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# Unexpected Challenges: The Increasingly Evident Disadvantage of Considering International Humanitarian Law in Isolation

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# **Unexpected Challenges: The Increasingly Evident Disadvantage of Considering International Humanitarian Law in Isolation**

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## **I. Introduction**

I have been invited to address any topic relating to emerging issues in international humanitarian law (IHL). When considering which subject to address, I decided to avoid a specific IHL topic, some of which are being addressed in depth during this symposium, but rather to take a step back and consider some of the more fundamental challenges that IHL is now facing.

The most pressing challenge, in my opinion, is the trend of IHL being misused to justify killings which are of dubious legality under the law relating to the use of inter-State force. The purpose of IHL is supposed to be to prevent avoidable death and destruction, not the reverse. I am thinking here primarily of the rise in targeted killings abroad of non-State actors, on the basis that these are justified as attacks on fighters in a non-international armed conflict. Such attacks have been facilitated by the increased availability of armed drones. It needs to be remembered that any practice that is acquiesced in by the international community can then easily be undertaken by other countries against targets that they perceive as threats. Furthermore, this trend is straining further the two classical IHL categories, into which various activities, such as U.N. operations and mixed conflicts, do not easily fit. There needs to be a serious reconsideration of whether it is possible to speak of “rules of armed conflict” without first classifying the violence as international or non-international.

The other topic I wish to address is a development which invites IHL specialists to seriously rethink the reasons why so many IHL rules are violated. Recent findings by human rights procedures have illustrated that a culture of human rights violations leads to serious humanitarian law violations. This has been indisputably proved in the area of violence against women. I am convinced that the same is the case for many other rules of IHL.

These two seemingly unrelated topics have one point in common: the separation of IHL from other bodies of law, although technically accurate, can be an illusion in reality. The non-respect of other branches of international law can, and increasingly does, have a direct negative effect on a genuine respect of the purpose and spirit of IHL. Several branches of international law are important to achieve what IHL is intended to do, for example, certain aspects of environmental law, air law or cultural property law. However, for the purpose of this presentation, I will limit my comments to the law regulating inter-State force and human rights law.

## **II. Perverse Effect on IHL by the Non-Respect of the Rules Limiting Inter-State Force**

### ***A. Unrealistic Expectations That IHL Can Compensate for Violations of the U.N. Charter***

Everyone is aware of the degree to which Article 2(4) of the U.N. Charter has been disrespected. With a few exceptions, such as Iraq’s invasion of Kuwait, and Indonesia’s invasion of East Timor, invading nations have for the most part gotten away with their aggression. Some have had to retreat due to military confrontation by the invaded nation,

such as Russia in Afghanistan and Argentina in the Falklands, but for the most part wars have increasingly come to be seen as “inevitable,” even by international lawyers. It is my theory, which I cannot prove, that the progressive disrespect of the rules prohibiting force in the U.N. Charter has led to an increased acceptance by many nations, and other groups, of the use of force. The difficulty with which the crime of aggression was included in the Statute of the International Criminal Court is evidence to this effect.<sup>1</sup> A serious low point, as far as the behavior of western nations is concerned, was the bombardment of Kosovo in 1999 by NATO without a self-defense justification and without even a semblance of trying to get United Nations’ advance approval. Such a mentality helped pave the way for the invasion of Iraq in 2003, which was an egregious violation of the U.N. Charter.<sup>2</sup>

All of this has concentrated attention on the rules of IHL. I, like many others, have worked hard to make these rules known, and helped their modernization to match developments in technology and new practices. However, IHL was never meant to solve political and social problems. The respect of its rules will not prevent the death, destruction, suffering, and long-term misery, economic and otherwise, that armed conflict inevitably entails. Concentrating on IHL as the principal means to alleviate violence and horror is a major mistake, as this is to expect too much of what IHL can do. The decision made by the International Committee of the Red Cross (ICRC) in the late 1980s to educate the general public in at least one fundamental rule of IHL, namely, that civilians are not to be targeted, at least had the effect of newspapers reporting on this issue and human rights groups actively denouncing violations of IHL.<sup>3</sup> I was very much involved in encouraging this development. However, the result is that many people now have the idea that any civilian casualties must mean that violations have occurred—which we know is not the case. Indeed, even in the case of the intervention in Libya, further to U.N. Security Council Resolution 1973 in 2011, dozens of civilian casualties have been reported, even though the purpose of the mandate was to protect civilians.<sup>4</sup> It should have been obvious to anyone that, even with the best of care, an air campaign was bound to result in civilian casualties, as military activity was likely to occur near or in urban environments. Also, as the journalist David Rieff comments: “War, even

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1. As a member of the International Committee of the Red Cross (ICRC) Delegation to the Rome Conference in 1998, I experienced the difficulties involved firsthand. However, it has been described by other authors, e.g., Noah Weisbord, *Prosecuting Aggression*, 49 HARV. INT’L L.J. 161, 170–71 (2008).
  2. Justifications based on prior U.N. Security Council resolutions do not stand up to scrutiny. See S.C. Res. 1441, U.N. Doc. S/RES/1441 (Nov. 8, 2002) (not authorizing the use of force); S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990) (which only authorized the use of force to remove Iraq from Kuwait); S.C. Res. 687, ¶¶ 12, 22, U.N. Doc. S/RES/687 (Apr. 8, 1991) (adopted after Kuwait was liberated and insisting that Iraq abandon all weapons of mass destruction; the only consequence, if this was not undertaken, was that the economic sanctions against Iraq would not be lifted). Furthermore, the preamble to S.C. Res. 687 “[a]ffirm[ed] the commitment of all Member States to the sovereignty, territorial integrity and political independence of . . . Iraq.” *Id.* pmb. ¶ 2.
  3. Since the 1990s, Human Rights Watch and Amnesty International have regularly written reports on the respect or otherwise of international humanitarian law. See, e.g., CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW (Roy Gutman & David Rieff, eds., 1999).
  4. S.C. Res. 1973, ¶ 4, U.N. Doc. S/RES/1973 (Mar. 17, 2011). On civilian casualties, see C. J. Chivers & Eric Schmitt, *In Strikes on Libya by NATO, an Unspoken Civilian Toll*, N.Y. TIMES (Dec. 17, 2011), <http://www.nytimes.com/2011/12/18/world/africa/scores-of-unintended-casualties-in-nato-war-in-libya.html>.

when it is waged for a just cause and with scrupulous respect for international humanitarian law, always involves a descent into barbarism (think of the way Qaddafi died).<sup>5</sup> With the possible exception of the short Falklands War in 1982, it is difficult to think of an exception to this observation.

In other words, IHL cannot take the place of the original intention of the U.N. Charter, which was to prohibit the use of armed force against other nations. The purpose of the self-defense exception in Article 51 was to allow an invaded nation (inevitably, illegally invaded) to defend itself until the Security Council took over using Chapter VII. The blockage in the Security Council until 1989 prevented this,<sup>6</sup> but the end of this state of affairs should have enabled the original purpose of the United Nations to be implemented. As the preamble to the U.N. Charter makes clear, in order “to save succeeding generations from the scourge of war,” it is necessary “to practice tolerance,” to ensure that “armed forces shall not be used, save in the common interest” and, most importantly, to “employ international machinery for the promotion of the economic and social advancement of all peoples.”<sup>7</sup> Although some efforts have been made to this effect, the logic of power politics has still held sway.

The ongoing result is the continued use of force by governments, non-State groups and criminals (whether labeled terrorists or not) and the perception that this is the way to solve problems. It is not. Armed force is very good at capturing or recapturing territory, or repelling an armed attack, but, in my opinion, that is all. IHL rules are logical and effective for the purpose of capturing territory efficiently with the least possible destruction and loss of life. The rules were developed against such a background and still make perfect sense in that context. However, it needs to be properly questioned whether killing members of terrorist groups will actually make that terrorism go away.<sup>8</sup> Certainly it was not the use of force in Northern Ireland that finally solved the problem of resentment and associated violence, but rather the very difficult process of achieving sufficient mutual understanding between the groups to agree to a genuine peace process.

It is against this background that I am voicing serious concern about the process by which violations of Article 2(4) of the U.N. Charter have been justified by using IHL. Targeted killings against suspected terrorists abroad have been justified on the basis that there is an armed conflict with al-Qaeda and associated groups. As such, their members are to be seen as fighters that can be targeted. As these groups do not represent a State, and there is

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5. David Rieff, Op-Ed., *R2P, R.I.P.*, N.Y. TIMES (Nov. 7, 2011), <http://www.nytimes.com/2011/11/08/opinion/r2p-rip.html> (commenting on the negative effect of using force under the “Responsibility to Protect” banner, using the intervention in Libya as an example).

6. The effect of the Cold War was to prevent the adoption of many resolutions by the U.N. Security Council, largely, although not entirely, due to vetoes by the USSR. After the fall of the Berlin Wall, and the dissolution of the USSR, the Security Council began to adopt numerous resolutions, but, with the exception of Resolution 678 in 1990, none took action further to an act of aggression. Weisbord, *supra* note 1, at 169.

