direct causal link between the act and the harm, and the act must be specifically designed to cause such harm.[585] Further, the IACommHR has stated that the term 'direct participation in hostilities' is generally understood to mean 'acts which, by their nature or purpose, are intended to cause actual harm to enemy personnel and *matériel*'.[586]

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[580] APII, article 13(3).
[581] The ICRC study on Customary IHL found this rule in the military manuals of Australia, Benin, Colombia, Croatia, Ecuador, Germany, Italy, Kenya, Madagascar, Netherlands, Nigeria, South Africa, Spain, Togo, and Yugoslavia. See ICRC Study on Customary IHL, rule 6, online: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule6 (accessed 11 February 2019).
[582] See ICRC, Study on Customary International Humanitarian Law, rule 1, online: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1 (accessed 23 October 2016).
[583] ICRC Study on Customary IHL, 17. See also Marco Sassoli and Laura Olson. 'The Relationship between International Humanitarian and Human Rights Law Where it Matters: Admissible Killings and Internment of Fighters in Non-International Armed Conflicts' (2008) 90(871) International Review of the Red Cross
[584] Randall Bagwell and Molly Kovite, 'It is not Self-Defence: Direct Participation in Hostilities Authority at the Tactical Level' (2016) 224(1) Military Law Review 2.
[585] ICRC, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law' (International Committee of the Red Cross 2009), 46.
[586] Inter-American Commission on Human Rights, Third report on human rights in Colombia.

The practicalities of distinguishing between those who can be legally targeted and those who are entitled to protection in NIAC are thereby, and notably, more complex than the formal distinction suggests, and interpretations differ. Boothby, for example, argues that if it is accepted that the status of combatant does not exist in NIAC, members of armed opposition groups must be considered civilians,[587] and as such protected unless and for such time as they take direct part in hostilities. Sassòli and Olson, on the contrary, hold that mere lack of active participation in hostilities is not enough to prohibit attacks against civilians. In order to be immune from attack, they argue, individuals taking direct part in hostilities must take additional steps than stopping the immediate act and actively disengaging in order to be immune from attack,[588] which suggests a loss of protection that extends beyond mere direct participation in hostilities.

The lack of clarity on targetability in the law of NIAC complicates the determination of the rules regulating force in both NIACs and peace operations, but attention to the parameters of the regulation of the use of force can, to an extent, remedy this challenge, as is shown below. An important starting point in the quest for legal clarity on the use of force in IHL is the principle of military necessity.

9.1.3. The principle of military necessity

The principle of *military necessity* has been held to constitute the foundation of the entire framework of IHL. It has developed strictly within the confines of IHL, and is as such limited to the applicable scope of that law. The meaning and function of the principle of military necessity consequently informs the extent to which military objectives can be permitted to infringe on the security of civilians in armed conflicts, and it is thereby of key importance to identifying the protective nature and function of IHL.

Military necessity governs the rules of IHL in two ways. First, it guides the conduct in warfare, in which military aims must be balanced against humanitarian considerations. Secondly, and which has received significantly less attention, military necessity constitutes a fundamental *raison d'être* for the entire framework of IHL.[589] As Hill-Cawthorne notes, recognising this functional or constitutive notion of military necessity in IHL is essential in order to understand the presumptions that underlie IHL and that informs its rules.[590] Thus, the principle of military necessity constitutes an inherent requirement in each rule entailed in IHL. Even when not expressly mentioned in specific IHL rules,

[587] William H. Boothby, *The Law of Targeting* (First edn, Oxford University Press 2012), 70.
[588] Marco Sassoli and Laura Olson. 'The Relationship between International Humanitarian and Human Rights Law Where it Matters: Admissible Killings and Internment of Fighters in Non-International Armed Conflicts' (2008) 90(871) International Review of the Red Cross , 606.
[589] Lawrence Hill-Cawthorne. 'The Role of Necessity in International Humanitarian and Human Rights Law' (2015) 47(2) Israel Law Review, 229.
[590] ibid, 233.

military necessity always operates as a built-in underlying concept.[591] The ILC has similarly held that military necessity appears in the first place as the underlying criterion for the whole series of substantive rules of the law of war and neutrality, namely those rules that, by derogation from the principles of the law of peace, confer on a belligerent state the legal faculty of resorting to actions that meet the needs of the conduct of hostilities.[592] Thereby, the ILC seems to support the view that military necessity constitutes the underlying rationale of the entire body of IHL.

The applicability of military necessity consequently brings with it a legitimacy of military aims in all military operations undertaken in armed conflicts, which raises the question of the compatibility of the underlying premise of military necessity and the aims and purposes sought in peace operations and *jus post bellum*. As noted by Hill- Cawthorne, an underlying assumption in IHL is that the law of peace is inappropriate for safeguarding the essential interests of states in situations of armed conflicts. The rules of IHL, then, naturally rise above and beyond the law of peace, and the ultimate purpose pursued through the application of IHL is to safeguard the state in its entirety.[593] This influences the perception of what goals are to be pursued and the legitimate costs for pursuing such aims. The principle of military necessity thus functions to support the aim to enable a state to win the war, prevail over the enemy and secure the survival of the state.[594]

Such an understanding of the concept of military necessity – as an underlying rationale of the entire IHL framework – can guide the interpretation of its relevance and applicability in peace operations. Such a determination is dependent on the nature and function of the principle of military necessity, which is primarily determined by its permissive and restrictive function.

9.1.3.1. The permissive and restrictive function of military necessity

The roots of modern law on military necessity lie in the first official codification of the laws of war in General Order 100, more commonly known as 'the Lieber Code'.[595] It continues to influence the interpretation of the modern law of military necessity, and is as such a valuable starting point for identifying the nature and function of the principle.

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[591] Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interactions with International Human Rights Law* (Martinus Nijhoff Publishers 2009), 662. See also Lawrence Hill-Cawthorne. 'The Role of Necessity in International Humanitarian and Human Rights Law' (2015) 47(2) Israel Law Review , 232

[592] Report of the International Law Commission on the work of its Thirty-second session, 5 May - 25 July 1980, Official Records of the General Assembly, Thirty-fifth session, Supplement No. 10, 45-46.

[593] Lawrence Hill-Cawthorne. 'The Role of Necessity in International Humanitarian and Human Rights Law' (2015) 47(2) Israel Law Review , 233.

[594] See e.g. Noam Neuman, 'Applying the rule of proportionality: force protection and cumulative assessment in international law and morality', in *Yearbook of International Humanitarian Law* (2004) 7(0) 79, 100.

[595] Burrus M. Carnahan. 'Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity' (1998) 92(2) The American Journal of International Law 213, 213.

The specifics of military necessity are detailed in primarily three articles of the Lieber Code; Articles 14, 15 and 16. As noted by Ohlin, in order to determine the scope and limitation of the principle of military necessity as detailed in the Code, all three articles must be read in conjunction.[596] Article 14 of the Lieber Code, however, is most commonly referred to in reference to the definition of military necessity. It holds that:

> (…) [M]ilitary necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war.[597]

As noted by Melzer, the contention that military necessity must both fulfil the requirement that the action be necessary for the achievement of a legitimate military purpose, and otherwise not be prohibited by IHL, has been confirmed in both international jurisprudence and in legal doctrine.[598] In permitting 'measures that are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war', the article contains both permissive and restrictive functions.[599] It permits measures that are necessary to ensure the 'ends of war' which arguably can be equated to the survival of the state,[600] but it restricts such measures to those that are *indispensable*. The definition of *indispensable measures* consequently lies at the heart of determining and delineating the permissive and restrictive functions of the principle of military necessity.

The term seems to suggest that each measure must be specifically and directly aimed at the identified goal to secure the ends of war. This seems to differ from the permissive scope detailed in Article 15. It holds:

> Military necessity admits of **all direct destruction of life or limb of armed enemies, and of other persons** whose destruction is **incidentally unavoidable** in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of **all destruction of property**, and **obstruction of the ways and channels of traffic, travel, or communication**, and of all **withholding of sustenance or means of life from the enemy**; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such **deception** as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings,

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[596] Jens David Ohlin, *The Assault on International Law* (Oxford University Press 2015), 185.
[597] Instructions for the Government Armies of the US in the field, prepared by Francis Lieber, promulgated as General order no 100 by President Lincoln, 24 April 1863, art 14. Reprinted in Dietrich Schindler and Jiří Toman, The laws of armed conflict: A collection of conventions, resolutions and other documents, Martinus Nijhoff Publishers, Fourth revised and completed edition (2004).
[598] Nils Melzer, *Targeted killing in international law* (Oxford monographs in international law, Oxford University Press 2008), 285. In regards to jurisprudence, see also UNWCC, Wilhelm List Case at 66. In regards to legal doctrine, see Dinstein, Conduct of Hostilities; Greenwood, Historical development and legal basis;
[599] Burrus M. Carnahan. 'Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity' (1998) 92(2) The American Journal of International Law 213, 215.
[600] See similar argument in Lawrence Hill-Cawthorne. 'The Role of Necessity in International Humanitarian and Human Rights Law' (2015) 47(2) Israel Law Review , 233..

> responsible to one another and to God.[601]

The permitting of all direct destruction of life or limb of armed enemies and of other persons if incidentally unavoidable is, indeed, extensive. Firstly, the permitting of all direct destruction of life or limb of armed enemies entails a categorical permission to kill combatants. Secondly, the permissive function extends to permitting the killing of *any individual* so long as it is *incidentally unavoidable*, which permits the killing of civilians so long as it cannot be avoided. Furthermore, the article details permission to destroy property; obstruct traffic, travel or communication; withhold sustenance or means of life from the enemy; and to deceive in a way that does not break 'good faith'. The article thereby details a wide permissive scope, arguably leaving limited room for restrictions.

The restrictive function of military necessity is detailed in Article 16:

> Military necessity does not admit of cruelty – that is, the **infliction of suffering for the sake of suffering** or for **revenge**, nor of maiming or wounding except in fight, nor of **torture** to extort confessions. It does not admit of the use of **poison** in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, **in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult**.[602]

The restrictive function of military necessity, as detailed in Article 16 of the Lieber Code, is thus limited to force that is not related to warfare, such as infliction of suffering for the sake of suffering rather than to further the war effort, torture and the use of poison.

Of importance here is the last sentence prohibiting any act of hostility *that makes the return to peace unnecessarily difficult*. Research into the causes of peace, and in particular sustainable peace, is scarce. A recent analysis conducted by a group of experts noted that a key factor in creating sustainable peace is cultivating and promoting non-violence as a value.[603] Research has also found strong support for the claim that protecting human rights is one of the preconditions for peace.[604]

With what we know today about what it is that makes peace, and what makes peace sustainable, it may be held that the prohibition to engage in acts that make the return to peace unnecessarily difficult

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[601] Instructions for the Government Armies of the US in the field, prepared by Francis Lieber, promulgated as General order no 100 by President Lincoln, 24 April 1863, art 15. Reprinted in Dietrich Schindler and Jiří Toman in *The laws of armed conflict: A collection of conventions, resolutions and other documents,* Martinus Nijhoff Publishers, Fourth revised and completed edition (2004). Emphasis added.

[602] Instructions for the Government Armies of the US in the field, prepared by Francis Lieber, promulgated as General order no 100 by President Lincoln, 24 April 1863, art 16. Reprinted in Dietrich Schindler and Jiří Toman in *The laws of armed conflict: A collection of conventions, resolutions and other documents,* Martinus Nijhoff Publishers, Fourth revised and completed edition (2004).

[603] See Report of the Advisory Group of Experts for the 2015 Review of the United Nations Peacebuilding Architecture, *The Challenge of Sustaining Peace*, 29 June 2015.

[604] Kjersti Skarstad, 'Human Rights Violations and Conflict Risks: A Theoretical and Empirical Assessment' in Cecilia Marcela Bailliet and Kjetil Mujezinovic Larsen (eds), *Promoting Peace Through International Law* (Oxford University Press 2015) 133, 145.

encompasses a requirement to balance military necessity with humanity in a way that enables effective protection of civilians. It is, however, an unlikely rationale instructing the wording of the Lieber Code at the time of its drafting. Indeed, the restrictive function of military necessity in the Lieber Code was primarily focused on the combatant and on prohibiting specific means (such as poison and perfidy). This suggests that while the permissive function is extensive, the restrictive function is limited, providing for an imbalance between the permission and the restriction of military necessity, in which the balance tilts towards the permissive function.[605]

While the St Petersburg Declaration of 1868 explicitly identified a limitation on the necessities of war by holding that *'the progress of civilization should have the effect of alleviating as much as possible the calamities of war'* and that the only legitimate object '*which States should endeavor to accomplish during war is to weaken the military forces of the enemy'*,[606] other, more recent, legal instruments have not taken that ambition forward, and do not seem to offer any counterweight to Lieber's tilt towards the permissive function of military necessity. API even prescribes limitations on the prohibitions on attacks on civilian objects if such attacks are required by *imperative military necessity*. Article 54(5) of API holds:

> In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 [to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population] may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity'.[607]

The permission to attack civilian objects if imperatively necessary significantly reduces the protective scope of the law. This, together with the lack of identified purposes of force in modern legal instruments, results in the conclusion that modern law on military necessity has not taken the attempt to minimize force entailed in the St Petersburg Declaration forward.

Further, the lack of criteria for identifying the nature and scope of the permissive and the restrictive function in the law on military necessity complicates the identification of where the balance between humanity and the requirements of armed conflicts lies. In combination with the lack of specifics on the 'aim of war', this results in the conclusion that the balance between the permissive and the restrictive functions, and thus between military necessity and humanity, is tilting towards military necessity as long as the actions are not prohibited by specific rules, or fails to bring a military

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[605] See similar conclusion in Jens David Ohlin and Larry May, *Necessity in International Law* (Oxford University Press 2016), 105, in which Ohlin argues that the regulating funciton is increadibly weak, and 'only outlaws acts of vengeance, cruelty and sadism.'

[606] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November- 11 December 1868.

[607] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (API), 8 June 1977, article 54(5).

advantage. In short, force is permitted unless specifically prohibited by exception. In *jus post bellum* perspective, this is to be contrasted against the regulation of force under IHRL, in which force is prohibited unless specifically permitted by exception.[608]

Although focus has shifted from states to individuals *jus ad bellum* in the quest for safeguarding humanity,[609] there does not seem to have been the same development regarding the balance between the necessities of war and humanity *jus in bello*. The nature and function of military necessity reveal that the protective scope of IHL, as determined by the restrictive and permissive functions of military necessity, is limited. Despite being aimed at minimizing the sufferings of war, IHL seeks to do so through an acceptance of the realities and necessities of armed conflicts. These perceived necessities influence each rule contained in IHL, and the application of those rules; in putting the principle of military necessity to work, it will tilt towards the perceived need for military action to secure 'the ends of war' at the expense of the protection of civilians. Consequently, the protective scope is still limited under IHL and military necessity.[610]

There is consequently an important distinction to make between engaging in an armed conflict in a manner that protects civilians, which is reflected in the function of the principle of military necessity and the protective nature of IHL, and to engage in an armed conflict *for the purpose* of protecting civilians. In other words, military necessity enables war fought in a manner that protects civilians to the extent possible given the realities of armed conflicts. Protection under IHL, thus, is indirect and limited to the realities of armed conflicts. On the contrary, the primary aim for peace operations to engage in an armed conflict is to protect civilians.

In conclusion, the law of military necessity as entailed in legal instruments today is still strongly influenced by the Lieber Code. The application of the principle of military necessity, functioning as an underlying premise of IHL, permits pursuit of the aims of armed conflict, which contrasts against aims pursued in other protective regimes. This, thus, must be considered in the identification of a normative framework for effective, purposive and sustainable protection of civilians under *jus post bellum*.

In distinguishing between different forms of threats in *jus post bellum* environments, and in recognising that the principle of military necessity can serve to protect the host state from threats posed by armed groups, the principle of military necessity can be held to be both appropriate and valuable in guiding conduct in peace operations aimed at addressing threats of a military nature.

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[608] The regulation of the use of force as entailed in IHRL is further explored and analysed in Chapter 8.1 herein.
[609] Through, for example, the development of the doctrine on Responsibility to Protect, and the growing tendency of the Security Council to adopt enforcement measures under Chapter VII of the UN Charter in response to threats to civilians.
[610] See similar argument in Jens David Ohlin and Larry May, *Necessity in International Law* (Oxford University Press 2016), 105.

Nevertheless, the permissive scope of the regulation of force in IHL and the causal link between the protection of civilians and peace[611] suggest that the application of IHL in peace operations should be limited. Consequently, the application of the principle of military necessity should be restricted to situations of active hostilities, and not be used to guide all military operations in peace operations.

Identifying a dividing line between IHL and IHRL specifically designed for protection under *jus post bellum*, and which can further the aim of peace operations, is therefore required in order to guide peace operations to effective, purposive and sustainable protection of civilians.

9.1.4. The principle of proportionality

The principle of proportionality is found in various areas of international law, such as IHL, IHRL, trade law and general law on the resort to force by states.[612] However, much like the principle of necessity as entailed in IHRL and IHL respectively, the principle operates in different ways in the two frameworks.

The principle of proportionality regulates the kind and amount of force permitted by limiting it to such force that is expected to not cause *incidental loss of civilian lives*, and that is not *excessive in relation to the military advantage* sought. The principle is codified in Article 51(5)(b) of API. It prohibits *indiscriminate* attacks, and defines *indiscriminate* as:

> (…) 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[613]**

Notably, API is only applicable in IAC, and neither CA3 nor APII, applicable in NIAC, makes reference to a principle of proportionality. The ICRC study on customary IHL, however, has determined the rule to be customary in nature, and as such applicable in both IAC and NIAC.[614]

While some argue that it is not clear whether the content of the principle is the same under both treaty and customary law,[615] a majority adopt the understanding that the two contain the same rule.[616] The principle of proportionality also appears in a number of instruments applicable to NIAC, such as *The*

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[611] See further herein in Chapter 1.
[612] Emanuela-Chiara Gillard, *The principle of proportionality in the conduct of hostilities: The incidental harm side of the assessment* (Chatham House The Royal Institute of International Affairs December, Research paper , 2018), 6.
[613] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (API), 8 June 1977, article 51(5)(b).
[614] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, ICRC, Cambridge University Press, 2005 (hereinafter "ICRC Customary IHL Study"), Rule 14.
[615] Emanuela-Chiara Gillard, *The principle of proportionality in the conduct of hostilities: The incidental harm side of the assessment* (Chatham House The Royal Institute of International Affairs December, Research paper , 2018), 7.
[616] See for example Yutaka Arai-Takahashi, 'The battle over elasticity- interpreting the concept of 'concrete and direct military advantage anticipated' under International Humanitarian Law' in Yves Haeck and others (ed), *The Realisation of Human Rights: When Theory Meets Practice: Studies in Honour of Leo Zwaak* (Intersentia 2013) 351, 352, where he refers to the 'customary law equivalent' to the rule entailed in API article 51(5)(b).

Conventional Weapons Convention, which cites proportionality in relation to the indiscriminate placement of weapons in both the original 1980 Protocol II on the *Use of Mines, Booby Traps and Other Device*s,[617] and in the 1996 Amended Protocol II on the same subjects (Article 3.8(c)). As per these instruments, a placement that causes excessive incidental injury or collateral damage is forbidden. Similarly, the 1999 Second Hague Protocol for the *Protection of Cultural Property in the Event of Armed Conflict* forbids attacks that may cause incidental damage to cultural property that would be excessive in relation to the concrete and direct military advantage anticipated.[618]

In assessing proportionality, thus, the notion of *military advantage* is central. The key word is 'excessive', which indicates unreasonable conduct in light of the circumstances prevailing at the time.[619] Determining proportionality is not, however, an exact science. As observed during an expert meeting on the principle of proportionality, there is no set formula to determine where the balance between permissible military benefits and civilian harm lies.[620] Nor does the principle of proportionality come into play in general military operations that do not constitute an 'attack'.[621] As noted herein, the notion of *attack* is smaller in scope than the concept of *military operations*, which suggests that not all military operations are regulated by the principle of proportionality. Defining the term attack as *acts of violence* against the adversary, whether in offence or defence,[622] necessarily differentiates the notion of attack from the broader term of military operations.

Notably, as made clear in Article 51(5)(b) of API, it is only *incidental* loss of civilian life, injury to civilians or civilian objects that is prohibited, and only if it is *excessive* in relation to the *concrete* and *direct* military advantage anticipated. Arai-Takahashi argues convincingly that the term *concrete* can be defined as specific rather than general, and that the term is equivalent to the term definite, which qualifies the concept of military objective under Article 52(2) of API. Arai-Takahashi contends that, regarding the term *definite military advantage*, the concept *concrete advantage* can be understood as perceptible rather than hypothetical and speculative.[623]

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[617] See article 3.3(c) in named instrument.
[618] Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954, article 7 (c).
[619] Michael N. Schmitt, Charles Garraway and Yoram Dinstein, 'The Manual on the Law of Non-International Armed Conflict: With Commentary' (International Institute of Humanitarian Law 2006), 23.
[620] Laurent Gisel, Laurent (Legal Adviser, Report prepared by and edited by). 'Expert meeting: The Principle of Proportionality in the Rules Governing the Conduct of Hostiltiies under International Humanitarian Law' (International Expert Meeting.International Committee of the Red Crott, Quebec, Canada 22-23 June 2016 2018), 8.
[621] Emanuela-Chiara Gillard, *The principle of proportionality in the conduct of hostilities: The incidental harm side of the assessment* (Chatham House The Royal Institute of International Affairs December, Research paper, 2018), 8.
[622] Michael N. Schmitt, Charles Garraway and Yoram Dinstein, 'The Manual on the Law of Non-International Armed Conflict: With Commentary' (International Institute of Humanitarian Law 2006), 7.
[623] Yutaka Arai-Takahashi, 'The battle over elasticity- interpreting the concept of 'concrete and direct military advantage anticipated' under International Humanitarian Law' in Yves Haeck and others (ed), *The Realisation of Human Rights: When Theory Meets Practice: Studies in Honour of Leo Zwaak* (Intersentia 2013) 351, 354.

The notions of *direct* and *concrete* military advantage, although not specified in IHL, affect the permissible level of incidental harm and determines whether an attack is disproportionate and therefore prohibited under IHL.[624] According to Arai-Takahashi, the common understanding of the term *direct* is that it is to be contrasted against *indirect* advantage. While indirect advantage appearing at a remote or unknown point in time is to be ruled out, direct advantage must be anticipated as an immediate consequence of the attack rather than as a later development.[625] This suggests both temporal and geographical limitations on the advantage permitted within the principle of proportionality.

Moreover, as observed during an expert meeting, the requirement that an advantage has to be *military* in nature has been deemed the most significant restriction in the legal framework governing targeting.[626] While some have argued that military advantage can only consist of ground gained or of the weakening of the enemy, and that a military advantage can only be of tactical nature, others have argued that any consequence that enhances friendly military operations or hinders those of the enemy can fall within the notion of military advantage.[627] It has also been argued that military advantage is not limited to tactical gains, but rather linked to the full context of a war strategy, and may include operational and strategic effects.[628]

Under such understanding, notably, the assessment against which military advantage is to be weighed is undoubtedly broader than the concept of 'attack' as defined as 'acts of violence against the adversary, whether in offence or defence'.[629] This raises the question of whether the advantage should be assessed against each individual attack, or if the general war effort is relevant in the assessment of proportionality.

