

# QUESTIONING THE UTILITY OF THE DISTINCTION BETWEEN COMMON ARTICLES 2 AND 3 OF THE GENEVA CONVENTIONS OF 1949 SINCE *TADIĆ*: A STATE SOVEREIGNTY APPROACH

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*The distinction between common articles 2 and 3 of the Geneva Conventions of 1949 is unsupportable in the context of contemporary armed conflict. This article argues that the distinction should be eliminated for policy and legal reasons. The differing protection offered by common article 2, which applies in international armed conflicts, compared to common article 3, which applies in non-international armed conflicts, is outlined in Parts I and II. Part III addresses the landmark Tadić Interlocutory Decision of the International Criminal Tribunal of the Former Yugoslavia ('ICTY'), which acknowledged that there is a trend in international practice to diminish the distinction between common articles 2 and 3. Although the ICTY reasoned on the correctness of the distinction, it did not criticise its legality. Similarly, Sub-Part A of Part III reasons that the distinction between common articles 2 and 3 is wrong in policy as opposed to it being wrong in law. After analysing the International Court of Justice's ('ICJ') reasoning in the Genocide Case (2007), Sub-Part B goes a step further than the Appeals Chamber did in Tadić (1999). It argues that, while the distinction is right in law, it gives rise to an incorrect application of the overall control test. Moreover, in order to apply the Geneva Conventions of 1949 to any type of armed conflict, the distinction between common articles 2 and 3 should be eliminated.*

Blurring the distinction between common articles ('CAs') 2 and 3 of the *Geneva Conventions of 1949*<sup>1</sup> ('GCs') is consonant with recent trends of general international law. In this article, the word 'should' appears frequently. Although it assesses general international law for what it is, the article argues that modern international law *should* seek to adopt a unified legal regime applicable to all armed conflicts. This is achievable by eliminating the distinction between CAs 2 and 3. Part I begins with a discussion on the evolution of the law regulating battlefield conduct culminating with the drafting of the GCs and the distinction between CAs 2 and 3. Part II addresses Additional Protocols ('APs') I and II and the lack of protection afforded by the latter in non-international armed conflicts ('NIACs'). The relevance of the *Tadić* decision divides Part III into two sub-parts. Sub-Part A reasons why this distinction should be eliminated from a policy perspective. It delivers a human-oriented approach towards eliminating the distinction by considering the reasons provided by the *Tadić* decision on the Defence Motion for Interlocutory Appeal on Jurisdiction ('*Tadić Interlocutory Decision*')<sup>2</sup>. In particular, it recommends that, regardless of the character of

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<sup>1</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) arts 2-3 ('GCI'); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) arts 2-3 ('GCII'); Geneva Convention Relative to the Treatment of Prisoners of War of August 12, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) arts 2-3 ('GCIII'); Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) arts 2-3 ('GCIV'). Together, these provisions will be referred to as 'Common Article 2' and 'Common Article 3'.

<sup>2</sup> Prosecutor v Duško Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) ('*Tadić Interlocutory Decision*').

the conflict, lawful participants should be entitled to prisoner of war ('POW') status and States should support a uniform regime of war crimes in the *Rome Statute*<sup>3</sup>. Sub-Part B provides a State sovereignty-oriented approach by analysing the legal reasoning of the Trial Chamber in *Tadić (Opinion and Judgment)* ('*Tadić Judgment*')<sup>4</sup> and critiquing the reasoning of the Appeals Chamber. It contends that eliminating the distinction between CAs 2 and 3 will ensure that the overall control test is not adopted into contexts unknown. Unless and until this occurs, due to the requirement in CA2 that an international armed conflict ('IAC') exists between two States, persons cannot be protected by, or prosecuted under, the GCs without first applying the overall control test like a fish out of water. This article identifies these issues through a detailed analysis of the law of armed conflict ('LOAC') and concludes that 'the full range of [LOAC] should apply in all cases of armed conflict, [even those which are] not of an international character'.<sup>5</sup> This is justified by policy, which is in the interests of human rights and is the correct approach in law, which preserves the sovereignty of States.

## I THE EVOLUTION OF THE GENEVA CONVENTIONS OF 1949 AND THE DISTINCTION BETWEEN COMMON ARTICLES 2 AND 3

### A The Lieber Code

The laws of warfare do not come without history.<sup>6</sup> Francis Lieber was the drafter of the first regulations on battlefield conduct.<sup>7</sup> After his publishing of *On Liberty and Self Government* in 1853,<sup>8</sup> he created a pamphlet about *Guerrilla Parties* with reference to the *Law and Wages of War* in 1860.<sup>9</sup> This triggered his desire to compile the customary rules of warfare. While working amongst a board of senior officers to propose a code of regulations for armies in the field, Lieber wrote the code that bears his name.<sup>10</sup> This was a significant achievement given that, by 1868, all enemies had acknowledged there were limitations on battlefield conduct.<sup>11</sup> Lieber emphasised that combatants should be commanded, disciplined, follow the rules of war and distinguish themselves from civilians before they were entitled to be POWs.<sup>12</sup>

<sup>3</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*').

<sup>4</sup> *Prosecutor v Tadić (Opinion and Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-94-1-T, 7 May 1997) 220 [615] ('*Tadić Judgment*').

<sup>5</sup> Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949* (ICRC, 1960) vol 3, 303.

<sup>6</sup> Geoffrey Best, *War and Law Since 1945* (Oxford University Press, 1994) 41; Michael Walzer, *Just and Unjust Wars* (Basic Books, 3<sup>rd</sup> ed, 2000) 42; Karma Nabulsi, *Traditions of War: Occupation, Resistance, and the Law* (Oxford University Press, 1999) 166; *Brown v United States*, 12 US (8 Cranch) 110, 122-3 (1814).

<sup>7</sup> Department of the Army, *Field Manual 27-10: The Law of Land Warfare* (GPO, 1956) 33.

<sup>8</sup> Francis Lieber, *On Liberty and Self Government* (Lippincott, Grambo and Co, 1853).

<sup>9</sup> James Childress, 'Francis Lieber's Interpretation of the Laws of War: General Orders No 100 in the Context of His Life and Thought' (1976) 21(1) *American Journal of Jurisprudence* 34, 35.

<sup>10</sup> Burriss Carnahan, 'Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity' (1998) 92 *American Journal of International Law* 213, 220; Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press, 2010) 45; Francis Lieber, *Instructions for the Government of Armies of the United States in the Field* (Government Printing Office, 1898) arts 56-7; Dieter Fleck, *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford University Press, 1995) 116; Richard Hartigan, *Lieber's Code and the Law of War* (Legal Classics Library, 1995) 24.

<sup>11</sup> UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford University Press, 2004) 102; R R Baxter, 'The First Modern Codification of the Law of War' (1963) 25 *International Review of the Red Cross* 171, 183; Geoffrey Best, *Humanity in Warfare* (Weidenfeld & Nicholson, 1980) 172.

<sup>12</sup> G I A D Draper, 'The Development of International Humanitarian law' in Michael A Meyer and Hilaire McCoubrey (eds), *Reflections on Law and Armed Conflicts* (Kluwer Law, 1998) 70-1; Richard Hartigan, *Lieber's Code and the Law of War* (Precedent, 1983) 1; Thomas Holland, *The Laws of War on Land (Written and Unwritten)* (Clarendon Press, 1908) 72-3.

These regulations have been developed into four main principles of LOAC: the principles of distinction, military necessity, unnecessary suffering and proportionality.<sup>13</sup>

## B *The Geneva Conventions*

The four GCs protect the wounded and sick in armed forces, the shipwrecked, POWs and civilians.<sup>14</sup> They each enshrine the four main principles of LOAC.<sup>15</sup> The initial intention behind the law regulating battlefield conduct was that it would apply to all battles, whether the battle takes place within, across or between States' borders.<sup>16</sup> Ironically, this intention played no part in the drafting of the GCs as they almost entirely apply only to IACs. The application of the GCs is dependent upon how the status of a conflict is characterised, that is, whether it takes place within or between States' borders. The issue with this today is that modern armed conflicts can occur in more than two ways,<sup>17</sup> and NIACs are becoming more frequent,<sup>18</sup> cruel and protracted.<sup>19</sup>

Following the Second World War, the International Committee of the Red Cross ('ICRC') argued that the GCs should apply to all types of armed conflicts.<sup>20</sup> The ICRC's proposal was opposed by States, who were not prepared to accept an obligation to apply the fullness of the detailed and complicated provisions of the GCs in NIACs.<sup>21</sup> States feared that there would be a reduction in their capacity to quell riots within their own borders.<sup>22</sup> Further opposition derived from the lack of success in which the GC regime would be complied with by non-state armed groups. Rather than leaving non-international armed conflicts unregulated, a compromise was reached by creating an article common to all armed conflicts – CA3.<sup>23</sup> After

<sup>13</sup> George Schwarzenberger, *International Law: As Applied by International Courts and Tribunals, The Law of Armed Conflict* (Stevens, 1968) 10; Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press, 2004) 50.

<sup>14</sup> GCI; GCII; GCIII; GCIV.

<sup>15</sup> *Legality of the Threat of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 266; Henri Meyrowitz, 'The Principle of Superfluous Injury or Unnecessary Suffering' (1994) 299 *International Review of the Red Cross* 98, 101; Geoffrey Corn, 'International & Operational Law Note: Principle 4: Preventing Unnecessary Suffering' [1998] 1 *The Army Lawyer* 50; W Hays Parks, 'Conventional Weapons and Weapons Reviews' (2005) 34 *Yearbook of International Humanitarian Law* 55, 57; William Fenrick, 'The Rule of Proportionality and Protocol I in Conventional Warfare' (1982) 98 *Military Law Review* 91, 102

<sup>16</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Oxford University Press, 2005) vol 1, 3; Christopher Greenwood, 'Customary Law Status of the 1977 Geneva Protocols', in Astrid Selissen and Gerard Tanja (eds), *Humanitarian Law of Armed Conflict Challenges Ahead* (Martinus Nijhoff, 1991) 109; William Downey, 'The Law of War and Military Necessity' (1953) 42 *American Journal of International Law* 251, 253.