7. U.N. Charter pmb.

8. The result can indeed be the reverse. See comments to this effect in two articles published in the *International Herald Tribune* on April 15, 2010: Mark Medish & Joel McCleary, Op-Ed., *Assassination Season Is Open*, INT’L HERALD TRIB., Apr. 15, 2010; Robert Wright, Op-Ed., *The High Cost of Political Killing*, INT’L HERALD TRIB., Apr. 15, 2010.

understandably no intention of according prisoner of war (POW) status to any that might be captured, the conflict has been classified as a non-international one. This justification is an abuse of IHL. In fact it is the very acceptance of such use of force on another State's territory as a non-international conflict that I consider to be a major mistake. Common Article 3 (Article 3) of the four Geneva Conventions was motivated by the desire to introduce basic IHL rules to protect persons not, or no longer, taking part in hostilities during civil wars.<sup>9</sup> This is abundantly clear not only from the wording of that article,<sup>10</sup> but also from the commentary to this provision. The discussion of delegates during the negotiation of this article spoke exclusively of insurgents resisting the incumbent government inside a single State.<sup>11</sup> Furthermore, the rules within the article refer exclusively to the protection of those in the hands of the other party to the conflict, including an obligation to collect and care for the sick and wounded. Targeting someone in another country through the exclusive use of drones or other air power makes it automatically impossible to respect these provisions. Article 3 was clearly never meant to apply to such a situation.

Although this point is relevant for any cross-border operations using air power, there is a greater danger now that the acquisition of drones has increased exponentially. Even Iran has just shown off its first domestically-built armed drone with a range of 620 miles.<sup>12</sup> Although the argument in favor of drones is that the operators can take more care on accurate targeting than a stressed pilot,<sup>13</sup> there is also no doubt that drones could create a huge temptation for many States to use force against targets in other countries.<sup>14</sup> Their own armies would not be put at risk. As they are manipulated through a computer, it would not necessarily be evident where the attack originated (unless drones display the national flag as aircraft are required to do under customary rules). In fact, we are on the edge of what could be a descent into a nightmare if firm measures are not taken to insist on the importance of the prohibition of the use of force. Insisting that such cross-border activities are not non-international actions needs to be part of this effort.

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9. See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].
  10. The article states: "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . ." *Id.*
  11. See, e.g., ICRC, COMMENTARY ON THE GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 49–50 (Jean S. Pictet ed., 1952); ICRC, COMMENTARY ON THE GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED, SICK AND SHIPWRECKED MEMBERS OF THE ARMED FORCES AT SEA 33 (Jean S. Pictet ed., A.P. de Heney trans., 1960); ICRC, COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 35–37 (Jean S. Pictet ed., A.P. de Heney trans., 1960) [hereinafter COMMENTARY ON GENEVA CONVENTION III]; ICRC, COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 35–36 (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958). Extending the interpretation to include non-governmental forces fighting each other within a State does not undermine either the language of the provision or its main intention and is therefore acceptable.
  12. *Iran Unveils First Bomber Drone*, BBC NEWS (Aug. 22, 2010), <http://www.bbc.co.uk/news/world-middle-east-11052023>.
  13. See, e.g., Jack M. Beard, *Law and War in the Virtual Era*, 103 AM. J. INT'L L. 409, 431–33 (2009).
  14. *Id.* at 443.

**B. Re-Interpretation of “Non-International Conflict” as a Result of the Deterioration of the Rules Prohibiting the Use of Force**

The approach that seems to have been adopted in recent years is to classify any conflict that is not inter-governmental as non-international. I can see the semantic logic of this, but it is not the intention of Article 3. Kenneth Anderson dates the abusive use of Article 3 to the judgment of the U.S. Supreme Court in the *Hamdan* case, which applied this article to the treatment of Guantanamo detainees, thereby implying that it can apply to “a borderless terrorist group.”<sup>15</sup> As Anderson says in that article, it would have simply been better to insist on the application of minimum standards. In 1949, Article 3 provided the only binding legal standards for the protection of detained persons, whereas now, human rights law and more recent treaty and customary IHL are the relevant sources. The other reason why Article 3 is not the proper source is the standard required for that article to apply, namely, the organization of rebel forces and the intensity of fighting.<sup>16</sup> The intensity criterion is not normally met with most terrorist attacks. As the commentary to Article 3 says: “it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with *armed forces* on either side engaged in *hostilities*—conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country.”<sup>17</sup>

The misuse of Article 3 of the Geneva Conventions has been made possible by the dangerous deterioration of the interpretation of Articles 2(4) and 51 of the U.N. Charter. The purpose of separating the *jus ad bellum* from the *jus in bello* was to ensure that invaded nations could not argue that, as they had been the victim of aggression, IHL should not apply to them. As the ICRC needs to remain neutral as to which party is responsible for an aggression, it avoids addressing the *jus ad bellum*. However, it is a mistake for other international lawyers to treat IHL as totally divorced from the effects of how force is used and the justification given for it. Non-ICRC personnel may, and indeed should, publicly comment on whether such justifications are acceptable.

If we are to avoid a world of increased anarchy, violence and chaos, it is important to understand how we have reached a situation where many States seem to be accepting, or at least not vociferously objecting to, the killing of hundreds (maybe thousands) of people on another continent, supposedly in the absence of an international armed conflict. As commented on by John Bellinger III: “For several years, U.S. allies have made no public comment even as U.S. drone strikes have killed twice as many suspected al-Qaeda and Taliban members than were ever imprisoned in Guantanamo Bay.”<sup>18</sup>

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15. Kenneth Anderson, *More Predator Drone Debate, in the Wall Street Journal, and What the Obama Administration Should Do as a Public Legal Position*, THE VOLOKH CONSPIRACY (Jan. 9, 2010), <http://www.volokh.com/2010/01/09/more-predator-drone-debate-in-the-wall-street-journal-and-what-the-obama-administration-should-do-as-a-public-legal-position/>.

16. See, e.g., Prosecutor v. Haradinaj, Balaj, Brahimaj, Case No. IT-04-84-T, Judgment, ¶¶ 37–60 (Int’l Crim. Trib. for the Former Yugoslavia (Apr. 3, 2008), available at <http://www.icty.org/x/cases/haradinaj/tjug/en/080403.pdf> (discussing the definition of a non-international armed conflict).

17. COMMENTARY ON GENEVA CONVENTION III, *supra* note 11, at 37.

18. John B. Bellinger III, *Will Drone Strikes Become Obama’s Guantanamo?*, WASH. POST (Oct. 2, 2011), <http://www.washingtonpost.com/opinions/will-drone-strikes-become-obamas-guantanamo/2011>

The trend towards a regression from the standards in the U.N. Charter has been well described by Christian Tams, in his article entitled *The Use of Force against Terrorists*, published in the *European Journal of International Law*.<sup>19</sup> This article describes the fact that until the end of the 1980s it was the accepted view of the vast majority of States,<sup>20</sup> supported by the International Court of Justice,<sup>21</sup> that the interpretation of Article 51 of the U.N. Charter was to be interpreted restrictively. In this regard, there is a deliberate difference between the words “any use of force” in Article 2(4) and “armed attack” in Article 51. The term “armed attack” in that article had to be one undertaken by a State directly. If undertaken by a non-State actor, it had to be attributable to another State, i.e., effectively controlled by it.<sup>22</sup> Additionally, the International Court of Justice stressed in the *Nicaragua* case (1986) and the more recent *Oil Platforms* case (2003), that attacks would need to reach a certain threshold of violence in order to trigger the right of self-defense.<sup>23</sup> This means, therefore, that for the vast majority of terrorist activity, the use of force could not be justified by the doctrine of self-defense. This was the view of the vast majority of States also, despite the fact that they had been at the receiving end of terrorism for decades. Counter-terrorism treaties concentrated on cooperation in criminal prosecution and other non-forcible measures, as the majority of States feared that allowing the use of force against terrorists would inevitably “invite abuse.”<sup>24</sup>

With regard to the position in the present day, States still refer to self-defense as the justification for the use of force against terrorists, and the International Court of Justice has not changed its opinion on the meaning. However, since the 1990s, States seem less keen to criticize an attack against non-State actors abroad. In his article, Tams referred not only to the general acceptance of the use of force against Afghanistan following the 9/11 attacks,<sup>25</sup> but also to the lack of criticism to the practice of resorting to the use of force against certain

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/09/30/gIQA0ReIGL\_story.html. John Bellinger III was a legal adviser for the U.S. State Department from 2005 to 2009 and at the time of writing the article he was an adjunct senior fellow at the Council on Foreign Relations. The statement, therefore, cannot be in the nature of a mere allegation.

