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## Improving Civilian Protection during War through Conflict-Specific Behavioural Regulation of Combatants

Kirsten MD Stefanik, *The University of Western Ontario*

Supervisor: Oosterveld, Valerie, *The University of Western Ontario*

A thesis submitted in partial fulfillment of the requirements for the Doctor of Philosophy degree in Law

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## Abstract

This thesis advances the claim that there is a gap between the regulation of behaviour for the protection of individuals in peace and the regulations needed to protect civilians from combatant violence during war. Social psychology and criminology theories can help to develop the necessary conflict-specific behavioural regulations. This is because social psychology and criminology theories can explain how combatant deviance is adversely affected by psychological processes that reframe combatants' conceptions of right and wrong and, in so doing, fundamentally alter the way in which combatants view the IHL rules intended to protect civilians. This thesis uses legal doctrinal methodology to establish the current status of IHL application to armed groups and existing IHL protections for civilians, which are based largely on peacetime protections for individuals (e.g., prohibitions on assault, murder, rape, etc.). It demonstrates the need and utility of turning to academic disciplines beyond law, specifically social psychology and criminology, to understand combatant violence toward civilians. Through the use of case studies focusing on the Sierra Leone civil war and the numerous ongoing conflicts in the Democratic Republic of Congo, this thesis identifies two common combatant behaviours that contribute to the perpetration of IHL violations against civilians, but are currently unregulated by IHL: (1) combatant use of demeaning, degrading, or dehumanizing language toward civilians and (2) combatant use of nicknames, particularly violent or heroic nicknames. The thesis proposes two new IHL regulations to address these behaviours and to inhibit the ability of these behaviours to contribute to violence toward civilians during armed conflict. Ultimately, the thesis demonstrates how combatant psychology can be used to develop the substantive content of IHL for the protection of civilians.

## Keywords:

International humanitarian law; non-state armed groups; combatants; civilian protection; dehumanization; diffusion of responsibility; social psychology; criminology

## Summary for Lay Audience

This thesis argues that there is a need for new laws regulating the behaviour of members of armed groups in order to improve protection for civilians during war. Current protections for civilians are largely based on the same protections for individuals in peacetime (e.g., no murder, no stealing, no rape), but new laws focusing on behaviour which, in the context of war, places civilians in danger. The behaviour in need of regulation can be identified through an improved understanding of the psychology causes of acts of direct violence toward civilians by members of armed groups. This thesis uses social psychology and criminology to understand the psychology of fighters. It then applies this understanding to case studies examining violence toward civilians in Sierra Leone and the Democratic Republic of Congo. The thesis develops two new legal rules to regulate the use of demeaning, degrading or dehumanizing language by fighters and the use of nicknames by fighters. The dehumanization of civilians leads to violence towards civilians. Nicknames allow fighters to feel anonymous and not responsible for their actions toward civilians. Targeting these behaviours through the law will prevent the patterns of thought that lead to civilian harm.

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## List of Abbreviations

AFDL – Alliance des forces démocratiques pour la libération du Congo

AFRC – Armed Forces Revolutionary Council

APCLS – Alliance des patriotes pour un Congo libre et souverain

CDF – Civil Defense Forces

DRC – Democratic Republic of Congo

FARDC – Forces armées de la République Démocratique du Congo

ICC – International Criminal Court

ICCPR – International Covenant on Civil and Political Rights

ICJ – International Court of Justice

ICRC – International Committee of the Red Cross/Red Crescent

ICTY – International Criminal Tribunal for the Former Yugoslavia

IHL – International Humanitarian Law

IHRL – International Human Rights Law

M23 – Mouvement du 23 mars

NIAC – Non-International Armed Conflict

SCSL – Special Court for Sierra Leone

SLA – Sierra Leone Army

SLPP – Sierra Leone People's Party

TRC – Truth and Reconciliation Commission

UN – United Nations

US – United States

## Chapter 1

### 1 War and Peace

War and peace: What's the difference? ... [W]ar is violent and peace is, well, peaceful; in other words, peace is the antithesis of war.

-David Keen<sup>1</sup>

Peace is the absence of war or, as Keen puts it, “peace is the antithesis of war.”<sup>2</sup> In peace, there is a seemingly never-ending amount of law, both domestic and international, that governs most aspects of day-to-day life. By contrast, war often epitomizes “the breakdown of legal systems” and the existence of “unleashed violence means the obliteration of standards of behaviour and legal systems.”<sup>3</sup> However, war is not an ungoverned space. War, referred to as ‘armed conflict’ under international law, is governed by an entire body of law: international humanitarian law (IHL).<sup>4</sup>

IHL has, for more than a century, sought to protect and minimize harms to, among others, civilians during conflict.<sup>5</sup> IHL has continued to develop in the face of terrible violence directed

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<sup>1</sup> David Keen, “War and peace: What’s the difference?” (2000) 7:4 *International Peacekeeping* 1 at 1.

<sup>2</sup> *Ibid.*

<sup>3</sup> Frédéric Maurice, “Humanitarian Ambition” (1992) 289 *International Review of the Red Cross* 363 at 371.