<sup>17</sup> G Aldrich, 'The Laws of War on Land' (2000) 94 *American Journal of International Law* 42, 62; *Prosecutor v Tadić (Appeal on Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeal Chamber, Case No 94-1-A, 15 July 1999) 34, 84. See also, Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflict* (Oxford University Press, 2012) 32; Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 *American Journal of International Law* 239, 253.

<sup>18</sup> Nils Gleditsch et al, 'Armed Conflict 1946-2001: A New Dataset' (2002) 39 *Journal of Peace Research* 615.

<sup>19</sup> For the brutality of NIAC, see Gleditsch et al, above n 18; United Nations Development Program 'Human Development Report 2005' (Report, 2005) 153–61. See also, Anthony M Helm, *The Law of War in the 21st century: Weaponry and the Use of Force* (Naval War College, 2006) 193, 199.

<sup>20</sup> Christopher Greenwood, 'Scope of Application of Humanitarian Law', in Fleck, above n 10; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford University Press, 1999) 41-62.

<sup>21</sup> International Committee of the Red Cross, *Final Record of the Diplomatic Conference of Geneva* (Federal Political Department, 1949) vol 2B, 9-15. See also, Jean Pictet (ed), *Commentary on the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC, 1952) 38-48.

<sup>22</sup> *Ibid*; Derek Jinks, 'The Applicability of the Geneva Conventions to the 'Global War on Terrorism'' (2006) 46 *Virginia Journal of International Law* 1, 20; Michael Schmitt, 'Responding to Transnational Terrorism Under the *Jus ad Bellum*: A Normative Framework' in Michael Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines* (Martinus Nijhoff, 2007) 157.

<sup>23</sup> Common Article 3 was explained and applied by the ICJ in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgment) [1986] ICJ Rep 14, 113-4 [219] ('Nicaragua').

an assessment of the difference between CAs 2 and 3, however, this article will reveal that the ICRC's proposal should either have been entirely adopted or completely ignored, so as to apply humane treatment, without distinction, to persons of the same status in conflict. This article will argue that humane treatment should not be 'compromised'. By 'compromise', the author suggests that like prisoners should be treated alike. This does not prevent the possibility of applying different levels of humane treatment to prisoners who have committed varied levels of wrongdoing.

## C The Distinction

### 1 Common Article 2

CA2 sets out the application of the GCs, namely to all cases of declared war or of any other armed conflict, which may arise between two or more of the High Contracting Parties ('States'), even if the state of war is not recognised by one of them.<sup>24</sup> In IACs, this means all four GCs and AP1.<sup>25</sup> The general principle embodied in the GCs is that nobody in enemy hands can be outside the law.<sup>26</sup> Consequently, a participant in an IAC will always have some type of status. The participant is either wounded or sick and thus covered by GCI, or a member of an armed force at sea who is wounded, sick or shipwrecked and, as such, covered by GCII. The captured participant is a POW covered by the GCIII, and GCIV protects civilians. There is no intermediate status.<sup>27</sup> What is unfortunate, however, is the requirement in CA2 that the conflict exist between two States. Armed conflicts often occur, not between two States, but within the territory of a State or between a State and a non-state actor, in which cases the minimum provisions of CA3 apply.<sup>28</sup> Therefore, CA2 is rarely applied compared to CA3.

### 2 Common Article 3

CA3 of the GCs was adopted as a self-contained 'mini-convention'.<sup>29</sup> The name of CA3 reflects its range of minimum mandatory rules that apply in *all* armed conflicts.<sup>30</sup> It is observed, not only in IACs, but also 'in the case of non-international armed conflict occurring in the territory of one high contracting party'.<sup>31</sup> CA3 extends protection from acts of murder, torture,<sup>32</sup> taking of hostages,<sup>33</sup> and inhumane and degrading treatment.<sup>34</sup> It provides that the wounded and sick shall be 'collected and cared for'<sup>35</sup> and states that:

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' sickness,

<sup>24</sup> Common Article 2.

<sup>25</sup> L C Green, *The Contemporary Law of Armed Conflict* (Juris Manchester University Press, 2<sup>nd</sup> ed, 2000) 65-6; Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, 1963) 29; Solis, above n 10, 150.

<sup>26</sup> *United States v Wilhelm List et al (Trial)* (Military Tribunal V, Case No 7, 19 February 1948) 1253-4 (*The Hostage Case*); Alan Sershowitz, *Shouting Fire* (Brown, 2002) 473; Fleck, above n 10, 33.

<sup>27</sup> Jean Pictet (ed), *Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, 1958) 51; *The Hostage Case* (Military Tribunal V, Case No 7, 19 February 1948) 1253-4.

<sup>28</sup> Common Article 3.

<sup>29</sup> M Sassòli and A Bouvier, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (International Committee of the Red Cross, 1999) 202; Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge University Press, 2002) 2-3; Eve La Haye, *War Crimes in Internal Armed Conflicts* (Cambridge University Press, 2008) 35.

<sup>30</sup> *Nicaragua* [1986] ICJ 14, 113 [218].

<sup>31</sup> Common Article 3; Tadić Judgment.

<sup>32</sup> Common Article 3(1)(a).

<sup>33</sup> *Ibid* art 3(1)(b).

<sup>34</sup> *Ibid* art 3(1)(c).

<sup>35</sup> *Ibid* art 3(2).

wounds, detention, or any other cause, shall in all circumstances be *treated humanely*, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.<sup>36</sup>

The ICJ in *Nicaragua* confirmed that these rules reflect ‘elementary considerations of humanity’.<sup>37</sup> The term ‘humane treatment’ in CA3(1) has been interpreted to ‘safeguard the entitlements which flow from being a human being’.<sup>38</sup> However, these safeguards are not expressly listed.<sup>39</sup> The term is commonly known for its prohibition on what is *not* humane, rather than what *is* humane.<sup>40</sup> Therefore, rights of injured people in NIACs are only recognised once the deprivation has occurred.<sup>41</sup> This marks a significant difference between CA3 and the GCs, which define ‘what constitutes humane treatment’ in over 400 provisions.<sup>42</sup> Every person in an IAC is *as human as every other human person* in an NIAC. Thus, humane treatment should not be compromised according to the status of the conflict.<sup>43</sup> More will be said of the provision of humane treatment in Part III (in particular, how humane treatment can be accorded to people in different forms, depending on the nature of the wrong committed and the status that the person carried in the conflict). For now, a description of the Additional Protocols to the GCs will be invoked to further illustrate the variance of protection afforded to persons in IACs as compared to NIACs.

## II THE ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF 1949

The Additional Protocols to the GCs were created to address new realities by extending further protection in modern armed conflicts.<sup>44</sup> API applies to IACs.<sup>45</sup> In addition to GCs I

<sup>36</sup> Ibid art 3(1).

<sup>37</sup> *Nicaragua* [1986] ICJ Rep 14, 112 [215], citing *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 22.

<sup>38</sup> *Prosecutor v Aleksovski (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/1T, 25 June 1999) 49; *Prosecutor v Delalić, Mucić, Delić, and Landžo (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) 525 (*‘Delalić Judgment’*); *Prosecutor v Kordić and Čerkez (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/2, 26 February 2001) 269.

<sup>39</sup> Cf Emily Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (Oxford University Press, 2010) 34–6.

<sup>40</sup> *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) 220 [615].

<sup>41</sup> For example, in 1992, the UNSCR condemned the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population in the cases of Somalia and Georgia. SC Res 794, UN SCOR, 3145<sup>th</sup> mtg, UN Doc S/RES/794 (3 December 1992); (SC Res 814, UN SCOR, 3188<sup>th</sup> mtg, UN Doc S/RES/814 (26 March 1993).

<sup>42</sup> Pictet, above n 21, 39; see also Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)* (ICRC, 1987) 1370 [4521].

<sup>43</sup> *Common Article 3* itself identifies the issue of providing comparatively less protection than *Common Article 2* by its recommendation that: ‘Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention’. This suggests that the rest of the GCs offer something more than *Common Article 3*. Further, that the only way in which the GCs can apply to NIAC is by voluntary agreement between the parties. This is a non-guaranteed: United Nations Development Programme ‘Human Development Report 2005’ (Report, 2005) 153–61. See also, Kenneth Watkin, ‘Chemical Agents and Expanding Bullets: Limited law Enforcement Exceptions or Unwarranted Handcuffs?’ in Anthony M Helm (ed), *International Law Studies* (Naval War College, 2006) vol 82, 193, 199.

<sup>44</sup> Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, 1987) xxix; George Aldrich, ‘Some Reflections on the Origins of the 1977 Geneva Protocols’, in Christophe Swinarski (ed), *Studies and Essays on International Humanitarian Law and Red Cross Principles, in Honour of Jean Pictet* (ICRC, 1984) 135; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (*‘API’*); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) (*‘APII’*).