19. Christian J. Tams, *The Use of Force against Terrorists*, 20 EUR. J. INT'L L. 359 (2009).
20. *Id.* at 363 (citing G.A. Res. 2131, U.N. Doc. A/RES/20/2131 (Dec. 21, 1965); G.A. Res 25/2625, U.N. Doc. A/RES/25/2625 (Oct. 24, 1970); G.A. Res. 29/3314, U.N. Doc. A/RES/29/3314; and G.A. Res. 42/22, U.N. Doc. A/RES/42/22 (Nov. 18, 1987)). *See also id.* at 367 (pointing out that attempts by a few States to use self-defense to justify attacks on terrorists in another country were always rejected by the international community).
21. *Id.* at 363 (citing, in particular, the landmark ICJ rulings, *Corfu Channel* (1949) and *Nicaragua* (1986)).
22. *Id.* at 368–69.
23. *Id.* at 387.
24. *Id.* at 373.
25. Serious concern about the unilateral use of force against non-State actors abroad was already voiced by Antonio Cassese in 2001. Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 996–97 (2001). He pointed out, in particular, that Security Council Resolution 1638, adopted shortly after the attacks of 9/11, was “ambiguous and contradictory” because although the preamble referred to the right of self-defense, operative paragraph 1 referred only to a “threat to peace” and not an “armed attack.” *Id.* The seeming acceptance of unilateral action without a Security Council authorization meant that States assimilated “a terrorist attack by a terrorist organization to an armed aggression by a state, entitling the victim state to resort to self-defence.” *Id.* at 997.

groups in a number of other cases, e.g., by Turkey against the PKK in Iraq, by Russia against Chechen bases in Georgia, etc.<sup>26</sup> He noted that many of these actions were more in the nature of reprisals or self-help than traditional concepts of self-defense. Furthermore a lot of the attacks by terrorists could not be said to have been controlled by the State they were based in. Tams suggested, therefore, that a better way to understand contemporary State practice is to recognize that the level of attribution required has changed from one of control to one of “complicity in the activities of terrorists based on its territory,” in other words, a form of “aiding and abetting” the terrorists’ conduct.<sup>27</sup> He was of the view that this development had occurred because of the international community’s determination to fight terrorism, but at the same time he recognized the risk of abuse. In particular, if in the future States were to generally accept an accumulation of small attacks as a basis for the use of self-defense, this would undermine “the temporal dimension of self-defence and risk[] turning a temporal right into an open-ended licence to use force.”<sup>28</sup> He did not think that this had yet occurred but that there was a risk that it could. In his article, Tams hoped, therefore, that Operation Enduring Freedom in Afghanistan, “which has turned into a self-perpetuating military campaign serving a range of objectives . . . will remain an isolated deviation from the general rule.”<sup>29</sup>

Tams’ article was published in 2009. It is evident that the “deviation” described by Tams was not temporary, at least not in the light of the targeted killing policy of the present U.S. administration. The rationale for the policy is described by John Bellinger III in the following manner:

The United States . . . believes that drone strikes are permitted under international law and the United Nations Charter as actions in self-defense, either with the consent of the country where the strike takes place or because that country is unwilling or unable to act against an imminent threat to the United States. . . .

Obama administration officials have explained . . . that strikes against particular militant leaders are permissible, either because the individuals are part of the overall U.S. conflict with al-Qaeda or because they pose imminent threats to the United States.<sup>30</sup>

He adds, however, that:

No other government has said publicly that it agrees with the U.S. policy or legal rationale for drones. European allies, who vigorously criticized the Bush administration for asserting the unilateral right to use force against terrorists in countries outside Afghanistan, have neither supported nor criticized reported U.S. drone strikes in Pakistan, Yemen and Somalia. Instead, they have largely looked the other way . . .<sup>31</sup>

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26. Tams, *supra* note 19, at 378–81. Other examples include force by Colombia against members of the FARC in Ecuador, and by Rwanda, Tajikistan and Burma, who responded to cross-border attacks by rebels by moving their troops into neighboring States, and by Israel against Hezbollah in Lebanon. *Id.* Criticism of Israel’s action in 2006 concentrated on its disproportionate use of force, rather than the decision to resort to the use of force. *Id.* at 379.

27. *Id.* at 385–86.

28. *Id.* at 389.

29. *Id.* at 390.

30. John B. Bellinger III, *Obama’s Drone Danger*, WASH. POST, Oct. 3, 2011, at A17.

31. *Id.*

It is my theory that one of the major reasons why the rules prohibiting recourse to the use of force have been allowed to lapse to such a degree is that there are no significant non-governmental organizations dedicated to criticizing violations. There can be no doubt that the amount of attention to international human rights law and to IHL is thanks to the efforts of such organizations. However, most human rights organizations do not address the issue of the validity of any particular inter-state force under the rules of the U.N. Charter, for reasons that do not seem particularly convincing to me.<sup>32</sup>

Various elements are relevant to this situation: is the justification given by the U.S. government a reflection of present law? Should it be in the light of the potential implications? What is its effect as far as IHL is concerned?

### ***C. Evaluation of the Stated Rationale for Attacks on Individuals Abroad***

An increased acquiescence to such strikes on non-State actors, including individuals, in another State's territory could in due course adjust customary law to allow for them. The actual legal rationale, however, remains unclear.<sup>33</sup>

Attacks with the consent of the government may, at first sight, seem a reasonable justification, but there are two potential problems. The first is that a State has human rights obligations toward those within its jurisdiction and normally extra-judicial executions are a violation of the right to life.<sup>34</sup> Only if a person is a threat to life and it is impossible to arrest him or her before that person takes another life, is lethal force permissible.<sup>35</sup> Asking or allowing another State to attack such a person outside such a situation is a violation of the asking State's human rights obligations, and the attacking State is complicit in that violation. It may be argued that the situation would be different if the State in which the attack is to take place is in a non-international armed conflict and the person concerned is one of the insurgent fighters. From an IHL point of view, this would not be problematic as such, but it could amount to unlawful interference in the internal affairs of another State. In an article I wrote some time ago for the *British Yearbook of International Law*, I argued that if a government is in difficulty because of an insurrection, it may not lawfully call on another State to aid it.<sup>36</sup> This conclusion was based on the fact that all governments that requested

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32. The International Commission of Jurists (of which I was Secretary-General at the time) was one of the very few organizations that published a view that the invasion of Iraq in 2003 was illegal. I consider it also appropriate that Philip Alston, the U.N. Special Rapporteur on extrajudicial, summary, or arbitrary executions, also addressed the issue of the use of inter-State force in his study on targeted killings. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, Human Rights Council, ¶¶ 34–45, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) [hereinafter *Study on Targeted Killings*].

33. See NILZ MELZER, TARGETED KILLING IN INTERNATIONAL LAW 51–55 (2008) (summarizing various explanations and the difficulties associated with them).

34. Extra-judicial executions are an arbitrary deprivation of life contrary to all the major human rights treaties. For a description, including during times of conflict, see LOUISE DOSWALD-BECK, HUMAN RIGHTS IN TIMES OF CONFLICT AND TERRORISM ch.6 (2011).

35. Code of Conduct for Law Enforcement Officials, G.A. Res. 34/169, Annex at art. 3, cmt (c), U.N. Doc. A/RES/34/169 (Dec. 17, 1979).

36. Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 1985 BRIT. Y.B. INT'L L. 189.

outside help justified the request on the basis of self-defense, alleging that the rebels were encouraged and helped by another State.<sup>37</sup> If a government no longer has control of a State because of a serious insurrection, it should no longer be seen as the sole representative of that State.<sup>38</sup>

The second basis articulated for such attacks is that the State in which the non-State actor is based is “unable or unwilling” to stop the threat to another State. This ground seems to be accepted by some commentators, albeit within strict limits.<sup>39</sup> Cassese, for example, pointed out that the network of cells making up al-Qaeda was based in about sixty States. These individuals were therefore involved, in one form or another, in aiding or abetting the attacks of 9/11. It could hardly be accepted that all the countries in which these individuals operated could be subject to attack, not without risking a third world war. He suggested, therefore, limiting any action in self-defense to an attack on terrorist headquarters, which in this case was considered to be in Afghanistan. Further he stressed the need to bring alleged terrorists to justice as well as to go beyond repressive measures. He pointed out that the long-term perspective has to address social inequalities, poverty, ignorance and other endemic problems that lie at the root of terrorism.<sup>40</sup> This point has been recognized by the U.N. Global Counter-Terrorism Strategy which includes “measures to address the conditions conducive to the spread of terrorism.”<sup>41</sup>

#### ***D. Reasons to Maintain the Traditional Post-Charter Interpretation of Self-Defense***

There are a number of reasons why drone attacks against individuals are a problem from both a legal and practical point of view. First, the covert nature of drone attacks means that it is probably impossible to evaluate the validity of intelligence information that underpinned the decision to use force. The likelihood of mistakes is high.<sup>42</sup>

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37. I have not seen any change in State practice in this regard.