<sup>4</sup> IHL is also referred to as the law of armed conflict (LOAC). These terms (IHL and LOAC) can and are often used interchangeably; however, the former, IHL, tends to be preferred by those who wish to emphasize the humanitarian aims of the body of law, such as the International Committee of the Red Cross, while the latter, LOAC, is often preferred by states and their armed forces.

<sup>5</sup> See, e.g., “Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, 22 August 1864” in D Schindler & J Toman, eds, (Leiden, NLD: Martinus Nijhoff, 1988) 280; *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949 [*Geneva Convention I*]; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949 [*Geneva Convention II*]; *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949 [*Geneva Convention III*]; *Geneva Convention, Relative to the Treatment of Civilian Persons in Time of War*, 12 August 1949 [*Geneva Convention IV*]; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977 [*Additional Protocol I*]; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977 [*Additional Protocol II*]; Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary Humanitarian Law Volume I: Rules* (Cambridge, UK: ICRC and Cambridge University Press, 2009).

toward civilians in an effort to improve the protection it provides to civilians. For example, in the wake of World War II, states negotiated the four Geneva Conventions of 1949<sup>6</sup> and, in the shadow of the Vietnam War, they negotiated the two 1977 Additional Protocols to the 1949 Geneva Conventions.<sup>7</sup> More recently, the aim of civilian protection and the prevention of civilian suffering has been the catalyst behind treaties prohibiting the use of anti-personnel landmines and cluster munitions.<sup>8</sup>

Unlike in peace, it is legal and encouraged that combatants injure and kill enemy combatants during armed conflict.<sup>9</sup> The generally absolute prohibition on murder during peace time is eroded during war. Despite permitting combatants to use lethal force against enemy combatants, IHL prohibits combatants from directly targeting civilians.<sup>10</sup> Apart from this rule requiring combatants to distinguish between combatants and civilians, to take precautions to avoid excessive indirect harm to civilians during conflict, and to ensure that any indirect harm to civilians is proportionate to the military advantage acquired, the specific acts prohibited under IHL for the protection of civilians are acts equally prohibited during peace such as murder, assault, torture, and rape.<sup>11</sup> The basic rules of IHL, including rules for the protection of civilians, are widely known among civilians and combatants around the world.<sup>12</sup> Even so, in most contemporary armed conflicts, the majority of casualties are civilians who take no part in the hostilities.<sup>13</sup>

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<sup>6</sup> *Geneva Convention I*, *supra* note 5; *Geneva Convention II*, *supra* note 5; *Geneva Convention III*, *supra* note 5; *Geneva Convention IV*, *supra* note 5.

<sup>7</sup> *Additional Protocol I*, *supra* note 5; *Additional Protocol II*, *supra* note 5.

<sup>8</sup> *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*, United Nations, 18 September 1997 [*Landmine Treaty*]; *Convention on Cluster Munitions*, 3 December 2008 [*Convention on Cluster Munitions*].

<sup>9</sup> See, e.g., Marco Sassoli, *Legitimate Targets of Attacks under International Humanitarian Law* (Cambridge, MA: Harvard Program on Humanitarian Policy and Conflict Research, 2003); Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977) at 34, 41.

<sup>10</sup> See, e.g., Henckaerts & Doswald-Beck, *supra* note 5 at Rule 1 (distinction); *Additional Protocol I*, *supra* note 5 at Articles 48, 51(2), 52(2); *Additional Protocol II*, *supra* note 5 at Article 13(2).

<sup>11</sup> See, e.g., *Geneva Convention IV*, *supra* note 5 at Common Article 3; *Additional Protocol II*, *supra* note 5 at Article 4(2); Henckaerts & Doswald-Beck, *supra* note 5 at Rules 87-98.

<sup>12</sup> Daniel Muñoz-Rojas & Jean-Jacques Frésard, *The Roots of Behaviour in War, Understanding and Preventing IHL Violations* (Geneva: ICRC, 2004) at 5.

<sup>13</sup> See, e.g., Valerie Epps, “Civilian Casualties in Modern Warfare: The Death of the Collateral Damage Rule” (2013) 41 *Georgia Journal of International and Comparative Law* 307 at 329; Sobhi Tawil, “International Humanitarian Law and Basic Education” (2000) 82 *International Review of the Red Cross* 581; Walter C Clemens & J David Singer, “A Historical Perspective: The Human Cost of War” (2000) 282 *Scientific American* 56.

Since World War II, the nature of conflicts has drastically changed: the preponderance of armed conflicts today are of a non-international character – sometimes referred to as civil wars – in which at least one of the parties to the conflict is a non-state armed group (more commonly referred to as rebels, guerrillas, or insurgents).<sup>14</sup> Statistics show that, since 2000, armed groups have accounted for the majority of the direct violence toward civilians in armed conflicts around the world.<sup>15</sup> Conflicts, such as those in Sierra Leone and the Democratic Republic of Congo (DRC), have become synonymous with widespread civilian harms committed by members of armed groups in direct violation of IHL.<sup>16</sup> This violence has included assault; murder; torture; and cruel, inhumane, humiliating and degrading treatment of civilians by combatants.<sup>17</sup> News reports often provide horrifying details of women whose babies are cut from their wombs by combatants only to be killed,<sup>18</sup> or people trapped in their homes by combatants and burned to death.<sup>19</sup> With such appalling details, it is easy to dismiss these combatants as psychopaths, sadists, or monsters; however, the number of perpetrators of violence toward civilians during non-international armed conflicts (NIACs) far exceeds societal prevalence rates of sadism and psychopathy,<sup>20</sup> personality disorders that, during peace, are sometimes used to explain how

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<sup>14</sup> In fact, of the 49 conflicts worldwide in 2017 only one was an inter-state conflict, the conflict between India and Pakistan over Kashmir: Kendra Dupuy & Rustad, Siri Aras, *Trends in Armed Conflict* (Oslo: Peace Research Institute Oslo, 2018).