<sup>45</sup> API art 1(3).

and II, API protects civilian medical personnel, civilian units, transports, equipment and supplies.<sup>46</sup> Articles 35-60 of API address the conduct of hostilities and reaffirm the development of the *Hague Conventions* of 1899 and 1907. API further deals with the treatment of persons in the power of a party to the conflict, relief actions and the protection of civil defence organisations.<sup>47</sup> The Protocol has wide acceptance amongst States and includes LOAC counterparts such as the principle of distinction between civilians and combatants and between civilians and military objectives,<sup>48</sup> the prohibition on indiscriminate attacks and the principle of proportionality.<sup>49</sup>

APII was created to enhance the inadequate level of protection in CA3.<sup>50</sup> However, it falls short of this mark in some major respects. Its application is limited to parties that have ratified it and to conflicts where dissident forces have exercised control over part of their Host State's territory.<sup>51</sup> Situations of internal unrest, which do not reach a level of sustained or protracted armed conflict, are not covered by APII.<sup>52</sup> As noted by Schindler and Crawford, the application of APII is 'unduly complicated', it being limited to cases of territorial control where the parties must 'implement' it.<sup>53</sup> Accordingly, APII is more restrictive than CA3. Even if APII were applicable to an NIAC, its protection would be far less than that provided by the GCs and API.<sup>54</sup>

Significant humanitarian gaps exist in APII. Among other things, its provisions do not include the principle of distinction.<sup>55</sup> The law applicable to NIACs does not render a rigid distinction between civilians and combatants – as no such classifications are accorded to the participants and non-participants of non-international conflicts.

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<sup>46</sup> Ibid arts 8 – 34.

<sup>47</sup> Ibid arts 61-79.

<sup>48</sup> Ibid art 48 (1).

<sup>49</sup> Henckaerts and Doswald-Beck, above n 16, rr 1, 7, 11–4; Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press, 2004) 50; William Fenrick, 'The Rule of Proportionality and Protocol I in Conventional Warfare' (1982) 98 *Military Law Review* 91, 102; International Committee of the Red Cross, 'Report on the Work of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts' (Report, 1972) 97–9 [2.332]–[2.350]; John Bellinger III and William J Haynes II, 'A US Government Response to the International Committee of the Red Cross Study of Customary International Humanitarian law' (2007) 866 *International Review of the Red Cross* 443, 460-1.

<sup>50</sup> Kenneth Watkin, '21st Century Conflict and International Humanitarian Law: Status Quo or Change?' in Michael Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines* (Martinus Nijhoff, 2007) 262, 272.

<sup>51</sup> APII; International Committee of the Red Cross, 'How is the Term 'Armed Conflict' Defined in International Law?' (Opinion Paper, March 2008); Georges Abi-Saab, Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Vol VIII), 2<sup>nd</sup> sess, 24<sup>th</sup> mtg, CDDH/1/SR.24 (18 February 1975) 229, 235; L Zegveld, *The Accountability of Armed Opposition Groups in International Law* (Cambridge University Press, 2<sup>nd</sup> ed, 2002) 143.

<sup>52</sup> For the definition of an armed conflict, see *Tadić Interlocutory Decision* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) 561; Robert Cryer, 'International Crimes in the Al Bashir Arrest Warrant Decision' (2009) 7 *Journal of International Criminal Justice* 283, 285. For what does *not* fall under the definition of an armed conflict see *Rome Statute* arts 8(2)(d), (f).

<sup>53</sup> Emily Crawford, 'Unequal Before the Law: The Case for the Limitation of the Distinction Between International and Non-International Armed Conflicts' (2011) No 11/28 *Legal Studies Research Paper: Sydney Law School* 1, 15.

<sup>54</sup> D Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols' (1979) 163 *Recueil Des Cours* 121, 126–7.

<sup>55</sup> This principle is essential to LOAC because a military object can only be legitimate if it is aimed at weakening the enemy: Adam Roberts and Richard Guelff, *Documents on the Laws of War* (Oxford University Press, 3<sup>rd</sup> ed, 2000) 53; Carnahan, above n 10. The only circumstance in which civilians can be targeted is if they directly participate in hostilities: International Committee of the Red Cross, 'Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (2008) 872 *International Review of the Red Cross* 991, 997; Jelena Pejic, 'Unlawful/Enemy Combatants: Interpretations and Consequences', in Schmitt and Pejic, above n 50, 335.

Given that API (applicable in IACs) attaches more significance to the principle of distinction, as it is recognised by customary international law,<sup>56</sup> it follows that the principle, theoretically, carries more weight in IACs.<sup>57</sup> The consequences of this are paramount, as from ignorance of the principle of distinction comes ignorance of the rights of persons who are unnecessarily targeted in conflict. As a result, the law as it currently is exposes persons in NIACs to be at greater risk of subjection to disproportionate harm than persons in IACs.

Each Protocol authorises *differing* levels of sanctioned military action. Maintaining gradations of legal protection for *different* types of armed conflict seems to be inconsistent with the purpose of LOAC: counterbalancing battlefield violence with humanitarian considerations.<sup>58</sup> There is no reason why persons engaged in NIACs should be entitled to less protection and why the civilians alongside that conflict should be subject to greater risk of attack. The importance of the principle of distinction is such that it should automatically apply in NIACs, without requiring parties to come to an agreement or establish custom.<sup>59</sup> The author therefore urges the ICRC to recognise the civilian/combatant distinction in NIACs as a necessary concomitant of applying proportionate force in such conflicts.

### III THE TADIĆ DECISION

The Socialist Federal Republic of Yugoslavia ('FRY') comprised Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia.<sup>60</sup> In the early 1990s, the FRY began to disintegrate.<sup>61</sup> After Bosnia-Herzegovina declared independence in 1992, there was a civil war between all three main ethnic groups within Bosnia-Herzegovina in which more than 100,000 people died.<sup>62</sup> There was ethnic cleansing on all sides. This led to the establishment

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<sup>56</sup> Moise Tshombe, 'Public Statement of Prime Minister of the Democratic Republic of Congo' (Speech delivered at Leopoldville, Congo, 21 October 1964), quoted in Charles I Bevans, Alfred P Rubin and Bruno A Ristau (eds) 'Contemporary Practice of the United States Relating to International Law' (1965) 59(3) *American Journal of International Law* 610, 616; Jean-Marie Henckaerts, 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict' (2005) 87 *International Review of the Red Cross* 175, 181.

<sup>57</sup> API art 48, provides that, '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'. See also, API art 51(2); Great Britain War Office, *Manual of Military Law* (London HM Stationary Office, 1907); *Prosecutor v Thomas Blaskic (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) 27; *Prosecutor v Galic (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-29-A, 30 November 2006) 38.

<sup>58</sup> Interestingly, the rules of warfare provided by the Lieber Code were designed to apply to any type of armed conflict, but the drafters of the GCs did not adopt this approach: Lieber, above n 10; *Tadić Interlocutory Decision* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) 97; Solis, above n 10, 260.

<sup>59</sup> D Schindler and J Toman, *The Laws of Armed Conflicts* (Martinus Nijhoff Publisher, 1988) 263-4; *Respect for Human Rights in Armed Conflicts*, GA Res 2444 (XXIII), UN GAOR, 23<sup>rd</sup> sess, UN Doc A/RES/2444 (19 December 1968); GA Res 2675, UN GAOR, 25<sup>th</sup> sess, UN Doc A/RES/2675 (7 December 1970); Humanitarian Law Conference, 'Remarks of Michael J Matheson' (1987) 2 *American University Journal of International Law and Policy* 419, 430-1.

<sup>60</sup> *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case IT-94-1-T, 7 May 1997) 20 [56]; James Crawford, *The Creation of States in International Law* (Oxford University Press, 2<sup>nd</sup> ed, 2006) 50; Antonio Cassese, *Self Determination of peoples: A Legal Reappraisal* (Cambridge University Press, 1995) 251; Tom Grant, *The Recognition of States: Law and Practice in Debate and Evolution* (Greenwood Publishing Group, 1999) 123; Malcolm Shaw, *International Law* (Cambridge University Press, 7<sup>th</sup> ed, 2014) 113.

<sup>61</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment) [2007] ICJ Rep 43, 127-8 [202] ('Genocide Case'); *Tadić* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) 25 [70]; Jure Vidmar, *Democratic Statehood in International Law* (Oxford Hart Publishing, 2013) 70.

<sup>62</sup> *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) 20 [55], 24 [66], 29 [83].

of the ICTY, which addresses humanitarian law issues relevant to the distinction between CAs 2 and 3.<sup>63</sup> In the *Tadić* decision, the ICTY was required to determine whether article 2 of the Statute of the ICTY (*ICTY Statute*)<sup>64</sup> applied to the grave breaches of the GCs that Dusko Tadić had committed.<sup>65</sup> The main issue was whether the victims were protected persons under the GCs. Therefore, the ICTY was required to address the issue of whether the conflict was international.<sup>66</sup> The ICTY's assessment of this issue is divided into the following sub-parts A and B. This analysis will highlight how the law, as it currently is, requires an IAC to be found under CA2 before a person can be prosecuted for grave breaches under the GCs. Ultimately, it is argued that this condition is superfluous, because the status of the conflict is irrelevant to both the graveness of the crime and the responsibility of the individual who committed the crime. Accordingly, persons should be capable of being prosecuted of breaching the GCs, regardless of the status of the conflict. To remove the condition that an IAC be found, the distinction between CAs 2 and 3 should be eliminated.

### A *Eliminating the Distinction between Common Articles 2 and 3 for Policy Reasons*

#### 1 *The definition of humane treatment in Common Articles 2 and 3 should be unified*

##### (a) *Prisoner of war protection should extend to non-international armed conflicts*

In the *Tadić* Interlocutory Decision, the ICTY referred to resolutions of the United Nations General Assembly<sup>67</sup> and Security Council, the European Union,<sup>68</sup> as well as ICJ decisions and military codes of conduct, to conclude that the dichotomy between IACs and NIACs is becoming increasingly distorted.<sup>69</sup> This conclusion was justified on various bases, including

<sup>63</sup> C Gray, 'Bosnia and Herzegovina: Civil War or Inter-state Conflict? Characterization and Consequences' (1996) 67 *British Year Book of International Law* 155.