38. Ian Brownlie, writing in 1960, was already of the view that such justification was dubious: he considered that a government giving support to a beleaguered regime was objectionable because of the principles of self-determination and non-interference in internal affairs, and because of the danger of making an internal armed conflict an international one. IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 327 (1963) (incorporating this idea from Brownlie’s 1960 thesis).

39. See, e.g., *Study on Targeted Killing*, *supra* note 32, ¶¶ 35–41; Elizabeth Wilmshurst, *Principles of International Law on the Use of Force by States in Self-Defence* princ. 6 (Chatham House, Working Paper No. 05/01, 2005) [hereinafter *Chatham House Principles*], available at <http://www.chathamhouse.org/publications/papers/view/108106>. The Chatham House Principles were the result of a study to provide a statement on the rules of international law governing the use of force in self-defense. The participants were present and former principal legal advisers to the U.K. Foreign Office as well as leading British specialists in international law.

40. Cassese, *supra* note 25, at 999–1001.

41. G.A. Res. 60/288, Annex at I, U.N. Doc. A/RES/60/288 (Sept. 8, 2006).

42. One needs only to consider the number of persons held in Guantanamo who turned out to be innocent. As another example, in July 2005 British police thought they were killing a suicide bomber in London; the victim was an innocent Brazilian electrician.

Secondly, given that IHL governing international conflicts should apply, attacks have to be limited to military objectives, to combatants (if any)<sup>43</sup> and to persons taking a direct part in hostilities (which would probably be the terrorists here). Notwithstanding the Interpretative Guidance of the ICRC on the term “Direct Participation in Hostilities,” this still allows a degree of latitude in its practical application.

Third, although it may be argued that such attacks are discrete events and aimed at dangerous individuals, their effects should not be underestimated. There appears to be no clear indication of how many innocent persons are killed or injured in these attacks or how proportionality is assessed in advance. Additionally, many people suspected of giving information to those responsible for such attacks are murdered, as they are considered to be collaborators by members of the local population.<sup>44</sup> This should not come as a surprise; it is indeed to be expected.

Fourth, if a departure is made from the strict interpretation of “armed attack,” then quite a range of persons could be seen as targetable by some States. Many States, unfortunately, define “terrorism” in quite a lax way as covering anyone who disagrees with State policy.<sup>45</sup> Several regional treaties are frighteningly lax in their interpretation of “terrorism.”<sup>46</sup> The argument that people demanding change are being supported from abroad remains common—it is not beyond imagination that persons based abroad encouraging democratic change could be seen as a valid target.

At the other end, civilians that are firing the drones are most certainly taking a “direct part in hostilities,” and are therefore valid targets under IHL. This further weakens the distinction between combatants and civilians. A rather radical way around this problem is suggested by Kenneth Anderson. After having correctly noted that attacks on al-Qaeda abroad cannot be classified as a non-international armed conflict, he proposes avoiding IHL altogether by returning to traditional notions of self-defense. As he puts it: “Self-defense gives the discretionary ability to attack anywhere in the world where a target is located, without having to make claims about a state of armed conflict everywhere and always across the world.”<sup>47</sup>

This would mean that military action in self-defense against terrorist groups would exclude the application of IHL because such action would not be an “armed conflict.” This suggestion is very similar to notions of “measures short of war” that were common as

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43. If the so-called terrorists are acting on behalf of the State, then they could be combatants if they conform to the criteria in Article 4 of Geneva Convention III or Article 43 of Additional Protocol I for States party to that treaty.

44. See Ray Rivera et al., *A New Terror in Afghanistan: Death Squads*, INT’L HERALD TRIB., Nov. 30, 2011, at 5. In the case of Afghanistan, death squads kill suspected collaborators, including those considered to have given information enabling the choice of targets for drone attacks.

45. This general problem is described in the *Report of the U.N. High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism* ¶¶ 15, 20, 22–23, U.N. Doc. A/HRC/8/13 (June 2, 2008).

46. E.g. Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism, 1999 art. 1, June 4, 1999, available at <http://www.unhcr.org/refworld/docid/47fd9b290.html>; Convention of the Organisation of the Islamic Conference on Combating International Terrorism, art. 1, ¶ 2, July 1, 1999, Annex to Resolution No. 59/26-P, available at <http://www.unhcr.org/refworld/docid/3de5e6646.html>.

47. Anderson, *supra* note 15.

justifications for the use of force prior to 1914. As described by Ian Brownlie in his very well researched book on the use of force, “war” in the past depended on the intention to be in a state of war.<sup>48</sup> States that wanted to avoid the rules that were required for “war” argued another ground, such as self-defense, self-preservation, necessity or self-help. His analysis showed that these grounds were in reality not distinct, were used by States whenever convenient, and did not in practice reflect a rule of law.<sup>49</sup> Suggestions to go back to such a scenario do not fill one with confidence—after all, the first half of the twentieth century was not exactly known for its peaceful nature! The 1949 Geneva Conventions specifically apply to armed conflicts, whether a state of war is recognized or not,<sup>50</sup> precisely to avoid this situation.

A similar argument to that of Ken Anderson is made by Solon Solomon. He does not suggest avoiding IHL altogether, but proposes that actions violating IHL should be acceptable if such actions are in keeping with the right of self-defense. Using the example of Gaza, Solomon accepts that the economic sanctions that were imposed on Gaza could arguably be seen as amounting to “collective punishment,” which is prohibited under IHL, but which should be seen as an acceptable self-defense measure that is better than open hostilities.<sup>51</sup>

It is unclear which proposal is more troubling—suggesting that IHL doesn’t apply at all, or that it does, but that violations should not be considered a problem if the action can be justified under self-defense. Both try to avoid IHL because it is perceived as too restrictive. Suggesting self-defense as a justification instead presupposes a fairly generous interpretation of this term, which is not in keeping with how this has been interpreted by the International Court of Justice and traditionally understood within the regime of the U.N. Charter.

Solomon’s article does, however, unintentionally highlight the problem with the premise that force can create security. He recalls that after the disengagement of Israel from Gaza in 2007, Israel restricted the passage of persons and reduced the supply of electricity and fuel in the hope that this would pressure the Palestinians into halting rocket attacks. The policy did not have this effect—rather it just increased the degree of resentment of those subjected to this treatment. The decades of security measures taken by Israel have not significantly improved the situation because the basic problem of self-determination has not been properly resolved.

This leads back to the point that forcible counter-terrorism measures are not the way to solve the problem and in reality are more likely to create more resentment and hatred in the communities affected by the attacks. Loosening the standards of the U.N. Charter is not the way forward. Peacebuilding is hard work, unspectacular, long, and mostly undertaken behind the scenes. However, it is the only effective way to achieve peace in the long term. It is also achievable—Western Europe after the Second World War attests to this.

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48. BROWNLIE, *supra* note 38, at 38.

49. *Id.* at 41–48.

50. *See, e.g.*, Geneva Convention III, *supra* note 9, art. 2. The language in Article 2 is common to all four of the Geneva Conventions.

51. Solon Solomon, *The Great Oxymoron: Jus in Bello Violations as Legitimate Non-Forcible Measures of Self-Defense: The Post-Disengagement Israeli Measures towards Gaza as a Case Study*, 9 CHINESE J. OF INT’L L. 501 (2010).

In order to avoid an abusive use of the doctrine of self-defense as a justification for attacks on non-State actors in other countries, a group of leading international lawyers in Britain undertook an analysis of how the right to self-defense is to be interpreted. The result is a document called the “Chatham House Principles,” published in 2005. These principles reaffirm the International Court of Justice’s insistence that using force in self-defense can only be further to a large-scale attack, and only to the degree required to avert or end this attack.<sup>52</sup> They also insist that “force may only be used when any further delay would result in an inability by the threatened state effectively to defend against or avert the attack against it” and that such “force may be used only on a proper factual basis and after a good faith assessment of the facts.”<sup>53</sup> These Principles make the point that “[t]errorist organisations are not easily rooted out by foreign armed forces.”<sup>54</sup>

The result of these conditions is that such force will only be legitimate in exceptional cases and certainly not as an on-going activity. The correct treatment of such force as an international conflict, and not a non-international conflict, will mean that for parties to Additional Protocol I, the full range of provisions will apply. Not surprisingly, the Chatham House Principles also confirm that forcible action in self-defense “must conform with the rules of international humanitarian law governing the conduct of hostilities.”<sup>55</sup>

### ***E. IHL Qualification of Attacks on Non-State Actors Abroad***

As far as the qualification of an attack on non-State actors in another country is concerned, the first point to be made is that such an attack is a “use of force against the territorial integrity” of a State within the meaning of Article 2(4) of the U.N. Charter.<sup>56</sup> Logically it seems evident that the conflict is an international one. This point is confirmed by the definition of aggression in General Assembly Resolution 3314, which is probably going to be used for the interpretation of this term in the Statute of the International Criminal Court.<sup>57</sup> That definition includes the “[b]ombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State.”<sup>58</sup>

When I was at the ICRC, such an action was always accepted as reflecting an international armed conflict. However, it appears to be the case that many IHL specialists are accepting assertions that attacking armed groups in another State is a non-international armed conflict because the attack was not aimed at government troops.<sup>59</sup> Going along with

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52. *Chatham House Principles*, *supra* note 39.