<sup>15</sup> Sebastian von Einsiedel, *Civil War Trends and the Changing Nature of Armed Conflict*, United Nations University Centre for Policy Research Occasional Paper 10 (United Nations University, 2017) at 7.

<sup>16</sup> Other conflicts known for widespread violence toward civilians since the end of the Cold War have included the wars in the Central African Republic (2012-ongoing), Colombia (1964-ongoing), Darfur (2003-ongoing), Guatemala (1960-1996), Rwanda (1990-1994), Somalia (1991-ongoing), Sri Lanka (1983-2009), South Sudan (2013-ongoing), Syria (2011-ongoing), Former Yugoslavia (1991-1999).

<sup>17</sup> While these acts of violence have been common in many armed conflicts, chapter 7 of this thesis examines these acts in the specific context of the Sierra Leone Civil War and armed conflicts in the DRC since the mid-1990s.

<sup>18</sup> Human Rights Watch, *“We’ll Kill You if You Cry” Sexual Violence in the Sierra Leone Conflict*, Vol 15, No 1 (A) (New York: Human Rights Watch, 2003) at 35.

<sup>19</sup> “Casualties of War - Civilians, Rule of Law, and Democratic Freedoms”, (1 February 1999), online: *Human Rights Watch* <<https://www.hrw.org/report/1999/02/01/casualties-war/civilians-rule-law-and-democratic-freedoms>>; Mark Tran, “Northern Congo civilians ‘need urgent aid’”, (15 October 2009), online: *The Guardian* <<https://www.theguardian.com/world/2009/oct/15/northern-congo-civilians-urgent-aid>>; UN Office of the High Commissioner for Human Rights, *Report of a Mission of the United Nations High Commissioner for Human Rights – accounts of Congolese fleeing the crisis in the Kasai region, in the Democratic Republic of the Congo* (Geneva: United Nations, 2017) at paras 30, 37-38, 40, 43.

<sup>20</sup> The fifth edition of the Diagnostic and Statistical Manual of Mental Disorders records the 12-month prevalence rates of antisocial personality disorder, which includes psychopathy and sociopathy, at between 0.2% and 3.3%: American Psychiatric Association, “Personality Disorders” in *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed (Arlington, VA: American Psychiatric Association, 2013); A 2001 study based on 2053 adults in Oslo, Norway found prevalence rates of sadism at 0.2% and antisocial personality disorder at 0.7%: S Torgersen, E Kringlen & V Cramer, “The prevalence of personality disorders in a community sample” (2001) 58:6 *Archives of General Psychology* 590.

individuals come to commit acts of extreme violence against individuals.<sup>21</sup> In reality, more often than not, combatants who harm civilians are ordinary people who, before they took up arms, were law-abiding citizens and who, after they lay down their arms, return to ordinary law-abiding lives, although often plagued by the trauma of their war experiences.<sup>22</sup>

This transition from law-abiding citizen to law-breaking combatant raises questions as to why laws prohibiting certain behaviours for the security of individuals provide, more often than not, sufficient protection from extreme violence in peace but these same prohibitions often offer insufficient protection for civilians during armed conflict. Insight into this transition from law-abiding individual during peacetime to law-breaking individual in wartime can be found in criminology and social psychology theories.<sup>23</sup> These two disciplines have examined the psychological processes associated with ordinary individuals who come to commit war crimes, crimes against humanity, acts of genocide, and other violent acts toward civilians during armed conflict. They demonstrate how, for example, the dehumanization of civilians reframes how combatants view civilians and how they view rules for the protection of civilians.<sup>24</sup>

Psychological processes such as dehumanization reframe combatant conceptions of right and

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<sup>21</sup> See, e.g., David J Cooke, “Psychopathy, Sadism and Serial Killing” in Adrian Raine & José Sanmartin, eds, *Violence and Psychopathy* (New York; London, UK: Kluwer Academic/Plenum Publishers, 2001) 123; Rebecca Taylor LaBrode, “Etiology of the Psychopathic Serial Killer: An Analysis of Antisocial Personality Disorder, Psychopathy, and Serial Killer Personality and Crime Scene Characteristics” (2007) 7:2 *Brief Treatment and Crisis Intervention* 151; Hilda CP Morana, Michael H Stone & Elias Abdalla-Filho, “Personality disorders, psychopathy, and serial killers” (2006) 28:2 *Brazilian Journal of Psychiatry* 74.