<sup>64</sup> SC Res 827, UN SCOR, 48<sup>th</sup> sess, 3217<sup>th</sup> mtg, UN Doc S/RES/827 (25 May 1993), as amended by SC Res 1877, UN SCOR, 64<sup>th</sup> sess, 6155<sup>th</sup> mtg, UN Doc S/RES/1877 (7 July 2009) (*ICTY Statute*) art 2.

<sup>65</sup> The breaches were alleged to have been committed in the Omarska, Keraterm and Trnopolje prison camps. See *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) 2-4 [6]–[9], 277 [740].

<sup>66</sup> *Ibid* 49–51; GCI arts 13, 19, 24-6, 33-35; GCII arts 13, 22, 24-5, 27, 36-7; GCIII art 4; GCIV arts 4, 18-9, 20-2, 33, 53, 57.

<sup>67</sup> *Respect for Human Rights in Armed Conflicts* GA Res 2444 (XXIII), UN GAOR, 23<sup>rd</sup> sess, UN Doc A/RES/2444 (19 December 1968); *Basic Principles for the Protection of Civilian Populations in Armed Conflicts* GA Res 2675 (XXV), UN GAOR, 25<sup>th</sup> sess, UN Doc A/RES/2675 (9 December 1970).

<sup>68</sup> SC Res 788, UN SCOR, 3138<sup>th</sup> mtg, UN Doc S/RES/788 (19 November 1992); SC Res 972, UN SCOR, 3489<sup>th</sup> mtg, UN Doc S/RES/972 (13 January 1995); SC Res 1001, UN SCOR, 3594<sup>th</sup> mtg, UN Doc S/RES/1001 (30 June 1995) on Liberia; SC Res 794, UN SCOR, 3145<sup>th</sup> mtg, UN Doc S/RES/794 (3 December 1992); SC Res 814, UN SCOR, 3188<sup>th</sup> mtg, UN Doc S/RES/814 (26<sup>th</sup> March 1993) on Somalia; SC Res 1193, UN SCOR, 3921<sup>st</sup> mtg, UN Doc S/RES/1193 (28 August 1998) on Afghanistan.

<sup>69</sup> 'These sources of information are the next best to the actual behavior of the troops on the battlefield. Relying on these sources prevents risking recourse to misinformation by corrupt governments': *Tadić Interlocutory Decision* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) 83, 97. See also, Michael Scharf, 'Case Note on Tadić' (1997) 91 *American Journal of International Law* 718, 748; C Greenwood, 'International Humanitarian Law and the Tadić Case' (1996) 7 *European Journal of International Law* 265; M Sassòli and L Olsen, 'The Judgment of the ICTY Appeals Chamber on the Merits in the Tadić Case' (2000) 839 *International Review of the Red Cross* 733; C Warbrick and P Rowe, 'The International Criminal Tribunal for Yugoslavia: The Decision of the Appeals Chamber on the Interlocutory Appeal on Jurisdiction in the Tadić Case' (1996) 45 *International and Comparative Law Quarterly* 691.



the progression of a human-being-oriented approach to international law issues.<sup>70</sup> Whilst the ICTY acknowledged that there is a trend in international practice to diminish the distinction between CAs 2 and 3, this distinction has not yet been abolished in law.<sup>71</sup>

Currently, the minimum provisions of CA3 are inadequate compared to the treatment that GCIII affords to captured prisoners. Lawful participants in NIACs become ordinary prisoners once they are detained, whereas lawful combatants in IACs become POWs.<sup>72</sup> The difference in treatment between these two types of prisoners is undesirable. A further undesirable difference is the treatment accorded to captured civilians under GCIV compared to the treatment afforded to captured persons in an NIAC. The latter are not considered as civilians, solely because of the status of the conflict. Consequently, they are thus not entitled to the benefits of GCIV. There appears to be no purpose that validates this difference in treatment.

Neither CA3 nor APII mention POW, civilian or combatant status. By contrast, GCIII and GCIV expressly outline the positive entitlements for captured civilians and combatants. For instance, captured combatants become POWs, which is regarded as a measure of security and not of punishment.<sup>73</sup> Some privileges of POW status include bedding,<sup>74</sup> food and water,<sup>75</sup> clothes,<sup>76</sup> access to canteens,<sup>77</sup> hygiene benefits,<sup>78</sup> medical attention,<sup>79</sup> and medical inspections.<sup>80</sup> This has been described as the greatest benefit afforded to lawful combatants in IACs.<sup>81</sup> Similar benefits are accorded to captured civilians under GCIV. However, no such benefits are accorded to captured persons in NIACs. Crawford argues that the protections

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<sup>70</sup> Charter of the United Nations; International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969); International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'); International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR'); Basic Principles for the Protection of Civilian Populations in Armed Conflicts, GA Res 2675 (XXV), UN GAOR, 25<sup>th</sup> sess, 1922<sup>nd</sup> plen mtg, Supp No 28, UN Doc A/8028 (9 December 1970); General Comment No 20: Non-Discrimination in economic, social and cultural rights (Art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/GC/20 (2 July 2009); Peace through Deeds, GA Res 380(V) UN GAOR, 5<sup>th</sup> sess, 308<sup>th</sup> plen mtg, Supp No 69 A/RES/380(V) (17 November 1950); International Commission on Intervention and State Responsibility, 'The Responsibility to Protect' (Report, International Development Research Centre, 2001); Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, GA Res 25/2625 (XXV), UN GAOR, 25<sup>th</sup> sess, UN Doc A/RES/25/2625 (24 October 1970).

<sup>71</sup> Zegveld, above n 51, 143; *Tadić Interlocutory Decision* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) 100-126.

<sup>72</sup> Sandra Fabijanić Gagro, 'Defining and recognizing prisoners of war in contemporary armed conflicts' (2014) 2(5) *International Journal of Social Sciences* 60, 65.

<sup>73</sup> War Department, *Rules of Land Warfare – 1914* (GPO, 1914) 60 [27]; Lieber, above n 10, arts 56, 57, cited in Solis, above n 10, 190.

<sup>74</sup> GCIII art 25.

<sup>75</sup> *Ibid* art 26.

<sup>76</sup> *Ibid* art 27.

<sup>77</sup> *Ibid* art 28.

<sup>78</sup> *Ibid* art 29.

<sup>79</sup> *Ibid* art 30.

<sup>80</sup> *Ibid* art 31.

<sup>81</sup> G I A D Draper, 'Personnel and Issues of Status', in Michael A Meyer and Hilaire McCoubrey (eds), *Reflections on Law and Armed Conflicts* (Kluwer Law International, 1998) 194, 197. Cf D Jinks, 'The Declining Significance of POW Status' (2004) 45 *Harvard International Law Journal* 367, 380; Laurie R Blank, 'A Square Peg in a Round Hole: Stretching Law of War Detention Too Far' (2011) 63(4) *Rutgers Law Review* 1169.

afforded to POWs in GCIII are similar to the protections provided by CA3.<sup>82</sup> However, the positive entitlements that are guaranteed to prisoners in GCIII are more beneficial for the prisoners than the negative rights listed in CA3. For instance, the term 'humane treatment' is given a definitive meaning in GCIII, whereas States are only obliged *not* to commit the inhumane acts proscribed in CA3.<sup>83</sup>

State practice confirms that lawful participants in NIACs should be entitled to POW status. For example, in 1984, the Congolese Prime Minister stated:

For humanitarian reasons, and with a view to reassuring...the civilian population which might fear that it is in danger, the Congolese Government suggests that International Red Cross observers come to check on the extent to which the Geneva Conventions are being respected, particularly in the matter of the treatment of prisoners.<sup>84</sup>

This is just one example of the application of POW status to captured persons in NIAC, alongside the principles enshrined in the GCs.<sup>85</sup> The rationale for this approach is to ensure that all persons who carry the same status during the conflict are entitled to the same benefits under the GCs. On this point, it is important to distinguish between humane and inhumane treatment, and also between the status carried by combatants and civilians.

(b) *Difference between humane and inhumane treatment*

Under the GCs, 'nobody in enemy hands is outside the law'.<sup>86</sup> Accordingly, no person captured in armed conflict should be treated inhumanely. Both CA2 and CA3 stipulate that humane treatment is mandatory.<sup>87</sup> Nevertheless, there are gaps in the law which have the effect of depriving some prisoners of the humane treatment that others are entitled to. This deprivation is dependent on the status of the conflict and without justifiable cause. For instance, if a prison cell contained three prisoners from an NIAC and three prisoners from an IAC, who were all non-participating civilians in their respective conflicts, only the latter three prisoners would be entitled to all of the benefits under GCIV, but the former three would not. Such a distinction is made solely because the statuses of their conflicts are different. This is unjustified on any policy basis, and can be most suitably remedied by eliminating the

<sup>82</sup> Crawford, above n 39, 34–6. See also Jean Pictet, *The Principles of International Humanitarian Law* (ICRC, 1985) 33–34, 58–61; D Koller, 'The Moral Imperative: Toward a Human Rights-Based Law of War' (2005) 46 *Harvard International Law Journal* 231; A Rosas and A Eide, 'Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards' (1995) 89 *American Journal of International Law* 215; D Petrusek, 'Moving Forward on the Development of Minimum Humanitarian Standards' (1998) 92 *American Journal of International Law* 557; H P Gasser, 'A Measure of Humanity in Internal Disturbances and Tensions: Proposal for a Code of Conduct' (1988) 262 *International Review of the Red Cross* 38.