53. *Id.* princ. 4.

54. *Id.* cmt. to princ. 6.

55. *Id.* princ. 7.

56. *Id.* cmt. to princ. 6.

57. G.A. Res. 3314, U.N. Doc. A/RES/3314 (Dec. 14, 1974). Following resolution RC/Res.4, adopted on June 11, 2010 by parties to the ICC Statute, the crime of aggression was defined by reference to G.A. Res. 3314. The new Article 8 *bis*, containing this definition, will be included in the Statute further to a decision in 2017 by parties to the ICC. See *The Crime of Aggression*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, <http://www.iccnw.org/?mod=aggression> (last visited Oct. 20, 2012).

58. G.A. Res. 3314, *supra* note 57, Annex at art. 3(b) (Definition of Aggression).

59. See *id.* art. 3(d) (“An attack on the armed forces of [another] State” is another alternative).

this thinking is accepting dangerous propaganda that further weakens the rule against the use of force. The attack on Lebanon in 2006, for example, which Israel asserted was aimed only at Hezbollah, was certainly felt by the government of Lebanon to be an attack on the State of Lebanon.<sup>60</sup> Drone attacks that occur in Pakistan are certainly felt by the government as an attack on the State. The situation of Gaza should be a good illustration of the opportunistic classification of attacks on another territory depending on the ends sought. The Israeli authorities consistently classified attacks on Hamas in Gaza as attacks on a terrorist group. However, in the context of the Palmer Inquiry on the Flotilla incident, Israel justified its blockade of Gaza on the basis that it was involved in an international conflict,<sup>61</sup> as only in such conflicts can blockades be lawfully created.

A further reason for maintaining the classification as an international armed conflict is the reasoning behind the “unwilling or unable” justification for attacks on terrorist groups abroad. The commentary to Principle 6 of the Chatham House Principles explains that it “may be that the state is not responsible for the acts of terrorists, but it is responsible for any failure to take reasonable steps to prevent the use of its territory as a base for attacks on other states.”<sup>62</sup> This reasoning reinforces the fact that the attack is on the State.

### III. Consideration of Whether IHL Needs to Be Limited to an International/Non-International Armed Conflict Dichotomy

The problem relating to the classification of attacks on non-State actors in other countries is just another manifestation of the fundamental problem with the traditional dichotomy of international or non-international armed conflict. There are so many mixed conflicts these days, as well as those involving the use of force by international organizations such as the U.N., that it makes sense to consider whether there could be another alternative. The following is not intended to be a magic formula that I have come up with, but rather a suggestion of how the issue could be thought about from a different angle.

Until recently it was fairly clear that there were far fewer rules for non-international conflicts and therefore the classification was of great importance. However, when evaluating State practice for the purpose of the customary law study,<sup>63</sup> it was clear that a major change began to take place in the 1990s. States began regularly insisting on basic rules, which were then mostly associated with only international armed conflicts, for *all* types of conflicts. This was especially the case regarding the condemnation of attacks on civilians and of indiscriminate attacks. As a result, by the beginning of 2002 (the time until which we collected material), there was sufficiently dense, widespread, and almost uniform official

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60. The assertion that this was a non-international armed conflict was even more bizarre given that Hezbollah was part of the government and was the accepted local government authority in southern Lebanon.

61. U.N. Secretary-General, *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident*, ¶ 47, (Sept. 2011), available at [http://www.un.org/News/dh/infocus/middle\\_east/Gaza\\_Flotilla\\_Panel\\_Report.pdf](http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf).

62. *Chatham House Principles*, *supra* note 39, cmt. to princ. 6.

63. 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* (2005).

State practice to establish a substantial number of customary rules applicable to both types of conflict.<sup>64</sup> As States continued to speak of international or non-international conflict, we could not avoid such a classification, as the evaluation of customary law was based on practice, and we could not invent ideas, however useful such ideas might be. However, this does not prevent a consideration of what the situation should or could be.

There is one major remaining difference in the customary law applicable to the two types of conflict; namely, the status of the parties. States are still adamant that rebel groups remain liable to prosecution for common crimes associated with their violent activities. This lack of POW status for fighters in non-international conflicts is the real reason why many States had been reluctant in the past to accept more rules for such conflicts. My experience from various negotiations to adopt new treaties in the 1990s made this fact quite clear. As long as extensive provisions were adopted to ensure that no status could accrue to rebels, and no reason for intervention would result, then States accepted that these treaties applied to both international and non-international conflicts.<sup>65</sup>

It is evident that combatant immunity (i.e., POW status) for actions not violating IHL needs to be maintained and that there is no chance at present of such status for rebel groups. Any suggestion for a combined set of rules applicable to any armed conflict needs to address this issue squarely. For this purpose, it is useful to consider what the origin of POW status was. Initially, it was accorded only to soldiers of an official army. As such, these persons belonged to an organ of the State (the army being part of the executive). Immunity from prosecution for such military personnel was, and still is, the normal result of sovereign immunity from prosecution for violation of national crimes of another State. This rationale could be maintained to ensure immunity from prosecution for those representing a State, but not for other individuals. With regard to some of the other categories of persons that have been accorded POW status since 1899, we could consider groups or individuals fighting for the State and with the approval of that State as exercising the functions of the State, as described in Article 5,<sup>66</sup> or even Article 11,<sup>67</sup> of the Articles on State Responsibility.<sup>68</sup> Although the Articles on State Responsibility relate to State responsibility for unlawful acts,

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64. If the study had been published a decade earlier, based on practice up until 1992, the result would have been very different, with far fewer rules also applicable to non-international conflicts.

65. *See, e.g.*, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996 art. 1, 35 I.L.M. 1206 (1980 Convention Protocol II as amended); Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict art. 22, Mar. 26, 1999, UNESCO Doc. HC/1999/7. Since then, new weapons treaties apply at all times.

66. Draft Articles on Responsibility of States for Internationally Wrongful Acts, *in* Rep. of the Int'l Law Comm'n, 53d Sess, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10, at 44 (2001) ("The conduct of a person or entity which is not an organ of the State . . . but which is empowered by the law of the State to exercise elements of governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.")

67. *Id.* at 45 ("Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.")

68. *See also* JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2003), which includes the full commentary to the articles.

and not sovereign immunity, the immunities accorded by States are not immutable. They are, for example, extended to persons acting for an international organization. It is just a question, therefore, of international agreement as to which persons or groups should benefit from this immunity. The fact that a government or State may not be recognized by another belligerent party would not make a difference to this so that the effect of Article 4(3) of the Third Geneva Convention<sup>69</sup> would not be altered. With regard to some of the other civilian personnel included in Article 4 of the Third Geneva Convention, in particular paragraph 5, it may well be that POW status is not particularly attractive. After all, this status entitles the other belligerent State to intern such persons for the whole length of the conflict, which could be decades. The lack of human rights law in 1949 meant that POW status provided some security that was otherwise missing. This is not necessarily the case now. Indeed, as far as treatment is concerned, the provisions in the Geneva Conventions for all internees have since been largely provided by various international human rights instruments. This is important as paragraph 5 of Article 4 only provides for POW status for persons “who do not benefit by more favourable treatment under any other provisions of international law.”<sup>70</sup>

As not all States are yet party to all the relevant human rights treaties, whereas all are party to the Geneva Conventions, I am not suggesting that the protections of the Geneva Conventions are now irrelevant. Rather, I propose that all the rules that have been identified as customary for both international and non-international conflicts apply to all types of conflicts. Other protective rules applicable only to international conflicts should remain for such conflicts in order to avoiding losing what is presently still important. The special rules for combatant immunity for those acting on behalf of the State will remain as a manifestation of sovereign immunity.

It needs to be remembered that the application of IHL confers not only protective rules, but also the entitlement to use force against fighters or, to be more accurate, recognition that such use of force would not be a violation of IHL. This fact means that the application of IHL is not necessarily to be advised in all situations of violence. This is why the threshold for non-international conflicts remains high, and also why the threshold for the use of force against non-State actors in self-defense needs to remain high. In fact, the scenarios described in the definition of aggression in Article 3 of Resolution 3314<sup>71</sup> would not be a bad basis for the

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69. Geneva Convention III, *supra* note 9.

70. *Id.* art. 4.

71. G.A. Res. 3314, *supra* note 57, Annex (listing the following scenarios as qualifying as acts of aggression: “(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation;” “(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above.”).

evaluation of the existence of an armed conflict for any cross-border activity, although it would need to include action also by an international organization and not only by a State. Activities by non-State actors need to meet the existing threshold, and IHL should not apply to the problem of criminal activity having no political agenda whatsoever,<sup>72</sup> as this could imply the possibility to engage in an excessively dangerous use of force.