9.1.4.1. Temporal and geographical proximity requirements of military advantage

There is nothing in treaty law that suggest any specific relation or correlation between the temporal and geographical position of effects that could help guide the assessment of proportionality. In other words, there are no treaty provisions that suggest that effects that are temporally or geographically

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[624] Gisel, Laurent (Legal Adviser, Report prepared by and edited by). 'Expert meeting: The Principle of Proportionality in the Rules Governing the Conduct of Hostiltiies under International Humanitarian Law' (International Expert Meeting.International Committee of the Red Crott, Quebec, Canada 22-23 June 2016 2018), 9.
[625] Yutaka Arai-Takahashi, 'The battle over elasticity- interpreting the concept of 'concrete and direct military advantage anticipated' under International Humanitarian Law' in Yves Haeck and others (ed), *The Realisation of Human Rights: When Theory Meets Practice: Studies in Honour of Leo Zwaak* (Intersentia 2013) 351, 354.
[626] Gisel, Laurent (Legal Adviser, Report prepared by and edited by). 'Expert meeting: The Principle of Proportionality in the Rules Governing the Conduct of Hostiltiies under International Humanitarian Law' (International Expert Meeting.International Committee of the Red Crott, Quebec, Canada 22-23 June 2016 2018), 11.
[627] HPCR, Manual on International Law Applicable to Air and Missile Warfare, produced by the Program on Humanitarian Policy and Conflict Research at Harvard University, Cambridge University Press (2013), Commentary on Rule 1(w), para. 3.
[628] Michael N. Schmitt, "The Relationship between Context and Proportionality: a Reply to Cohen and Shany'", *Just Security*, 11 May 2015, available at https://www.justsecurity.org/22948/response-cohen-shany/ (accessed latest 17 August 2019).
[629] Additional Protocol I to the Geneva Conventions, article 49(1).

distant permit less civilian harm under the principle of proportionality. There is also no consensus on the scope of the context in which a military advantage relevant for the proportionality assessment can arise.

The ICRC commentary on API claims that the terms *direct* and *concrete* are intended to show that the advantage concerned should be substantial and relatively close, and that advantages which are hardly perceptible and those which appear only in the long term should be disregarded'.[630] This suggests that the balance between military advantage and humanity is not to be assessed against the broader war effort, but against the circumstances specific in each situation. However, as observed in an expert meeting on proportionality, a number of states stated that in ratifying API they consider the military advantage to refer to the advantage anticipated from 'the attack as a whole' rather than from mere isolated, or parts of, attacks.[631] The scope of the notion of 'attack as a whole', however, is not clear. Some argue that if an attack is an element of a larger operation, rather than independent of, or unaffected by other attacks, the proportionality assessment should be considered based on the 'attack as a whole',[632] and that the relevant advantage to be considered is that anticipated from the military campaign, where the attack is part of a greater whole.[633] Others have stressed that the analysis cannot extend to the armed conflict as a whole, but must remain within defined limits.[634]

Disagreements on the geographical and temporal proximity of the advantage were also evident in the expert meeting on proportionality. Some experts held that the closer the geographical and temporal effects of an attack are, the higher the presumption that the advantage is *direct*. As a result, according to this view, longer term advantages should be treated with caution, and are consequently less likely to be direct and therefore proportionate. Several others, however, contested this view, and contended that long-term effects of eroding the military capability of the enemy are relevant to the assessment of the direct effects of the attack. Several experts further held that 'even if the distance of the objective from the front line could affect the assessment of the military advantage, it does not necessarily preclude the possibility that the attack offers a military advantage.'[635] In other words, much like

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[630] ICRC 1987 Commentary on AP I, para. 2209.
[631] Gisel, Laurent (Legal Adviser, Report prepared by and edited by). 'Expert meeting: The Principle of Proportionality in the Rules Governing the Conduct of Hostiltiies under International Humanitarian Law' (International Expert Meeting.International Committee of the Red Crott, Quebec, Canada 22-23 June 2016 2018), 13.
[632] See Emanuela-Chiara Gillard, *The principle of proportionality in the conduct of hostilities: The incidental harm side of the assessment* (Chatham House The Royal Institute of International Affairs December, Research paper, 2018), 9.
[633] Noam Neuman, 'Applying the rule of proportionality: force protection and cumulative assessment in international law and morality', in *Yearbook of International Humanitarian Law* (2004) 7(0) 79, 100.
[634] Knut Dörmann, 'Obligations of International Humanitarian Law, *Military and Strategic Affairs*, (2012) 4(2) 15; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2nd ed. (Cambridge University Press 2010), 94.
[635] Gisel, Laurent (Legal Adviser, Report prepared by and edited by). 'Expert meeting: The Principle of Proportionality in the Rules Governing the Conduct of Hostiltiies under International Humanitarian Law' (International Expert Meeting.International Committee of the Red Crott, Quebec, Canada 22-23 June 2016 2018).

temporal proximity, geographical proximity to 'the front line' of the combat zone was not held as required for military advantage to exist according to these experts.

Similarly, as observed by Arai-Takahashi, the Eritrea-Ethiopia Claims Commission quite controversially ruled that the term military advantage can only be understood in the context of the military operations as a whole, and not merely in the context of a specific attack.[636] The claims commission argued that:

> (…) [D]efinite military advantage must be considered in the context of its relation to the armed conflict as a whole at the time of the attack.[637]

If understood as entailing any benefit related to the overall aim of the armed conflict in its entirety, assessing proportionality against such broad notions as 'the armed conflict as a whole' would essentially risk nullifying any effective meaning of the proportionality equation.[638] Arai further observes that even commentators such as Dinstein arguing for a broad context against which proportionality is to be assessed distinguishes between an 'attack as a whole' and 'the armed conflict as a whole'.[639] Dinstein, in fact, argued that the statement by the Claims Commission that the assessment is to be made in the context of the armed conflict as a whole was a gross exaggeration.[640] State practice, further, reveals that some states have interpreted the term *concrete* and *direct* advantage so broadly and sufficiently elastic as to encompass both geographically and temporally distant advantages.[641]

Notably, an interpretation in which military advantage is assessed against the armed conflict as a whole would render void the constraints entailed in the defining terms *concrete* and *direct*. The experts observed that although the notion of *attack as a whole* is not defined, it must remain in finite operationally defined limits. It was suggested that the relevant advantage to be assessed is that emanating from the specific attack, but assessed in light of the attack as a whole.[642] Rather than opting

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[636] Yutaka Arai-Takahashi, 'The battle over elasticity- interpreting the concept of 'concrete and direct military advantage anticipated' under International Humanitarian Law' in Yves Haeck and others (ed), *The Realisation of Human Rights: When Theory Meets Practice: Studies in Honour of Leo Zwaak* (Intersentia 2013) 351, 361. See also

[637] Eritrea-Ethiopia Claims Commission, Partial Award: Western Front, Aerial Bombardment adn Related Claims – Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 and 26 19 December 2005 , para 113

[638] Yutaka Arai-Takahashi, 'The battle over elasticity- interpreting the concept of 'concrete and direct military advantage anticipated' under International Humanitarian Law' in Yves Haeck and others (ed), *The Realisation of Human Rights: When Theory Meets Practice: Studies in Honour of Leo Zwaak* (Intersentia 2013) 351, 361.

[639] ibid. See also Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict, 3rd ed* (Cambridge University Press 2016), 108-109.

[640] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict, 3rd ed* (Cambridge University Press 2016), 109.

[641] Yutaka Arai-Takahashi, 'The battle over elasticity- interpreting the concept of 'concrete and direct military advantage anticipated' under International Humanitarian Law' in Yves Haeck and others (ed), *The Realisation of Human Rights: When Theory Meets Practice: Studies in Honour of Leo Zwaak* (Intersentia 2013) 351, 363.

[642] Gisel, Laurent (Legal Adviser, Report prepared by and edited by). 'Expert meeting: The Principle of Proportionality in the Rules Governing the Conduct of Hostiltiies under International Humanitarian Law' (International Expert Meeting.International Committee of the Red Crott, Quebec, Canada 22-23 June 2016 2018).

for the narrow scope of military advantage of assessing against singular and isolated attacks, or the broader scope of assessment through perceiving the advantage in light of 'the attack as a whole', the expert meeting sought to merge the two, but without defining criteria for how the two can be related to each other.

Important in this context is the observation that the broader the context for which military advantage can be balanced against the principle of humanity, the greater leeway for military necessity, and thus the smaller the scope for protection of civilians. The principle of proportionality thus also limits the protective scope of IHL. This is in particular under the understanding that the entire war effort is relevant in the assessment of proportionality.

The scope of protection afforded civilians, furthermore, is notably limited to effects that are *incidental* and *excessive*. While the principle of proportionality as entailed in IHL may be understood as geared towards the protection of civilians, it permits intentional killing of civilians.[643] As observed by Kretzmer, thereby, the assumption that the principle enhances the protection of civilians is not necessarily valid since it depends on the alternative.[644] In *jus post bellum* and peace operation contexts, the alternative, notably, is that of IHRL, which, while entailing a principle of proportionality, functions differently and serves different aims, which enables greater protection for civilians than that entailed in IHL.[645]

Both the scope of the context against which the proportionality is to be assessed, and the weight afforded the military advantage on the one side and the principle of humanity on the other, are consequently anything but clear. It can be concluded that while it is not realistic to remove entirely the assessment of proportionality from the broader perspective of the aims sought in military operations and through operational plans, it is similarly untenable to extend the assessment of proportionality to the entire war effort. As observed in the *NIAC Manual*, although the term military advantage is often narrowly defined, an overly restrictive interpretation is untenable under customary international law. The term includes, it is held, a broad range of issues ranging from force protection to diverting the attention of the enemy from a site of intended invasion.[646] The realities and legitimate aims of warfare must, arguably, be considered in order to ensure that the law is and remains relevant, credible and adequate to the situation for which it is intended. However, limitations on how military advantage is

[643] David Kretzmer. 'Rethinking the application of international humanitarian law in non-international armed conflicts' (2009) 42(1) Israel Law Review, 28.
[644] ibid.
[645] See further in Chapter 8.1.2 addressing the principle of proportionality in IHRL.
[646] Michael N. Schmitt, Charles Garraway and Yoram Dinstein, 'The Manual on the Law of Non-International Armed Conflict: With Commentary' (International Institute of Humanitarian Law 2006), 24.

to be assessed are essential in order not to render moot the limitations of warfare imposed through the principle of proportionality.

It is neither the aim, nor does it serve the purpose of this research, to identify a solution to this dilemma. For the purpose of the present research, the mere observation that there is no consensus on the parameters relevant for assessing proportionality is of value. The fact that there is no consensus on the scope of the context against which proportionality is to be assessed highlights the distinction between the principle of proportionality as it exists under IHRL and IHL respectively, which emphasises the importance of finding the dividing line between IHL and IHRL, and between law enforcement operations and conduct of hostilities in identifying legal guidance for peace operations that enable effective and sustainable contributions to sustainable peace and security.

9.1.5. Relation between military necessity and proportionality

Both military necessity and proportionality can be held to entail a requirement of a balance with humanity, which raises the question of how the two principles relate to each other in the regulation of conduct. The relation between military necessity and proportionality can be understood in two ways. Either the two are viewed as intrinsically linked, whereby the principle of proportionality constitutes a condition of necessity, or the two are understood to constitute two separate principles, operating independently of each other. Scholars differ in their understanding and interpretation of the relationship between the two principles.

Under the interpretation that the two principles constitute distinct requirements on the use of force, once a measure has been deemed necessary, it must still conform to the principle of proportionality which measures whether the harm caused is proportionate to the objective sought.[647] While the principle of military necessity requires balancing between *the objective sought* and *humanity*, the principle of proportionality requires balancing between *the military advantage anticipated* from the achievement of the identified objective and the incidental harm to civilians and civilian objects. Military necessity, thereby, focuses on the military objective and military objects, whereas the principle of proportionality aims at limiting damage to civilians.

This suggest that the two principles of necessity and proportionality are best understood as distinct. Whereas military necessity determines whether force is permitted, the principle of proportionality determines how much force is permitted once the question of whether or not force can be applied has been answered in the affirmative. The two principles therefore require distinct assessments and

[647] See similar argument in Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford Monographs in International Law, Oxford University Press 2010), 173.

should, it is submitted, be kept distinct. The interpretation adopted here is therefore that the principle of proportionality entailed in IHL is distinct from that of necessity.

Placed into the context of peace operations, this means that the function of proportionality reinforces the importance of distinguishing between the use of force as permitted in IHL, and that regulated through IHRL. A significant difference from the principle as entailed in IHRL is that in IHL, the proportionality principle applies to attacks on legitimate targets, but only serves the purpose of protecting *civilians* from possible *incidental* effects. Sassòli and Olson note that combatants are part of the military potential of the enemy, and that it therefore is always lawful to attack them for the purpose of weakening the enemy.[648] Consequently, neither the military advantage derived from the attack, nor the effects inflicted from attacks on combatants and military objectives, are subject to a proportionality evaluation.[649]

Another potential distinction in the functioning of the principle of proportionality in IHL and IHRL respectively, is that whereas the principle is assessed against immediate and existing threats in IHRL, the principle may refer to more temporally and geographically distant effects in IHL. This expands the permissive scope of force and simultaneously reduces the protective scope of the law in IHL.

9.2. The notion of self-defense: a challenge to legal clarity on the use of force

Field realities and recent developments in approaches to justifying resort to force through the invocation of the right to self-defense in asymmetrical conflicts and complex security environments warrants attention here. While a right to the use of force in self-defense is usually contained in domestic legislation, IHL is silent on the right to self-defence. There is, however, a long-standing assumption that forces are permitted to defend themselves in combat. The notion of self-defence has, at least since the 1980s, been included in rules of engagements for military forces, and although often referred to as a *right*, there is no consensus and very little consideration of the legal foundation of such right.

The right to self-defence in armed conflicts has been held to stem from an expansion of the domestic right to self-defence.[650] Such an explanation thus seemingly assumes that it derives from IHRL. Another argument holds that the right to self-defence is an independent customary international law

[648] Marco Sassoli and Laura Olson. 'The Relationship between International Humanitarian and Human Rights Law Where it Matters: Admissible Killings and Internment of Fighters in Non-International Armed Conflicts' (2008) 90(871) International Review of the Red Cross, 606.
[649] ibid.
[650] Erica Gaston, Soldier Self-Defense Symposium: The View from the Ground- Emerging State Practice on Individual and Unit Self-Defense (*Opinio Juris,* May 2 2019) http://opiniojuris.org/2019/05/02/soldier-self-defense-symposium-the-view-from-the-ground-emerging-state-practice-on-individual-and-unit-self-defense/> accessed 2 May 2019

norm,[651] and thirdly, the right to self-defence for soldiers has been held to derive from states' sovereign right to self-defence.[652] The latter claim, notably, risks blurring *jus ad bellum* self-defence with *jus in bello* regulations. Most common, however, is the claim that the right to self-defence is derived from an extraterritorial application of domestic legislation.

Although few states have elaborated on the legal basis for self-defence in armed conflicts, it has become an almost default use of force paradigm in asymmetric conflicts such as Iraq and Afghanistan. This development has led to confusion on the legal parameters of the use of force in armed conflicts and has challenged accountability in *in bello* situations.[653] The standard proclamation of the 'right' to self- defence is as a response to imminent or ongoing threats, but much as in the UN policy on the protection of civilians[654] and in the implementing guidelines for the military component,[655] the US Rules of Engagement determines that 'imminent' does not necessarily mean immediate or instantaneous',[656] and the US interpretation thus does not entail the limitations entailed in notions of self-defence derived from domestic criminal law, such as 'last resort' or proportionality.[657]

Likely as a result of these flexible and expansive interpretations of self-defence in armed conflicts, the terms *hostile act* and *hostile intent* have become trigger words for the right to use force in self-defence,[658] Rather than offering definitional guidance on the necessity for the use of force, they have become buzzwords for justifying attacks against *potential*, but not immediate, threats. Perhaps most disturbingly, they have become the default authority for engaging with civilians who are directly participating in hostilities.[659]

Furthermore, *unit self-defence* has been increasingly relied on to justify use of aerial assets, including to justify strikes and drone strikes to mitigate or prevent non-immediate threats, enabled through the

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[651] Dale Stephens. 'Rules of Engagement and the Concept of Unit Self-Defense' (1998) 45 Naval Law Law Review 126, 128..
[652] Erica Gaston, Soldier Self-Defense Symposium: The View from the Ground- Emerging State Practice on Individual and Unit Self-Defense (*Opinio Juris,* May 2 2019) http://opiniojuris.org/2019/05/02/soldier-self-defense-symposium-the-view-from-the-ground-emerging-state-practice-on-individual-and-unit-self-defense/> accessed 2 May 2019, 3.
[653] ibid, 3.
[654] See United Nations Department for Peacekeeping Operations/ Department for Field Support, 'DPKO/ DFS Policy: The Protection of Civilians in United Nations Peacekeeping Operations' (United Nations 2015a), 5 (footnote no 14).
[655] See United Nations Department for Peacekeeping Operations/ Department for Field Support, 'Protection of Civilians: Implementing Guidelines for Military Components of United Nations Peacekeeping Missions' (Approved by Hervé Ladsous, USG DPKO 13 February 2015, DPKO/DFS reference no to be provided PBPS edn 2015b), 25.
[656] Dustin Kouba, *Operational Law Handbook* (International and Operational Law Department The Judge Advocate General's Legal Center and School Charlottesville, Virginia 17th edition, 2017), 79.
[657] Erica Gaston, Soldier Self-Defense Symposium: The View from the Ground- Emerging State Practice on Individual and Unit Self-Defense (*Opinio Juris,* May 2 2019) http://opiniojuris.org/2019/05/02/soldier-self-defense-symposium-the-view-from-the-ground-emerging-state-practice-on-individual-and-unit-self-defense/> accessed 2 May 2019, 4. See also further on the notion of imminence in Chapter 4.1.
[658] Erica Gaston, Soldier Self-Defense Symposium: The View from the Ground- Emerging State Practice on Individual and Unit Self-Defense (*Opinio Juris,* May 2 2019) http://opiniojuris.org/2019/05/02/soldier-self-defense-symposium-the-view-from-the-ground-emerging-state-practice-on-individual-and-unit-self-defense/> accessed 2 May 2019, 4.
[659] ibid, 7.

flexible definition of immediacy.[660] These practices have resulted in targeting models that incorporate common civilian behaviours, and in relaxing traditional IHL standards such as distinction and proportionality. Consequently, self-defence has been used to justify lethal force not only against those directly firing on or about to fire on international forces, but also against those speeding near checkpoints, running away from the site of an attack, standing on the side of the road or talking on a mobile phone as troops approach, or digging in the ground (interpreted as placing an explosive device in the ground).[661] Adopting such approaches in transitional environments, where, as noted, threats of different legal natures blend, would result in an expansive approach to the use of force, including lethal force, and would as such be catastrophic to the aims pursued.

Recent developments on the use of force in peace operations can, importantly, be held to mirror this evolution of the notion of self-defence in armed conflicts. One of the bedrock tenets of peace operations is the use of force only in self-defence or when strictly necessitated, and self-defence is therefore a longstanding justification for the use of force in peace operations. The concept of self-defence in peace operations has, however, been conflated to include 'defence of the mandate', and to an extent that seemingly lacks support in law.

The guidance instrument *Use of Force by Military Components in United Nations Peacekeeping Operations* details that 'peacekeepers are authorized to use force in self-defence *and* to execute their mandated tasks in appropriate situations'.[662] The 2002 *Guidelines for the Development of Rules of Engagement (RoE) for UN Peacekeeping Operations* confirms the de-linking of defence of the mandate and self-defence when it is recognised that force may be used 'beyond self-defence'.[663] Nevertheless, a broad interpretation of self-defence is reflected in the recognition of a right to use deadly force in self-defence to protect oneself, which may include: UN personnel; international personnel; UN installations, areas or goods; civilian personnel in need of protection from a hostile act or hostile intent; and preventing limitations to their freedom of movement.[664] The interpretation of self-defence in peace operations thereby goes well beyond domestic regulations on self-defence. As noted by Findlay, the use of force in self-defence must abide by the principles of necessity and

[660] Erica Gaston, Soldier Self-Defense Symposium: The View from the Ground- Emerging State Practice on Individual and Unit Self-Defense (*Opinio Juris,* May 2 2019) http://opiniojuris.org/2019/05/02/soldier-self-defense-symposium-the-view-from-the-ground-emerging-state-practice-on-individual-and-unit-self-defense/> accessed 2 May 2019, 6.
[661] ibid, 4.
[662] UN DPKO/ DFS *Use of Force by Military Components in United Nations Peacekeeping Operations* (2016.24, 2017), para 6.
[663] UN DPKO, Military Division, 'Guidelines for the Development of Rules of Engagement (ROE) for UN Peacekeeping Operations' (2002), ref. MD/FGS/0220.0001, principle 7(j),
[664] ibid, rules no 1.3; 1.5; 1.7; 1.10.

proportionality. As such, he contends, force can only be used in self-defence as a last resort, when absolutely necessary, and in a proportionate manner to the threat addressed.[665]

Such limitations are not considered, however, in recent developments on the use of force in peace operations. In addition to policy and guidance instruments frequently entailing references to *hostile intent* and *hostile acts*,[666] the so-called *Cruz-report* elaborates on the requirement to adopt proactive postures in self-defence and to take the initiative to use force to eliminate threats, and claims that overwhelming force is required to defeat hostile actors. The Cruz report specifies that:

> Peacekeepers must adopt a proactive posture in self-defence: they must take the initiative to use force to eliminate threats and end impunity for attackers by quickly organising special operations. Bases must become a point of irradiating security. Overwhelming force is necessary to defeat and gain the respect of hostile actors.'[667]

Further, the Cruz report details, personnel need to be assured by their commanders, their Headquarters, and their capitals that they have the right to self-defence and must respond with force to hostile acts.[668] On the use of force generally, further, the report contends that:

> To improve security, missions should identify threats to their security and take the initiative, using all the tactics, to neutralise or eliminate the threats. Missions should go where the threat is, in order to neutralise it. Missions should also push combat to the night, to take advantage of their superior technology. Waiting in a defensive posture only gives freedom to hostile forces to decide when, where and how to attack the United Nations.[669]

The Cruz report thereby suggests an aim and purpose of force akin to that of neutralizing or eliminating an enemy in armed conflicts, and it explicitly claims a need to use 'overwhelming' force to 'defeat' hostile actors, which undoubtedly is an approach foreign to law enforcement operations, and only adequate in combat. The justification of force based on 'hostility' or hostile acts, which are not defined as threats that motivate force as per the requirements of absolute necessity in IHRL, is telling of the legal challenges posed by the approach suggested.

The report does not, problematically, place such approach into a legal context. Neither does it offer reflections or guidance on the compatibility of such approach with the aims of peace operations, and nor does it entail analysis on relevant law. Military engagements are thus not placed into the greater whole, and military contributions are not related to the overarching aims of peace operations. Rather, peace operations are viewed solely as combat functions, in which peace operations are to identify an

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[665] Trevor Findlay, *The Use of Force in UN Peace Operations* (Oxford University Press and Stockholm International Peace Research Institute (SIPRI) 2002), 16.
[666] See further in Chapter 9.1.1..
[667] Alberto dos Santos Cruz, Lieutenant General (Retired), *Improving Security of United Nations Peacekeepers: We need to change the way we are doing business ('The Cruz report')* (December 19 2017), 10.
[668] ibid, 12.
[669] ibid, Executive Summary.

'enemy' who is to be defeated and eliminated. The logic and reasoning of the report is consequently blind to the law enforcement role of peace operations, often assigned to military actors. This undermines both adequate responses to the wide range of security challenges characterising transitional environments, and legality in operations.

Despite the glaring difference in aim and purpose between peace operations and armed conflicts, peace operations are thus problematically, and seemingly increasingly,[670] viewed *in toto* as engagements in combat functions in armed conflicts, which contrasts starkly with the field reality in peace operations, and in particular with the concept of protection. As observed by Sheeran, expanding the notion of self-defence to include the use of force for the protection of civilians obscures its content and blurs the meaning of the concept of self-defence. Such expansion of the concept of self-defence stretches it beyond recognition, and obscures both its legal basis and the legitimacy of the use of force by peace operations,[671] which further underscores the importance of distinguishing between IHL and IHRL in protection engagements, and the value of a protection regime specific to *jus post bellum* environments.

[670] The Cruz report is frequently referenced in relation to peace operations in varying contexts. Recently, the report was referenced in the Swedish Government office's draft report on the experiences from Sweden's non-permanent membership in the Security Council 2016-2018, which the present author was involved in editing.
[671] Scott Sheeran, 'The Use of Force in United Nations Peacekeeping Operations' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in United Nations Peacekeeping Operations* (Oxford University Press 2015), 365.