<sup>83</sup> That is, acts that constitute a 'systematic scorn for human values': *Prosecutor v Aleksovski (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case IT-95-14/1T, 25 June 1999) 49; *Delalić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) 525; *Prosecutor v Kordić and Čerkez (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/2, 26 February 2001) 269. Although APII art 4(1) refers to 'humane treatment' using terminology in art 4 of the *Hague Regulations of 1907* to achieve uniformity between its interpretation in IACs and NIAC, APII is not guaranteed to apply in every NIAC. Furthermore, there is no guarantee that the term 'humane' in *Common Article 3* will be interpreted as it is construed in GCIII. The promotion of gradations of humanitarian concern will always leave open the possibility of favouring the lowest possible level of treatment.

<sup>84</sup> Tshombe, above n 56.

<sup>85</sup> *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) 83; 97–127; M Bassiouni and P Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Transnational Publishers, 1996) 479; Joan Sloan, 'The International Criminal Tribunal for the Former Yugoslavia and Human Rights' (1997) 2 *European Human Rights Law Review* 329, 350.

<sup>86</sup> *The Hostage Case* (Military Tribunal V, Case No 7, 19 February 1948) 1253–4; Sershowitz, above n 26; Fleck, above n 10, 33.

<sup>87</sup> Common Article 2, Common Article 3.

distinction between CAs 2 and 3. The only instance in which the provision of humane treatment should vary is when the prisoners or participants in the conflict have committed varying degrees of unlawful activity. This issue will now be addressed.

(c) *Difference between the level of humane treatment accorded to combatants compared to civilians*

In the contemporary justice system, a person convicted of murder is often sentenced to a longer period in detention compared to a person convicted of manslaughter. This is the reality of justice and proportionate punishment. Similarly, in international humanitarian law, a civilian who directly participated in hostilities that pose a threat to the security of the State will be subjected to a stricter punishment in detention than a captured civilian who did not so participate. This is recognised in article 5 of GCIV.<sup>88</sup> As such, the larger the threat posed by the person, the less benefit he or she will be entitled to under the GCs. That is not to say that such a person would be treated inhumanely. Rather, he or she would be treated more restrictively. At this point it is useful to discuss the consequences of being a ‘civilian directly participating in hostilities’ compared to a ‘combatant’ through the lens of the principles of distinction and military necessity.

The principle of distinction, in treaty and in customary international law,<sup>89</sup> holds that parties to the conflict must always distinguish between civilians and combatants, and between civilian objects and military objects.<sup>90</sup> Moreover, a military object can only be legitimate if it is aimed at weakening the enemy.<sup>91</sup> However, civilians are not the enemy: combatants are. Therefore, combatants are the only legitimate targets that can be killed under international humanitarian law.<sup>92</sup> In order to become a combatant, pursuant to article 4(2) of GCIII, a person must prove they:

- (a) [were] commanded by a person responsible for their subordinates;
- (b) had a fixed distinctive sign recognisable at a distance;
- (c) carried arms openly;
- (d) conducted their operations in accordance with the laws and customs of war.<sup>93</sup>

Prima facie, authorising people to kill others seems to conflict with the fundamental human right to life.<sup>94</sup> However, once a person becomes a combatant, their human rights are limited due to the circumstance of war.<sup>95</sup> Captured combatants, as POWs, may be interned without any form of process until the end of active hostilities. They may also be criminally prosecuted for war crimes or other criminal acts committed before or during internment. Members of armed state groups are known as ‘unlawful combatants’ or ‘civilians directly participating in hostilities’. This article does not seek to assert which is the correct term to use. Rather, it will comment on the entitlements of such captured persons in order to prove that international humanitarian law condones different levels of humane treatment depending on the status that the person held during the conflict. This is completely different to cases that are dependent on the status of the conflict. If six prisoners were sitting in the *same* prison cell

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<sup>88</sup> GCIV art 5.

<sup>89</sup> Tshombe, above n 56; Henckaerts, above n 56, 181.

<sup>90</sup> API arts 48, 52; Henckaerts, above n 56, 181; Malcolm MacLaren and Felix Schwendimann, ‘An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law’ (2005) 6 *German Law Journal* 1217, 1239; Sabrina Balgamwalla, ‘Review of Conference: “The Reaffirmation of Custom as an Important Source of International Humanitarian Law”’ (2006) 13 *Human Rights Brief* 13, 25; *Legality of the Threat of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 78.

<sup>91</sup> Adam Roberts and Richard Guelff, *Documents on the Laws of War* (Oxford University Press, 3<sup>rd</sup> ed, 2000) 53; Carnahan, above n 10.

<sup>92</sup> Pejic, above n 55, 335.

<sup>93</sup> GCIII, art 4; API art 43.

<sup>94</sup> ICCPR art 6.

<sup>95</sup> Crawford, above n 39, 34–6.

and each held the same status in *different* conflicts, they should all be entitled to the same humane treatment, regardless of the status of the conflict from which they came. The requirement to give humane treatment should not be conditioned on conflict status.

(d) *Civilians directly participating in hostilities*

The level of humane treatment that will be provided to POWs depends on the status that the person carried in the conflict, rather than the status of the conflict itself. What about armed rebel groups, otherwise known as non-state actors? Are they capable of being classified as either combatants or civilians? This question has sparked much controversy.<sup>96</sup> Although the aim of this paper is not to engage in an in-depth analysis of the opposing sides, it suffices to make a passing comment on the issue. This is because it demonstrates that the higher the security concern posed by the person's wrongdoing, the more scope the State has to justifiably restrict its provision of humane treatment. Moreover, this issue underpins the cogency of proportionality in the operation of international humanitarian law.

In answering the question of whether armed rebel groups can be classified as either combatants or civilians, the United States ('US') would answer 'no'.<sup>97</sup> After the September 11 attacks, the US, under the Bush government, declared that the captured Taliban and al-Qaeda fighters were 'unlawful combatants' (so as *not* to classify the captured fighters as POWs).<sup>98</sup> The government stated that it was in a war of terror and that it did not need to treat the prisoners as either combatants or civilians, because they were unlawful combatants and hence fell outside the scope of international humanitarian law.<sup>99</sup> The existence of the notion of 'unlawful combatants' has triggered debate.<sup>100</sup>

The contrary argument to that of the US is that the concept of unlawful combatants does not exist, and armed rebel groups are therefore simply civilians directly participating in hostilities, who are thus covered by GCIV.<sup>101</sup> The Supreme Court of Israel offered insightful jurisprudence to support this argument in the *Detention of Unlawful Combatants Case*<sup>102</sup> and the *PCA Torture v Government Case*<sup>103</sup>. In these cases, the Supreme Court held that the concept of unlawful combatants only exists as a sub-category of civilians under GCIV. Further, the Supreme Court held that 'civilians' is a negative definition: it includes everyone

<sup>96</sup> J Callen, 'Unlawful Combatants and the Geneva Conventions' (2003-2004) 44 *Virginia Journal of International Law* 1025, 1050; George P Fletcher, 'The Indefinable Concept of Terrorism' (2006) 5 *Journal of International Criminal Justice* 1137, 1145; Jelena Pejic, 'Terrorist Acts and Groups: A Role for International Law?' (2004) 75 *British Yearbook of International Law* 71, 75.

<sup>97</sup> Robert K Goldman and Brian D Tittmore, 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian Law and Human Rights Law' (Report, ASIL Task Force on Terrorism December 2002) 23-31.

<sup>98</sup> R Baxter, 'So-Called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs' (1951) 28 *British Yearbook of International Law* 323, 340.

<sup>99</sup> US Department of State, *The Global War on Terrorism: The First 100 Days* (10 November 2001) The Coalition Information Centres <<https://2001-2009.state.gov/s/ct/rls/wh/6947.htm>>. Notably, after the Yemen Strike in 2002, the US Government, under the Obama administration, abandoned the terms 'war on terror' and 'unlawful combatants'.

<sup>100</sup> C Greenwood, 'International Law and the "War Against Terrorism"' (2002) 78 *International Affairs* 301, 303; G Rona, 'Interesting Times for International Humanitarian Law: Challenges from the "War on Terror"' (2003) 27 *Fletcher Forum on World Affairs* 55, 62. Knut Dörman, 'The Legal Situation of Unlawful/Unprivileged Combatants' (2003) 85 *International Review of the Red Cross* 45, 51; George P Fletcher and Jens David Ohlen, *Defending Humanity* (Oxford University Press, 2008) 183; Pejic, above n 55, 335.

<sup>101</sup> T Franck, 'Criminals, Combatants, or What? An Examination of the Role of Law in Responding to the Threat of Terror' (2004) 98 *American Journal of International Law* 686, 690; J Yoo and J Ho, 'The Status of Terrorists' (2003-2004) 44 *Virginia Journal of International Law* 207, 231; M Hoffman, 'Terrorists are Unlawful Belligerents, Not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law' (2002) 34 *Case Western Reserve Journal of International Law* 227, 230.

<sup>102</sup> *Iyad v State of Israel* (2008) CrimA 6659/06 ('Detention of Unlawful Combatants Case').