#### IV. Practical Importance of Human Rights Law to Ensure Implementation of IHL

As a result of studies undertaken in the human rights context, for example, reports by U.N. Special Rapporteurs, observations by human rights treaty bodies, and various fact-finding reports, it has become increasingly evident that many serious violations of IHL occur because of disrespect for human rights in the countries concerned before the conflict. This is particularly true of the non-discrimination rule that is valid for IHL and human rights, as well as those individual economic, social and civil rights which are common to both bodies of law. Additionally, freedom of expression, not provided for as such in IHL, is in practice important to ensure the implementation of IHL. The following will only touch on just a few aspects that illustrate this problem.

##### A. *Non-Discrimination*

The requirement to respect IHL without discrimination can be subject to an almost insurmountable hurdle when the conflict itself is based on ethnic discrimination. The murder and displacement of civilians associated with so-called “ethnic cleansing” is the most obvious manifestation of this. However, inherent negative attitudes towards certain parts of the population will make the respect of almost all IHL rules that much more difficult or even impossible.<sup>73</sup>

The problem with discrimination is that it is the product of attitudes passed from one generation to another and so firmly absorbed into the mentality of people that they may not even be aware of how biased they are. Even if the official law appears neutral, assumptions absorbed from childhood can prevent genuine equality in practice. This is normally referred

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72. Although a political agenda is not a criterion mentioned in any of the treaties or case law defining a non-international conflict, in practice it has always been implied. The ICRC Commentary to Article 3 confirms that States did not intend the expression “Party to a conflict” to include “common brigands” or mere “felons.” See COMMENTARY ON GENEVA CONVENTION III, *supra* note 11, at 32. A study of situations classified as armed conflicts has shown that States insist on the respect of both human rights law and international humanitarian law in situations where the rebels have a political agenda. See, e.g., Ilia Siatitsa & Maia Titberidze, *Human Rights in Armed Conflict from the Perspective of the Contemporary State Practice in the United Nations: Factual Answers to Certain Hypothetical Challenges*, UNGA, UNSC, HRC, and CHR addenda (ADH Research Paper, 2011), available at [http://www.geneva-academy.ch/RULAC/international\\_human\\_rights\\_law.php](http://www.geneva-academy.ch/RULAC/international_human_rights_law.php).

73. For references to the inherent problems of disadvantaged minorities and indigenous peoples, see Comm. on Econ., Soc. and Cultural Rights (CESCR), Concluding Observations: Chad, ¶ 7, U.N. Doc. E/C.12/TCD/CO/3 (Dec. 16, 2009) [hereinafter CESCR Chad]; CESCR, Concluding Observations: Democratic Republic of the Congo ¶¶ 15, 17, U.N. Doc. E/C.12/COD/CO/4 (Dec. 16, 2009) [hereinafter CESCR DRC]; and CESCR, Concluding Observations: Doc. Submitted by the U.N. Interim Admin. Mission in Kosovo, ¶¶ 15, 17–18, 21–22, 32, U.N. Doc. E/C.12/UNK/CO/1 (Dec. 1, 2008) [hereinafter CESCR UNMIK].

to as “indirect discrimination,” which is particularly prevalent in the economic and social sphere and has become very clear in the context of gender discrimination.<sup>74</sup> Unfortunately, the issue of gender discrimination has been seen as marginal in the past, and in many places still is. This is a fundamental error. Quite apart from the injustice of this approach, it has become clear, including by a World Bank study,<sup>75</sup> that gender discrimination is the most important reason for the lack of development and poverty of many societies. This in turn can frequently lead to conflict, thereby further exacerbating economic problems, and indeed creating a vicious circle.

IHL rules concentrate on the prohibition of rape and other sexual violence, as well as the care of maternity cases. Not only is this rather a narrow approach, but these rules are not respected because of gender discrimination. Studies have shown that pre-existing attitudes contribute to such violations. As noted in the U.N. Secretary-General’s Report on Women, Peace and Security: “Where cultures of violence and discrimination against women and girls exist prior to conflict, they will be exacerbated during conflict.”<sup>76</sup> In turn, such behavior is based on long-term attitudes relating to the status of women:

Violence against women throughout the life cycle derives essentially from cultural patterns, in particular the harmful effects of certain traditional or customary practices and all acts of extremism linked to race, sex, language or religion that perpetuate the lower status accorded to women in the family, the workplace, the community and society.<sup>77</sup>

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74. The meaning of “gender” and “gender inequality” is well described in General Comment 16 of the CESCR:

Gender refers to cultural expectations and assumptions about the behaviour, attitudes, personality traits, and physical and intellectual capacities of men and women, based solely on their identity as men or women. Gender-based assumptions and expectations generally place women at a disadvantage with respect to substantive enjoyment of rights, such as freedom to act and to be recognized as autonomous, fully capable adults, to participate fully in economic, social and political development, and to make decisions concerning their circumstances and conditions. Gender-based assumptions about economic, social and cultural roles preclude the sharing of responsibility between men and women in all spheres that is necessary to equality.

CESCR, General Comment No. 16 on the Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights, 34th Sess., Apr. 25–May 13, 2005, ¶ 14, U.N. Doc. E/C.12/2005/4 (Aug. 11, 2005). The same General Comment notes this lack of equality in relation to many rights, concluding that “[w]omen are often denied equal enjoyment of their human rights . . . by virtue of the lesser status ascribed to them by tradition and custom, or as a result of overt or covert discrimination.” *Id.* ¶¶ 4–5.

75. WORLD BANK, WORLD BANK POLICY RESEARCH REPORT: ENGENDERING DEVELOPMENT—THROUGH GENDER EQUALITY IN RIGHTS, RESOURCES AND VOICE (2001).

76. U.N. Secretary-General, *Report of the Secretary-General on Women, Peace and Security*, ¶ 5, U.N. Doc. S/2002/1154 (Oct. 16, 2002) [hereinafter *SG Report*].

77. Rep. of the Fourth World Conference on Women, Beijing, China, Sept. 4–15, 1995, ¶ 118, U.N. Doc. A/CONF.177/20 (Oct. 17, 1995). See also Special Rapporteur on Violence against Women, Its Causes and Consequences, *Rep. on Integration of the Human Rights of Women and the Gender Perspective: Violence against Women in Accordance with Comm’n on Human Rights Resolution 2000/45, Violence against Women Perpetrated and/or Condoned by the State During Times of Armed Conflict (1997–2000)*, Comm’n on Human Rights, U.N. Doc. E/CN.4/2001/73 (Jan. 23, 2001) (by Radhika Coomaraswamy) for a thorough study on the causes and consequences of violence against women.

The result of this is that violence in peacetime is rarely addressed or punished, often being seen as a private affair, or even justifiable.<sup>78</sup> Not surprisingly, against such a background, such violence multiplies with impunity during the chaos and stress of armed conflict.

The same discrimination creates disproportionate economic hardship for women and prevents them from receiving appropriate humanitarian aid. The U.N. Secretary-General's report explains that gender inequality creates particular stress during armed conflict:

With the loss of men and boys . . . through participation in armed forces, detention or disappearance, women and girls are forced to take on more responsibility for family security and well-being, often without the necessary resources or social support. Lack of land and property rights and lack of access to, or control over, resources threaten women's livelihoods.<sup>79</sup>

As far as humanitarian aid is concerned, it has been pointed out that:

A significant proportion of official and non-governmental aid fails to reach women survivors. Almost invariably, men are placed in charge of the decision-making process regarding humanitarian assistance and its distribution, despite the fact that women are generally far more experienced in food production, distribution, and preparation than men. Consequently, women are frequently disadvantaged, either deliberately or because their needs are not properly understood.<sup>80</sup>

The point relating to food is equally relevant for medical and hygiene supplies. The U.N. Secretary-General's report therefore recommends that women be fully involved in the management of camps and in decision-making.<sup>81</sup>

The link between gender inequality and violence, including in armed conflict, is recognized in a number of Concluding Observations of the U.N. Committee on Economic, Social and Cultural Rights,<sup>82</sup> as well as treaties dedicated to the problem of violence against women.<sup>83</sup>

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78. For examples of such behavior described in two human rights cases, see *Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. Judgment (June 9, 2009), available at <http://www.unhcr.org/refworld/docid/4a2f84392.html>; and *González et al. v. Mexico*, Judgment, Inter-Am. Ct. H.R. (Nov. 16, 2009), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_205\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_ing.pdf).

79. *SG Report*, *supra* note 76, ¶ 9.