Section V: *A protection regime* jus post bellum*: The law of occupation, the law of non-international armed conflicts and an emergency law regime under* jus post bellum

10. Protection in the law of occupation

The law of occupation shares several characteristics with both peace operations and *jus post bellum*. Much like peace operations, the law of occupation entails obligations both relating to warfare and law enforcement. It also constrains an occupying power in relation to the objectives sought in occupied territories, such as prohibiting the alteration of laws (the conservationist principle),[672] and an obligation to prevent eruption of hostilities. The context, aim, and purposes sought in the law of occupation therefore make it particularly valuable to consider in the identification of an effective and purposive framework for protection of civilians under *jus post bellum*.

10.1. Applicability of the law of occupation on peace operations

The law of occupation is an integral branch of IHL,[673] sprung from the law of *international* armed conflict.[674] It is derived from the Hague Regulations, GCIV (and a modicum of API provision), as well as their customary law equivalents. The Hague Regulations respecting the Laws and Customs of War on Land (1899) were initially an annex to the Hague Convention II of 1899, but later revised in the Hague Convention of 1907.[675] The Hague Regulations were initially innovative, but have since acquired the declaratory status of customary international law.[676] As customary rules, the provisions have become binding on all states, irrespective of their signatory status.

Although, as noted, it has become generally accepted that IHL apply to peace operations to the extent that they become engaged as parties to an armed conflict, the applicability of the law of occupation, integral to IHL, is more complex. As observed in the expert meeting on occupation, peace operations such as those in Kosovo and East Timor share many similarities with traditional military occupation.[677] The law of occupation, however, has generally not been recognized as a legal framework relevant in peace operations. That may have changed with the adoption of UN Security Council Resolution 1483, in which the UK and the US were explicitly referred to as occupying

[672] On the notion of 'conservationist princople', see Gregory Fox. 'The Occupation of Iraq' (2005) 36(2) Georgetown Journal of International Law 195.
[673] Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press 2009a), 3.
[674] Eyal Benvenisti, *The International Law of Occupation*, vol 2 (Oxford University Press 2013), 11.
[675] Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press 2009a), 4-5. See also Fourth Hague Convention of 1907, art 4, which holds that the convention is *substituted* for the Hague Convention of 1899.
[676] Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press 2009a), 5.
[677] Tristan Ferraro, *Expert meeting: Occupation and other forms of administration of foreign territory* (International Committee of the Red Cross , 2012), 8. Although the peace operations in Kosovo (UNMIK) and East Timor (UNAMET) are considered the only 'executive' peace operations, the mandates afforded peace operations today are tasked to temporarily perform functions of governmental authority in lieu of the territorial sovereign. See further in Chapter 4 addressing mandates of peace operations.

powers.[678] In particular, affording peace operations tasks that resemble territorial administration has raised questions regarding the applicability of the law of occupation to peace operations.[679]

Sassòli holds, for example, that the law of international armed conflicts, including the rules on occupation, does not apply when a peace operation is present in a territory with the consent of the sovereign of that territory.[680] Similarly, Sams holds that the question of *de jure* applicability of the law of occupation to a peace operation hinges on the issue of consent.[681] Seemingly, under such an interpretation, the applicability may be different when peace operations are mandated under Chapter VII. Sassòli argues, however, that IHL, including Article 43 of the Hague Convention, applies to any factual occupation irrespective of whether the occupying power acts on a Security Council mandate, in self-defense or in violation of *jus ad bellum*.[682] Under such interpretation, Article 43 of the Hague Convention would apply *de jure* to peace operations irrespective of the nature of the mandate, as long as the tasks performed by the peace operation fulfil the material criteria of occupation.

But some commentators argue to the contrary. Dinstein, for example, argues that while the underpinnings of peace operations are Security Council resolutions, occupation is predicated on general international law. As a result, according to Dinstein, Article 43 is not applicable to peace building such as in Kosovo and East Timor, 'except, possibly, by analogy'. [683] Similarly, de Brabandere argues that occupation law can be applied to peace operations even though *de jure* application can be contested.[684] In other words, while Sassòli and Sams hold Article 43 as applicable directly, through *de jure* application, Dinstein and de Brabandere hold the law as applicable indirectly, through analogy. They all thereby agree that the law of occupation is applicable to peace operations, but through different legal reasoning.

It has also been suggested that Part III of GCIV[685] should apply, as a matter of analogy, to international forces in situations where they are *not* faced with armed resistance, and that GCIV can

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[678] UNSC res 1483 (2003).
[679] E. Katie Sams, 'IHL Obligations of the UN and other International Organisations involved in International Missions' in Marco Odello and Ryszard Piotrowicz (eds), *International Military Missions and International Law* (International Humanitarian Law Series, Martinus Nijhoff Publishers 2011), 66.
[680] Marco Sassòli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (online edn, Oxford Scholarship Online 2011), 6.
[681] E. Katie Sams, 'IHL Obligations of the UN and other International Organisations involved in International Missions' in Marco Odello and Ryszard Piotrowicz (eds), *International Military Missions and International Law* (International Humanitarian Law Series, Martinus Nijhoff Publishers 2011), 67.
[682] Marco Sassòli. 'Article 43 of the Hague Regulations and Peace Operations in the 21st Century: Background Paper Prepared for Informal High-Level Expert Meeting on Current Challenges to International Humanitarian law' (International Humanitarian Law Initiative, Cambridge June 25-27 2004), 3.
[683] Yoram Dinstein, *Legislation under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding* (Program on Humanitarian Policy and Conflict Research, Harvard University Occasional Paper Series 1, 2004), 2.
[684] Eric de Brabandere, *Post-Conflict Administrations in International Law*: *International Territorial Administration, Transitional Authority and Foreign Occupation in Theory and Practice*, Martinus Nijhoff Publishers 2009), 126.
[685] Part III of GCIV deals with the status and treatment of protected persons.

be considered applicable to most UN authorized operations where there is no consent or formal agreement from the territorial state.[686] Notably, such an interpretation suggests that the law of occupation applies to peace operations authorized under Chapter VII of the Charter. There are also arguments that hold that the customary international law that has developed since 1949 has broadened the material scope of application of the law of occupation, and that as a result, some conventional elements may have become redundant in the modern scope of occupation, enabling the law of occupation to apply to all scenarios of military presence in foreign territory. As argued by Arai-Takahashi, it is possible that this may result in the application of the law of occupation to UN peace operations that are deployed pursuant to resolutions adopted by the UN Security Council.[687]

Of significance to this research, however, is that, as further observed by Arai-Takahashi, the deployment of military actors in peace operations following a Security Council resolution pursues very different objectives than those of an occupying power.[688] Notably, in regular conduct of hostilities, the question of military advantage and military necessity is at centre stage. In situations of occupation, on the contrary, political and strategic goals may constitute the primary priority.[689] Consequently, occupation is a means towards a policy end, and is directly related to the ultimate objective of war and its causes. This, in turn, shapes the policies of occupation.[690] Peace operations, on the other hand, are aimed at creating conditions conducive to sustainable peace on the territory of operations. A primary means towards that end, as evidenced by contemporary mandates, is to provide security for individuals.

Thereby, while peace operations engage for the purpose of strengthening the security of a foreign population and a foreign state, a traditional occupying force is concerned with its own state and its survival. The differences in the ultimate goals influence both what and how the actors can and should engage in regarding the question of security. As noted by Giladi, the occupation of territory frequently constitutes a policy goal, which is intimately wedded to the overall objective of war.[691] This highlights the importance of considering the purpose and ultimate aim of any legal framework in the assessment of its applicability and functionality to any given situation.

The inherently different purpose and aim of peace operations, situations of occupation and the conduct of hostilities must therefore be carefully considered in the assessment of the applicability of

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[686] Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interactions with International Human Rights Law* (Martinus Nijhoff Publishers 2009), 10.
[687] ibid.
[688] ibid, 423.
[689] Rotem Giladi. 'The Jus ad Bellum/ Jus in Bello Distinction and the Law of Occupation' (2008) 41 Israel Law Review, 280.
[690] ibid.
[691] ibid, 277.

law to protection engagements in peace operations.[692] However, the law enforcement obligations of occupying powers bring the law off occupation close to the role of peace operations, and therefore warrants consideration in the identification of a regime specific to protection engagements *jus post bellum*.

10.2. Material, temporal and geographical scope of the law

Whether or not a territory is occupied as per the meaning of the law of occupation is a question of fact based on whether the territory is actually placed under the authority of the hostile power. Article 42 of the Hague Convention provides the material and geographical scope of application. It holds that:

> Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.[693]

Article 42 thereby holds that, much like the application of IHL in general, it is a situation of actual occupation that triggers the applicability of the law of occupation rather than recognition of occupation by any involved parties. The occupation, moreover, extends only to the territory where such authority has been established and can be exercised.[694] The rule also makes specific reference to hostility, which seems to support the view that occupation requires prior hostility. Arai-Takahashi holds, however, that case law and the writing of publicists reveal that this requirement should not be read too restrictively.[695]

GCIV provides a broader scope of application *ratione materiae* to encompass all forms of occupation. Article 2(2) stipulates that the convention applies to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Article 6 of GCIV provides the scope of application of the Convention. It holds:

> The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2. In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.
>
> In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present

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[692] See further in Chapter 9.1 on the protective scope of IHL.
[693] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907 (hereafter Hague Convention 1907), article 42.
[694] Nils Melzer, *Targeted killing in international law* (Oxford monographs in international law, Oxford University Press 2008), 156.
[695] Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interactions with International Human Rights Law* (Martinus Nijhoff Publishers 2009), 6.

> Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.[696]

Article 6 of GCIV was later supplemented by Article 3 of API, which holds:

> Without prejudice to the provisions which are applicable at all times:
>
> (a) the Conventions and this Protocol shall apply from the beginning of any situation referred to in Article 1 of this Protocol;
>
> (b) the application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release, repatriation or re-establishment.[697]

Just like IHL, thus, the law of occupation applies to factual situations of occupation,[698] and until the termination of the occupation. In the perspective of the field realities in peace operations, it is of essence to note, as Arai-Takahashi does, that the fact that guerrilla groups are able to briefly control territory does not alter the legal status of occupation.[699] In other words, the applicability of the law is not terminated by brief control by adverse parties. Arai-Takahashi also holds that it is not only control over territory by an adverse party to the conflict that is covered by the notion of occupation, but also control exercised by neutral powers or co-belligerents.[700] Under such interpretation of the modern juridical concept of occupation, the term *belligerent* is void, and does not require that the party exercising actual control is or has been a party to the conflict. This, in turn, would mean that such control exercised by a peace operation might fall within the ambit of the law of occupation.

Termination of occupation, in turn, is a gradual sociological process in terms of time and geographical locality.[701] As noted herein in relation to IHL, GCIV and API stipulates that the convention shall cease to apply 'on the general close of military operations',[702] and in the case of occupied territory, the convention ceases to apply 'on the termination of the occupation'[703] or 'one year after the general close of military operations'.[704] As noted in the 1958 ICRC Commentary, the general close of military

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[696] GCIV, article 6.
[697] API, article 3.
[698] *The United States Military Tribunal, Nuremburg, Trial of Wilhelm List and Others (The Hostages Trial) (1949), 8 LRTWC*, Judgment of 19 February 1948, in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, Volume XI/2, 1247.
[699] Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interactions with International Human Rights Law* (Martinus Nijhoff Publishers 2009), 6-7.
[700] ibid, 8.
[701] ibid, 22.
[702] GCIV, article 6 and API, article 3(b).
[703] API, article 3(b).
[704] GCIV, article 6.

operations is the final end of all fighting between parties concerned.[705] Thus, IHL, including its rules on conduct of hostilities, continues to apply in occupied territory until all fighting has ended, and peace is more or less restored.

10.3. Regulation of conduct in the law of occupation

Article 43 of the Hague Convention is the linchpin of the international law of occupation.[706] Article 43 holds:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.[707]

The *travaux preparatoires* of Article 43, like its predecessors, the 1874 Brussels Declaration and the 1880 Oxford Manual, contained two separate clauses, one for the executive obligations and another for the legislative obligations of an occupying power.[708] The contraction of the two clauses into one in Article 43 of the Hague Regulations does not impinge on the substantive duality of the two concepts.[709] The dual obligations of the executive branch on the one hand, and the legislative branch on the other, remain. This is of value to observe in relation to the task to protect civilians in peace operations.[710] GCIV thus requires the occupying power to assume roles such as regulating socio-economic issues and providing of services to meet the needs of the local population.[711] Such a transformation of duties from watch guard to an involved provider is arguably also mirrored in the development of the mandates and tasks of peace operations that have occurred in recent decades.

It is also important to address the relationship between the two sources of law. Article 154 of GCIV clarifies that the Convention supplements, rather than replaces, the rules on conduct of hostilities. Article 154 holds:

> In the relations between the Powers who are bound by the Hague Conventions respecting the Laws and Customs of War on Land, whether that of July 29, 1899, or that of October 18, 1907,

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[705] ICRC Commentary of 1958 to Geneva Convention IV, online: https://ihl-databases.icrc.org/ihl/COM/380-600009?OpenDocument (accessed 6 march 2019).
[706] Yoram Dinstein, *Legislation under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding* (Program on Humanitarian Policy and Conflict Research, Harvard University Occasional Paper Series 1, 2004), Summary.
[707] Hague Convention 1907, article 43.
[708] Yoram Dinstein, *Legislation under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding* (Program on Humanitarian Policy and Conflict Research, Harvard University Occasional Paper Series 1, 2004), 3.
[709] ibid.
[710] As shown herein, the task to protect civilians can be held to constitute a function that fall within the enforcement jurisdiction of sovereign states, and, when performed by peace operation, the distinction between enforcement jurisdiction and other forms of jurisdiction is of essence in detailing how peace operations are authorised to act in the host state. See further in Chapter 2.1.
[711] Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interactions with International Human Rights Law* (Martinus Nijhoff Publishers 2009), 116.

> and who are parties to the present Convention, this last Convention shall be supplementary to Sections II and III of the Regulations annexed to the above-mentioned Conventions of The Hague.

Notably, the Hague regulations made a distinction between the rules governing the conduct of hostilities (section II) , and the rules governing conduct during occupation (section III).[712] Careful distinction thus needs to be made between the maintenance of military control over the territory (conduct of hostilities) and the maintenance of public order and safety (law enforcement paradigm).

10.4. Identifying a dividing line between conduct of hostilities and law enforcement in occupation

As importantly observed by Melzer, almost any security measure taken by the occupying power will have certain military value, be it internment, prohibitions to carry arms, or curfews.[713] As a result, all activities of the occupying power that interfere with the rights of protected persons remain subject to the law enforcement paradigm, 'even if they are based on considerations of military necessity'.[714]

Under such interpretation, law enforcement operations in the context of an occupation (and an armed conflict) are subject to considerations of military necessity, and thus to the realities of armed conflicts. The nature and function of military necessity, enabling force against different parameters than under the law enforcement paradigm,[715] in turn, suggests that there are two different forms of law enforcement paradigms: one for armed conflicts, in which military necessity is relevant in operational assessments, and another in peace time, in which military necessity has no relevance.[716]

Consequently, much like the tasking of peace operations, the law of occupation tasks an occupying power both to maintain public order and to carry out military operations in parallel. Thereby, both conduct of hostilities and law enforcement obligations are integral to the law of occupation. Yet, the law of occupation, primarily Article 43 of the Hague Regulations and the Fourth Geneva Convention, is silent on the separation and interaction between law enforcement operations and the use of military force under the conduct of hostilities paradigm.[717] The law, further, gives no concrete guidance for confronting resistance movements and other armed opposition. A number of issues relating to the

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[712] Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interactions with International Human Rights Law* (Martinus Nijhoff Publishers 2009), 53.
[713] Nils Melzer, *Targeted killing in international law* (Oxford monographs in international law, Oxford University Press 2008), 157.
[714] ibid.
[715] See further in Chapter 9.1.3 on the principle of military necessity.
[716] See further in Chapter 13.3 on the possible distinction between law enforcement in the context of an armed conflict, and law enforcement in peacetime.
[717] Tristan Ferraro, *Expert meeting: Occupation and other forms of administration of foreign territory* (International Committee of the Red Cross , 2012), 109.

identification of the applicable legal regime remains legally unresolved in situations of occupation, which may affect the nature and scope of protection afforded the civilian population.[718]

An expert meeting on occupation held in Geneva in October 2009, five (5) legal sources potentially relevant to the regulation of conduct in occupied territory were identified. Since the law of occupation is integral to IHL, a primary source, naturally, is IHL, and in particular article 43 of the Hague Regulation, which outlines the duties in relation to maintenance of law and order. Secondly, the meeting also identified IHRL as a relevant source of law. After a vivid discussion on the extraterritorial applicability of IHRL, a majority of experts agreed that IHRL would unavoidably apply in occupied territory, as indicated by international jurisprudence, in particular that of the ICJ.[719] It was argued that effective control would constitute a sufficient basis for establishing jurisdiction, and thus for the application of IHRL in occupied territory.

Article 43 of the Hague Convention can be held to constitute a legal source both for distinguishing law enforcement from conduct of hostilities, and for establishing an obligation to prevent resumption of hostilities. As observed by Longobardo, although policing powers are primarily territorial and, unless a permissive rule specifically allows it, prohibited extraterritorially, such authority is granted under the law of occupation through Article 43 of the Hague Convention,[720] and it thus provides a basis for a distinction between conduct of hostilities and law enforcement.

The obligation to *restore* and *ensure* public order and safety can be held to specify, as observed by Longobardo, that the law of occupation requires not only the maintenance of the criminal law system and judiciary, as per the conservationist principle, but demands the use of force under the same conditions as the ousted government, namely law enforcement.[721] That, notably, includes an obligation to prevent the eruption of hostilities. As a result, as noted by Longobardo, the occupying power may not lawfully resume hostilities or open new hostilities in the occupied territory without violating Article 43 of the Hague Convention.[722] It follows that an occupying power is not permitted to respond with the means and methods enabled in the regulation of conduct of hostilities unless the threat addressed has reached the threshold for hostilities. As a result, and since an occupation exists as a result of an occupying force having obtained sufficient control, it can be held that the law enforcement paradigm must be afforded primacy in situations of occupation.

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[718] Tristan Ferraro, *Expert meeting: Occupation and other forms of administration of foreign territory* (International Committee of the Red Cross , 2012), 109.
[719] ibid, 111.
[720] Marco Longobardo, *The Use of Armed Force in Occupied Territory* (Cambridge University Press 2018), 186.
[721] ibid, 192.
[722] ibid.

Notably, the Hague Regulations made a distinction between the rules governing the conduct of hostilities (Section II) , and the rules governing conduct during occupation (Section III).[723] Similarly, GCIV makes a distinction between conduct in combat zones, and rules specifically elaborated for the purpose of safeguarding the rights of protected persons in occupied or enemy territory.[724] This distinction between Section II (on the conduct of hostilities) and Section III (on the rules of occupation) in the Hague regulations was pointed out in the expert meeting on the right to life, and it was held that the distinction implies that the rules on conduct of hostilities under IHL do not regulate all forms of force in situations of occupation.[725] As a result, the law enforcement model was held as the default legal regime governing the use of potentially lethal force in occupation, unless there was a resumption of hostilities that would be classified as either an IAC or a NIAC.[726]

Furthermore, the expert meeting observed that state practice indicates that the application of the law enforcement paradigm in occupied territory assumes a 'relatively secure hold on the territory', whereas the application of conduct of hostilities is based on the premise that organised armed groups or the armed forces of the ousted government still pose a threat to the occupying force, or have resumed such violent acts.[727] The reference to 'secure hold on the territory' was contrasted against existing threats to the occupying force. *Control*, consequently, would give primacy to the IHRL framework, whereas threats 'still posed' or 'resumed' indicate that the occupying force had not obtained sufficient control, and that remaining threats to the occupying force would render the rules on conduct of hostilities applicable.

The gist, thereby, lies in finding criteria for identifying the dividing line between conduct of hostilities and law enforcement operations in situations where both apply,[728] and where the criterion of control is key to such dividing line. This is of value to observe in relation to the use of force in peace operations, and it demands that peace operations can differentiate between threats that require a law enforcement response, and threats against which the means and methods of conduct of hostilities are applicable.

The requirement to identify a dividing line between IHL and IHRL is also evident in NIAC, meriting attention also to the protective nature and scope of the law of NIAC.

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[723] Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interactions with International Human Rights Law* (Martinus Nijhoff Publishers 2009), 53.
[724] ibid, 53.
[725] 'Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation' (University Center for International Humanitarian Law, International Conference Center, Geneva 1-2 September 2005), 22.
[726] ibid.
[727] Tristan Ferraro, *Expert meeting: Occupation and other forms of administration of foreign territory* (International Committee of the Red Cross , 2012), 109.
[728] The dividing line between the conduct of hostilities and law enforcement is further addressed herein in Chapter 13.

11. Protection in non-international armed conflicts

Much like the law of occupation, NIACs share several characteristics with peace operations, *jus post bellum* and IHRL. They all operate in highly asymmetrical realities, and they are all also primarily aimed at enabling sustainable peace, whether among parties to the conflict or, as in the case of IHRL, by preventing the rise of conflicts between individuals and actors within the national territory. These characteristics differ in important ways from the context for which the legal framework of IHL was developed. As observed herein, IHL is based on the notions of legal equality and reciprocal obligations between parties, which is diametrically different from the asymmetric realities of NIAC. Furthermore, the aim and purpose of both peace operations and *jus post bellum* stands in contrast to the aim and purpose of IHL, which is ultimately aimed at enabling survival of the state, and defeat, elimination or forcing of the enemy into submission.[729]

In light of the aim and purpose of this research to identify a legal framework for effective protection of civilians that also contributes towards the aim of enabling sustainable peace and security in the conflict affected state, and considering both the different realities and the aims and purposes reflected in IHL on the one hand, and in *jus post bellum*, peace operations, IHRL, and NIACs on the other, it is particularly valuable for the present research to afford special attention to the law of NIAC.

11.1. Identifying a dividing line between IHL and IHRL in NIACs

Much as in situations of occupation, a significant challenge in NIACs is identifying criteria for defining the dividing line between the law of law enforcement and the rules on conduct of hostilities. While, as noted herein, there are somewhat clear criteria for determining when a NIAC exists, the justificatory regime determining when a state may target individuals as per the rules on the conduct of hostilities inside its territory is less firm.

An expert meeting on the use of force in armed conflicts also revealed different interpretations on how law regulates the use of force in armed conflicts. The report on the meeting observed that while some consider the conduct of hostilities paradigm as the *lex specialis* on the use of force in armed conflicts, which, they hold, displaces the law enforcement paradigm, others argue that the rules on the conduct of hostilities are not clear or precise enough to oust the law enforcement paradigm as *lex specialis*, and that it may therefore be held that the law enforcement paradigm prevails in NIAC. It was further observed that others yet argue that the legal framework that is applicable depends on the circumstances, and that whether the situation occurs inside or outside a *conflict zone* may be taken as

[729] See further on the aim and purpose of IHL in Chapter 6.

an element to determine which of the two paradigms that applies in the specific situation. Yet another argument noted during the expert meeting was that it is relevant, in order to determine the applicable legal regime, to consider the criteria of *control over territory* and the *intensity* of the violence.[730]

Much as in relation to situations of occupation, thereby, the *lex specialis* of law, a distinction between armed conflict and *conflict zone*, the *intensity of violence* and the notion of *control* have consequently all been held as relevant criteria for determining the applicable law in NIACs. However, despite claims of a lack of regulation of the conduct of hostilities in NIACs, and even though CA3 is silent on the conduct of hostilities, and APII contains limited reference to the conduct of warfare, a range of rules exists that are applicable to NIAC.[731] To maximise protection, it may also be necessary to take note of the different types of NIACs. The ICRC detailed in its 2016 Commentary that:

> While common Article 3 contains rules that serve to limit or prohibit harm in non-international armed conflict, it does not in itself provide rules governing the conduct of hostilities. However, **when common Article 3 is applicable, it is understood that other rules of humanitarian law of non-international armed conflict, including those regarding the conduct of hostilities**, also apply. Thus, while there may be no apparent need to discern possible limits to the scope of application of common Article 3, it is important that the rules applicable in armed conflicts apply only in the situations for which they were created. [732]

Although the treaty rules applicable in NIACs do not address the regulation of conduct, the rules governing the conduct of hostilities has acquired customary status, and the interpretation adopted here is that they are as such applicable in NIAC, including to CA3 conflicts.