<sup>22</sup> See, e.g., Alette Smeulers, “Perpetrators of International Crimes: Towards a Typology” in Alette Smeulers & Roelof Haveman, eds, *Supranational Criminology: towards a criminology of international crimes* (Antwerp, BE: Intersentia, 2008) 233 at 233–34; James Waller, *Becoming Evil How Ordinary People Commit Genocide and Mass Killing* (New York: Oxford University Press, 2002) at 55–87; Sara Reardon, “Colombia: after the violence” (2018) 557:7703 *Nature: International Journal of Science*; RJ Lifton, *The Nazi Doctors* (New York: Basic Books, 1986); Hannah Arendt, *Eichmann in Jerusalem* (New York: Viking, 1963).

<sup>23</sup> For example, the theories of techniques of neutralization, moral disengagement, deindividuation, and obedience to authority discussed in chapter 7. See, e.g., Albert Bandura, “Moral Disengagement in the Perpetration of Inhumanities” (1999) 3:3 *Personality and Social Psychology Review* 192; Albert Bandura, *Moral Disengagement: How People Do Harm and Live with Themselves* (New York: Worth Publishers, 2016); Philip Zimbardo, *The Lucifer Effect Understanding How Good People Turn Evil* (New York: Random House, 2007); Herbert C Kelman & V Lee Hamilton, *Crimes of Obedience Toward a Social Psychology of Authority and Responsibility* (New Haven, CT: Yale University Press, 1989); Stanley Milgram, *Obedience to authority: An experimental view* (New York: Harper & Row, 1974); Alexander Alvarez, “Adjusting to Genocide: The Techniques of Neutralization and the Holocaust” (1997) 21:2 139; Emily Bryant et al, “Techniques of Neutralization and Identity Work Among Accused Genocide Perpetrators” (2017) spx026 *Social Issues* 1.

<sup>24</sup> See, e.g., Alvarez, *supra* note 23 at 167; Bandura, *supra* note 23 at 84–89; Bandura, *supra* note 23 at 201–203; Kelman & Hamilton, *supra* note 23 at 18–19; Zimbardo, *supra* note 23 at 17, 222–24.

wrong such that their conceptions of right and wrong are no longer the same as during peace time.

The continued excessive suffering of civilians during conflicts demands reflection on the current content of IHL and how the protection of civilians during NIACs may be improved. IHL discussions of, and approaches to, improving civilian protection in recent years have focused predominantly on engagement with armed groups for the promotion of compliance with existing rules as the best means of improving civilian protection.<sup>25</sup> The assumption inherent in this focus on engagement and enforcement of existing IHL rules is that existing IHL provides sufficient protection for civilians and, consequently, engagement, education, and training are all that is needed to improve armed group respect for civilians during armed conflict.<sup>26</sup> Advocacy for new

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<sup>25</sup> See, e.g., Hyeran Jo, *Compliant Rebels Rebel Groups and International Law in World Politics* (Cambridge, UK: Cambridge University Press, 2015); Hyeran Jo, “Compliance with International Humanitarian Law by Non-State Armed Groups: How Can It Be Improved?” (2016) 19 *Yearbook of International Humanitarian Law* 63; Liam Elphick, “A Model of Amnesty: Inducing Armed Groups to Comply with International Humanitarian Law” (2016) 1 *Perth International Law Journal* 10; Jann Kleffner & Liesbeth Zegveld, “Establishing an individual complaint procedure for violations of international humanitarian law” (2000) 3 *Yearbook of International Humanitarian Law* 384; Marco Sassoli, “Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law” (2010) 1:1 *Journal of International Humanitarian Legal Studies* 5; Olivier Bangerter, “Disseminating and Implementing International Humanitarian Law within Organized Armed Groups: Measures armed groups can take to improve respect for IHL” in International Institute of Humanitarian Law, ed, *Non-State Actors and International Humanitarian Law* (Milan: Franco Angeli, 2010) 187; Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge, UK: Cambridge University Press, 2002); Sandesh Sivakumaran, “Courts of Armed Opposition Groups: Fair Trial or Summary Justice?” (2009) 7 *Journal of International Criminal Justice* 489; Heike Krieger, ed, *Inducing Compliance with International Humanitarian Law, Lessons from the African Great Lakes Region* (Cambridge, UK: Cambridge University Press, 2015); Cedric Ryngaert & Anneleen Van de Meulebroucke, “Enhancing and Enforcing Compliance with International Humanitarian Law by Non-State Armed Groups: an Inquiry into some Mechanisms” (2011) 3:1 *Journal of Conflict and Security Law* 443; Michelle Mack, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts* (Geneva: ICRC, 2008).

<sup>26</sup> See, e.g., ICRC, *Enhancing Protection for Civilians in Armed Conflict and Other Situations of Violence*, 2d ed (Geneva: ICRC, 2012) at 7; Marco Sassoli, “The Implementation of International Humanitarian Law: Current and Inherent Challenges” (2007) 10 *Yearbook of International Humanitarian Law* 45 at 46, 73; Inter-Parliamentary Union & ICRC, *International Humanitarian Law, Handbook for Parliamentarians* N° 25 (IPU & ICRC, 2016) at 24; Gabor Rona, “Interesting Times for International Humanitarian Law: Challenges from the ‘War on Terror’” (2003) 27:2 *Fletcher Forum of World Affairs* 55 at 69.