80. Judith Gardam & Hilary Charlesworth, *Protection of Women in Armed Conflict*, 22 HUM. RTS. Q. 148, 154–55 (2000) (citations omitted). See also CHARLOTTE LINDSEY, *WOMEN FACING WAR: ICRC STUDY ON THE IMPACT OF ARMED CONFLICT ON WOMEN* 41, 88, 124 (2001) (addressing some of the same points).

81. *SG Report*, *supra* note 76, ¶ 51. See also *id.* ¶ 29 (describing the need for women's involvement in peace operations); S.C. Res. 1889, U.N. Doc. S/RES/1889 (Oct. 5, 2009) (describing the need for greater empowerment of women and practical measures to this effect).

82. CESCR Chad, *supra* note 73; CESCR DRC, *supra* note 73; CESCR UNMIK, *supra* note 73; CESCR, Concluding Observations: Colombia, U.N. Doc. E/C.12/COL/CO/5 (June 7, 2010); CESCR, Concluding Observations: Afghanistan, U.N. Doc. E/C.12/AFG/CO/2-4 (June 7, 2010).

83. Organization of American States (OAS), Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women arts. 6, 9, Jun. 9, 1994, 33 I.L.M. 1534; Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, pmb. ¶ 10, art. 2, Nov. 5, 2011, C.E.T.S. No. 210. Both treaties provide for measures to change attitudes and to ensure greater diligence in pursuing perpetrators of such violence.

### ***B. Exploitation of Children***

Attitudes toward children contribute to their exploitation in wartime. Displacement is particularly dangerous for them. Machel's report summed it up as follows: "At least half of all refugees and displaced people are children. . . . In the course of displacement, millions of children have been separated from their families, physically abused, exploited and abducted into military groups, or they have perished from hunger and disease."<sup>84</sup>

Sexual exploitation of girls, and also some boys, takes advantage of their legal and practical vulnerability. Armed groups are also able to recruit children because of the children's poverty.<sup>85</sup> Abuses against children show that no allowance is made for their age.<sup>86</sup> Attitudes, especially for recruited girls, make reintegration into their families and communities difficult, or even impossible.<sup>87</sup> The resulting psychological trauma of the younger generation may well lead to abuses by them in later conflicts.

### ***C. Treatment of Wounded***

This is, of course, a very basic rule of IHL, dating back to the First Geneva Convention of 1864, with various developments culminating in the 1949 Geneva Conventions and its three Protocols. The human rights equivalent is the right to life, which includes positive obligations to protect life,<sup>88</sup> as well as the right to the highest attainable standard of health.<sup>89</sup> Withholding necessary medical treatment also amounts to "inhuman treatment."<sup>90</sup> However, during the Arab Spring unrest, there have been reports of doctors and nurses being arrested and convicted to long prison sentences for treating wounded demonstrators.<sup>91</sup> This kind of attitude could well be repeated in time of armed conflict.

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84. Report of the Expert of the Secretary-General, *Impact of Armed Conflict on Children*, ¶ 66, U.N. Doc. A/51/306, (Aug. 26, 1996) (Graça Machel).

85. *Id.* ¶¶ 38–48.

86. See S.C. Res. 1539, ¶ 1, U.N. Doc. S/RES/1539 (Apr. 22, 2004) (condemning the serious abuses committed against children in armed conflict).

87. See, e.g., U.N. CHILDREN'S FUND, THE PARIS PRINCIPLES: PRINCIPLES AND GUIDELINES ON CHILDREN ASSOCIATED WITH ARMED FORCES OR ARMED GROUPS ¶¶ 7.30–7.34, 7.37–7.43, 7.59–7.67 (2007), available at <http://www.unhcr.org/refworld/pdfid/465198442.pdf>.

88. All the human rights treaty bodies have interpreted the right to life as including such positive measures. With regard to treating the wounded during armed conflict, see, e.g., *Ahmed Özkan and Others v. Turkey*, Eur. Ct. H.R. ¶¶ 307–08 (2004); *Varnava and Others v. Turkey*, Eur. Ct. H.R. ¶ 185 (2009); *Neira Alegria et al. v. Peru*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 20, ¶ 74 (Jan. 19, 1995).

89. See Covenant on Economic, Social and Cultural Rights, art. 12, Dec. 16, 1966, 993 U.N.T.S. 3. See also CESCR, General Comment No. 14 (2000) ¶ 50, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) (noting that withholding medical treatment from particular individuals or groups is an egregious violation of the duty to respect this right).

90. See *Huri-Laws v. Nigeria*, African Comm'n on Human and Peoples' Rights, Communications Decisions 225/98 ¶ 41 (2000); *Istratii and Others v. Moldova*, Eur. Ct. H.R., ¶¶ 46–58 (2007); *Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela*, Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 150, ¶¶ 101–03 (July 5, 2006).

91. See J. David Goodman, *Bahrain Court Hands Down Harsh Sentences to Doctors and Protestors*, N.Y. TIMES, Sept. 29, 2011, [http://www.nytimes.com/2011/09/30/world/middleeast/bahrain-court-hands-down-harsh-sentences-to-doctors-and-protesters.html?\\_r=1&scp=5&sq=%E2%80%9CDoctors+get+prison+terms+in+Bahrain+over+unrest%E2%80%9D&st=nyt](http://www.nytimes.com/2011/09/30/world/middleeast/bahrain-court-hands-down-harsh-sentences-to-doctors-and-protesters.html?_r=1&scp=5&sq=%E2%80%9CDoctors+get+prison+terms+in+Bahrain+over+unrest%E2%80%9D&st=nyt).

### **D. Disrespect for Civil Rights**

The stress created by armed conflict means that it is difficult to maintain certain standards during this time. There is a temptation, as we have seen in many instances, including actions after 9/11, to believe that such standards should be dropped in the face of emergency. There is, therefore, the need to reinforce the compulsory character of many of these rights, such as the prohibition of torture, the right to a fair trial and the compulsory registration of detainees to prevent disappearance. The Geneva Conventions are crucially important to stress that these standards must be maintained, and to provide mechanisms to help this.

However, what is less talked of is the fact that such standards cannot be implemented in armed conflict if they were not respected prior to the outbreak of armed conflict. The following sections provide examples to illustrate.

#### **1. Prohibition of Torture**

Unfortunately, in many countries it is standard procedure to base criminal convictions on confessions. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment describes the implications of this as follows:

It is self-evident that a criminal justice system which places a premium on *confession evidence* creates incentives for officials involved in the investigation of crime—and often under pressure to obtain results—to use physical or psychological coercion. . . . [I]t is of fundamental importance to develop methods of crime investigation capable of reducing reliance on confessions . . . .<sup>92</sup>

It is evident that the other methods of investigation referred to here include the analysis of objective data such as forensic evidence. It is highly unlikely that countries that rely primarily or entirely on forcing confessions will suddenly become proficient in the collection and analysis of other data once an armed conflict breaks out.

In addition, human rights studies have proved that the most dangerous time for a detained person is the first hours after capture. Therefore human rights bodies have established ways that help prevent torture: the insistence on the presence of a lawyer from the outset and during any interrogation,<sup>93</sup> the recording of interrogations,<sup>94</sup> and access to a

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92. The European Comm. for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 12th General Report on the CPT's Activities, ¶ 35, (2002).

93. See, e.g., *id.* ¶ 41; CPT, 6th General Report, ¶ 35, (1996); Human Rights Council, Resolution 13/19 on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: the Role and Responsibility of Judges, Prosecutors and Lawyers, U.N. Doc. A/HRC/RES/13/19 ¶¶ 5, 6 (Apr. 15, 2010) [hereinafter HRC Res. 13/19]; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. Doc. A/RES/43/173 Annex at princ. 17 (Dec. 9, 1988) [hereinafter U.N. Body of Principles on Detention]; Comm. of Ministers, Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, ¶ 98, (Jan. 11, 2006) (EC); *Salduz v. Turkey*, Eur. Ct. H.R. ¶ 54, (2008), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-89893>; African Comm. on Human and People's Rights (ACHPR), Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, Res. 61, ¶ 20(c) (2002) [hereinafter Afr. Comm. Res. 61]; Inter-Am. Comm. on Human Rights, Report on Terrorism and Human Rights, ¶ 237, OEA/Ser.L/V/II.116 (Oct. 22, 2002).

doctor on arrival and thereafter whenever requested.<sup>95</sup> If these measures are not a habit in peacetime, they will hardly be implemented in wartime. Unfortunately, IHL does not require these measures expressly, but IHL specialists should be aware that they are necessary to prevent torture.

## 2. Prohibition of Enforced Disappearance

Although this prohibition is not articulated in IHL treaty law as such, it is clearly prohibited because it amounts to a combination of other violations, in particular, murder, lack of registration of prisoners, incommunicado detention, probably torture, and lack of any procedural rights. In this regard, IHL treaty law applicable to international conflicts is better than that for non-international conflicts. However, once again, if the conditions that favor enforced disappearance are present in peacetime situations, then the likelihood of occurrences during armed conflict is that much greater. The International Convention for the Protection of All Persons from Enforced Disappearance (ICED) lists the main measures that are required to help prevent this phenomenon. These are a distillation of relevant existing treaty law, together with its interpretation by caselaw. The measures include the requirement to keep detained persons in officially-recognized and supervised centers, the keeping of detailed official registers, the right for a detainee to communicate with family, lawyer and, if a foreigner, consular authorities, and the right to take proceedings to establish the lawfulness of detention by the detained person or his family.<sup>96</sup> An absence of these in peacetime does not bode well for detained persons in wartime.