<sup>103</sup> Public Committee Against Torture in Israel v Government of Israel (2005) HCJ 769/02, 25, 35 ('Targeted Killings Case').

who is *not* a combatant, so long as they fulfil the nationality criteria in GCIV. The following comment summarises the Supreme Court's position: 'civilians who are unlawful combatants are not beyond the law; not outlaws; and their human dignity is to be honoured – they enjoy and are entitled to protection.'<sup>104</sup>

Accordingly, participants in hostilities who do not satisfy the criteria under article 4(2) of GCIII are considered to be civilians directly participating in hostilities under GCIV.<sup>105</sup> For such time as civilians directly participate in hostilities, they can be targeted by military operations.<sup>106</sup> However, once captured, they will be treated according to the rights of civilians in GCIV. This analysis illustrates the principle that all persons are treated with at least some level of humane treatment under the GCs. The status that a person carries in conflict – whether it is as a civilian, combatant, or direct participant in hostilities – determines the level of humane treatment that he or she will be entitled to. To the contrary, it would be incorrect to say that the level of humane treatment accorded to a person should be dependent on the status of the *conflict*, rather than the status of the *person* themselves. To prevent the latter conclusion from being formed, the distinction between CAs 2 and 3 ought to be eliminated.

## 2 *The war crimes regime in Article 8 of the Rome Statute should be unified*

By the 1990s, amongst the increasing prevalence of NIAC,<sup>107</sup> reform became necessary if war crimes law was to be relevant for victims of conflict. The drafters of the *Rome Statute* acknowledged this and adopted the approach taken by the ICTY in the *Tadić Interlocutory Decision*.<sup>108</sup> A clear majority in Rome was strongly committed to the inclusion of war crimes in NIAC, with there now being four separate types of war crimes in article 8 of the *Rome Statute*.<sup>109</sup> However, for two reasons, this reform did not entirely achieve what the *Tadić* decision would have permitted. The first reason is repetition. Article 8(2)(a) lists war crimes applicable in IAC, which mirror those provided in article 8(2)(e) for NIACs.<sup>110</sup> However, the applicability of war crimes law should not be dependent on the status of the conflict if the war crime in question is identical, regardless of the conflict's status. Accordingly, the inclusion of the same war crime in each type of conflict was an unsuccessful attempt by the drafters of the *Rome Statute* to achieve uniformity. This is because the applicability of some war crimes is now unnecessarily dependent on the existence of an IAC. The second reason why the drafting of the *Rome Statute* does not follow *exactly* what the *Tadić* decision would have permitted, is that there is no recognition in article 8(2)(e) of the ability to prosecute fundamental war crimes. Therefore, there are still many war crimes that should be, but are not, recognised in article 8(2)(e) for NIAC.<sup>111</sup> Each issue is now dealt with in turn.

<sup>104</sup> Ibid.

<sup>105</sup> International Committee of the Red Cross, 'Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law', reprinted in (2008) 872 *International Review of the Red Cross* 991, 997; Pejic, above n 55, 335.

<sup>106</sup> API art 51(3).

<sup>107</sup> UN Development Program, *Human Development Report 2005* (UNDP, 2005) 153–61; *Tadić Interlocutory Decision* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) 217; Human Security Centre, *Human Security Report 2005* (Oxford University Press, 2005) 22–5;

<sup>108</sup> Antonio Cassese, *Cassese's International Criminal Law* (Oxford University Press, 2013) 43; Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Beck/Hart, 2008) 37; Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford University Press, 2005) 120.

<sup>109</sup> International Criminal Court, *Rules of Procedure and Evidence*, Doc No ICC-ASP/1/3 (adopted 9 September 2002) r 74; *Rome Statute* art 8(2).

<sup>110</sup> Knut Dörman, *Elements of War Crimes Under the Rome Statute of the International Criminal Court* (Cambridge University Press, 2003) 81; *Rome Statute* arts 8(2)(a), (e).

<sup>111</sup> Such as willful killing and torture or inhuman treatment, including biological experiments: *Rome Statute* arts 8(2)(a)(i), (ii).

(a) *The issue of repetition in Article 8(2) of the Rome Statute*

Approximately half of the provisions from IAC have been transplanted to NIAC.<sup>112</sup> While this was done for policy reasons,<sup>113</sup> it is inefficient to have the same war crime applicable to both IAC and NIAC. If two war crimes are similar in substance, there is no utility in drafting them differently in form. The way in which the *Rome Statute* has been drafted, however, necessitates an initial analysis of whether or not the conflict is international. This analysis is unnecessary, as the answer will not affect whether or not a war crime has been committed. For example, ‘wilful killing’ in article 8(2)(a)(i) equates to ‘murder’ in article 8(2)(c)(i); ‘biological experiments’ in article 8(2)(a)(ii) are similar to ‘medical or scientific experiments’ in article 8(2)(e)(xi); and ‘wilfully causing great suffering’ in article 8(2)(a)(iii) is the equivalent of ‘cruel treatment’ in article 8(2)(c)(i). There is no justification in making the distinction between these crimes for the purposes of maintaining the distinction between CAs 2 and 3.

(b) *The issue of non-recognition of war crimes in Article 8(2)(e) of the Rome Statute*

The International Criminal Court (‘ICC’) Statute is ‘retrograde’, as suggested by Cassese, in that it does not completely abolish the IAC-NIAC distinction.<sup>114</sup> Whilst the trend favours convergence, the two regimes have not become identical. The leader of the US delegation to the Rome Conference claimed that differences between articles 8(2)(a)-(b) and 8(2)(e) of the *Rome Statute*<sup>115</sup> reflect agreement among most delegates that ‘customary international law has developed to a more limited extent with respect to NIAC’.<sup>116</sup> However, this claim should not be accepted in contemporary circumstances. Fundamental provisions with long recognition in IAC have not yet been recognised in NIAC, such as the prohibition of starvation as a means of warfare, the use of chemical weapons and launching disproportionate attacks. Further, grave breaches against persons or property protected by the GCs are provided in article 8(2)(a) but are not recognised in article 8(2)(e) because of the distinction between CAs 2 and 3.<sup>117</sup>

All four of the GCs contain a grave breaches provision,<sup>118</sup> specifying particular breaches for which States have a duty to prosecute those responsible. Although it is open to some debate, this duty to prosecute is universal and mandatory among contracting States *only* in IACs.<sup>119</sup> State parties to the GCs did not desire to give other States jurisdiction over grave breaches committed within their own borders.<sup>120</sup> Therefore, during the negotiation of the GCs, the

<sup>112</sup> The trend to converge the principles applicable to both types of conflict was further recognised in the 2010 Kampala Review Conference, where the ICC Statute was amended to reflect the principle of unnecessary suffering. Poisoned weapons, asphyxiating gases, and ‘dum-dum’ bullets became prohibited in internal armed conflicts as well as international armed conflicts: Amal Alamuddin and Philippa Webb, ‘Expanding Jurisdiction over War Crimes under Article 8 of the ICC Statute’ (2010) 8 *Journal of International Criminal Justice* 1219, 1230.

<sup>113</sup> The minority in opposition gave way to acceptance of a limited list of other fundamental provisions in article 8(2)(e): Cassese, above n 108, 12; Triffterer, above n 108, 75.

<sup>114</sup> Antonio Cassese, ‘The Statute of the International Criminal Court: Some Preliminary Reflections’ (1999) 10 *European Journal of International Law* 149, 150. Further, article 10 of the *Rome Statute* affirms that nothing in the *Rome Statute* limits or prejudices the development of other international law.

<sup>115</sup> *Rome Statute* arts 8(2)(a), (b), (e).

<sup>116</sup> David Scheffer, ‘The United States and the International Criminal Court’ (1999) 93 *American Journal of International Law* 12, 16.

<sup>117</sup> Alamuddin and Webb, above n 112.

<sup>118</sup> See especially CGI art 50; GCII art 51; GCIII art 130; GCIV art 147; API arts 11, 85.

<sup>119</sup> *Tadić Interlocutory Decision* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) 79; Solis, above n 10, 305.

<sup>120</sup> *Tadić Interlocutory Decision* (International Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) 80; Sonja Boelaert-Suominen, ‘Grave Breaches, Universal Jurisdiction and Internal Armed Conflict: Is Customary Law Moving Towards A Uniform Enforcement Mechanism for All Armed Conflicts?’ (2000) 5 *Journal of Conflict & Security Law* 63, 71.

delegations that pressed for recognition of grave breaches in NIACs were strongly opposed.<sup>121</sup> The scope of universal jurisdiction, however, is controversial in international law.<sup>122</sup> It has rarely been applied,<sup>123</sup> and should not be a reason why States do not recognise grave breaches in NIACs.<sup>124</sup> Further, customary international law illustrates that not all States are opposed to prosecuting grave breaches within a NIAC framework.<sup>125</sup> If grave breaches were applicable in NIACs, then this would have avoided the complex issue in *Tadić* as to whether or not the conflict was international: Dusko Tadić would have been *prima facie* responsible for the grave breaches under article 2 of the *ICTY Statute* because of the nature of the crimes, rather than the nature of the conflict. To achieve this desired result, the distinction between CAs 2 and 3 should be eliminated. Upon removal of the distinction, grave breaches would be applicable without having to raise the preliminary question of whether the offences occurred in an IAC.

The issue of war crimes being dependent upon the existence of an IAC arose in *Prosecutor v Lubanga (Judgment pursuant to Article 74 of the Statute) ('Lubanga Art 74 Judgment')*<sup>126</sup>, which was the first case to be tried by the ICC.<sup>127</sup> Whilst the Prosecutor characterised the conflict as non-international,<sup>128</sup> both the Pre-Trial and Trial Chambers characterised the conflict as international from July 2002 to 2 June 2003 (the date of withdrawal of the Republic of Uganda).<sup>129</sup> After this date the conflict became non-international. Accordingly, the ICC applied the distinction between CAs 2 and 3, as the conflict was only international when it occurred between two States.<sup>130</sup> Nevertheless, the ICC observed that:

Some academics, practitioners, and a line of jurisprudence from the *ad hoc* tribunals, have questioned the usefulness of the distinction between international and non-international armed conflicts, particularly in light of their changing nature.<sup>131</sup>

<sup>121</sup> Pictet, above n 21, 38-48; Jaques Verhaegen, 'Legal Obstacles to Prosecution of Breaches of Humanitarian Law' (1987) 261 *International Review of the Red Cross* 607, 615.