IHL rules has largely been limited to the use of new technology in armed conflict such as lethal autonomous weapons (colloquially referred to as ‘killer robots’)<sup>27</sup> and cyberwarfare.<sup>28</sup>

This thesis examines the issue of civilian protection under IHL and whether existing IHL protection provisions do, in fact, provide adequate protection for civilians during armed conflict or whether, contrary to dominant opinions, there is a need for further regulation. This thesis questions the view that IHL currently provides all of the necessary protections for civilians. This thesis argues that, in understanding the psychological processes that contribute to violence toward civilians in armed conflict, it is possible to determine that new IHL regulation is needed and the content required in that new IHL regulation.

## 1.1 Objectives

This thesis advances the claim that there is a gap between the regulation of behaviour for the protection of individuals in peace and the regulations needed to protect civilians from combatant violence during war. Rather than mirror peacetime protections for individuals, the regulation of combatant behaviour under IHL must include behavioural regulation specific to conflict that address behaviours which, in conflict, pose a risk to the safety of civilians. Social psychology and criminology theories can help to develop the necessary conflict-specific behavioural regulations because they explain how combatant deviance is adversely affected by psychological processes that reframe combatants’ conceptions of right and wrong and, in so doing, fundamentally alter the way in which combatants view the IHL rules intended to protect civilians.

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<sup>27</sup> See, e.g., Denise Garcia, “Killer Robots: Why the US should Lead the Ban” (2015) 6:1 *Global Policy* 57; Vincent C Müller & Thomas W Simpson, *Killer robots: Regulate, don’t ban* (Blavatnik School of Government Policy, University of Oxford, 2014); Armin Krishnan, *Killer Robots: Legality and Ethicality of Autonomous Weapons* (Burlington, VT: Ashgate, 2009); John Lewis, “The Case for Regulating Fully Autonomous Weapons” (2015) 124 *Yale Law Journal* 1309 at 1319–25; Peter Asaro, “On banning autonomous weapon systems: human rights, automation, and the dehumanization of lethal decision-making” (2012) 94:886 *International Review of the Red Cross* 687 at 709.

<sup>28</sup> See, e.g., Jeffrey K Walker, “The Demise of the Nation-State, The Dawn of New Paradigm Warfare, and a Future for the Profession of Arms” (2001) 51 *Air Force Law Review* 323 at 337–38; Rex Hughes, “Towards a Global Regime for Cyber Warfare” in Christian Czosseck & Kenneth Geers, eds, *The Virtual Battlefield: Perspectives on Cyber Warfare* (Amsterdam, NLD: IOS Press, 2009) 106 at 115.



Although there are a number of academic disciplines which examine and analyze past crimes or IHL violations against civilians during armed conflict,<sup>29</sup> this thesis focusses on theories from the fields of criminology and social psychology to identify possible psychological factors that contribute to crimes directed against civilians during armed conflict. These disciplines were chosen because both address the subject of deviant behaviour. One key topic examined by criminology is the “exploration of what causes some people to commit crimes”.<sup>30</sup> Social psychology “stud[ies] how people behave in real-world situations” including “why [people] commit crimes”.<sup>31</sup> Together, these disciplines provide a rich body of literature that explores how and why ordinary people commit genocide, crimes against humanity, and war crimes.<sup>32</sup> The theories considered for this thesis specifically focus on individual behaviour within that individual’s “immediate social or physical environment” (social context).<sup>33</sup> This thesis focuses on the social context of war. In my discussion, I address four dominant theories within the social psychology and criminology literature: techniques of neutralization, moral disengagement, deindividuation, and obedience to authority. It is necessary to note that the theories used in this thesis do not suggest that the behaviours they identify are deterministic.<sup>34</sup> The presence of one or

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<sup>29</sup> For example, work in the fields of history, philosophy, political science, and literature have all addressed the subject of war and, most frequently, genocide. See, e.g., Arendt, *supra* note 22; Christopher Browning, *Ordinary Men* (New York: Harper Collins, 1998); Pascal Boniface, *Les guerres de demain* (Paris: Seuil, 2001); Erich-Maria Remarque, *All Quiet on the Western Front* (New York: Fawcett, 1967).

<sup>30</sup> Ronnie Lippens, *A Very Short, Fairly Interesting and Reasonably Cheap Book about Studying Criminology* (London, UK: Sage Publications Ltd, 2009) at 2.

<sup>31</sup> Chris Woodford, “Psychology: An introduction to the science of human behavior”, online: <<https://www.explainthatstuff.com/introduction-to-psychology.html>>.