## 3. Right to Fair Trial

The right to fair trial is not only provided for by Common Article 3, but also in more detail in the Third and Fourth Geneva Conventions and the two 1977 Additional Protocols. Ensuring a fair trial necessitates not only the fundamental element of an independent and impartial tribunal, but also a host of other attributes that will ensure equality of arms between the parties concerned. This requires an effective defense that includes proper access to documents, reliable evidence and the means to counter prosecution arguments. The prohibition on using evidence obtained by torture is part of this requirement.<sup>97</sup> All this involves a sophisticated apparatus that cannot exist without extensive prior training and mechanisms in place. Most crucially, it requires a mentality that recognizes the principle of innocence until proved guilty through fair procedures. This was recognized in 1949 through

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94. See CPT, 12th General Report, *supra* note 92, ¶ 36; G.A. Res. 43/173, *supra* note 93; U.N. Human Rights Committee, CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), (Mar. 10, 1992).

95. See, e.g., HRC Res. 13/19, *supra* note 93, ¶ 5; CPT, 12th General Report, *supra* note 92, ¶ 42; U.N. Body of Principles on Detention, *supra* note 93, Annex at princ. 24; Afr. Comm. Res. 61, *supra* note 93, ¶ 20(b).

96. See International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177, Annex at art. 17, U.N. Doc. A/RES/61/177 (Jan. 12, 2007). See also DOSWALD-BECK, *supra* note 34, §§ 6.4, 6.6, 7.5, 8–9 (2011).

97. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 15, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.

the wording of Common Article 3 which required judgments to be pronounced by a “regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>98</sup> The last words have since been dropped because of their offensive connotation, but the original meaning, namely, the level of sophistication required, does reflect what a fair trial requires.<sup>99</sup>

Unfortunately, a myriad of cases brought before international human rights treaty bodies have shown the degree to which this right has not been properly respected. This is particularly the case where there is insufficient separation between the judicial and executive branches of government. Once again, such shortfalls are hardly going to be remedied during an armed conflict.

#### 4. Right to Freedom of Expression

Freedom of Expression includes the right to not only impart information but also to receive it.<sup>100</sup> This is a human right that is clearly absent in IHL as such, and yet several aspects of IHL implementation would be difficult to achieve without it.

The most obvious point is that IHL requires governments to disseminate its provisions not only to the army but also, as far as possible, to the civilian population.<sup>101</sup> This clearly implies a right to receive such information.

More significantly, the required repression of IHL violations cannot take place in most cases without the ability to report on suspected violations. This is clearly the case within the army where a commander would need to be informed by someone if a violation is being or had been committed.<sup>102</sup> The required refusal to carry out a manifestly unlawful act also implies that the soldier at the receiving end of the order has the right to express this.<sup>103</sup> However, the issue is not limited to the army. Information on war crimes is often uncovered by investigative journalists and who must be able to publish that information if war crimes are to be punished and their repetition avoided. A case to this effect came before the European

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98. Art. 3 (1)(d) of all four of the 1949 Geneva Conventions.

99. For an interpretation of the principle of legality and the right to fair trial, including international caselaw, see DOSWALD-BECK, *supra* note 34, chs. 11, 12, 13; WALTER KÄLIN & JÖRG KÜNZLI, THE LAW OF INTERNATIONAL HUMAN RIGHTS PROTECTION 450–63 (2009); RHONA K. M. SMITH, TEXTBOOK ON INTERNATIONAL HUMAN RIGHTS, ch. 16 (4th ed. 2010). For a practical explanation, see INT’L COMM’N OF JURISTS, TRIAL OBSERVATION MANUAL FOR CRIMINAL PROCEEDINGS (2009).

100. This is spelled out in several treaties: International Covenant on Civil and Political Rights art. 19(2), Dec. 16, 1966, 999 U.N.T.S. 171; American Convention on Human Rights art. 13(1), Nov. 21, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143; European Human Rights Convention art. 10(1), Nov. 4, 1950, 213 U.N.T.S. 221; Organization of African Unity, African Charter on Human and Peoples’ Rights art. 9, June 27, 1981, CAB/LEG/67/3 rev. 5; League of Arab States, Arab Charter on Human Rights art. 32, Sept. 15, 1994.

101. *See, e.g.*, Geneva Convention III, *supra* note 9, arts. 41, 127; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 144, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 19, June 8, 1977, 1125 U.N.T.S. 609.

102. *See, e.g.*, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) arts. 86, 87, June 8, 1977, 1125 U.N.T.S. 3.

103. *See, e.g.*, Rome Statute of the International Criminal Court art. 33, Jul. 17, 1998, 2187 U.N.T.S. 90.

Court of Human Rights in which a journalist from Azerbaijan was convicted for publishing information showing that some war crimes were committed by its own soldiers. Freedom of expression, like the other human rights freedoms, are subject to possible limitations in national law provided that they are genuinely necessary and proportionate to the aim required, such as national security. This was not the case in this instance. As the European Court said: “it is essential in a democratic society that a debate on the causes of acts of particular gravity which may amount to war crimes or crimes against humanity should be able to take place freely.”<sup>104</sup> An atmosphere of repression during peacetime is likely to continue, and indeed get worse, during wartime.

### *E. What Should IHL Specialists Make of this Information?*

The first point, I think, is for IHL specialists to feel less apologetic about the violations that do occur, given that many of these stem from conditions beforehand. I am not one of those that believe that IHL is almost always violated, as conformity with the rules often means the abstention from certain actions. However, it is best to be clear about why there is so much difficulty in ensuring the respect of many rules, at least in the context of a number of armed conflicts. A novel approach could be, therefore, that where rules of IHL and human rights law are the same, efforts to respect human rights law in peacetime may be seen as preparation for a proper respect of IHL. This is because, as stressed above, many IHL requirements cannot be created overnight, but need to be embedded in the culture and long-term practice of a society at all times.

In cases where human rights law is not reflected in rules of IHL directly, it would be wise to recognize the value of human rights in order to help enforce IHL. This includes, for example, logical deductions made by human rights bodies, such as the need to investigate possible violations of the right to life, which is not spelled out in human rights treaties, but which makes sense to ensure its implementation. All this reinforces the need to ensure respect for both human rights and IHL. Arguments that one can function well without the other do not stand up.

## **V. Conclusion**

The effect of armed measures on non-governmental actors based abroad, and the increasing availability of armed drones, means that international law is facing a fundamental choice. The bottom line is whether we want to create a world that is more peaceful or more violent. No one can deny the right of a country to defend itself against invasion or serious attack. However, in order to avoid a culture of using force to try to solve problems, which it cannot, it is the responsibility of international lawyers to remind the world of what post-Charter international law was supposed to be about, namely, the creation of international peace and security. This is still the aim that needs to be worked toward. The world is now so much more interconnected than in 1945 that it has helped the spread of international

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104. *Fatullayev v. Azerbaijan*, Eur. Ct. H.R., Judgment, (2010), ¶¶ 87, 102–03, 116, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98401>.

terrorist activity. By the same token, however, our present day inter-dependency means that it is not viable to go back to nineteenth century modalities on the use of force. Unfortunately, violence usually creates more violence, together with social and economic upheaval.

IHL is only meant to be a stop-gap to prevent the total descent into absolute barbarism and destruction. Ideally, it should not be necessary at all. At the moment it is much more present than it ought to be. By that I mean that far more armed force is being used than should be the case. Too many internal conflicts are being created by social unrest through an insufficient genuine desire to respect human rights. What I am trying to say here is that IHL specialists should not imagine that this branch of international law can exist and be properly implemented without reference to other branches of international law. A lack of a human rights culture will in practice prevent the proper respect of IHL. A lack of genuine belief in the need to prevent inter-State force motivates States to justify such force on the basis that there is a non-international conflict. When a State attacks the territory of another it has created an international conflict. Non-recognition of this fact merely plays into the hands of those wishing to weaken the rules preventing inter-State force.

IHL faces many challenges and difficulties, and unfortunately, others are likely to develop in the future. I would encourage lawyers not to be so blinded by dogmas that they forget what the original reasons for certain rules were. An example of this is the rigid distinction between international and non-international conflict, and the supposed equality of the parties in the latter. This needs honest re-examination. Whatever the challenge, it is crucial to keep in mind what the law is ultimately trying to achieve. On this basis I hope that international lawyers can courageously defend the fundamental aim of peace and human dignity and what is required to this end.