It is thus the hardening of the law of *international* armed conflict into customary law that has been largely perceived as bringing legal clarity to NIAC. Bringing the law of IAC closer to that of NIAC has the positive effect that controversies over characterisation of a specific conflict are rendered moot.[733] However, it also highlights concerns about how to draw distinguishing lines between situations governed by the law enforcement paradigm and situations governed by the law of armed conflict. The general interpretation that IHL applies to the whole territory of a state involved in an armed conflict[734] augments the challenge of identifying such dividing line, and risks tilting the legal categorisation of specific situations towards that of IHL. Furthermore, as noted herein, the aims sought in IAC differ from those sought in both NIAC and peace operations, and since the rules

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[730] Gloria Gaggioli, *Expert meeting, The use of Force in Armed Conflicts: interplay between conduct of hostilities and the law enforcement paradigms* (International Committee of the Red Cross, 2013), iii-iv.
[731] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2014), 428.
[732] See ICRC study on Customary IHL and ICRC *Commentary on the First Geneva Convention, 2016,* online*:* https://ihl-databases.icrc.org/ihl/full/GCI-commentary (accessed latest 12 August 2019), para 389.
[733] Marco Sassoli and Laura Olson. 'The Relationship between International Humanitarian and Human Rights Law Where it Matters: Admissible Killings and Internment of Fighters in Non-International Armed Conflicts' (2008) 90(871) International Review of the Red Cross.
[734] See further on the geographical scope of IHL in Chapter 6.1.

governing the conduct of hostilities have been created around the aims sought in IAC, this constitutes yet another significant challenge to merging the law of IAC to that of NIAC.

The Geneva Conventions were adopted, however, before the dramatic evolution of IHRL. Today, moving from a law enforcement model to the law of armed conflict is beneficial to the state,[735] since it provides more freedom, fewer restrictions, and less control of state actions. In this new reality, it is arguably problematic that the criteria for determining the existence of a NIAC is far from determinate, and leave significant leeway for states to claim that a certain situation has reached the threshold for NIAC, which legitimises the application of the IHL framework.[736] While the original intent of applying IHL to NIACs was to enhance protection of civilians, categorizing a situation as a NIAC today may rather weaken the protection afforded civilians, given the evolution of IHRL.[737]

Further complicating the identification of relevant law is the lack of a justificatory regime on targeting in NIAC. Under treaty law of NIAC, it is not clear when an individual can be targeted and killed.[738] Neither CA3 nor APII refer to the term combatant, and the relevant provisions prohibit 'violence to life and person, in particular murder' directed against 'persons taking no active part in hostilities',[739] including those who have ceased to take part in hostilities. Specifically addressing the conduct of hostilities, Article 13 of Protocol II prohibits attacks against civilians 'unless and for such time as they take a direct part in hostilities.'

Although attempts to clarify the legal categorization of individuals taking direct part in hostilities and those holding continuous combat functions[740] have taken the debate forward, the lack of legal clarity results in a difficulty both in determining who belongs to armed groups, and the legal categorisation of armed groups. As observed by Boothby, during a NIAC, the members of the armed forces on the government side are permitted to use lawful force and will not usually breach domestic law by doing so. Due to the absence of a combatant status in NIAC, however, fighters of non-state armed groups may be prosecuted under domestic law for their participation.[741]

Moreover, as observed by Sassòli and Olson, neither the law of NIAC nor that of IAC explicitly prescribe that 'fighters' must distinguish themselves from the civilian population.[742] As armed groups

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[735] David Kretzmer. 'Rethinking the application of international humanitarian law in non-international armed conflicts' (2009) 42(1) Israel Law Review, 23.
[736] David Kretzmer. 'Rethinking the application of international humanitarian law in non-international armed conflicts' (2009) 42(1) Israel Law Review, 36.
[737] ibid.
[738] Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014), 4-5.
[739] Article 3 common to the Geneva Conventions I– IV and Additional Protocol II, Article 4.
[740] See further in Chapter 9.1.2.3 on the concepts of direct participation in hostilities and continuous combat function
[741] William H. Boothby, *The Law of Targeting* (First edn, Oxford University Press 2012), 433.
[742] Marco Sassoli and Laura Olson. 'The Relationship between International Humanitarian and Human Rights Law Where it Matters: Admissible Killings and Internment of Fighters in Non-International Armed Conflicts' (2008) 90(871) International

are also inevitably illegal as per domestic legislation, they will do their utmost to conceal their military nature rather than clearly distinguish themselves from the civilian population.[743] This highlights another challenge that is frequently neglected, namely that IHL is equally applicable to all parties of an armed conflict,[744] as CA3 explicitly points out, 'equally binding to each party to the conflict'.

There is a risk that the asymmetric nature of NIACs and the merger of the law of IAC to NIACs result in the perception of IHL as inadequate, reducing the relevance and thus possibly the adherence to law in NIAC. As a result of making the identification of applicable law easier in relation to different types of conflicts, it may also make the differentiation between NIACs and law enforcement contexts more difficult. This, in turn, risks resulting in a more extensive application of IHL, including the rules on conduct of hostilities, and thus a general reduction of protection of the civilian population.

This lack of legal clarity is particularly troublesome in *jus post bellum* contexts, where the legal frameworks of IHL and IHRL often apply in parallel, and to situations that are difficult to categorise as falling within the realm of a specific framework. This is also the reality in which peace operations operate, and this legal conundrum consequently constitutes a significant challenge for identifying legal guidance for protection tasks in peace operations.

11.2. IHRL as a prevailing regime in NIAC? Criteria for determining thresholds for the application of IHL in NIAC

As noted herein, there is a glaring disparity between the regulation of the resort to, and the regulation of lethal force in IHRL and IHL. Legitimising the resort to force against an individual merely based on the status of that individual, as in IHL, is anathema to IHRL.[745] As a result, and following the strong evolution of IHRL, the underlying assumption on which the application of IHL to NIACs is built, is no longer valid.[746] Yet, it cannot be presumed that violence occurring in NIACs can be effectively addressed within IHRL. There is consequently a need to identify criteria for determining a

Review of the Red Cross, 609. See also similar argument in David Kretzmer. 'Rethinking the application of international humanitarian law in non-international armed conflicts' (2009) 42(1) Israel Law Review, 42.

[743] Marco Sassoli and Laura Olson. 'The Relationship between International Humanitarian and Human Rights Law Where it Matters: Admissible Killings and Internment of Fighters in Non-International Armed Conflicts' (2008) 90(871) International Review of the Red Cross, 609.

[744] Marco Sassoli and Laura Olson. 'The Relationship between International Humanitarian and Human Rights Law Where it Matters: Admissible Killings and Internment of Fighters in Non-International Armed Conflicts' (2008) 90(871) International Review of the Red Cross, 602.

[745] See also David Kretzmer. 'Rethinking the application of international humanitarian law in non-international armed conflicts' (2009) 42(1) Israel Law Review, 25.

[746] ibid, 8.

threshold for the application of IHL in NIAC that goes beyond the mere existence of an armed conflict, and that enables a careful balancing between IHL and IHRL.

Kretzmer thus argues, convincingly in the opinion of this author, that the presumption should be that the prevailing legal regime that governs NIAC should be that of IHRL. Much as Dworkin does, he argues that the only justification for departure from the IHRL and for the application of the IHL regime should be in the situation when the level of force is such that a state 'cannot reasonably' be expected to act in accordance with the law enforcement model of IHRL.[747] It is not clear what criteria can be used to determine 'reasonableness'. He suggests, however, that the question of whether IHL applies to a situation should not be addressed through the legal question of *threshold*, but rather whether it can or cannot be contained within the IHRL framework. He holds that only when IHRL 'clearly is not suited to deal with the scope and level of violence should IHL apply'.[748]

The criteria for determining when IHRL is 'clearly' unsuitable are not evident. It may be held, however, that the thresholds reflected in CA3 and APII, respectively, are indicative of when a situation cannot reasonably be contained within the IHRL framework and the means and methods enabled through the law enforcement paradigm. Kretzmer holds, however, that any situation that meets the criteria for APII would fall within such a category, but that in situations of protracted, low, and high threshold of violence, which can be classified as armed conflict under CA3, the presumption would be that IHRL prevails. According to Kretzmer's argument, only a fairly high level of organized armed violence that cannot be contained without resort to the armed conflict model would justify a resort to IHL.[749]

Kretzmer thus views the intensity of the violence as a primary criterion for applying the IHL framework in NIAC, but, for IHL to apply, adds the criterion of organisation. He further notes, however, that several factors need to be taken into account in determining the applicable law. When a state does not have sufficient 'control' to carry out such measure without further endangering life, he holds, IHRL may not be appropriate.[750] It is not clear what kind of control, or control over what, Kretzmer argues would be a factor in assessing the sufficiency of IHRL. A high threshold for applicability of IHL in NIAC, as suggested by Kretzmer, however, would risk creating a legal gap,

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[747] David Kretzmer. 'Rethinking the application of international humanitarian law in non-international armed conflicts' (2009) 42(1) Israel Law Review, 8. See also Anthony Dworkin. 'Individual, Not Collective: Justifying the Resort to Force against Members of Non-State Armed Groups' (2017) 93(476) International Law Studies, U S Naval War College 476. See also similar argument in Gloria Gaggioli, *Expert meeting, The use of Force in Armed Conflicts: interplay between conduct of hostilities and the law enforcement paradigms* (International Committee of the Red Cross, 2013), iii.

[748] David Kretzmer. 'Rethinking the application of international humanitarian law in non-international armed conflicts' (2009) 42(1) Israel Law Review, 42.

[749] ibid.

[750] ibid, 43.

and consequently also a protection gap, between the CA3 level of violence and the APII level of organisation and military capability of armed groups.

As examined at length in Chapter 7, the criteria entailed in CA3 and APII are established thresholds for the application of IHL in NIACs. Under the interpretation that they offer distinct thresholds for application, they can also be held to offer distinct thresholds for the extent to which IHL applies. While CA3 provides elements for the lowest threshold, APII requires fulfilment of elements that suggest that the situation is more severe than a situation falling within the ambit of CA3. The different scopes of application of CA3 and APII may thus also be held to warrant a different scope of application of IHL, one that correlates with the severity of the respective thresholds.

Under the interpretation that the application of IHL needs to be minimised in order to avoid further exacerbation of an armed conflict and to maximise the quest for peace, CA3 and APII arguably warrant different temporal and geographical scopes of application of IHL. Such approach is equally valuable in both NIAC and *jus post bellum* contexts, and could thus be utilised in the identification of a normative framework for protection *jus post bellum*.

11.3. The significance of the purpose of force

Another criterion of relevance, but rarely explicitly expressed in relation to distinguishing between the conduct of hostilities and the law enforcement paradigms, is the purpose of force. As observed in the expert meeting on the use of force in armed conflicts, the rules on the conduct of hostilities entailed in IHL reflect the reality of armed conflicts, and are based on the assumption that the use of force is inherent to waging war because the ultimate aim of military operations is to prevail over the enemy. Parties to armed conflicts are permitted (or at least not barred from) attacking each other's military objectives and personnel.[751] Similarly, in addressing legal challenges posed by contemporary warfare, an ILA study group observed that the conduct of hostilities refers to the means and methods of warfare undertaken with the specific aim of defeating the enemy.[752]

This aim and purpose, notably, contrasts starkly with those pursued through the IHRL framework in peacetime. IHRL is based on different assumptions. It was initially perceived as aiming to protect individuals from abuse by states, and its rules on the use of force in law enforcement provide guidance on the use of force when absolutely necessary, such as in self-defence, to prevent crime, to assist in lawful arrest, to prevent escape of offenders or in quelling a riot. IHRL, in other words,

[751] Gloria Gaggioli, *Expert meeting, The use of Force in Armed Conflicts: interplay between conduct of hostilities and the law enforcement paradigms* (International Committee of the Red Cross, 2013), 6-7.
[752] T. Gill, R. Heinsch and R. Geiss, *ILA Study Group 'The conduct of hostilities and international humanitarian law:challenges of 21st century warfare* (International Law Association Interim Report, 2014), 4.

regulates the resort to force only in order to maintain or restore public security, and law and order. Lethal force, notably, may be used only as a last resort in order to protect life, when other available means remain ineffective or without any promise of achieving the intended result.[753] The ILC study group further noted that these different aims and purposes pursued in contexts of law enforcement and warfare dictate that the legal frameworks are inherently incompatible and need to be kept separate.[754]

The need for a similar distinction as that between IHL and IHRL has been voiced in relation to the law of NIAC and that of IAC. The *NIAC Manual* notes the different aims and purposes of IAC and NIAC and holds that aims sought in international conflicts are unsuited for application by analogy to NIAC. It is held that references to controlling ground and weakening the enemy armed forces are unsuited for application by analogy since there is no ground to be gained, and no 'enemy' armed forces. This is particularly so, it is held, in relation to conflicts that do not reach the threshold of APII, but merely constitute CA3 conflicts.[755] Droege similarly observes that the determination of which body of law regulates each situation must be resolved by reference to the underlying object and purpose of the respective legal frameworks.[756]

Some argue that the law enforcement paradigm could be relevant in NIAC since force is used against fighters in order to maintain or restore public security, law and order.[757] Thereby, *the purpose of force* is used as a criterion for determining the applicable law, and the purpose identified for NIAC differs from that entailed in IHL. The relevance of the object and purpose in determining the relevant law is of particular interest here, since it highlights the different nature, prerequisites and aims and purposes of IAC and NIAC.

Peace operations and *jus post bellum* share many of the specific characteristics of NIACs that are at odds with those of IACs, such as the aim to weaken or defeat the enemy. The aim to weaken or defeat the enemy is perhaps the difference of greatest significance, since it dictates a certain point of departure in assessing both what to engage in and how to conduct operations. In NIAC, in which all parties to the conflict are legitimately present on the territory of the affected state, defeat and destruction result in consequences that are not likely to promote peaceful coexistence among different

[753] Gloria Gaggioli, *Expert meeting, The use of Force in Armed Conflicts: interplay between conduct of hostilities and the law enforcement paradigms* (International Committee of the Red Cross, 2013), 7.
[754] T. Gill, R. Heinsch and R. Geiss, *ILA Study Group 'The conduct of hostilities and international humanitarian law:challenges of 21st century warfare* (International Law Association Interim Report, 2014), 4.
[755] Michael N. Schmitt, Charles Garraway and Yoram Dinstein, 'The Manual on the Law of Non-International Armed Conflict: With Commentary' (International Institute of Humanitarian Law 2006), 24.
[756] Corduba Droege. 'Elective affinities? Human rights and humanitarian law' (2008) 90(871) International Review of the Red Cross, 536.
[757] Gloria Gaggioli, *Expert meeting, The use of Force in Armed Conflicts: interplay between conduct of hostilities and the law enforcement paradigms* (International Committee of the Red Cross, 2013), iii.

parts of the population. Neither are they likely to strengthen the legitimacy of the state nor of state actors, and may, as a result, cause deeper divides between the state and its population.

Similarly, peace operations are tasked to enable conditions that are conducive to sustainable peace and security, and the prerequisites for that, as noted herein, are the equal protection of rights without discrimination, and state institutions and processes based on legitimacy, accountability and transparency. Much like the prerequisites for NIAC, this is harshly at odds with the aim of defeating or weakening an 'enemy'. This also highlights the distinction in aims and purpose between NIAC and situations of occupation, which entail obligations to maintain law and order, but nonetheless maintain an authority to defeat the enemy that the occupying force was originally in an (international) armed conflict with.

Since the aim and purpose of IHL and IHRL, respectively, dictate means and methods that result in diametrically different consequences, it can be concluded that attention to the aim and purpose of force is of value to observe in order to ensure that the approaches adopted in ensuring security in transitional environments contribute to the ultimate aim sought in peace operations and *jus post bellum*.

12. An emergency law regime under *jus post bellum*- a missing link to peace?

IHRL entails provisions that permit states to derogate from their human rights obligations in exceptional circumstances. Derogations are based on the balancing of human rights with collective goals such as public order and national security. Put differently, the notion of derogation reflects a recognition of a need to balance state security with the security and protection of individuals. The law on state of emergency is therefore of value to consider in relation to protection in contexts characterised by complex security realities, and in which IHL is intertwined with IHRL.

Emergency powers, notably, come into play only in exceptional circumstances, and are limited in both time and scope. The purpose of affording a state these powers is to enable a return to normalcy as soon as possible. The law on state of emergency thereby shares both the context of addressing exceptional situations, and the aim and purpose with both *jus post bellum* and peace operations. Attention paid to the law regulating state of emergency, and how it relates both to 'the law of peace' and the 'law of armed conflict', is valuable and can enhance legal clarity in challenging times that are often perceived as legally blurred. However, although both *jus post bellum* and the context of peace operations can be held to largely mirror emergencies, neither should be understood as triggering emergency powers *en bloc*. These different legal frameworks operate and offer protection in related but distinct security situations. The law of state of emergency can thereby constitute an important bridge between that regulating armed conflicts (IHL) and that of traditional law enforcement (IHRL) in transitional environments.

It is submitted that the law of emergency can be held as applicable to peace operations on a case-by-case basis, and to the extent that the situation at hand reaches the threshold required for derogation. Inclusion of the emergency regime in the regulatory corpus of law guiding peace operations can contribute to legal clarity and offer essential input into how law can guide peace operations in their protection tasks. This, in turn, can strengthen the efforts to deliver on the overall aims of peace operations to enable conditions that are conducive to sustainable peace and security. This Chapter offers insight into the law regulating states of emergency. It will offer criteria for distinguishing between the different protection regimes that apply in *jus post bellum*, and can contribute to more effective protection of civilians. Apart from outlining the law on state of emergency, a primary focus here is on determining the potential function of emergency powers in transitional *jus post bellum* environments, and in relation to peace operations.

12.1. Recent developments in addressing situations of emergency

The question of how extreme situations should be regulated in law has a long history.[758] But, as observed by Sheeran, states of emergency have become one of the most serious challenges to the implementation of IHRL today. It has become common practice, and, as evidenced by the Arab Spring, he notes, it is associated with severe human rights violations.[759] Yet, it has received little academic attention, at least prior to the attacks in the United States on September 11 2001 (hereafter 9/11). 9/11 brought renewed interest in the notion of emergency powers in political theory and constitutional law scholarship. That debate, however, has failed to address the regimes of derogations as entailed in human rights treaties and in the perspective of international law.[760]

The post-9/11 era has also seen a substantial change in the practice of democratic states in particular. Consolidated democracies have made little if any use of derogations provisions in the post- 9/11 period.[761] That is not to say, however, that the use (and abuse) of emergency powers has decreased. In a report from August 2018, the *Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism* observed that practises have changed after 9/11, and that as a result of the declared 'war on terror', the language has been repudiated by subsequent UN administrations, and become the basis for a set of global and national practices 'whereby some customary distinctions between war and peace have melted away.'[762] The Special Rapporteur holds:

> (…) [H]uman rights law considers war as a justified legal basis for the declaration of emergency — although an armed conflict does not per se automatically justify a state of emergency —, the post-9/11 articulations of fighting a global war on terror may have muddled the legal and rhetorical waters on the legal basis for emergency powers.[763]

While the negative press received by the concept of a 'war on terror' has forced from the language of 'war', the sustained emergency enabled through these developments also allows an executive to increase security measures and impose liberty-depriving actions with less judicial and political interference.[764] What is emerging, according to some, is a new balance between liberty and security

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[758] Oren Gross. 'Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?' (2003) 112(5) Yale Law Journal 1011, 1011-1012.
[759] Scott Sheeran. 'Reconceptualising States of Emergency under International Human Rights Law' (2013) 34 Michigan Journal of International law 491, 491.
[760] ibid, 494.
[761] Fionnuala Ní Aoláin, 'The Cloak and Dagger Game of Derogation' in Evan J. Criddle (ed), *Human Rights in Emergencies* (ASIL Studies in International Legal Theory, Paperback edn, Cambridge University Press 2017) 124, 127.
[762] UN HRC, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights challenge o states of emergency in the context of countering terrorism* (A/HRC/37/52, 2018), para 63.
[763] ibid.
[764] Fionnuala Ní Aoláin, 'The Cloak and Dagger Game of Derogation' in Evan J. Criddle (ed), *Human Rights in Emergencies* (ASIL Studies in International Legal Theory, Paperback edn, Cambridge University Press 2017) 124, 133.

based on 'non-trial-based liberty-invading measures' which severely limit the exercise of derogable rights under the ECHR.[765] *The International Commission of Jurists* has also recognised the increasing tendency of states to invoke state of emergency to forego human rights obligations. It recognised in its 2016 annual report its previous condemnation of the global tendency to use states of exception to justify departures from normal legal processes and human rights protections.[766]

In her report from August 2018, the Special Rapporteur observes several current tendencies that challenge the emergency power regime's fundamental parameters. First, she notes, states have a tendency to exercise emergency powers without declaring a state of emergency. She refers to these situations as *de facto* states of emergency and notes several examples that illustrate this practice among states. She further observes that the passing of emergency legislation into law, and a translation of the same or equivalent emergency powers into ordinary legislation, but without the word 'emergency' in the title, is a deceptive legal approach.[767] Such an approach, arguably, enables an expansion of emergency powers into situations of normalcy without necessarily requiring the formal procedures, such as a declaration of emergency, or the checks and balances required in order to distinguish a state of emergency from both normalcy and armed conflicts.

There is also an increasing tendency to pass ordinary legislation that is exceptional in character and scope. Such practice, the Special Rapporteur further observes, 'foregoes the manoeuvre that it is a limited emergency piece of legislation' and enables states to effectively bypass a formal declaration of emergency.[768] Focusing specifically on terrorism, the Special Rapporteur notes that such overreliance on and abuse of limitation clauses contributes to the phenomena of *de facto* emergencies, but, she importantly further observes, 'national legislation frequently contains vague definitions of terrorism, and broadly target core human rights, including the rights to life, liberty and security, due process, fair trial, freedom of speech, peaceful assembly and association, and religion or belief.'[769] The Special Rapporteur observes that use of limitation clauses and the lack of long-term appreciation for the cumulative effect of such reliance on the integrity of the rule of law must be robustly addressed.[770] Thereby, the Special Rapporteur makes a similar observation to the one made in the present research: that there is a need to note both short-term and long-term perspectives on security, and to ensure that

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[765] Fionnuala Ní Aoláin, 'The Cloak and Dagger Game of Derogation' in Evan J. Criddle (ed), *Human Rights in Emergencies* (ASIL Studies in International Legal Theory, Paperback edn, Cambridge University Press 2017) 124, 131.
[766] International Commission of Jurists, Annual Report 2016, online: file:///C:/Users/User/iCloudDrive/Kent%20University%20PHD/Human%20Rights/Emergency%20powers/Universal-ICJ-year-2016-Publications-Annual-Report-2017-ENG.pdf (accessed latest 1 November 2018).
[767] UN HRC, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights challenge o states of emergency in the context of countering terrorism* (A/HRC/37/52, 2018), para 30.
[768] ibid, para 31-32.
[769] ibid), para 33.
[770] ibid.

security approaches are sensitive to long-term consequences of short-term priorities. While the law on state of emergency arguably enables a balancing of short-term effectiveness with long-term sustainability, current practices, however, undermine it.