<sup>32</sup> See, e.g., Alvarez, *supra* note 23; Bryant et al, *supra* note 23; Bandura, *supra* note 23; Bandura, *supra* note 23; Kelman & Hamilton, *supra* note 23; Milgram, *supra* note 23; Zimbardo, *supra* note 23; Stanley Cohen, *States of Denial Knowing About Atrocities and Suffering* (Cambridge, UK: Polity, 2001); Daniel Maier-Katkin, Daniel P Mears & Thomas J Bernard, “Towards a criminology of crimes against humanity” (2009) 13:2 *Theoretical Criminology* 227; Dawn L Rothe & Christopher W Mullins, “Toward a Criminology of International Criminal Law: An Integrated Theory of International Criminal Violations” (2009) 33:1 *International Journal of Comparative and Applied Criminal Justice* 97; Alette Smeulers & Roelof Haveman, “International Crimes and Criminology: An Agenda for Future Research” in Alette Smeulers & Roelof Haveman, eds, *Supranational criminology: towards a criminology of international crimes* (Antwerp, BE: Intersentia, 2008) 487; Alette Smeulers, “What Transforms Ordinary People into Gross Human Rights Violators?” in SC Carey & SC Poe, eds, *Understanding human rights violations: New Systematic Studies* (Aldershot, UK: Ashgate, 2004) 239; Waller, *supra* note 22; Ervin Staub, *The Roots of Evil The Origins of Genocide and Other Group Violence* (New York: Cambridge University Press, 1989); Ervin Staub, *Overcoming Evil: Genocide, Violent Conflict, and Terrorism* (Oxford: Oxford University Press, 2011); Roy F Baumeister, *Evil Inside Human Cruelty and Violence* (New York: WH Freeman and Company, 1997); Lt Col Dave Grossman, *On Killing The Psychological Cost of Learning to Kill in War and Society* (New York: Back Bay Books, 2009).

<sup>33</sup> “Social Context definition | Psychology Glossary | alleydog.com”, online: <<https://www.alleydog.com/glossary/definition.php?term=Social+Context>>.

<sup>34</sup> See, e.g., Lippens, *supra* note 30 at 2–3.

more of these behaviours does not guarantee that an individual will violate IHL; however, they can have a profound impact on the psyche of a combatant that culminates in violence toward civilians. For this reason, throughout the thesis, these behaviours are referred to as possibly, potentially, or capable of contributing to or facilitating violations of IHL. This distinction is important: these theories are not intended to excuse or justify deviant actions, nor are the situational and psychological effects identified intended to minimize the degree of personal accountability an individual bears for committing deviant acts.<sup>35</sup>

In order to demonstrate the existence of a gap between the current regulation of behaviour for the protection of individuals during peace and the behavioural regulations necessary to provide protection for civilians during war, and the need to address this with new IHL regulation, this thesis develops six key arguments. First, it demonstrates that armed groups and their members are bound by IHL and, therefore, would likely be subject to new regulations of IHL. Second, it argues that the humanitarian goals of IHL warrant consideration of possible avenues by which to improve civilian protection during non-international armed conflicts, including through the ongoing development of the substantive rules of IHL for the protection of civilians. Third, it demonstrates that the specific acts prohibited under IHL for the protection of civilians, such as murder, assault, and rape, are the same protections offered to individuals during peace. Fourth, through an examination of case study conflicts in Sierra Leone and the DRC, the thesis argues that the mere existence of widespread IHL violations in practice provides little to no insight into why legal protections that are largely sufficient during peace offer insufficient protection for civilians during war. Fifth, it argues that combatant psychology understood through criminological and social psychological theories developed and applied to the specific context of violence toward civilians during conflict can help explain some of the underlying causes of IHL violations. Sixth, it argues that these theories of criminology and social psychology help to identify behaviours that are legal during peace (e.g., the use of dehumanizing language and the use of nicknames) but which pose a sufficient risk to the safety of civilians during armed conflict that they should be regulated under IHL. The thesis recommends the adoption of two new IHL regulations - to address the use of dehumanizing language toward civilians and the use of nicknames by combatants - in order to inhibit psychological processes that contribute to violence

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<sup>35</sup> See, e.g., *Zimbardo*, *supra* note 23 at 230–313.

toward civilians during armed conflict. This thesis concludes that the flawed application of IHL to armed groups, as well as the gap between the legal protections offered to individuals during peace and those needed to protect civilians during war, can be addressed through new regulations based on problematic behaviours identified through the use of social psychology and criminology theories.

There is a certain internal tension to the suggestion that the failure to comply with existing legal protections for civilian protection should be resolved through the development of new laws. However, there is a critical difference between existing IHL rules for the protection of civilians and the two new IHL rules recommended in this thesis. The rules recommended in this thesis target psychological processes that contribute to violations of existing IHL laws. These psychological processes, for example dehumanization or the displacement of responsibility for one's actions, critically alter how combatants view civilians, how combatants view themselves, and how combatants view existing laws for civilian protection. The adverse effects of the psychological processes discussed in this thesis and targeted by the new rules developed in the thesis increase over time. The effects of psychological processes such as dehumanization or displacement of responsibility intensify, thereby increasing the combatants' disassociation from both civilians who will become victims and from their own actions. There is a meaningful and, in terms of civilian protection, a critical difference between the question of compliance before psychological processes have been used by combatants to reframe their psyches and way of thinking and the question of compliance after these psychological processes have been employed and begun to operate on combatant psyches.<sup>36</sup> Through the use of these psychological processes, combatants create an obstacle or impediment to compliance with existing IHL rules for civilian