<sup>122</sup> Danielle Ireland-Piper, 'Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine' 9(4) *Utrecht Law Review* 68, 77 [3.3.3]; Luc Reydam, *Universal Jurisdiction* (Oxford University Press, 2003) 157, 191, 201; Michail Vagias, *The Territorial Jurisdiction of the International Criminal Court* (Cambridge University Press, 2010) 202; M C Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) *Virginia Journal of International Law* 42, 97.

<sup>123</sup> See, eg, *Eichman v Attorney General of Israel* (1962) 136 ILR 177; *R v Bartle and the Commissioner of Police for the Metropolitan District, ex parte Pinochet* (1999) 2 WLR 827.

<sup>124</sup> Maintaining the distinction between *Common Articles* 2 and 3 will not change the fact that States always run the risk of other States prosecuting crimes committed on their own territory under the principle of nationality, the effects doctrine, the principles of subjective or objective territoriality or the protective principle: Vagias, above n 122, 22, 98, 250; Matthew Garrod, 'Protective Principle of Jurisdiction over War Crimes and the Hollow Concept of Universality' (2012) 12 *International Criminal Law Review* 763, 790.

<sup>125</sup> For example, in the German Military Manual, the law regulating IACs governs violations of *Common Article* 3. See, Federal Ministry of Defence for the Federal Republic of Germany (ed), *Humanitarian Law in Armed Conflicts – Manual* (1992) 16 [211].

<sup>126</sup> *Prosecutor v Lubanga (Judgment pursuant to Article 74 of the Statute)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012) ('*Lubanga Art 74 Judgment*').

<sup>127</sup> *Ibid*; O Bekou, 'Prosecutor v Thomas Lubanga Dyilo – Decision on the Confirmation of Charges' (2008) 8 *Human Rights Law Review* 343, 347-8.

<sup>128</sup> *Prosecutor v Lubanga (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/06-803, 29 January 2007) 230-5.

<sup>129</sup> *Ibid* 543; *Lubanga Art 74 Judgment* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012) 504, 523-4; Bekou, above n 127, 347-8.

<sup>130</sup> *Common Article* 2; *Prosecutor v Blaškić (Decision on the Prosecution and Defence Motions Dated 25 January 1999 and 25 March 1999 Respectively)* (International Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-95-14-T, 22 April 1999) 4; *Prosecutor v Al Bashir (Warrant of Arrest)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09-1, 4 March 2009).

<sup>131</sup> *Lubanga Art 74 Judgment* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012) 539.

The ICC only applied the distinction because it is enshrined in the Court's statutory framework.<sup>132</sup> The conflict was characterised as international because the Ugandan Peoples' Defence Force ('UPDF') troops in occupation of the Ituri province were Ugandan forces, thus meaning that a conflict existed between two States.<sup>133</sup> Complex issues would have otherwise arisen if the UPDF were a non-state actor.<sup>134</sup> In such a case there would be an issue of whether the State of Uganda had overall control over the non-state actor of the UPDF.<sup>135</sup> This is because if an armed group is not acting on behalf of a government, in the absence of two States opposing each other, there is no IAC.<sup>136</sup> Under the current war crimes regime provided by article 8 of the *Rome Statute*,<sup>137</sup> in the absence of an IAC, the most fundamental war crimes and grave breaches cannot be prosecuted. To prevent this undesired result, the distinction between CAs 2 and 3 should be eliminated.

The overall control test is used to internationalise conflicts that occur between States and non-State actors.<sup>138</sup> This test was first enunciated by the Appeals Chamber in the *Tadić Interlocutory Decision* and applied by the ICC in the *Lubanga Art 74 Judgment*.<sup>139</sup> If the test is successfully applied, a conflict of an international character will be deemed to exist between two States pursuant to CA2. International courts and tribunals desire to apply the overall control test, because it operates to internationalise what would otherwise be an NIAC and therefore triggers the application of all four GCs.<sup>140</sup> The test, however, is not otherwise desired. According to the ICJ in the *Genocide Case*, overall control is inconsistent with effective control, which is the only test that can apply to render States responsible for controlling the actions of non-state actors.<sup>141</sup> Sub-part B argues that the overall control test is not a suitable test to internationalise conflicts, as it has been adopted *ipso facto* out of context, and that the finding of criminal responsibility should not depend on the fulfilment of a test that was designed to hold States, not individuals, accountable. Therefore, the distinction between CAs 2 and 3 should be eliminated so the GCs can simply apply to all armed conflicts, without having to invoke the overly broad overall control test.

<sup>132</sup> Rome Statute art 21.

<sup>133</sup> *Lubanga Art 74 Judgment* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012) 72, 84, 541-2: In January 2001, Edison Muzoora of the UPDF seized control of the province of Ituri. Thereafter, the conflict was international. See also, *Tadić Interlocutory Decision* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) 70; *Delalić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) 183; *Prosecutor v Branin (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-99-36-T, 1 September 2004) 122.

<sup>134</sup> Anne-Marie LaRosa and Carolin Wuerzner, 'Armed Groups, Sanctions and the Implementation of International Humanitarian Law' (2008) 870 *International Review of the Red Cross* 327, 331.

<sup>135</sup> *Lubanga Art 74 Judgment* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012) 541; *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) 84, 90, 131, 137-145; Sylvain Vité, 'Typology of armed conflicts in international humanitarian law: legal concepts and actual situations' (2009) 91 *International Review of the Red Cross* 70, 90; Antonio Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 *European Journal of International Law* 649, 651; Jelena Pejić, 'Status of Armed Conflicts' in Elizabeth Wilmshurst (ed), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press, 2007) 92-3.

<sup>136</sup> Pictet, above n 21, 32; Claus Krieb, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts' (2010) 15 *Journal of Conflict and Security Law* 245; Andrew Clapham, 'Extending International Criminal Law Beyond The Individuals to Corporations and Armed Opposition Groups' (2008) 6(5) *Journal of International Justice* 899, 901.

<sup>137</sup> Rome Statute art 8.

<sup>138</sup> *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) 49-50.

<sup>139</sup> *Ibid*; *Lubanga Art 74 Judgment* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012) 541.

<sup>140</sup> *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) 217; *Lubanga Art 74 Judgment* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012) 541.

<sup>141</sup> *Genocide Case* [2007] ICJ Rep 43, 208 [400].



## B *Eliminating the Distinction Between Common Articles 2 And 3 for Legal Reasons*

### 1 *Application of the Geneva Conventions of 1949 should not be dependent on conflict status*

In an international criminal court or tribunal, before the prosecutor is entitled to prosecute a criminal for committing grave breaches of the GCs, the prosecutor must first establish that the conflict is international. As previously mentioned, an IAC is defined in CA2 as ‘a case 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 recognised by one of them’.<sup>142</sup>

The overall control test can be appropriately used in the context of determining conflict status, because the result of this determination does not impact on the responsibility of the States involved in the conflict. This would be a different issue if the definition of a CA2 armed conflict involved ‘the use of force between two States’. In such a case, once the finding of an IAC is made, questions concerning the State’s responsibility would automatically follow for potentially breaching article 2(4) of the *UN Charter* (which prohibits the use of force).<sup>143</sup> However, CA2 does not require a State to use force, but rather acknowledges the possibility of a State not recognising the fact that it is in a state of war. This reinforces the fact that a State does not have to use direct force to be considered as a party to a conflict. Consequently the finding of an IAC will not necessarily entail a corollary finding of the State’s responsibility. Despite this, it is undesirable to use the overall control test to determine the status of conflicts in international humanitarian/criminal law because:

1. the test has been adopted in the context of the law of State responsibility (to circumvent the effective control test);
2. it is not necessary to invoke the overall control test in order to render a person criminally responsible; and
3. it causes international criminal law prosecutors to argue that what appears to be a non-international armed conflict by fact is an international armed conflict by law.

These three points will now be illustrated in an analysis of the ICTY’s *Tadić Judgment* and the ICJ’s decisions in the *Genocide Case* and *Nicaragua*.

#### (a) *The Trial Chamber in Tadić: An analysis of the law on State responsibility*

The Trial Chamber in the *Tadić Judgment* held that State responsibility should be determined pursuant to the rule of customary international law set out in article 8 of the *Draft Articles on State Responsibility*.<sup>144</sup> Under this article, if a non-state actor conducts itself under the direction, control, or instructions of a State, responsibility for the actions of the non-state actor can be attributed to the State.<sup>145</sup> The Trial Chamber further held that the concept of ‘control’ required by article 8 must be understood in light of the effective control

<sup>142</sup> Common Article 2.

<sup>143</sup> *UN Charter* art 2(4).

<sup>144</sup> *Draft Articles on Responsibility States for Internationally Wrongful Acts*, GA Res 56/83 UN GAOR, 56<sup>th</sup> sess, 85<sup>th</sup> plen mtg, Supp No 49, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) art 8; James Crawford, *First Report on State Responsibility*, GA Res 52/156, 50<sup>th</sup> sess, Agenda Item 2, UN DOC A/CN.4/490 and Additional 1-7 (12 August 1998); *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) 205-6 [585]; *Genocide Case* [2007] ICJ Rep 43, 207 [398].