Agamben has made similar observations, and holds that the state of exception has increasingly appeared as the dominant paradigm of government in contemporary politics.[771] Frankenberg similarly observes that states have increasingly sacrificed the rule of law and human rights for the benefit of security programs, privileging pre-emptive, proactive and coercive methods of political engineering.[772] Along the same lines, Gross notes that crises tend to concentrate power in the hands of the executive and correspondingly reduce individual freedoms and liberties, and it is in times of crises that the temptation to disregard (or, arguably, reinterpret) the law is at its peak.[773] Gross concludes that governments are likely to opt for draconian, authoritarian measures, and that such overreaction may be the result of the breakdown of the traditional checks and balances.[774]

Some have also noted that states use emergency clauses for internal political reasons, since emergency doctrines permit greater effectiveness with fewer constraints.[775] This phenomenon of new pathways to, and normalisation of, emergencies has by some been termed 'covert emergencies'.[776] The Special Rapporteur also highlights the practice of 'covert' emergencies, in which states engage in subtle persuasion of parliaments and Courts to yield to the minimal interpretations that strip the rights of much of their content. This practice, the Special Rapporteur notes, has the effect of seeking to create effective covert derogations and, at best, redefining the rights to a diluted form of practice. To enable this, state tactics include simple assurances to parliamentarians that the measures taken are compliant with human rights treaty obligations or for those who are more inquiring, the issuance of executive assurances that the measures involve only partial minimization of rights and that this is justified by the necessity of the exceptional threat posed by terrorists. These assurances, the Special Rapporteur importantly and alarmingly notes, are often merely rhetorical and not supported by a review of actual legislation and the substance of human rights implications.[777]

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[771] Giorgio Agamben, *The State of Exception* (Kevin Attel tr, The University of Chicago Press 2005), 2.
[772] Gunther Frankenheim, Political Technology and the Erosion of the Rule of Law: Normalizing the State of Exception (Edward Elgar Publishing Inc., Elgar Monographs in Constitutional and Administrative Law Series, 2014).
[773] Oren Gross. 'Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?' (2003) 112(5) Yale Law Journal 1011, 1028- 1029.
[774] ibid, 1041.
[775] Emelie M. Hafner-Burton, Laurence R. Helfer and Christopher J. Fariss, 'Emergency and Escape: Explaining Derogations from Human Rights Treaties' in Evan J. Criddle (ed), *Human Rights in Emergencies* (ASIL Studies in International Legal Theory, Paperback edn, Cambridge University Press 2017) 83, 92.
[776] Helen Fenwick and Gavin Phillipson. 'Covert Derogations and Judicial Deference: redefining Liberty and Due Process Rights in Counterterrorism Law and Beyond' (2011) 56(4) McGill Law Journal 863, 863.
[777] UN HRC, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights challenge o states of emergency in the context of countering terrorism* (A/HRC/37/52, 2018), para 35.

Disturbingly, these tendencies are also not limited to state practice. The UN Security Council has contributed to strengthening this practice by declaring in a series of resolutions that terrorism, by definition and notably without reflecting on existing variations of the term, constitutes a threat to international peace and security.[778] Thereby, Security Council resolutions have been used as a justification for alternate legal regimes to address the challenge of terrorism.'[779] Certain countries, the Special Rapporteur notes, have authorised the use of force and a range of broad extraterritorial action based on this notion of a global threat of terrorism. Such authorisation, she further observes, effectively constructs a state of war all the time and everywhere.[780] This development is of essence to note here, since peace operations are the primary means of the Security Council to address threats to international peace and security. Also, these practices are, as per the observations by the Special Rapporteur, primarily adopted by states that contribute to, rather than host, peace operations, so that policies and practices of peace operations are at risk of being influenced by these expanded notions of emergency powers.

In order to enable legal clarity and furthering of the aims of peace operations, and arguably of international peace and security generally, the law on state of emergency needs to be incorporated into legal analyses generally, and on the law of peace operations specifically. The law of emergency constitutes a middle ground between normalcy and armed conflict, and is, as such, of value in situations transitioning from conflict to peace. As such, the law on state of emergency as entailed in IHRL enables distinguishing emergencies from normalcy and armed conflicts and may as such be held to constitute a safeguard, and provide checks and balances for enabling a response that ensures short term effectiveness in dealing with an emergency situation without simultaneously undermining long-term peace and security.

12.2. The law regulating emergencies and emergency powers

Prior to embarking on an analysis of the law on state of emergency, and although the issue of *limitations* of human rights largely falls outside the scope of the present research, it is important to briefly note that derogations are distinct from restrictions and limitations.[781] It is therefore of value to first note some basic features of the notion of *limitations*. The idea of limitations is based on the recognition that most human rights are not absolute, but rather reflect a balance between the

[778] See UNSC resolutions 1373 (2001); 1456 (2003); 1566 (2004); 1624 (2005); 2178 (2014); 2341 (2017); 2354 (2017); 2368 (2017); 2370 (2017); 2395 (2017;) and 2396 (2017).
[779] UN HRC, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights challenge o states of emergency in the context of countering terrorism* (A/HRC/37/52, 2018), para 63.
[780] ibid, para 64.
[781] UN HR Committee, General Comment No 29, States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001, para, 4.

individual and communal interests.[782] A derogation, in turn, is the partial or complete elimination of an international obligation. According to McGoldrick, , however, there is seemingly an overlap between limitations and derogations.[783] The UDHR, notably the blueprint for subsequent human rights instruments, contains a general limitation clause that allows for two kinds of scenarios in which limitations of individual rights are permissible: where limiting an individual's rights is necessary either *to allow others to exercise their rights* or *for a society to achieve its objectives*. As a result, under the international legal framework, individual rights may be subject to limitations that are determined by law for the purposes of 'securing due recognition and respect for the rights and freedoms of others' and 'of meeting the just requirements of morality, public order, and the general welfare in a democratic society'.[784]

The regulation of emergency powers is enshrined in both national and international law. A variety of terms are used to describe emergency situations, such as 'state of emergency', 'state of exception', 'state of siege' and 'martial law'.[785] Nevertheless, as observed by McGoldrick, different states may be subject to different international legal obligations in relation to emergencies.[786] The international jurisprudence on the issue of state of emergency largely derives from the *International Covenant for Civil and Political Rights* (ICCPR) and the *European Convention on Human Rights*. As observed, the ICCPR contains the derogation clauses that are generally perceived as having constituted the blueprint for the law on state of emergency in international law. Consequently, ICCPR is afforded primacy in the analysis here.

The ICCPR specifies in Article 4 the state authority to derogate from human rights obligations. It holds:

> In time of public emergency which **threatens the life of the nation** and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.[787]

The first paragraph of the article thus sets out the general power to derogate, and the substantive conditions for such derogation. Of value to note here is the requirement that *the life of the nation* must

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[782] Dominic McGoldrick. 'The interface between public emergency powers and international law' (2004) 2(2) International Journal of Constitutional Law 380, 383.
[783] ibid.
[784] UDHR, article 29.
[785] Scott Sheeran. 'Reconceptualising States of Emergency under International Human Rights Law' (2013) 34 Michigan Journal of International law 491, 492.
[786] Dominic McGoldrick. 'The interface between public emergency powers and international law' (2004) 2(2) International Journal of Constitutional Law 380, 381.
[787] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), article 4. Emphasis added.

be threatened in order for states to be permitted to derogate. Derogations are further permitted only to the extent required by the exigencies of the situation, and require any measure to adhere to international legal obligations.

The ECHR similarly requires the existence of a threat to the life of the nation for derogations to be permitted. Article 15(1) holds:

> In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.[788]

The American Convention on Human Rights (ACHR), further, provides the following provision on derogation in Article 27:

> In time of war, public danger, or other emergency that **threatens the independence or security of a state** party, it may take measures derogating from its obligations under the present convention **to the extent and for the period of time strictly required** by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion or social origin.[789]

Two major differences relating to the justification for and extent of derogation must be noted. First, as opposed to in ICCPR and ECHR, the threat does not have to face the life of the nation under ACHR. Rather, a threat posed at the *independence or security* of a state is considered sufficient. Secondly, also in contrast to other treaties, the ACHR dictates a temporal limitation on the right to derogate through the wording 'for the period of time strictly required'.

Certain rights, however, are non-derogable, and consequently must not be subjected to suspension regardless of circumstances. The ICCPR provides the broadest prohibition on derogation in Article 4(2) which simply states:

> No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.[790]

The covenant thereby prohibit derogation from the right to life (Article 6), the prohibition of torture and slavery or cruel, inhuman or degrading treatment or punishment (Article 7), the prohibition of slavery (Article 8), the prohibition of imprisonment for inability to fulfil a contractual obligation (Article 11), the prohibition of being held accountable for an offence that did not constitute a criminal

[788] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) entered into force on 1 June 2010, article 15(1).
[789] American Convention on Human Rights (ACHR), adopted on 22 November 1969, came into force on 18 July 1978, article 27(1). Emphasis added.
[790] ICCPR, article 4 (2).

offence at the time it was committed (Article 15), the right to recognition as a person before the law (Article 16), and the freedom of thought, conscience and religion (Article 18). Of value to note here is the fact that the right to liberty is not listed as non-derogable. It is held, however, that the right to liberty:

> (…) shall not be subjected to any restrictions except those which are provided for by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others.[791]

Security detention, usually addressed in relation to armed conflicts and IHL, thereby, is seemingly permitted also in times of emergency. The right to leave one's country is, notably, similarly limited as per Article 12(2) of ICCPR.

The ACHR, in turn, is more specific in its textual declaration of non-derogable rights. Article 27(2) holds:

> The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.[792]

ECHR, in turn, notably, exempts lawful acts of war from the non-derogable rights. Article 15(2) holds:

> No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.[793]

The articles referred to relate to the prohibition of torture (Article 3), prohibition of slavery (Article 4) and the *nulla poena sine lege* principle (the 'no punishment without law' enshrined in Article 7). Notably, the right to liberty and security (Article 5) is not listed as non-derogable in ECHR. The Arab Charter, in turn, offers the longest list of non-derogable rights among international instruments.[794]

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[791] ICCPR, article 12 (3).
[792] ACHR, article 27 (2).
[793] ECHR, article 15 (2).
[794] See Arab Charter on Human Rights, May 22, 2004, League of Arab States (reprinted in 12 International Human Rights Rep. 893) (2005), entered into force March 15, 2008, article 4 (2), online: https://app.icrc.org/elearning/curso-sobre-privacion-libertad/story_content/external_files/Carta%20Arabe%20de%20Derechos%20Humanos%20(2004).pdf (accessed 16 November 2018). The Arab Charter on human rights is still largely in the making and has consequently received significantly less attention in relation to derogations. A first version of the Charter was created in 1994, but no state ratified it. An updated version of the Charter came into force in 2008 after ratification by seven states, but later the same year, the United Nations Office of High Commissioner for Human Rights (UNOHCHR) declared that the Charter was incompatible with the UN's understanding of universal human rights.

The Arab Charter of 2004 is based largely on the ICCPR, but also reflects some of the specific traditions and challenges of the Arab world.[795] A clause permitting derogation is included in Article 4, which holds:

> In time of public emergency which threatens the life of the nation and which shall be officially proclaimed as such, the State Parties may take measures derogating from their obligations under the present Charter to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.[796]

Like the ICCPR and the ECHR, the Arab Charter limits derogations to situations that threaten 'the life of the nation'. Further, much like the ICCPR and ECHR, a requirement of legality is included through the wording 'not inconsistent with their other obligations under international law', and measures taken are limited to the 'extent required by the exigencies of the situation', requiring assessment of proportionality.

All three conventions, notably, require that any measure not be inconsistent with other obligations under international law, and the Arab Convention, ICCPR, and ACHR require that any derogation not be discriminatory. As for temporal requirements, only the ACHR require that measures are taken (only) 'for the period of time' strictly required. Such temporal limitation, Milanovic notes, is merely implicit in ICCPR and ECHR.[797] All conventions also, importantly, list the right to life and the right not to be subjected to torture, unlawful arrest or detention as non-derogable. Restrictions on the right to liberty, however, are seemingly permitted in all conventions, and in ICCPR it is specified as permitted for the purpose of ensuring national security, public order or morals, of the rights and freedoms of others, provided that such restriction is provided for by law. As a result, security detention similar to that entailed in IHL and for the purposes listed, is seemingly permitted in times of emergency.

In addition to the non-derogable rights listed in ICCPR, ECHR, and ACHR, the Arab Charter also categorises, in the category of non-derogable rights, rights such as the right to be free from human trafficking, the right to a fair trial, the right to not be imprisoned for non-payment of a debt, the right to not be subjected to double jeopardy (tried twice for the same offense), the right to not be detained

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[795] Mohamed Y. Mattar. 'Article 43 of the Arab Charter on Human rights: Reconciling National, Regional, and International Standards' (2013) 26 Harvard Human Rights Journal 91, 96.

[796] League of Arab States, Arab Charter on Human Rights, May 22, 2004, (reprinted in 12 International Human Rights Rep. 893) (2005), entered into force March 15, 2008, article 4 (1), online: https://app.icrc.org/elearning/curso-sobre-privacion-libertad/story_content/external_files/Carta%20Arabe%20de%20Derechos%20Humanos%20(2004).pdf (accessed 16 November 2018).

[797] Marko Milanovic, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' in Nehal Buhta (ed), *The Frontiers of Human Righs* (Oxford Scholarship Online: April 2016 2016) 55, 60.

except for a legal cause, the right to political asylum, the right to a nationality, and the right to freedom of religion.[798]

As observed by Neuman, the textual differences displayed through the wordings entailed in different treaties, such as 'strictly required by the exigencies' and 'necessary in a democratic society' may be interpreted as illustrating the poverty of language rather than as explaining actual differences in material application of derogation clauses.[799] Milanovic similarly observes that despite the textual differences in the ICCPR and ECHR, the HR Committee and the IACtHR have interpreted the arbitrariness standard as strictly as the ECHRs absolute necessity standard, 'at least in peacetime conditions'.[800] This suggests that although a textual reading would suggest disparate regulation of a state of emergency, a fairly coherent international legal regime for emergency powers can be envisioned. Case law, however, reveals disparate interpretations on the law of state of emergency. In particular, identifying objective criteria for determining whether an emergency situation exists seems challenging.

12.2.1. Case law on derogations in the jurisprudence of the ECHR

The UN Commission on Human Rights noted as early as the 1950s that the article on derogations 'might produce complicated problems of interpretation and give rise to considerable abuse'.[801] So far, the jurisprudence on states of emergency and derogations under IHRL is limited only to the ECHR. The case-law of the erstwhile European Commission on Human Rights (ECommHR) and European Court of Human Rights (ECtHR) under Article 15 ECHR is, however, inconsistent and divergent.

The issue of derogation was first addressed by the ECommHR in the *Cyprus* cases, which concerned two interstate applications by Greece against the United Kingdom in 1956, and that alleged mistreatment of prisoners.[802] The Commission concluded that the government 'should be able to exercise *a certain measure of discretion* in assessing the extent strictly required by the exigencies of the situation.'[803] As observed by Sheeran, however, the Commission's measure of discretion applied

[798] See similar observation in Mohamed Y. Mattar. 'Article 43 of the Arab Charter on Human rights: Reconciling National, Regional, and International Standards' (2013) 26 Harvard Human Rights Journal 91, 114, and in Evan J. Criddle, 'Introduction: Testing Human Rights Theory During Emergencies' in Evan J. Criddle (ed), *Human Rights in Emergencies* (ASIL Studies in International Legal Theory, Paperback edn, Cambridge University Press 2017) 1.
[799] Gerald L. Neuman, 'Constrained Derogation in Positive Human Rights Regimes' in Evan J. Criddle (ed), *Human Rights in Emergencies* (ASIL Studies in International Legal Theory, Paperback edn, Cambridge University Press 2017) 15, 22.
[800] Marko Milanovic, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' in Nehal Buhta (ed), *The Frontiers of Human Righs* (Oxford Scholarship Online: April 2016 2016) 55, footnote 18.
[801] Scott Sheeran. 'Reconceptualising States of Emergency under International Human Rights Law' (2013) 34 Michigan Journal of International law 491, 493.Sheeran refers to UN Secretary-General, 'Annotations on the Text of the Draft International Covenants on Human Rights', A/2929 (1 July 1955).
[802] *Greece v. United Kingdom* (First Cyprus), App. No. 176/56, 1958-1959 Y.B. Eur. Conv. on H.R. 174, 174 (Eur. Comm'n on H.R.).
[803] ibid, 176. Emphasis added

only to the secondary legal question concerning proportionality, *not* to the assessment of whether a public emergency exists.

In 1959, in *Lawless v Ireland*, the ECommHR argued that while the concept of public emergency is sufficiently clear, it is not an easy task to determine whether the facts and conditions of any particular situation fall within that concept.[804] The case addressed the question of extrajudicial detention of Irish Republican Army members in Ireland. A majority of the Commission members accepted that a 'certain discretion – a *certain margin of appreciation* – must be left to the government in determining the existence of a public emergency that threatens the life of the nation'.[805]

The margin of appreciation is commonly explained as the idea that each European society is 'entitled to certain latitude in resolving the inherent conflicts between individual rights and national interests or among different moral convictions'.[806] In a subsequent ruling on *Lawless* in the ECtHR, it was held that it is for the Court to determine whether a government has complied with Article 15, which seems to contradict the margin of appreciation suggested by the Commission**.** The Court indicated that the 'natural and customary meaning' of the words of Article 15(1) were sufficiently clear as 'they refer to *an exceptional situation of crisis or emergency* which affects the *whole population* and constitutes *a threat to the organised life of the community* of which the State is composed.'[807]

The *Greek Case*, in turn, addressed the question of the suspension of aspects of the Greek Constitution and rule by martial law after a military coup in 1967.[808] In a key statement, and after quoting the *Lawless v Ireland* definition of public emergency, the Commission declared that a public emergency must have the characteristics of (i) an actual or imminent threat, (ii) affect the whole nation, (iii) threaten the continuance of organised life of the community, and (iv) the crisis must be exceptional in that the normal measures or restrictions under the Covenant are plainly inadequate. It thus rejected the military governments claim that the nation faced a state of emergency due to a threat from communists and their allies. The Commission concluded that there was no state of emergency motivating derogation,[809] and in identifying the above listed criteria for determining whether an emergency existed, it reduced the margin of appreciation afforded states in *Lawless*.

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[804] *Lawless v Ireland*, 19 December 1959, Application No 332/57, European Commission of Human Rights (ECommHR), Report of the Commission, Series B 1960-1961, adopted on 19th December 1959, 84.
[805] ibid, 85.
[806] Eyal Benvenisti. 'Margin of Appreciation, Consensus and Universal Standards' (1999) 31(4) New York Univesity Journal of International Law and Politics 843, 843.
[807] *Lawless v Ireland* (No 3), European Court of Human Rights (ECtHR), 1 July 1961, para 28.
[808] *The Greek Case*, App. Nos. 3321/67, 3322/67, 3323/67, 3344/67, 1969 Y.B. ECHR, 1 (Eur. Comm'n on H.R.).
[809] Ibid, 165, n 290.

The ECtHR, in turn, first expressly relied on the margin of appreciation doctrine in *Ireland v UK*, in which the Court allowed a wide margin of appreciation for national authorities in deciding on the existence of an emergency and on derogations necessary to avert it.[810] The Court held:

> It falls in the first place to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency.[811]

The Court further determined that states' powers in this regard are not unlimited, and that states' authority is accompanied by European supervision.[812] These early cases thus reveal a disparate jurisprudence on the law on state of emergency. In subsequent cases, however, and notably, the Court has continued to provide only cursory analysis of the factual basis for the state of emergency and has not overruled any government's assertion of the existence of a public emergency.[813]

In *A & Others v. United Kingdom* (2009, the Belmarsh Detainees case), however, the ECtHR held that the existence of a public emergency was a 'political question' and not for the Court, and thus maintained the leeway for states to determine the existence of an emergency established in previous Court decisions. The European Court of Human Rights held:

> The Court recalls that it falls to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities.[814]

As revealed through case law, and as observed by Sheeran, the ECtHR has failed to identify strict and objective standards for derogations. Further, the UN and European jurisprudence on state of emergency and derogations reveal that the margin of appreciation has been understood as entitling states to certain latitude in resolving conflicts between individual and societal interests.[815] While not included in the *travaux preparatoires* of the ECHR, it has become integral to the ECtHR interpretation of the emergency powers.[816] By contrast, the UN HR Committee has rejected the

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[810] Yutaka Arai-Takahashi, *The Margin pf Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002), 5-6.
[811] *Ireland v UK*, Application no. 5310/71, Judgment of 18 January 1978, A 25, para 207.
[812] Ibid.
[813] Scott Sheeran. 'Reconceptualising States of Emergency under International Human Rights Law' (2013) 34 Michigan Journal of International law 491, 534.
[814] ECtHR, *A & Others v. United Kingdom*, App. No. 3455/05, 173 (Eur. Ct. H.R. 2009), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91403 (accessed 24 Oct 2018).
[815] Scott Sheeran. 'Reconceptualising States of Emergency under International Human Rights Law' (2013) 34 Michigan Journal of International law 491, 537-538.
[816] ibid, 539.

margin of appreciation in its interpretations.[817] The jurisprudence on the law of state of emergency is thus not conclusive as to the material scope of, and the justificatory regime of derogations from IHRL.

However, the ECtHR recently issued a guide on article 15 of the ECHR. The guidance refers to *Lawless v Ireland* and specifies that:

> The natural and customary meaning of "public emergency threatening the life of the nation" is clear and refers to "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.[818]

The Court details that the emergency should be 'actual or imminent', and that a crisis that concerns only a particular region of the state can amount to a public emergency threatening the life of the nation.[819] The Court further argues that the state of emergency should be exceptional in the sense that normal measures to ensure public security should be 'plainly inadequate'.[820] Rather than relying on criteria to establish a threshold for the point at which exceptional measures would be permitted, and require capability and capacity to adequately address situations falling below that threshold, the Court, notably, opines that 'normal capabilities' are determinative of the legality of exceptional measures. The Court also notes that it has generally deferred to the national authorities' assessment to determine whether such exceptional situation exists. National authorities are, it is held, in a better place to determine whether an emergency exists, and the nature and scope of the derogations required. Thus, it holds, a wide margin of appreciation should be left to national authorities, but it is noted that the discretion is not unlimited, but requires European supervision.[821]

In relation to the temporal scope of the right to derogate, the Court holds that the Court's case law to date has not required the emergency to be temporary, and that it is possible for an emergency to continue for many years. The security situation in Northern Ireland is referenced, along with the security situation in the aftermath of the 9/11 attacks.[822] Thereby, the geographical scope of an emergency is thus limited to part of a states' territory in order to motivate derogation, and the temporal scope of such measures are extended, suggesting that a state is authorized to derogate from its human rights obligations for several years.

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[817] Scott Sheeran. 'Reconceptualising States of Emergency under International Human Rights Law' (2013) 34 Michigan Journal of International law 491, 540. See also Rep. of the 3d Comm., *Draft International Covenants on Human Rights*, 49, U.N. Doc. A15655 (Dec. 10, 1963).
[818] ECtHR, 'Guide on Article 15 of the European Convention on Human Rights', *Derogation in time of emergency* (2018), para 7.
[819] Here, the court refers to *Ireland v the UK*, para 205 and *Aksoy v Turkey*, para 70.
[820] ECtHR, 'Guide on Article 15 of the European Convention on Human Rights'*, Derogation in time of emergency* (2018), para 8.
[821] ibid, para 10.
[822] ibid, para 9.

The temporal scope of the right to derogate was further expanded by the Court when it also held that the purpose of Article 15 is 'to permit states to take derogating measures to protect their populations from *future* risks'.[823] The extent of the permissible scope of preemptive measures is not further elaborated on, but the permission to derogate to tackle future threats seems to widen the scope of the types of threats that trigger permissions to derogate. At the same time, the Court held that the determination of the existence of a threat must be assessed primarily based on the facts known at the time,[824] which although reasonable, is an approach that offers remedy for incorrect assessments, and thus reduces the demands for sober and adequate calculations of threats. The Special Rapporteur has further observed that there is broad and international consensus on the general contours of the term emergency, and specifically regarding its contingent and exceptional nature, the requirement of oversight and regulation of emergencies, and the finite and limited purposes of emergency powers,[825] which validly raises questions on the adequacy of expanding the temporal scope of derogation.

12.2.2. Guiding instruments on derogation under the ICCPR and the ACHR

Turning to the ICCPR, General Comment 29, crafted by the HRC, also details that the enumeration of non-derogable rights is related to, but not identical with, peremptory human rights norms of international law.[826] Some rights are non-derogable but not of peremptory nature. Further, peremptory norms extend beyond the list of non-derogable rights expressly enumerated in Article 4 of ICCPR. Peremptory norms prohibiting the taking of hostages, imposing collective punishments, arbitrary deprivation of liberty or deviating from fundamental principles of fair trial and presumption of innocence are not listed in the Covenant as non-derogable, but are of peremptory nature,[827] permitting neither exception nor derogation despite being derogable. In other words, the derogation regime entailed in IHRL is not exclusive in terms of identifying rights from which no exception is permitted. The derogation regime thereby complements peremptory norms, which draws attention to the complexity in identifying a legal regime for protection *jus post bellum*, and the importance of placing both protection and the legal regime into the specific context of *jus post bellum*.[828]

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[823] ECtHR, 'Guide on Article 15 of the European Convention on Human Rights'*, Derogation in time of emergency* (2018), para 13. Emphasis added.
[824] ibid.
[825] UN HRC, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights challenge o states of emergency in the context of countering terrorism* (A/HRC/37/52, 2018), para 14.
[826] UN HR Committee, General Comment No 29, States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001, para 11.
[827] ibid.
[828] It is beyond the limitations of the present research to give a full account of the regime of peremptory norms. It suffices to note here that the scope of non-derogable rights is expanded through General Comment 29, and the ambit of *jus cogens* is more limited than the scope of derogable rights. See Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interactions with International Human Rights Law* (Martinus Nijhoff Publishers 2009), 468.