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<sup>36</sup> I have developed an analogy to demonstrate the issue that arises from the use of these psychological processes and the point at which legal intervention can have the most effect. You ask two people to sort through boxes of pens that are identical except for the colour of ink. You instruct them to divide their box of pens into a pile of blue pens and a pile of red pens. Once the sorting has been carried out, you observe that person A has perfectly sorted his pens into two piles: one pile of blue pens and one pile of red pens. Person B has made two piles of pens, but the blue pens and red pens have not been sorted and remain mixed in both piles. It would seem, and it is easy to assume, that person A has chosen obedience, while person B has chosen disobedience. However, if person B is colour blind, the task set was critically different for them than for person A. Person B faces a critical obstacle to performing the task of sorting the pens according to the instructions provided. Person A represents the combatant prior to the reframing of right and wrong based on behaviours such as the dehumanization of civilians or the displacement of responsibility through the use of nicknames. Person B represents the combatant after they have employed dehumanization or nicknames to reframe their understanding of the task before them: whether or not to target civilians for acts of violence.

protection. Consequently, the current problem of non-compliance is not a pure enforcement issue and will be difficult to remedy without addressing the root psychological processes contributing to acts of direct violence toward civilians.

The new rules proposed in this thesis are designed to address the risk posed to civilians when combatants begin to employ certain psychological processes but before combatants have altered their psyches and reframed how they view civilians, their own responsibility and actions, and existing laws. These new rules represent an upstream intervention, that can decrease the problem of direct violence toward civilians and non-compliance with existing IHL rules downstream.

## 1.2 Scope

The primary objective of this thesis is to improve civilian protection during armed conflict by identifying behavioural regulations needed in the specific context of armed conflict for the protection of civilians and addressing this problem through the development of new IHL regulations. In doing so, the thesis focuses on IHL as the body of international law designed for the regulation of armed conflict and the protection of civilians during armed conflict and on the further development of the substantive content of IHL. This section will address the scope of the thesis and why it is important to concentrate on law development within IHL, in addition to IHL's current focus on armed group engagement. It will also explain why it is important to focus on non-state armed groups and NIACs as well as on IHL, rather than other bodies of international law, namely international criminal law and international human rights law, that overlap in some ways with the protection of individuals during armed conflict.

As noted, the dominant approach of scholars and practitioners of IHL to improving civilian protection during armed conflict is through engagement with armed groups for the promotion of compliance with existing rules.<sup>37</sup> A much smaller body of work has focused on the development of new rules of IHL.<sup>38</sup> This thesis takes the approach that attention does need to be paid to ways of further developing civilian protection through new regulations, which can complement and

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<sup>37</sup> See, e.g., Jo, *supra* note 25; Jo, *supra* note 25; Elphick, *supra* note 25; Kleffner & Zegveld, *supra* note 25; Sassoli, *supra* note 25; Bangerter, *supra* note 25; Zegveld, *supra* note 25; Sivakumaran, *supra* note 25; Krieger, *supra* note 25; Ryngaert & Van de Meulebroucke, *supra* note 25; Mack, *supra* note 25.

<sup>38</sup> See, e.g., Garcia, *supra* note 27; Müller & Simpson, *supra* note 27; Krishnan, *supra* note 27; Lewis, *supra* note 27 at 1319–25; Asaro, *supra* note 27 at 709; Walker, *supra* note 28 at 337–38; Hughes, *supra* note 28 at 115.

facilitate the work of practitioners on engagement with armed groups for the purpose of promoting compliance with IHL protections for civilians. The psychological factors that are discussed in this thesis, in particular the dehumanization of civilians and the displacement of responsibility by combatants for their actions, reframe combatants' conceptions of right and wrong and, in so doing, reframe the way in which combatants view IHL rules intended to protect civilians. When practitioners seek to promote IHL compliance with protections for civilians who have been subjected to dehumanization, they first need to re-humanize the civilians in the eyes of the combatant. This renders the practitioners' task of securing improved IHL compliance significantly more difficult. New rules that seek to prevent the dehumanization of civilians will enhance civilian protection by decreasing IHL violations. Additionally, education on these new rules could, in the medium- and long-term, make ongoing IHL engagement with armed groups on compliance more effective. It is for this reason that this thesis focusses on the development of new rules of IHL rather than the enforcement of existing rules. Theories of criminology and social psychology demonstrate how combatant psychology makes compliance more unlikely and promoting compliance more difficult for practitioners, therefore there is great value in focusing on law development that could ultimately enhance compliance.

The thesis focuses its analysis and discussion on the behaviour of members of non-state armed groups as opposed to the behaviour of soldiers in national armed forces. Further, a focus on members of non-state armed groups requires a focus on NIACs because, unless an armed group is under the overall control of a state,<sup>39</sup> an armed conflict against that armed group will be a NIAC.<sup>40</sup> The focus on non-state armed groups and NIACs is important for three reasons. First, the majority of contemporary armed conflicts are NIACs involving one or more non-state armed group.<sup>41</sup> Further, the majority of direct armed violence against civilians in armed conflicts has

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<sup>39</sup> The 'overall control' test was adopted by the ICTY Appeals Chamber in *Tadic*. The ICTY distinguished its 'overall control' test from the ICJ's earlier 'effective control' test in *Nicaragua*: "the ICTY holds that it is important to distinguish between the control for individual persons (effective control) and the control for militarily organized groups (overall control)." (Djemila Carron, "When is a conflict international? Time for new control tests in IHL" [2016] 98:3 *International Review of the Red Cross* 1019 at 1025).