<sup>145</sup> James Crawford, ‘Revising the Draft Articles on State Responsibility’ (1999) 10(2) *European Journal of International Law* 435, 444.

test established in *Nicaragua*.<sup>146</sup> Effective control must be exercised in respect of each operation in which the violations occurred, not generally in respect of the overall actions taken by the non-state actor.<sup>147</sup> For example in *Nicaragua*, whilst the US supported the contras by funding, organising, equipping and training their operations, it could not be proved that the US intended to assist the contras in respect of their military operations. Accordingly, such evidence could not show that the US effectively controlled the contras' specific actions.<sup>148</sup> Such a level of control can only be established by exceptional gravity and the proof should be such as to leave no room for reasonable doubt.<sup>149</sup>

In the *Tadić Judgment*, the Trial Chamber held that FRY did not have effective control over *Republika Srpska* in the same way the US did not have effective control over the contras in *Nicaragua*.<sup>150</sup> The Trial Chamber had no evidence before it to prove that FRY had directed or influenced the actual military operations of *Republika Srpska*.<sup>151</sup> Therefore, while various forms of assistance were provided, this was insufficient to constitute effective control.<sup>152</sup> For this reason, the victims of the unlawful acts were protected by the minimal provisions of CA3,<sup>153</sup> applicable as it is to all armed conflicts, rather than the specific protection under CA2.<sup>154</sup> Even though responsibility could not be attributed to FRY, the Appeals Chamber nevertheless found a way to internationalise the conflict.

(b) *The Appeals Chamber in Tadić: a critique on its application of the law on State responsibility*

The approach taken by the Appeals Chamber towards the issue of whether there was an IAC differed greatly from that taken by the ICTY at Trial. Rather than accepting that there was no IAC, the Appeals Chamber formulated its own test of overall control, requiring that it must 'go beyond the mere financing and equipping of armed forces and involve participation in the planning and supervision of military operations'.<sup>155</sup> This test was held not to require evidence of specific orders or instructions relating to particular military actions.<sup>156</sup> For this reason, the overall control test differs markedly from that of effective control. Moreover, the Appeals Chamber created a way to internationalise the conflict, without making a necessary

<sup>146</sup> *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) 205-6 [585]; *Genocide Case* [2007] ICJ Rep 43, 206 [399].

<sup>147</sup> *Genocide Case* [2007] ICJ Rep 43, 207 [400].

<sup>148</sup> *Nicaragua* [1986] ICJ Rep 14, 57 [95]-[97], 59 [101], 62-64 [109]-[110], 63 [110], 64-5 [115], 113 [217], 129 [277].

<sup>149</sup> *Genocide Case* [2007] ICJ Rep 43, 130 [210]. For example, proof of instructions or an official statement reflecting specific intention would be enough: 214 [413].

<sup>150</sup> The Trial Chamber decision in *Tadić* was criticised in dissent and in commentary for not reflecting the reality of the situation: *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) 287-299 (McDonald J, dissenting); Theodor Meron, 'Classification of Armed Conflict in the Former Yugoslavia: *Nicaragua's* Fallout' (1998) 92 *American Journal of International Law* 236, 241. However, sometimes the nuance of the law does not line up with reality: Magda Karagiannakis and James Crawford, 'State immunity, war crimes and human rights' [2013] *Peace & Security Global Change* 1, 8.

<sup>151</sup> *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) 216 [600]-[605].

<sup>152</sup> *Genocide Case* [2007] ICJ Rep 43, 207-211 [397]-[407].

<sup>153</sup> *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) 276 [733]. The ICTY Trial Chamber the same approach as the ICJ did in the *Nicaragua* [1986] ICJ Rep 14, 114 [219].

<sup>154</sup> *Ibid* 217 [607].

<sup>155</sup> *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) 62 [145]. See also, *Prosecutor v Aleksovski (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/1-A, 24 March 2000) 131-4; *Prosecutor v Delalić, Mucić, Delić, and Landžo (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-21-A, 20 February 2001) 26; *Prosecutor v Kordić and Čerkez (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/2-A, 17 December 2004) 306-7.

<sup>156</sup> *Prosecutor v Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) 62 [145].

finding on the law of State responsibility. Upon revision by the ICJ in the *Genocide Case*, the majority opinion stated that the overall control test *may* be employed to determine whether or not an armed conflict is international. While true, in the sense that the status of a conflict will not necessarily invoke State responsibility, the invocation of the overall control test is to determine the status of armed conflicts is undesirable.

(c) *The ICJ's use of 'control' in the Genocide Case and Nicaragua*

It must be noted that the ICJ's comment in the *Genocide Case*, supporting the use of overall control in the context of armed conflict, was just that – a comment. The main issue for the ICJ was whether the overall control test was relevant to a determination of State responsibility, to which the Court answered in the negative. It held that the overall control test had the major drawback of broadening the scope of State responsibility.<sup>157</sup> In this regard, the overall control test was described as 'stretching too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility'<sup>158</sup>.

Though not appropriate for State responsibility, the overall control test was still considered by the ICJ to be appropriate for determining conflict status. As noted by the ICJ, 'logic does not require the same test to be adopted in resolving two different issues.'<sup>159</sup> This article, nevertheless, expresses reservation about the way in which the Court condoned use of the overall control test in the international humanitarian/criminal law context.

The overall control test was adopted and formulated by the ICTY in the context of the law of State responsibility. Yet, it has been operating ever since outside of the context of the law of State responsibility. By expressing a lower threshold, the test stretches the law of State responsibility 'almost to breaking point'<sup>160</sup> and therefore should not be invoked in other areas of law to prevent the possibility of an inconsistency arising. For example, in *Nicaragua*, before the overall control test was formulated by the ICTY, the effective control test was used to determine both questions of State responsibility and the status of conflicts. In *Nicaragua*, given the fact that the US did not have effective control over the contras, the conflict between the contras and Nicaragua was held *not* to be international.<sup>161</sup> Therefore, the same test, that of effective control, was used to resolve the issues of both State responsibility *and* the status of the conflict.<sup>162</sup> Now that the overall control test is used to determine the issue of conflict status, inconsistencies may arise as between what the effective control test would realise compared to that of overall control.

In any event, the overall control test was adopted in a foreign context to that of international humanitarian/criminal law. Courts and tribunals should thus exercise caution in adopting a test developed in a foreign context to apply to particular issues. The simplest point of all goes beyond 'appropriateness'. Whether or not adopting the overall control test to determine the status of a conflict is 'appropriate', the fact is that satisfying the test is not necessary in order to hold an individual criminally responsible for committing grave breaches of the GCs. A breach is a breach, whether international or non-international. Thus, criminals should be capable of being prosecuted for grave breaches of the GCs, with the prospect of such prosecutions not being conditioned on satisfaction of the excessively broad overall control test. Ideally, there should be no requirement to determine the status of a conflict in order to

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<sup>157</sup> *Genocide Case* [2007] ICJ Rep 43, 210 [406].

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid* [405].

<sup>160</sup> *Ibid* [406].

<sup>161</sup> *Nicaragua* 114 [219].

<sup>162</sup> *Nicaragua* is also worth mentioning, as upon the finding of a NIAC, the Court decided only to apply *Common Article 3* instead of the protection afforded by CA2, illustrating the limited use to which the GCs are put due to the stringent thresholds that have to be met in order to classify the status of the conflict.

apply the GCs at all. This can be simply achieved by eliminating the distinction between CAs 2 and 3.

### III CONCLUSIONS TO BE DRAWN AND RECOMMENDATIONS

The regime of international humanitarian law would be more humane in its practical application if the distinction between CAs 2 and 3 were eliminated. This is justified by protective and prosecutorial reasons. There is no reason why persons of the same status in armed conflict should be accorded different levels of humane treatment. The fact that those persons came from different armed conflicts is immaterial. The status of the conflict cannot predicate the level of humane treatment provided. Justice only requires that the status of the person determine what he or she is entitled to.

While recognition of CA2 and APII was a remarkable achievement for NIACs, they both fall short of what humane treatment permits: protection by all four of the GCs.<sup>163</sup> As noted by the ICTY in the *Tadić Interlocutory Decision*:

Elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.<sup>164</sup>

This article has shown that international criminal lawyers have found a way to circumvent the law of State responsibility in pursuit of their aim to establish criminal responsibility. In order to prosecute a criminal for a grave breach of the GCs, there must first exist an IAC. Such a conflict can be determined by the overall control test, as decided by the Appeals Chamber in the *Tadić Interlocutory Decision*. This test, however, is unsupportable in the context of contemporary armed conflict and international criminal law, because: (1) it was developed in the context of State responsibility and so should not be used in foreign contexts; and (2) it is not necessary to determine criminal responsibility. On that second note, as a matter of substance and not of form, once a grave breach of the GCs is committed, the accused should be brought to justice. The mere fact that the crime was committed in an NIAC should make no difference to the prospects of prosecution for such a breach. Above all, the distinction between CAs 2 and 3 should be eliminated to ensure that LOAC maintains its standard to humanise war. Moreover, the distinction should be eliminated in order to ensure that the GCs are properly applied in all circumstances; they should be applicable to *all* armed conflicts,<sup>165</sup> regardless of whether or not they are international.

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<sup>163</sup> *Tadić Interlocutory Decision* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) 94–6; Theodor Meron, ‘International Criminalisation of Internal Atrocities’ (1995) 89 *American Journal of International Law* 554; Darryl Robinson and Herman von Hebel, ‘War Crimes in Internal Conflicts: Art 8 of the ICC Statute’ (1999) 2 *Yearbook of International Humanitarian Law* 193.

<sup>164</sup> *Tadić Interlocutory Decision* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) 121.

<sup>165</sup> This would only leave the definition of an ‘armed conflict’ being the threshold indicator of whether the Geneva Conventions of 1949 apply.