For the purpose of identifying an extra list of non-derogable rights that are applicable even during armed conflict and occupation, the ICRC Customary IHL study draws heavily upon the IACommHR's Report on Terrorism and Human Rights.[829] Both documents are vital in providing 'supplementary catalogues of non-derogable rights'.[830] Yet, the former goes even further than the latter in identifying a more expansive list of non-derogable rights.

12.2.3. Contextualizing the law on state of emergency under *jus post bellum*

The Arab Charter, ICCPR and ECHR require an emergency that threatens *the life of the nation*, whereas ACHR requires merely public danger or an emergency threatening the *independence or security of the state*, which seemingly is a more permissive threshold,[831] and suggests different thresholds for derogation under different treaties.

An added complicating factor in identifying criteria for objective identification of a situation of emergency is that the subject matter of a *threat to the life of a nation* is highly politically charged. Perceptions also seem to differ on whether a threat to the 'life of a nation' legally speaking must constitute an *existential* threat to the state. In *Lawless*, a threat to the life of the nation was found to exist as a result of the presence of a secret army engaged in unconstitutional activities on the territory, activities of this group outside the territory, jeopardizing the relations with neighbouring states, and an increase in terrorist activities.[832] This, Milanovic observes, constituted a real threat, but not an *existential* threat to the state. Milanovic also recalls that both the ECtHR and the House of Lords considered that a threat to the life of the UK nation existed after the 9/11 attacks, even though no attack had taken place on UK soil.[833] The Court, notably, was prepared to look at a broad range of factors in establishing the existence of an emergency, and has been ready to accept localized emergencies as a threat to the nation. Thereby, as observed by Milanovic, the Court did not require a threat that affected the whole population or the nation as such.[834] This seems to suggest that there is room for a broader interpretation of the notion of threat to 'the life of the nation' than the existential threat a textual reading would suggest. But there are also indications to the contrary.

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[829] IACommHR, Report on Terrorism and Human Rights, Doc. OEA/Ser.L/V/II.116Doc.5rev.1corr., 22 October 2002.
[830] Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interactions with International Human Rights Law* (Martinus Nijhoff Publishers 2009), 515. See also *ibid*., at 516 and 519.
[831] Marko Milanovic, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' in Nehal Buhta (ed), *The Frontiers of Human Righs* (Oxford Scholarship Online: April 2016 2016) 55, 60.
[832] European Court of Human Rights (ECHR), Case of *Lawles v. Ireland*, Judgment of 1 July 1961 (Series A, No 3), para 28. Available online: http://hudoc.echr.coe.int/hudoc/default.asp?Language=en&Advanced=1 (accessed latest 22 July 2019).
[833] Marko Milanovic, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' in Nehal Buhta (ed), *The Frontiers of Human Righs* (Oxford Scholarship Online: April 2016 2016) 55, 70. See also ECtHR, *A and others v United Kingdom*, Application No 3455/05, Judgment of 19 February 2009, Grand Chamber, para 177-181.
[834] Marko Milanovic, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' in Nehal Buhta (ed), *The Frontiers of Human Righs* (Oxford Scholarship Online: April 2016 2016) 55, 70.

In 1984, in response to a long-standing observation that one of the main instruments employed to repress and deny human rights by governments was the illegal and unwarranted declaration of a state of emergency, the *American Association for the International Commission of Jurists* with the co-sponsorship of the *International Commission of Jurists*, the *Urban Morgan Institute for Human Rights* and the *International Institute of Higher Studies in Criminal Sciences* held a symposium in Siracusa, Italy, with an aim to examine the conditions and grounds for permissible limitations and derogations in order to enable effective implementation of the rule of law.[835] The participants endeavoured to identify the legitimate objective of the provisions in the ICCPR, the general principles of interpretation and some of the main features of the grounds for limitation or derogation. It was determined that a public emergency that threatens the life of the nation is one that affects the whole of the population, and 'either the whole or part of the territory of the state', and 'threatens the physical integrity of the population, the political independence or the territorial integrity of the state or the existence or basic functioning of institutions indispensable to ensure and protect the right recognized in the Covenant.'[836]

This threshold, notably, shares common characteristics with the prohibition on the threat or use of force against the territorial integrity or political independence of any state enshrined in Article 2(4) of the UN Charter, and may thus be understood as equivalent to a threat to the very existence of a state. General Comment 29 seemingly adopted a similar interpretation, and held that a situation that permits derogations must entail a situation that threatens the life of the nation, and that not every disturbance or catastrophe qualifies as a public emergency permitting derogations.[837] Consequently, as observed by Ackerman, the emergency powers of a state have largely been premised on the presence of a threat to the very existence of the state, and which necessitates empowering the executive branch to take extraordinary measures.[838]

The symposium in Siracusa further noted that *internal conflict* and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4,[839] essentially distinguishing emergencies from NIAC. Along similar lines, the Special Rapporteur recently argued that each treaty requires that the scale of threat to the State must be exceptional and

[835] American Association for the International Commission of Jurists, *Siracusa Principles: on the Limitations and Derogation Provision in the International Covenant on Civil and Political Rights* (1985).
[836] ibid, part II, para 39 (a) and (b).
[837] UN HR Committee, General Comment No 29, States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001, para 2-3.
[838] Bruce Ackerman. 'The Emergency Constitution' (2004) 113(5) Yale Law Journal 1029, 1031.
[839] American Association for the International Commission of Jurists, *Siracusa Principles: on the Limitations and Derogation Provision in the International Covenant on Civil and Political Rights* (1985), part II, para 39 (c). Emphasis added.

impact the state's core security, independence and function.[840] The threat, consequently, must face either the state in its entirety, or the fundamental foundations of state functions, in order to be held as equating to an existential threat.

In conclusion, while jurisprudence is not definite, the most convincing interpretation is that a 'threat to the life of the nation' is similar to a threat to the very existence of the state. The threshold for giving rise to a right to derogate from human rights obligations under international law must, consequently, face the whole population, and part of or the whole territory of a state, or the fundamental foundations of state functions. This threshold, notably, differs from that determining the existence of an armed conflict, which results in the conclusion that the law of law enforcement, emergencies, and armed conflicts constitutes three distinct protective regimes. All regimes, notably, are relevant under *jus post bellum*, which, from a protection perspective, necessitates differentiation of different legal contexts, and identification of how these regimes interrelate.

12.3. Differentiating emergencies from armed conflicts

As observed by Agamben, one of the elements that make a state of exception (or state of emergency) difficult to define is its close relationship to civil war, insurrection and resistance.[841] While ECHR and ACHR explicitly mention *war* as a situation permitting derogation, the ICCPR and the Arab Charter do not. As observed by Milanovic, the drafting history of the ICCPR reveals that the absence of explicit reference to 'war' in Article 4 of ICCPR should not be understood as evidence that the drafters did *not* intend armed conflicts to fall under the umbrella of the concept of public emergency threatening the life of the nation. Rather, Milanovic notes, the drafting history of ICCPR clearly shows that the derogation clause was meant to apply to situations of war, however the term 'war' is defined. The absence of express reference to 'war' cannot, however, be understood as suggesting that ICCPR cannot apply in times of war, nor that it is completely displaced by the law of war.[842]

The question of how to distinguish between emergencies and armed conflicts is still, however, not clear. Firstly, the criterion *threat to the life of the nation* may differ in important ways from the intensity criterion for determining the existence of a NIAC. As noted above, while the threshold for an emergency situation shares common characteristics with the prohibition on the use of force under the UN Charter, the threshold of intensity is not necessarily to be equated to the threshold for an

[840] UN HRC, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights challenge o states of emergency in the context of countering terrorism* (A/HRC/37/52, 2018), para 7 and 11.
[841] Giorgio Agamben, *The State of Exception* (Kevin Attel tr, The University of Chicago Press 2005), 2.
[842] Marko Milanovic, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' in Nehal Buhta (ed), *The Frontiers of Human Righs* (Oxford Scholarship Online: April 2016 2016) 55, 65.

emergency situation. This suggests that the respective thresholds for NIAC and emergencies are not entirely overlapping.

A situation that reaches the required threshold of intensity in order to constitute a NIAC does not necessarily affect 'the life of the nation' and as such may not justify derogations. On the other hand, a situation that threatens the life of the nation may not necessarily amount to the legal threshold of intensity in order for a NIAC to exist. Milanovic has similarly argued that depending on how strictly we interpret the standard 'life of the nation', it may be argued that not all armed conflicts would satisfy that test.[843] Milanovic concludes that the derogation clauses in ICCPR, ECHR and ACHR are open to several reasonable interpretations.[844] In conclusion, it can be assumed that an emergency situation permitting derogations entails, but is not limited to, and does not necessarily include an armed conflict. Thereby, a specific category of protection regime can be identified for a situation that fulfils the intensity criterion and reaches the threshold for a NIAC but does not threaten the 'life of the nation', and thus does not permit derogation from IHRL. In such a situation, and under the interpretation that the law regulating conduct of hostilities under IHL comes into play at the lowest level of NIAC (CA3 conflicts),[845] the identification of how IHL and IHRL interplay and interact becomes central.[846]

The reference to 'war' in ECHR and ACHR, however, is not unproblematic. As observed by Milanovic, the legal concept of 'war' has fallen into disuse in modern international law, and as a result, three possible interpretations of the term 'war' can be envisaged. Firstly, the term can be understood as a reference to the technical legal concept as it existed in classical international law. Secondly, it may be understood as a reference to the modern concept of international armed conflicts (IAC), perhaps with the addition of belligerent occupation. Thirdly, it may be understood as a reference to any type of armed conflict, thus entailing both international armed conflicts (IAC) and NIAC, as well as occupation[847] and, arguably, the different forms of NIAC (CA3 and APII).[848] As observed by Milanovic, the choice is crucial for interpreting article 15 of ECHR, which allows derogations from the right to life 'in respect of deaths resulting from lawful acts of war'.[849]

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[843] Marko Milanovic, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' in Nehal Buhta (ed), *The Frontiers of Human Righs* (Oxford Scholarship Online: April 2016 2016) 55, 68.
[844] ibid, 76.
[845] See further in Chapter 7 on the identification and classification of armed conflicts.
[846] See further in Chapter 13 on the dividing line between IHL and IHRL.
[847] Marko Milanovic, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' in Nehal Buhta (ed), *The Frontiers of Human Righs* (Oxford Scholarship Online: April 2016 2016) 55, 67.
[848] Non-international armed conflicts are divided between those regulated only by Common Article 3 of the Geneva Conventions (CA3 conflicts) and those also regulated by Additional Protocol II to the Geneva Conventions (APII conflicts).
[849] Marko Milanovic, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' in Nehal Buhta (ed), *The Frontiers of Human Righs* (Oxford Scholarship Online: April 2016 2016) 55, 68.

While interpreting the concept as limited to IAC would allow for the status-based targeting, it would be more problematic in NIACs since in the absence of a derogation, the applicable standard would be Article 2(2) of ECHR, which requires the use of force to be 'no more than absolutely necessary' for the specific aims set out, of which one is quelling a riot or insurrection.[850]

12.4. The purpose of derogation

For protection purposes, and indeed in light of the aim to further the protection of human rights generally and thereby to enable sustainable peace, it is important to determine what aim and purpose derogation is to achieve. General Comment 29 specifies that the aim and purpose of any derogation must be the restoration of normalcy where full respect for the Covenant can again be secured.[851] The Special Rapporteur has similarly observed that emergency powers are a limited device aimed at providing a positive basis for the return to the full protection of human rights within a reasonable time frame.[852]

Two things are worthy of attention here. First, the objective of any derogation differs from the objective of an armed conflict in that derogations seek to enable 'normal' peaceful conditions. In that way, the objective sought correlates with the purpose of *jus post bellum* and peace operations and derogations may therefore aid in achieving the objective sought in peace operations. Secondly, the recognition that derogation is permitted in order to seek normalcy 'where the full respect for the Covenant' can be secured inherently entails a recognition of a hierarchy between the rights entailed in the Covenant. The notion of derogation can thereby be argued to introduce a hierarchy between rights applicable in situations of normalcy, on the one hand, and in situations of emergency, on the other. Such a hierarchy may contribute to identifying a priority among protection aims in different phases of transitional environments, which in turn could contribute to achieving the aims sought.

However, a prerequisite for any derogation is *legality*. As concluded by Benvenisti:

> Considerations of democracy and subsidiarity do merit such a renvoi, but only when the national procedures can be trusted (…) But where national procedures are notoriously prone to failure (…) no margin and no consensus should be tolerated. Anything less than the assumption of full responsibility would amount to a breach of duty by the international human rights organs.[853]

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[850] Marko Milanovic, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' in Nehal Buhta (ed), *The Frontiers of Human Righs* (Oxford Scholarship Online: April 2016 2016) 55, 68.
[851] UN HR Committee, General Comment No 29, States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001, para 1.
[852] UN HRC, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights challenge o states of emergency in the context of countering terrorism* (A/HRC/37/52, 2018), 1.
[853] Eyal Benvenisti. 'Margin of Appreciation, Consensus and Universal Standards' (1999) 31(4) New York Univesity Journal of International Law and Politics 843, 583-584.

In other words, any derogation must not only be legitimate in terms of the purpose sought. It must also be necessary and proportionate, and adequate procedures for transparency and accountability must be in place for derogations to be legally and morally acceptable. That is equally true for complex scenarios, such as in *jus post bellum* and peace operations.

Another challenge of incorporating the context of peace operations into debates on emergencies is that the notion of derogation requires a threat to 'the life of the nation', whereas Security Council resolutions are founded on threats to international peace and security.[854] Sheeran, for example, argues that the UN's capacity to derogate could be based on the threat to international peace and security.[855] In other words, as per Sheeran's suggestion, the purpose of derogation in peace operation would be to secure *international* peace and security, whereas the purpose of derogation entailed in treaties is rather to secure *national* security. Sheeran thereby links the right to derogate to the *jus ad bellum* requirement of a threat to international peace and security for launching a peace operation under Chapter VII.

As observed herein, the *jus ad bellum* justification for launching a peace operation must be distinguished from the legal regime regulating the activities undertaken *jus in bello* and *jus post bellum*. As also observed here, the purpose of each activity undertaken in peace operations is not necessarily to enable international peace and security, in particular when the peace operation is launched in response to NIAC or a security situation that is internal to a state, which is the case in a majority of peace operations today. A better understanding in such operations may be that tasks should rather be seen as aiming towards enabling national, or internal peace and security. Under such an interpretation, international peace and security, while constituting a *jus ad bellum* requirement for authorising peace operations under Chapter VII of the Charter, are rather to be understood as an outcome of enhanced national peace and security inside the host state, and as such of secondary priority in *jus in bello* and *jus post bellum* perspectives.

It is important to note, however, that the notion of *threat to international peace and security* does not necessarily equate to the emergency situation referred to in human rights instruments and which triggers rights to derogate. There is also seemingly very little, if any, support in international treaty law, state practice and jurisprudence for such an interpretation. Emergency legislation is therefore not

[854] Scott Sheeran, 'Human Rights and Derogation in Peacekeeping: Addressing a Legal Vacuum Within the State of Exception' in Evan J. Criddle (ed), *Human Rights in Emergencies* (ASIL Studies in International Legal Theory, Paperback edn, Cambridge University Press 2017) 205, 206.
[855] ibid, 225.

applicable *en bloc* to peace operations but may arise as per the criteria established in law. Scholars have also begun to recognise the inevitable relevance of derogations in peace operations.[856]

Notably, the purpose of affording extraordinary powers under emergency clauses is to secure the ability to protect human rights more broadly. Thereby, derogations can be seen as enabling increasingly greater scope of protection in transitional environments to emerge from conflicts, and would thus be particularly well suited in peace operations whose very aim and purpose is the creation of conditions that enable protection of the full spectrum of human rights, and thus, consequently, sustainable peace. The interpretation that peace operations are entitled to derogate would create a coherent and transparent legal framework,[857] and thereby contribute to both legal clarity and enhanced effectiveness in protection.

12.5. Extraterritorial derogation, state sovereignty and peace operations

As correctly and importantly observed by Milanovic, the law on derogations has the potential of bringing clarity and flexibility to the applicable legal framework, and in particular in situations of armed conflict and in relation to the interplay between IHL and IHRL.[858] These are questions that are central to transitional, *jus post bellum* environments, and the question of extraterritorial derogation can consequently bring much needed legal clarity both to the scope of protection available, and to the legal regulation of protection in peace operations.

The law on state of emergency and extraterritorial derogations is, firstly, dependent on the applicability of human rights law. As observed herein, a potentially emerging impact-based model of determining human rights obligations extraterritorially in relation to the right to life may bring enhanced legal clarity to such applicability. However, notably, the impact-based model is based on a distinction between positive and negative obligations that is not reflected in the law on state of emergency. Yet, the law on state of emergency and derogations may still be compatible with the impact model of identifying human rights obligations. Determining the legal sources of extraterritorial derogation is, however, a first requirement.

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[856] See e.g. Scott Sheeran, 'Human Rights and Derogation in Peacekeeping: Addressing a Legal Vacuum Within the State of Exception' in Evan J. Criddle (ed), *Human Rights in Emergencies* (ASIL Studies in International Legal Theory, Paperback edn, Cambridge University Press 2017) 205, 206, Marko Milanovic, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' in Nehal Buhta (ed), *The Frontiers of Human Righs* (Oxford Scholarship Online: April 2016 2016) 55, and Kjetil Mujezinovic Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (Cambridge studies in international and comparative law, Cambridge University Press 2014).

[857] Kjetil Mujezinovic Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (Cambridge studies in international and comparative law, Cambridge University Press 2014), 313.

[858] Marko Milanovic, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' in Nehal Buhta (ed), *The Frontiers of Human Righs* (Oxford Scholarship Online: April 2016) 55, 56.

The UDHR is generally considered to have obtained customary status,[859] but it failed to incorporate provisions on derogation from human rights in emergencies. As observed by Sheeran, it is also widely accepted that human rights are explicitly entrenched in the UN Charter, and the understanding that the Security Council is required to respect human rights in accordance with the Charter is not seriously contested.[860]

One possibility for determining a right to derogate in peace operations, as noted, is through extraterritorial application of treaties. As observed by Milanovic, no state has to date derogated from its human rights obligations in extraterritorial settings, and as a result, there is very little legal analysis available on the issue of extraterritorial derogation. Milanovic, however, has embarked on a valuable contribution to this issue. He observes that the first line of defence for states engaged in extraterritorial operations is to deny that human rights obligations apply extraterritorially at all. This argument, importantly, as observed by Milanovic, is becoming increasingly unconvincing in the face of increasing case law supporting the existence of extraterritorial human rights obligations.[861]

A central question to address in relation to the potential of extraterritorial human rights derogations in peace operations, and which could offer some legal clarity on extraterritorial derogation, is whether the right to derogate attaches to the sovereignty or territorial jurisdiction of a state, or if it can be reasonably argued that the right to derogate stems from factual jurisdiction, whether territorial or extraterritorial. It has been suggested that derogation is such a value-laden judgement that it goes to the very heart of sovereign decision-making authority.[862] Carl Schmitt also famously held, in his work *Political Theology*, that a sovereign 'is he who decides on the exception',[863] which suggests a close relation between sovereignty and derogation. A recent publication by the ECtHR similarly seems to connect the right to derogate to territorial jurisdiction or sovereignty. It was held that 'if measures are taken outside the territory to which the derogation applies, the derogation will not apply and the Government concerned will not be able to rely on it to justify the measures'.[864] The Court thus argued that a state acting in extraterritorial circumstances is not authorised to derogate.

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[859] Christian Tomuschat, *Human Rights: Between Idealism and Realism* (2nd edn, Oxford University Press 2008), 37.
[860] Scott Sheeran, 'Human Rights and Derogation in Peacekeeping: Addressing a Legal Vacuum Within the State of Exception' in Evan J. Criddle (ed)*, Human Rights in Emergencies* (ASIL Studies in International Legal Theory, Paperback edn, Cambridge University Press 2017) 205, 227.
[861] Marko Milanovic, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' in Nehal Buhta (ed)*, The Frontiers of Human Righs* (Oxford Scholarship Online: April 2016), 55-56.
[862] Scott Sheeran. 'Reconceptualising States of Emergency under International Human Rights Law' (2013) 34 Michigan Journal of International law 491, 551.
[863] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, reprinted (Georg Schwab tr, Originally published in 1922, University of Chicago Press 2006).
[864] European Court of Human Rights, 'Guide on Article 15 of the European Convention on Human Rights' *, Derogation in time of emergency* (2018), para 14.

The question of extraterritorial derogation was similarly rejected in the *Al-Jeddah* case, in which it was noted that Article 15 of ECHR allows for derogations in time of war or other public emergency 'that threatens the life of the nation'.[865] In that case, Lord Bingham argued that the life of the nation refers to the nation that seeks to derogate, and that a state cannot be threatened by an overseas situation, that it entered into voluntarily and from which it can withdraw at any time.[866] A similar interpretation that a right to derogate stems from territorial jurisdiction or sovereignty of a state was seemingly also adopted by the *Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*. In a report from August 2018, the Special Rapporteur noted that while extraterritorial derogations are not *per se* impossible, it requires fulfilling the requirements of the 'threat to the life of the nation', 'time of war' and public danger or other emergency that threatens the independence or security of a state.[867] Much like Lord Bingham in the *Al-Jeddah case*, she further held that 'when States enter into overseas military operations voluntarily and can withdraw from those operations at any point, the necessity of a blanket derogation seems at odds with political circumstances which engage the use of military force.'[868] The Special Rapporteur thus seemingly subscribes to a similar understanding as Lord Bingham's that a right to derogate from human rights obligations is not motivated in extraterritorial settings. A 'blanket' derogation, however, must arguably be distinguished from a general right to derogate. While the notion of a blanket derogation in situations of extraterritorial military operations is neither preferable nor supported by law, the right to derogate in certain circumstances that fulfil the requirements entailed in emergency law, should not, arguably, be dismissed by default.

The interpretations referred to above all seem to be based on an assumption that derogation from human rights law would reduce the scope of protection legally afforded individuals. The wording that a state will 'not be able to rely on [derogations] to justify the measures'[869] seems to suggest that the Court assumed that derogation would unnecessarily expand the authority of the state, and thus unjustly reduce the scope of protection. Similarly, the argument that a state cannot be threatened by an overseas situation, and therefore cannot be entitled to derogate, is seemingly based on the assumption that the right to derogate is limited to territorial sovereignty, and that the application of human rights extraterritorially expands, rather than reduces the protective scope of the applicable law. However, the

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[865] *Al-Jeddah v Secretary of State for Defence* (2007) UKHL 58 (2008).
[866] Marko Milanovic, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' in Nehal Buhta (ed), *The Frontiers of Human Righs* (Oxford Scholarship Online: April 2016) 55, 56. See also House of Lords, Opinions of the Lords of Appeal for Judgment in the Cause R (on the application of Al-Jedda) (FC) (Appelant) v Secretry of State for Defence, UKHL 58, 2008, Para 38.
[867] UN HRC, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights challenge o states of emergency in the context of countering terrorism* (A/HRC/37/52, 2018), para 68.
[868] ibid, para 69.
[869] ECtHR, Guide on article 15.

characteristics of *jus post bellum*, transitional environments warrant critical assessment of these underlying assumptions on which the refusal of extraterritorial derogation is seemingly based. As observed herein, peace operations operate in environments that often fluctuate between armed conflict and milieus characterized by varying degrees of violence which, in turn, are fueled by different drivers. Such contexts of great complexity may resemble the emergency situations reflected in the doctrine on the law on state of emergency.

When contrasted against protection through IHL, derogation does not necessarily result in a reduction of the scope of protection. Derogations from human rights obligations may, rather, constitute a middle ground between the legal frameworks applicable in *jus post bellum*, namely IHL and IHRL. As a result, denying the option of derogation in extraterritorial settings may be detrimental to maximising the scope of protection in uncertain and fluctuating security contexts. Without the option to derogate, a broader scope of situations in complex security landscapes risks being interpreted as falling within the ambit of armed conflict and thus limit protection of civilians to that afforded through IHL. In order to ensure the greatest scope of protection of human rights possible in each given context, as also argued by Milanovic, extraterritorial derogations are consequently not only permissible: they may also be both necessary and desirable.[870]

Given the aim and purpose of protection activities in extraterritorial settings, such as peace operations, and the *jus post bellum* realities, the better view, it is submitted here, is that the right to derogate is linked to human rights obligations rather than territorial sovereignty. This is also an argument made in *Serdar Mohamed*, in which Justice Leggart observes that Article 15 of the ECHR, like any other provision, must be tailored to its extraterritorial context. He notes that this can be achieved:

> (…) by interpreting the phrase 'war of public emergency threatening the life of the nation' as including, in the context of an international peacekeeping operation, a war or other emergency threatening the life of the nation on whose territory the relevant acts take place.[871]

As per Justice Leggart's interpretation, a peace operation can derogate from human rights when a situation threatens the life of the host state. Thereby, the right to derogate is, under such an interpretation, detached from the notion of sovereignty, and may, rather, be held to stem from the notion of jurisdiction. Under such an interpretation, sovereign rights remain with the host state, and any peace operation must respect the sovereign rights of the host state and its population, and as a consequence remain strictly within the confines of the authority afforded *jus ad bellum* and the law that applies to the regulation of conduct *jus in bello* and *jus post bellum*.

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[870] See similar argument in Marko Milanovic, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' in Nehal Buhta (ed), *The Frontiers of Human Righs* (Oxford Scholarship Online: April 2016) 55, 58.
[871] Serdar Mohammed v Ministry of Defence (2014) EWHC 1369 (QB), paras 155-156.

Assuming, thereby, that it can be reasonably argued that derogations can apply extraterritorially as a result of existing human rights obligations, the next challenge is determining what rights can be subject to such derogation. A particularly difficult question, as noted by Sheeran, is identifying the extent of the human rights obligations that apply to peace operations.[872] As noted, it is not clear what human rights obligations apply extraterritorially. What drives many states to resist applying human rights to peace operations, notably, is a fear that international human rights would apply, unrealistically in extraterritorial situations, in toto.[873] Park, notably, observes that the ECtHR, in *Hasan v United Kingdom*, has expressly held that a state is not always required to provide the whole panoply of human rights, and that states therefore are permitted to divide and tailor human rights as per the situation on the ground and the state's capability to offer protection.[874] This suggests that human rights can be applied according to a sliding scale, depending on the circumstances of each given context, which, applied to *jus post bellum*, would enable the necessary balance between protection and limitations of human rights in transitional environments. This will in particular apply to a state's positive human rights obligations, but it will also apply to the negative obligations to refrain from taking actions that would violate human rights.[875]

A clarification of the extent of human rights obligations, and thus of possible derogations, can possibly be sought through distinguishing between positive and negative obligations. Milanovic identifies a distinction between positive and negative obligations in relation to the reasoning of Lord Hope in *R v The Ministry of Defence* (2013).[876] Milanovic argues that Lord Hope refers to the potential rigidity of Article 2 of ECHR positive obligations if applied to military deployments overseas, which is why the possibility of derogations was invoked as a means of introducing needed flexibility. Lord Hope argued that due diligence obligations are inherently flexible, and that the margin of appreciation leaves ample room for the flexibility needed. However, Milanovic further observes, such flexibility cannot be said to exist in relation to negative obligations under Article 2 of ECHR, namely to refrain from intentionally taking a life unless it is absolutely necessary.[877] In other words, there was a perceived need to distinguish between positive and negative obligations in extraterritorial operations, an observation that could be of great value in determining the parameters

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[872] Scott Sheeran, 'Human Rights and Derogation in Peacekeeping: Addressing a Legal Vacuum Within the State of Exception' in Evan J. Criddle (ed), *Human Rights in Emergencies* (ASIL Studies in International Legal Theory, Paperback edn, Cambridge University Press 2017) 205, 226-227.
[873] ibid, 232.
[874] Ian Park, *The Right to Life in Armed Conflict* (Oxford Monographs in International Humanitarian and Criminal Law, Oxford University Press 2018), 69.
[875] Ian Park, *The Right to Life in Armed Conflict* (Oxford Monographs in International Humanitarian and Criminal Law, Oxford University Press 2018), 69.
[876] *R (smith and others) v Ministry of Defence* (2013), UKSC 41, para 59-60.
[877] Marko Milanovic, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' in Nehal Buhta (ed), *The Frontiers of Human Righs* (Oxford Scholarship Online: April 2016) 55, 69.

for derogation in peace operations. Such a distinction was also made by Milanovic in his model for identifying extraterritorial human rights obligations, an approach that was seemingly also adopted by the HR Committee in its General Comment 36 of 2018.[878] As argued by Milanovic, as a minimum, the negative obligation to not deprive people of their lives or liberty without sufficient justification should apply without any territorial limitation.[879]

This is an essential observation in relation to determining the law regulating protection activities in peace operations. A distinction between negative and positive obligations could unpack the understanding of the right to derogate as stemming from jurisdiction rather than sovereignty, and extraterritorial derogation could thus be premised on the same criteria as extraterritorial jurisdiction or impact-based human rights obligations in relation to the right to life. Thereby, the possibly developing model of impact-based human rights obligations in situations involving risk of arbitrary deprivation of life can aid in identifying the legal parameters for both human rights obligations and derogations in extraterritorial settings. This is also the interpretation made by Sassòli, who argues that the determination of the possibility of extraterritorial derogation from human rights should follow the same logic as the determination of extraterritorial obligations. He argues that one cannot simultaneously place obligations on states to uphold human rights while not enabling them to derogate from those in cases of emergencies.[880]

Indeed, in light of the increasing support for extraterritorial human rights obligations, it is also reasonable to suggest that the right to derogate should be determined based on criteria similar to that of jurisdictional obligations, namely control over territory or authority over individuals, or impact-based obligations in relation to the right to life, rather than on a notion of transferred sovereignty. In such a scenario, once a situation emerges that threatens the life of the (host) nation, derogation from the human rights obligations that exists either as a result of impact or as a result of control or authority, should be viewed as permitted to the extent that the exigencies of the situation so requires. The criteria for derogation, however, remain the same as under international treaty law, and require threats against the 'life of the (host) nation'. This understanding also corresponds with the aim and purpose of derogation, namely to enable a return to normalcy and the protection of human rights more broadly. Incorporating the law on state of emergency into the law of peace operations could thereby contribute to enhancing the ability to deliver on the overarching aim of peace operations, namely to enable transitions and create conditions conducive to sustainable peace and security. Derogations can

[878] See further in Chapter 5.4 addressing an emerging approach to extraterritorial human rights obligations.
[879] Marko Milanovic, *Extraterritorial application of human rights treaties: Law, Principles and Policy* (Oxford Monographs in International Law, Paperback edn, Oxford University Press 2013).
[880] Marco Sassòli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (online edn, Oxford Scholarship Online 2011), 14.

thus be an important instrument both to deliver on mandates, as well as to clarify the legal regulation of peace operations' engagements.

13. Identifying a dividing line between conduct of hostilities and law enforcement in *jus post bellum*

A conclusion drawn from this research is that identifying a dividing line between the rules regulating conduct of hostilities in IHL and the rules regulating the use of force in IHRL is key to ensuring the most adequate, purposive and sustainable protection possible in post-conflict, *jus post bellum* environments. The importance of such a dividing line is highlighted by the fact that, as observed by Milanovic, 'at their very core, IHL and IHRL are fundamentally incompatible'.[881]

Whereas human rights were initially solely a matter internal to states, IHL was by its very nature rooted in the relations between states.[882] IHRL was created in order to protect individuals from abuse by the state, or those in power, and rules on the use of force attempt to balance the right to life of individuals' with the state's interests and enforcement powers. In IHRL, the rules essentially provide guidance on how the right to not be arbitrarily deprived of one's life is to be protected while at the same time addressing or preventing crime, or ensuring public order and safety.[883] Furthermore, while rights and obligations are mutually correlating in IHL, IHRL separates the two without any necessary relation between them. While obligations are primarily placed on states under IHRL, individuals are afforded rights. In IHL, on the contrary, the primary objective is to create reciprocal relations between states.[884] Thereby, while IHL operates on a horizontal axis, between equals, IHRL operates in a vertical direction, between states and individuals.

As a result of these substantial differences, the means and methods for protection created for one context will be inadequate, at best, in another context, and at worst, they will result in decreased rather than increased protection of civilians. Determining the applicability and relevance of the respective legal frameworks, and the interplay between them in the complex security reality of *jus post bellum*, is consequently essential for any protection regime to be effective in dealing with the most serious threats while simultaneously enabling sustainable contributions towards peace and security.

Three criteria of significance to identifying a purposive dividing line between IHL and IHRL are identified above. Firstly, the intensity of violence is a key determining factor. Secondly, the

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[881] Marko Milanovic, *Extraterritorial application of human rights treaties: Law, Principles and Policy* (Oxford Monographs in International Law, Paperback edn, Oxford University Press 2013), 232. See also similar argument in Nils Melzer, *Targeted killing in international law* (Oxford monographs in international law, Oxford University Press 2008), 140.
[882] Corduba Droege. 'Elective affinities? Human rights and humanitarian law' (2008) 90(871) International Review of the Red Cross , 503.
[883] Jelena Pejic, 'Conflict Classification and the Law Applicable to Detention and the Use of Force' in Elizabeth Wilmshurst (ed)*, International Law and the Classification of Conflicts* (Oxford University Press 2012), 110.
[884] Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interactions with International Human Rights Law* (Martinus Nijhoff Publishers 2009), 407.

geographical scope of IHL may vary; and, thirdly, a distinction between resumption of violence of the original conflict and the rise of a new armed conflict may be essential.

13.1. Intensity of violence and level of control as criteria for distinguishing between law enforcement and conduct of hostilities

Both the intensity of violence and the organisational level of non-state armed groups have been repeatedly highlighted as factors of relevance in identifying applicable law. In an expert meeting on the use of force, the criteria *control over territory* and *intensity* of violence were held as relevant to consider in order to determine the applicable legal regime. It was submitted that the degree of control, both in relation to circumstances in general and the specific location of the operation, could be a useful criterion for determining applicable law.[885] The distinction between control in general circumstances and control in the specific situation is noteworthy, since it suggests that both overall and effective control may be relevant to consider in identifying the legal regime applicable in each instance.

The HRC, further, has offered a similar view. In a report on the protection of human rights in armed conflicts, it was held:

> (...) there had to be some type of test against which each situation would need to be assessed in order for the most adequate legal framework to be determined. There was a suggestion that such a test could be framed in the context of effective control: the more effective the control over persons or territory, the more applicable human rights law would be. In this respect, it was argued that the human rights law paradigm posited effective control over a population, while the international humanitarian law paradigm posited a breakdown of power as a result of armed conflict. As a way to inform the *lex specialis* maxim in the context of armed conflict, it was suggested that, the more stable the situation, the more the human rights paradigm would be applicable; the less stability and effective control, the more the international humanitarian law paradigm would be applicable to supplement human rights law.[886]

The underlying reasoning is that the conduct of hostilities would prevail, but only in situations of actual hostilities, where the intensity of violence is high and the level of control is low.[887] Under such an understanding, the level of control would influence the required intensity of violence for applying the regime of conduct of hostilities. In other words, there would be a scale of intensity required in

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[885] Gloria Gaggioli, *Expert meeting, The use of Force in Armed Conflicts: interplay between conduct of hostilities and the law enforcement paradigms* (International Committee of the Red Cross , 2013), iii-iv and 18. See also ICRC, Expert Meeting Report, Occupation and Other Forms of Administration of Foreign Territory, Third Meeting of Experts: The Use of Force in Occupied Territory, prepared by T. Ferraro , Geneva, Switzerland, April 2012. See also The University Centre for International Humanitarian Law, Report of an Expert Meeting, The Right to life in armed conflicts and situations of occupation, Geneva, Switzerland, 1-2 September 2005, 19.

[886] HRC, Outcome of the Expert Consultation on the Issue of Protecting the Human Rights in Armed Conflicts: reports of the United Nations High Commissioner for Human Rights, Eleventh session, 4 June 2009, UN Doc. A/HRC/11/31, para. 14.

[887] Gloria Gaggioli, *Expert meeting, The use of Force in Armed Conflicts: interplay between conduct of hostilities and the law enforcement paradigms* (International Committee of the Red Cross, 2013), 19.

order to consider the conduct of hostilities paradigm applicable, in which a high level of control would require a higher intensity, and correspondingly, a low level of control would require a lower level of intensity. The contention that the less stability the more IHL would be applicable, further suggests that a scale of human rights that corresponds with the level of stability and control can be envisioned.

At the expert meeting on occupation, however, the experts were unable to identify the kind of activity that would fall under the law enforcement paradigm except in cases of criminal activities clearly unconnected to the occupation and the hostilities related to it. The only agreement reached was that the law enforcement paradigm would prevail when an occupying force was engaged in police operations aimed at enforcing the law against criminal acts not linked to the armed conflict.[888] The expert meeting thus highlighted the necessity of a nexus between the violence and an armed conflict. This underscores the requirement to determine the nature of the threat, and its relation to an existing armed conflict.

Consequently, it is necessary to identify verifiable criteria for determining when a shift from the default regime of law enforcement to the rules on conduct of hostilities is required. In venturing to identify such criteria, the expert meeting on occupation observed that active hostilities must be present in the territory for the rules on conduct of hostilities to be applicable. [889] This thus highlights the distinction between the formal cessation of an armed conflict, and the temporal scope of application of the rules on conduct of hostilities, which is of essence to note here. Without hostilities that characterise active armed conflict, it was further held, the occupying power could not resort to the conduct of hostilities. It is consequently necessary to identify how 'active hostilities' can be determined.[890]

Similar to the observation made by Longobardo,[891] the expert meeting on occupation noted that an occupying force is not permitted to turn a certain situation into one of active hostilities,[892] which dictates that IHRL is to be afforded primacy so long as the intensity of the violence encountered does not reach the threshold for active hostilities. The expert meeting also envisioned a distinction between armed violence linked to the original conflict and violence emanating from organised armed groups not belonging to the ousted government. In relation to confrontations between the occupying power and the ousted government, it was held that the rules on conduct of hostilities would apply only if

[888] Tristan Ferraro, *Expert meeting: Occupation and other forms of administration of foreign territory* (International Committee of the Red Cross , 2012), 120.
[889] ibid.
[890] ibid.
[891] Marco Longobardo, *The Use of Armed Force in Occupied Territory* (Cambridge University Press 2018), 192.
[892] Tristan Ferraro, *Expert meeting: Occupation and other forms of administration of foreign territory* (International Committee of the Red Cross , 2012), 121.

hostilities persisted or had resumed within the original international armed conflict. As the threshold for IAC under Common Article 2 of the Geneva Conventions has always been considered very low, any degree of force, regardless of intensity, between the parties to the original conflict would thus render the rules on conduct of hostilities applicable.[893] On the contrary, in relation to violence between armed groups not belonging to the ousted government, notably, it was agreed that the threshold for NIAC within the meaning of Common Article 3 would be suitable for determining when the rules on conduct of hostilities would apply.[894] The experts, however, came to the agreement that such a threshold requires a certain level of organisation enabling the group to conduct concerted military operations, and violence that reaches a certain level of intensity.[895]

A similar approach was adopted in the expert meeting on the right to life, in which it was noted that on the issue of resumption of hostilities in NIAC, IHL of NIAC is not clear on the threshold required for its rules on the conduct of hostilities to apply. The experts felt a need to create a threshold for the purpose of the conference. They considered that the threshold for CA3 provided a suitable level for determining the application of the rules on the conduct of hostilities upon resumption of hostilities.[896]

It is of value to observe here that, contrary to the argument posited in relation to situations of occupation,[897] the determination of a *resumption* of a NIAC was held to lie at the same threshold as the level of a CA3 NIAC. This suggests an understanding that the threshold for determining the applicability of IHL in case of *resumption* of hostilities in the original conflict lies at the same intensity threshold as that determining the *rise* of a NIAC.

Others, however, argue to the contrary. Arai-Takahashi, for example, argues that the rules on conduct of hostilities should be considered applicable even to small-scale fighting in occupied territory.[898] As Arai-Takahashi notes, the realities in situations of occupation are often characterized by sporadic or even intense fighting involving the occupying power. In such situations, even in the case of small-scale fighting, the occupying power must take the rules on the conduct of hostilities into account.[899] Indeed, the argument that an occupying force would need to wait for an armed group to organise themselves to a sufficient degree, and use force that reached the specific intensity, was also contested

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[893] Tristan Ferraro, *Expert meeting: Occupation and other forms of administration of foreign territory* (International Committee of the Red Cross , 2012), 121.
[894] ibid.
[895] ibid, 122.
[896] 'Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation' (University Center for International Humanitarian Law, International Conference Center, Geneva 1-2 September 2005), Executive summary.
[897] See further in Chapter 10.3.
[898] Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interactions with International Human Rights Law* (Martinus Nijhoff Publishers 2009), 54.
[899] ibid, 57.

by some experts on occupation, who held that the approach lacked solid basis in IHL and would be unrealistic.[900]

No consensus has thus far been reached on the issue of identifying criteria that ensure both legal and practical adequacy for determining when the rules on conduct of hostilities would become applicable in NIAC and situations of occupation. In situations of instability, notably, much violence occurs that is unrelated to the conflict. As noted in this research, violence often mutates in post-conflict situations, and change from violence related to the armed conflict to various forms of criminal violence. Such criminal violence is regulated by IHRL, which necessitates that distinction is made between violence related to, and violence unrelated to an armed conflict. Distinguishing between different forms and legal character of violence is a significant challenge, but nevertheless of great importance in the strife for long-term peace.

There may consequently be good reason to distinguish between *the resumption* of hostilities inside an armed conflict, and *the rise* of a NIAC. In other words, it may be argued that violence that is related to the original conflict and that erupts before the armed conflict has come to a definite end is regulated by the rules on the conduct of hostilities under IHL rather than IHRL. Under such an understanding, it may be possible to argue for the existence of two different thresholds for application of the rules on conduct of hostilities *jus post bellum*: one threshold for addressing violence stemming from the original conflict, and another for addressing the rise of new NIAC. While the lower threshold for addressing a pre-existing conflict would enable a state or a peace operation to effectively deal with a threat that, evidently, has given rise to an armed conflict, the higher threshold for the rise of a new conflict would permit a greater scope of protection for civilians to the greatest extent possible, and ensure that states do not resort to the rules on conduct of hostilities in situations that do not require such response.

Three things are worthy of special attention here. First, two different thresholds for the applicability of the rules on conduct of hostilities can be envisioned. One threshold relates to the parties of the original conflict and does not require any specific intensity. Another threshold can be held to relate to armed groups unrelated to the original conflict and requires that the intensity of the violence reaches the level required to give rise to a NIAC.

Moreover, the experts on occupation adopted an interpretation that the threshold for NIAC entails an organisational criterion rather than merely a criterion of intensity. It was noted that guidance on criteria for determining the existence of an armed conflict within the meaning of CA3 should be

[900] Tristan Ferraro, *Expert meeting: Occupation and other forms of administration of foreign territory* (International Committee of the Red Cross, 2012), 123.

sought from the ICTY jurisprudence, in which the intensity and the organisational criteria were held as indispensable conditions.[901] Thereby, the expert meeting adopted an interpretation akin to the threshold of APII for the application of the conduct of hostilities paradigm. This, thus, raises the question whether a gap, signified by the difference between the CA3 threshold for intensity of violence and the APII threshold, requiring organisation of the parties, can arise. Such a gap would, arguably, be unfortunate and would contribute to the perceived insufficiency of law in complex security environments.

13.2. The geographical scope of the law on targeting: Combat zone as a distinguishing factor between law enforcement and conduct of hostilities?

As noted, it is often contended that IHL applies to the whole territory of a state in which an armed conflict exists.[902] This has been held to be relevant for both IAC and NIAC.[903] There may, however, be good reason to assess the adequacy of such interpretation in relation to identifying how IHL and IHRL interplay in relation to the rules on targeting *jus post bellum*. This is due to the contextual reality and complex, asymmetric character of contemporary armed conflicts, and the obligation of a state to prevent the rise of hostilities on its territory, and to distinguish between conduct of hostilities and law enforcement operations in situations of occupation.

Murray adopts such an interpretation. He argues that the lack of clear legal rules on the dividing line between conduct of hostilities and law enforcement in NIAC suggests that IHL should apply in 'active hostilities' on the basis on either sustained or concerted fighting, or as a result of lack of effective control. Active hostilities, further, are held to resemble traditional military operations, and the geographical scope of the application of the IHL paradigm is limited to areas where such high intensity fighting occurs, or where the state does not exercise effective control.[904] Murray suggests that no specific intensity of fighting is required for the application of IHL in areas where a state does not exercise effective control. He holds, however, that it must be foreseeable that any incursion would be met with force. Much as in the expert meetings on the use of force, the right to life and occupation,

[901] Tristan Ferraro, *Expert meeting: Occupation and other forms of administration of foreign territory* (International Committee of the Red Cross, 2012), 122.
[902] See such recent conclusion in *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Trial Chamber III, Judgment pursuant to Article 74 of the Statute, 138 (21 March 2016), para 141.
[903] See further in Chapter 6.3 on geographical scope of IHL.
[904] Daragh Murray, *Practitioners' Guide to Human Rights Law in Armed Conflict* (Dapo Akande and others ed, Oxford University Press in association with the Royal Institute of International Affairs (Chatham House) 2016), 95-97.

Murray thus submits that outside areas of active hostilities and in areas subject to control, IHRL should be afforded primacy.[905]

Droege similarly contends that the interplay between IHL and IHRL in NIACs may be identified by confining the application of IHL to the geographical area where fighting is taking place. This interpretation, she holds, is somewhat supported by the *Tadić* case, which held that some of the provisions of IHL are limited to the geographical scope of hostilities. Droege holds that the wording in *Tadić* could be understood to 'limit the certain rules of IHL to combat situations', which, then, would offer a broad scope of application of IHRL.[906]

Utilizing the notion of combat zone as a distinguishing factor has, however, also been repudiated. In the expert meeting on the use of force in armed conflicts, the vast majority of experts held the conflict zone as an irrelevant criterion for determining the applicable law. Introducing an additional criterion was considered too subjective and too open to debate, misinterpretation or disagreement. It was observed that such an approach would raise questions as to who would determine the geographical scope of hostilities, and how situations such as encampment or direct participation in hostilities outside such a zone would be regulated. It was held that factors such as conflict zone, intensity of violence and control would add to the complexity and thus be more suited for judicial discretion after the fact than to military decisions in real time.[907] This, however, was disputed by some, who, credibly in this author's opinion, held that such an approach would undermine the agreement reached on law enforcement as the default regime. Factors such as conflict zone, control, and intensity of violence, were considered relevant for determining which regime would apply as *lex specialis*.[908]

In the expert meeting on occupation, the experts seemed to agree with the minority opinion in the expert meeting on the use of force. It was contended that the rules on conduct of hostilities should be limited to the place of hostilities and apply only for the duration of the incident.[909] Thereby, and of particular value to observe in this research, these experts suggested that the temporal and geographical scope of application of the law on conduct of hostilities be limited to the time and place of active hostilities. This understanding was, notably, limited to NIAC, and it was held that the law of IAC is clear and specific as to targetability.[910] It was validly asserted that there is no combatant status in

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[905] Daragh Murray, *Practitioners' Guide to Human Rights Law in Armed Conflict* (Dapo Akande and others ed, Oxford University Press in association with the Royal Institute of International Affairs (Chatham House) 2016), 97.
[906] Corduba Droege. 'Elective affinities? Human rights and humanitarian law' (2008) 90(871) International Review of the Red Cross , 535.
[907] Gloria Gaggioli, *Expert meeting, The use of Force in Armed Conflicts: interplay between conduct of hostilities and the law enforcement paradigms* (International Committee of the Red Cross , 2013), 22.
[908] ibid, 20.
[909] Tristan Ferraro, *Expert meeting: Occupation and other forms of administration of foreign territory* (International Committee of the Red Cross , 2012), 123.
[910] Gloria Gaggioli, *Expert meeting, The use of Force in Armed Conflicts: interplay between conduct of hostilities and the law enforcement paradigms* (International Committee of the Red Cross, 2013), 20.

NIACs, and, as a result, the status of an individual cannot be considered the only relevant criterion for determining the relevant law in NIACs.[911]

It is apparent that there is no consensus on the geographical scope of IHL in NIAC and situations of occupation. Interpretations vary from broad to narrow. There is, however, good reason to reassess the traditional stance on the geographical scope of application of IHL, in particular the rules on conduct of hostilities, in relation to situations *jus post bellum*. This in particular in light of the aim and purpose sought in *jus post bellum*, and the fact that the point of departure, aim and purpose and short- and long-term effects of the force used suggest that a geographically and temporally limited application of IHL is warranted under *jus post bellum* in order to ensure that activities undertaken contribute towards, rather than undermine the objectives sought. Therefore, arguably, it is of decisive value to consider the notion of combat zone as one factor determinative of the dividing line between the rules on conduct of hostilities and the law enforcement paradigm in *jus post bellum*.

13.3. Distinguishing between law enforcement in the context of armed conflicts and peacetime law enforcement

As this research reveals, the different underlying premises of IHL and IHRL, their points of departure, aims and purposes, and the means and methods of the regulation of the use of force are diametrically different in the two frameworks.[912] As a result, the two frameworks must be held to operate along separate scales in the regulation of the use of force. Consequently, the application of the respective frameworks results in different consequences and thus enables different scope and forms of protection.

Furthermore, although law enforcement obligations are integral to IHL in the regulation of the use of force outside the conduct of hostilities, the regulation of law enforcement operations in armed conflicts is affected by the logic of IHL and the reality of armed conflicts. This is the case in particular under the interpretation that the principle of military necessity constitutes an underlying rationale of IHL, and informs all its rules, which permits considerations of military aims. Considerations of a military nature permits regard for factors that are foreign to IHRL and that risk narrowing the scope of protection for civilians, which suggests a need for a law enforcement paradigm for armed conflicts that is distinct from that of peacetime law enforcement.

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[911] Gloria Gaggioli, *Expert meeting, The use of Force in Armed Conflicts: interplay between conduct of hostilities and the law enforcement paradigms* (International Committee of the Red Cross, 2013), 21.

[912] Jelena Pejic, 'Conflict Classification and the Law Applicable to Detention and the Use of Force' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012), 110.

Security measures taken by an occupying power in the course of its administration of territory (law enforcement operations), such as internment and curfews, will have certain military value in the context of the armed conflict. However, as observed by Melzer, the standards for the use of lethal force outside the conduct of hostilities do not modify the law enforcement paradigm as derived from IHRL. This does not exclude, Melzer further observes, that the heightened tensions and other circumstances prevailing in an armed conflict will affect the interpretation and application of necessity, proportionality and precaution.[913] In other words, the reality of armed conflict will affect the legal classification of situations. As such, two different legal forms of law enforcement can be envisioned; one for peacetime and another for armed conflicts.

Two distinct forms of law enforcement were also envisioned in an expert meeting on the use of force in armed conflict. The law enforcement paradigm was held as the default regime in NIAC, but it was noted that the law enforcement regime would not be applied in the same way as in peacetime. It was held that the law enforcement paradigm is flexible, and can be adapted to the specific situation of an armed conflict.[914] It is not entirely clear how this understanding views the dividing line between the conduct of hostilities and law enforcement, but it was held that when the level of control is high and the intensity of violence low, the law enforcement paradigm 'continues to apply and is not displaced' by the conduct of hostilities paradigm.[915]

At the expert meeting on occupation, in turn, some experts similarly argued that the standards of law enforcement as entailed in IHL should be interpreted and applied more liberally in situations of occupation than in peacetime law enforcement. They argued that the standards for the use of force in peace time law enforcement could not be applied to law enforcement operations in situations of occupation.[916] As support for this interpretation, it was held that the type of violence inherent in situations of occupation would justify adjusting the principles of precaution, proportionality and necessity in order to enable the occupying power to do 'what was required under occupation law'.[917] It was pointed out that as per Article 27(4) of GCIV, the occupying power is authorised to take any security measure that 'may be necessary' during the occupation.[918] As observed by Melzer, authority

[913] Nils Melzer, *Targeted killing in international law* (Oxford monographs in international law, Oxford University Press 2008), 167.
[914] Gloria Gaggioli, *Expert meeting, The use of Force in Armed Conflicts: interplay between conduct of hostilities and the law enforcement paradigms* (International Committee of the Red Cross , 2013), 21.
[915] ibid.
[916] Tristan Ferraro, *Expert meeting: Occupation and other forms of administration of foreign territory* (International Committee of the Red Cross , 2012), 119.
[917] ibid, 120.
[918] GCIV, article 27(4) holds: 'However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.'

granted under Article 27(4) of GCIV confers powerful means to assume administrative responsibilities by the occupying force as well as to ensure its own safety.[919]

The position that the law enforcement regulations in occupation differ from peacetime law enforcement was, however, vigorously contested by other experts, who contended that any use of force other than conduct of hostilities remains subject to law enforcement standards similar to those dictated by IHRL.[920] It was submitted that the lawfulness of any deprivation of life unrelated to the conduct of hostilities had to be analysed against the same criteria as in peacetime. It was emphasised that this was not due to any flexibility of IHRL, but because the use of force in situations of occupation took place in circumstances that were evidently different.[921] Longobardo similarly argues that although some authors suggest a distinction between the law enforcement performed in the context of an armed conflict and that of peacetime law enforcement,[922] the difference between the exercise of law enforcement functions within a state and in a situation of occupation is insufficient to justify different terminology.[923]

What the suggestion of a distinction between law enforcement inside and outside armed conflicts reflects, however, is the fact that the aim and purpose of an armed conflict continues to influence the assessments of situations, and the decisions to engage in specific operations. As noted by Melzer, military necessity remains relevant in relation to security measures conducted in the context of an armed conflict, and Article 27(4) of GCIV grants the occupying force extensive authority to ensure its safety in a hostile environment.[924] However, Melzer holds that the necessity assessment for the resort to lethal force outside the conduct of hostilities cannot be based on the concept of military necessity underpinning Article 27(4) of GCIV. As a result, Melzer concludes, the resort to lethal force outside conduct of hostilities remains subject to the absolute necessity standard of IHRL.[925]

The gist thereby lies in the categorisation and legal classification of the threats posed in each specific situation. Such assessment is particularly challenging in post-conflict environments where threats that fall within the ambit of IHL intertwine with threats of a law enforcement character.

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[919] Nils Melzer, *Targeted killing in international law* (Oxford monographs in international law, Oxford University Press 2008), 160.
[920] Tristan Ferraro, *Expert meeting: Occupation and other forms of administration of foreign territory* (International Committee of the Red Cross, 2012), 120.
[921] ibid.
[922] As noted herein, Murray suggest the use of the term 'security operations' for law enforcement operations undertaken in the context of an armed conflict. See Daragh Murray, *Practitioners' Guide to Human Rights Law in Armed Conflict* (Dapo Akande and others ed, Oxford University Press in association with the Royal Institute of International Affairs (Chatham House) 2016), 91.
[923] Marco Longobardo, *The Use of Armed Force in Occupied Territory* (Cambridge University Press 2018), 187.
[924] Nils Melzer, *Targeted killing in international law* (Oxford monographs in international law, Oxford University Press 2008), 165.
[925] ibid, 165-166.

As further observed by Melzer in relation to the use of force against prisoners-of-war, which differs from the requirements on the use of force in IHRL, the logic of IHL must be considered in comparing law enforcement operations in the context of armed conflicts and peacetime law enforcement.[926] Thereby, the notions of military necessity and proportionality may influence the implementation of the law enforcement tasks by introducing military agendas or purposes into the assessment of what is necessary in terms of the use of force and other restrictions on human rights, such as freedom of movement, assembly and speech. These lingering military purposes of armed conflicts in the performance of law enforcement functions warrants consideration of a law enforcement model that differs from that of peacetime. Military aims and purposes also influence the understanding of the parameters of the use of force in peace operations, so that attention to the differing aims and purposes of peace operations and armed conflicts is therefore warranted.[927]

[926] Nils Melzer, *Targeted killing in international law* (Oxford monographs in international law, Oxford University Press 2008), 153.
[927] See further on the purposes of force herein in Chapter 11.3.

Section VI: *Conclusion— a normative framework for protection under* jus post bellum

14. A normative framework for effective, purposive and sustainable protection of civilians in United Nations peace operations

Since the first explicit mandate to protect civilians was introduced 20 years ago, it has become the *raison d'être* of peace operations. The protection of civilians is widely perceived as crucial to enable and maintain sustainable peace and security and the protection mandate has thus become a core priority for peace operations. Peace operations still struggle, however, to provide effective and adequate protection to civilians in the conflict and violence prone environments in which they operate.

One contributing factor for the lack of sufficient protection is that neither mandates nor the concept of protection is clearly defined, which has resulted in a variety of interpretations of what the concept entails. The lack of common understanding of the concept of protection risks undermining coordinated protection efforts, which, in turn, risks resulting in ineffective, and possibly misdirected protection activities. In order to enable protection engagements that are effective and purposive for each specific context and time period, and sustainable in the long-term, it is necessary to recognise and untangle different forms of security and protection, and to recognize the different legal contexts for protection, different legal categories of threats, and consequently the requirement of different forms of protection. Law provides important guidance to the identification and classification of threats, and thus constitutes an important foundation in the pursuit of peace and security in any context. Yet, law is surprisingly absent in both doctrine and guidance on protection.

In both scholarship and guidance instruments on protection, little attention has been afforded the underlying and long-term purpose of IHRL as a protective regime. In particular, there has been a lack of attention to the different scope of protection afforded in IHRL on the one hand, and in other regimes, such as IHL and state of emergency, on the other. There is, notably, a close relationship between respect for human rights and the maintenance of international peace and security, and systematic violation of human rights undermine national security and as a result may also constitute a threat to international peace and security.[928]

This research has revealed that the legal frameworks applicable to protection engagements in *jus post bellum*, namely IHL and IHRL, pursue different aims. While IHL enables protection from threats stemming from armed conflicts, and thus offers effective protection in short-term perspectives, IHRL guides protection engagements towards sustainable and long-term results. These different underlying premises of the respective frameworks result in the conclusion that the notion of protection is

[928] American Association for the International Commission of Jurists, Siracusa Principles: on the Limitations and Derogation Provision in the International Covenant on Civil and Political Rights (1985), Introductory note.

diametrically different in IHL and IHRL, necessitating determination of how these frameworks best contribute towards effective, purposive and sustainable protection of civilians under *jus post bellum*.

The present research has also revealed that IHL and IHRL provide very different forms of protection. While IHRL contains obligations to take positive action to provide protection to civilians, the protection afforded civilians under IHL is merely indirect, offered primarily through restrictions on force rather than positive obligations to protect. The positive obligations entailed in IHRL resemble the protection mandate afforded peace operations, whereas the ambitions reflected in the mandate to protect are poorly mirrored in IHL.

In fulfilling their authorized tasks, UN peace operations are bound by both IHL and IHRL. Law can apply to the UN as an organisation, to states contributing to the peace operation, or to both. IHL applies both to peace operations and to contributing states to the extent that they are involved as parties to an armed conflict. The applicability of IHRL, however, is more complicated. IHRL applies to the organisation either through the human rights obligations that are entailed in internal instruments and the Charter, or customary international law. By comparison, states contributing to peace operations are bound by IHRL either through the obligations of the organisation or through extraterritorial human rights obligations that arise as a result of their effective control in the mission area.

14.1. Primacy of IHRL: an individual- and human rights- centred approach to protection under *jus post bellum*

The mandate to protect civilians resembles the obligations entailed in IHRL. However, a distinction between positive and negative obligations as entailed in IHRL is warranted in relation to the protection mandate in peace operations. Field realities dictate that while both states and peace operations can be held to be legally obligated to observe negative obligations all the time irrespective of territorial boundaries, positive obligations should be limited to situations in which the peace operation or a contributing state is capable of exerting extraterritorial jurisdiction through territorial control. It is thus submitted that legal obligations to take positive action to protect arise with the kind and level of control that gives rise to extraterritorial jurisdiction, whereas any action taken that impacts an individual must ensure compliance with relevant law, including IHRL, as applicable.

Central to fulfilling the protection task is the use of force. However, the diametrically different regulation of the use of force in the two regimes results in their being fundamentally incompatible. As a result, identifying a dividing line between IHL and IHRL in relation to the use of force, and a justificatory regime for the application of IHL, is key to any legal guidance *jus post bellum*. As observed, the aims sought in *jus post bellum* and peace operations are incompatible with the aim,

purpose, and function of IHL, whereas they are compatible with the foundation, function, and aim of IHRL, which suggests that IHRL must be afforded primacy. However, given the complex and serious realities of *jus post bellum*, IHL cannot be entirely disregarded as a protection regime under *jus post bellum* due to the complex and highly volatile character of transitional environments. A first requirement for enabling transitions is to effectively combat the most serious threats, which may require the application of IHL and the rules on conduct of hostilities.

For the purpose of identifying a normative framework that enables both effective and sustainable protection engagements *jus post bellum* and that serves the ultimate aim to enable conditions that are conducive to sustainable peace and security, it is suggested that the law of NIAC and the law of occupation offer valuable contributions to identifying the role of IHL in protection under *jus post bellum*. Firstly, a distinction between NIAC regulated by CA3 and customary IHL and those also regulated by APII can enhance the protection of civilians under *jus post bellum* by providing a framework for distinction between different geographical and temporal scope of application of the IHL rules on conduct of hostilities.

In other words, while the intensity criterion entailed in CA3 can offer a threshold for application of temporally and geographically limited application of the rules on conduct of hostilities, the APII threshold, requiring organisational structures and military capabilities of a non-state armed group, thus providing for a higher threshold of applicability, can be held to justify a geographically and temporally more extensive application of the IHL rules on conduct of hostilities.

14.2. Extraterritorial derogation for enhanced protection of civilians under *jus post bellum*

For the purpose of maximizing the protection afforded civilians in violence prone transitions, the law on state of emergency can and should be utilized and held to apply extraterritorially. A protection regime that makes effective and adequate use of the right to derogate from IHRL does not require a resort to IHL to the same extent as if the right to derogate was not considered relevant.

Situations that threaten the state in its entirety, but that do not necessarily reach the threshold of intensity in order to give rise to a NIAC, or where the situation does not require application of the rules on conduct of hostilities in order to be effectively addressed, can be handled through invocation of the law on state of emergency. This would, for example, enable arrests and detention for security purposes, and would thus enable a peace operation to take preventative measures within the IHRL framework, halting a potential resumption of hostilities or the rise of a NIAC. As a result, the application of IHL would be minimized, whereby the protection of civilians would simultaneously be maximised in transitional environments.

The distinct nature and function of IHL and IHRL, and the different forms of protection provided through these frameworks result in a need to identify a dividing line between situations in which IHL is required to effectively deal with threats to civilians, and situations in which IHRL offers the most effective and sustainable form of protection. In assessing the relevance of IHL to protection engagements, however, it is first of essence to determine whether an armed conflict exists, and whether the engagement constitutes participation in the conflict. Only once these questions have been answered in the affirmative can IHL be considered as a protective regime under *jus post bellum*.

This research has found that three distinct thresholds for the application of IHL that would contribute to effective, purposive and sustainable protection of civilians under *jus post bellum* can be envisioned: (i) CA3 intensity of violence; (ii) APII intensity and organisation of armed groups; and (iii) distinction between resumption of hostilities, and the rise of a NIAC.

14.3. Threshold 1: Common Article 3 as a first threshold for the application of IHL in relation to protection engagements under *jus post bellum*

It is submitted that CA3 of the Geneva Conventions, providing a legal threshold of intensity of violence that goes beyond internal disturbances and riots, be used as a first threshold for applying IHL framework in protection engagements. The threshold dictated in CA3 is an indication, it is submitted, that the threat posed cannot be reasonably addressed within the law enforcement paradigm. Therefore, application of IHL rules to the conduct of hostilities is both legally applicable and adequate to deal with the threat at hand. However, this application, it is submitted, is best understood as limited geographically and temporally to the combat zone, to where and when the violence occurs. This is due to the long-term consequences and risks entailed in applying the rules on the conduct of hostilities too extensively in complex and vulnerable environments.

In this scenario, the criterion of control would not be relevant, since the rise of a situation reaching the threshold of CA3 assumes that the state or the peace operation does not exercise sufficient control to prevent such a situation from arising. The rules on targeting would in this scenario be applied as per the notion of direct participation in hostilities. In other words, targeting of an isolated fighter outside a combat zone as per the rules on targeting in IHL would not be permitted. IHL rules on conduct of hostilities would apply solely to the location and time of hostilities, and all other uses of force would be regulated by the IHRL law enforcement paradigm.

Furthermore, the potentially distinct forms of law enforcement in armed conflicts and peacetime can be considered. Inside the combat zone, law enforcement operations could be guided by the law enforcement obligations as dictated by the law of occupation. Such law enforcement operations inside a combat zone would consequently be influenced by the realities of armed conflict, and thus be guided

by the IHL principle of military necessity as an underlying foundation of all military operations in an armed conflict. Outside the combat zone, on the other hand, peacetime law enforcement would regulate any protective engagement, and the principle of military necessity or any other rationales for more 'brute' situations of battle or combat (namely the rationales underpinning the IHL rules on conduct of hostilities) would be invalid.

14.4. Threshold 2: Utilizing APII criteria for the application of IHL in relation to protection engagements under *jus post bellum*

Another threshold to be applied to the regulation of protection engagements under *jus post bellum* is that of APII, which, in addition to intensity, also requires that the parties are sufficiently organized and possess military capabilities akin to those of conducting concerted military operations. In such a scenario, it is submitted, the traditional application of IHL to the whole territory may be required in order to fulfil obligations to ensure security inside the state. It is recognized that protection must at times apply IHL extensively in order to minimize the spread of the violence and thus to prevent the threat of armed conflict spreading geographically across greater territory. Furthermore, it may be necessary to apply the rules on conduct of hostilities, in particular the rules on targeting, more extensively than to the location of hostilities, in order to combat the threat effectively.

Notably, effective control and a well-functioning law enforcement regime can be considered to exclude the applicability of the rules on conduct of hostilities, but the moment 'effectiveness wanes, an armed attack occurs and an armed conflict is renewed, those branches of law become applicable again.'[929] In order to determine such temporally and geographically broad application on the rules of targeting (to the 'isolated fighter'), it is suggested that the criterion of control be utilized. In other words, in situations reaching the legal threshold of APII, the IHL rules on the conduct of hostilities would apply throughout the territory and without the temporal limitations suggested under the CA3 threshold, where the state or the peace operation do not exercise control over the territory nor individuals. If, on the other hand, as also dictated in the law of occupation, the peace operation or the territorial state exercises effective control over territory or individuals, such extensive application of the rules on the conduct of hostilities is not necessarily required. Thus, the regulation of the use of force entailed in IHRL would regulate any force used against legitimate targets outside combat zones if the level of control so permits.

[929] Tristan Ferraro, *Expert meeting: Occupation and other forms of administration of foreign territory* (International Committee of the Red Cross, 2012), 144.

The rules on targeting would under this scenario be applied as per the notion of continuous combat function, which, it is held here, is equivalent to the targetability of combatants in international armed conflicts. In this scenario, the notion of military necessity may be relevant in order to determine the necessary engagements for the purpose of effectively addressing threats against civilians. As such, the notion of military necessity is held as relevant to guiding the determination of conduct in the broader context, such as planning and execution of military objectives. However, in applying the logic, aim and purpose on which the notion of military necessity is based, it must be noted that the ultimate aim and purpose of peace operations and *jus post bellum* differ, which necessitates careful balancing of the application of IHL rather than IHRL in protection engagements.

Making a distinction between CA3 and APII thresholds can offer a legal foundation for the argument that the geographical and temporal scope of application of the rules on the conduct of hostilities as entailed in IHL, can differ under *jus post bellum*. Such an argument may remedy the challenges reflected in the debate on both the threshold and the scope of the law of targeting in NIAC. As observed herein, there is a thesis that situations that trigger the operation of CA3 may give rise to the rules on the conduct of hostilities, and as such permit targeting as per the notion of direct participation in hostilities. It submitted that the application of the IHL paradigm on the conduct of hostilities in situations governed solely by CA3 should be held as limited to the geographical location of hostilities, and only for their duration. The APII threshold, on the other hand, justifies a temporally and geographically extended application of the rules on the conduct of hostilities. Such a distinction can thus ensure that the applicability of the extensive force permitted through IHL is allowed in the most serious situations. Thus, this would offer the most extensive protection to civilians possible in complex transitional environments. It would also ensure that approaches adopted in various tasks, including the protection of civilians, contribute towards the long-term aims sought.

14.5. Threshold 3: distinguishing between resumption and rise of a conflict

It is further submitted that threats stemming from the original conflict may warrant yet another approach to identifying the dividing line between IHL and IHRL in protection engagements. Here, the law of occupation can, through analogy, offer legal guidance on the dividing line between IHL and IHRL. Key to the law of occupation is the notion of control. When an occupying power has ensured a sufficient level of control over territory or individuals, a legal requirement to distinguish between the conduct of hostilities and law enforcement obligations arises.

The identification of a dividing line between IHL and IHRL in relation to the original conflict can be informed by the notion of impact-based human rights obligations proposed in the recently published General Comment 36 on the right to life. It is suggested here that such impact-based approach to

identifying obligations relating to the right to life be distinguished from the doctrines based on extraterritorial jurisdiction, which arises as a result of control over territory or individuals. The approach suggested here also enables a distinction between positive and negative human rights obligations. While impact-based obligations are generally limited to negative obligations of the right to life, extraterritorial jurisdiction gives rise to an obligation to ensure positive action to enable protection from a larger scope of human rights.

It is also submitted, however, that the realities of *jus post bellum* and transitional environments may warrant a scale, or a hierarchy of human rights, which suggest that not even when extraterritorial jurisdiction has arisen does it bring with it an obligation to ensure protection from the whole panoply of human rights. A requirement to protect all human rights in extraterritorial settings, and in particular in post-conflict environments, would be unrealistic, and thus risk reducing the likelihood of such approach being accepted by states. In order to determine what rights are to be protected when in the different phases of transition, peace and conflict research can offer guidance. While there is significant research into what prevents war, the research into what makes peace, and what makes peace sustainable, is less developed. Some empirical support does exist, however, for the conclusion that the rights to life and liberty are of primary importance in order to build sustainable peace and security. Thus, a scale of control and a corresponding level of intensity can guide the scope of obligations in such settings. A high level of control and a low intensity of violence would result in a broader scope of obligations, whereas a low level of control and a high level of intensity would reduce the scope of protective obligations.

In situations where control has given rise to extraterritorial jurisdiction, it is further submitted, a right to derogate from human rights obligations in extraordinary circumstances could enable a valuable bridge between situations of armed conflict and peaceful conditions and thus contribute to legal clarity in complex transitional environments. Although extraterritorial derogation has been largely rejected, it is submitted that the acceptance of a right to derogate in extraterritorial settings could enhance the protection of civilians and contribute to enhanced legal clarity for protection engagements in *jus post bellum*. Such approach to the law on state of emergency can be particularly valuable to consider in order to deal with situations that may not be easily classified as falling within either IHL or IHRL. Recognition of the relevance of the law on state of emergency could enable peace operations to extend the broadest possible applicable scope of IHRL, including in exceptionally challenging situations, and thereby limit the application of the more permissive and less protective regime of IHL. Here, attention to the fact that the nature and function of IHL offers limited support to the long-term aims and purposes of peace operations, and that IHL should thus be limited to when it is absolutely necessary, may contribute to identifying a dividing line between IHL and IHRL in protection engagements under *jus post bellum*.

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