<sup>40</sup> An international armed conflict (between two or more states) and a NIAC (between a state and an armed group or between armed groups) can occur concurrently. On the typology of armed conflicts under IHL, see Sylvain Vité, "Typology of armed conflicts in international humanitarian law: legal concepts and actual situations" (2009) 91:873 *International Review of the Red Cross* 69.

<sup>41</sup> See, e.g., Dupuy & Rustad, Siri Aras, *supra* note 14.

been attributed to non-state armed groups.<sup>42</sup> Consequently, efforts to develop ways to reduce and prevent direct violence toward civilians during armed conflict should logically target these actors. Second, IHL treaty law is significantly more developed in the context of international armed conflicts as compared to NIACs: between the four Geneva Conventions of 1949 and Additional Protocol I to the Geneva Conventions there are 475 substantive provisions governing international armed conflicts as compared to 19 provisions between Common Article 3 and Additional Protocol II that govern NIACs.<sup>43</sup> Although customary IHL has developed the content of substantive rules governing NIACs,<sup>44</sup> NIACs remain subject to fewer IHL rules than international armed conflicts.<sup>45</sup> Third, although the academic literature on NIACs and non-state armed groups has grown significantly in the past two decades,<sup>46</sup> academic literature focusing on international armed conflicts and state armed forces continues to far exceed the academic literature addressing the regulation of non-state armed groups.<sup>47</sup> For the three aforementioned reasons, a focus on members of non-state armed groups in this thesis can provide both the practical attention required to prevent harms against civilians and contribute to an area of IHL literature that receives comparatively limited attention.

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<sup>42</sup> See, e.g., von Einsiedel, *supra* note 15 at 7.

<sup>43</sup> *Geneva Convention I*, *supra* note 5; *Geneva Convention II*, *supra* note 5; *Geneva Convention III*, *supra* note 5; *Geneva Convention IV*, *supra* note 5; *Additional Protocol I*, *supra* note 5; *Additional Protocol II*, *supra* note 5.

<sup>44</sup> See, e.g., Henckaerts & Doswald-Beck, *supra* note 5.

<sup>45</sup> The ICRC customary IHL study suggests that 136 of 161 rules identified apply in non-international armed conflicts *ibid*; however, states, such as the U.S. have challenged the application of some of these rules to NIACs see, e.g., *Letter from John B Bellinger, III, Legal Adviser, US Dep't of State, and William J Haynes, Gen Counsel, US Dep't of Def, to Jakob Kellenberger, President, International Committee of the Red Cross regarding Customary International Law Study* (2006).

<sup>46</sup> See, for example, important works devoted entirely to NIACs and non-state armed groups, such as Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge, UK: Cambridge University Press, 2002); Zegveld, *supra* note 25; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: Oxford University Press, 2012); Dieter Fleck, "The Law of Non-International Armed Conflicts" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law* (Oxford: Oxford University Press, 2013) 581; Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge, UK: Cambridge University Press, 2014).

<sup>47</sup> ICRC, *Bibliography 3rd Issue 2018* (Geneva: ICRC, 2019); ICRC, *Bibliography 2nd Issue 2018* (Geneva: ICRC, 2018); ICRC, *Bibliography 1st Issue 2018* (Geneva: ICRC, 2018); ICRC, *Bibliography 4th Quarter 2017* (Geneva: ICRC, 2018); ICRC, *Bibliography 3rd Quarter 2017* (Geneva: ICRC, 2017); ICRC, *Bibliography 2nd Quarter 2017* (Geneva: ICRC, 2017); ICRC, *Bibliography 1st Quarter 2017* (Geneva: ICRC, 2017); ICRC, *Bibliography 4th Quarter 2016* (Geneva: ICRC, 2017); ICRC, *Bibliography 3rd Quarter 2016* (Geneva: ICRC, 2016); ICRC, *Bibliography 2nd Quarter 2016* (Geneva: ICRC, 2016); ICRC, *Bibliography 1st Quarter 2016* (Geneva: ICRC, 2016); ICRC, *Bibliography 2015 International Humanitarian Law* (Geneva: ICRC, 2016); ICRC, *Bibliography 2014 International Humanitarian Law* (Geneva: ICRC, 2015).

In addition to focusing on non-state armed groups in NIACs, this thesis limits itself to consideration of IHL as a distinct body of international law. This is because IHL provides the most direct regulation of the conduct of war in international law and is aimed at the *prevention* of harm to civilians. Other areas of international law have a different focus. For example, IHL is distinct from international criminal law, the body of international law that provides for individual criminal accountability for the commission of the most serious international crimes: genocide, crimes against humanity, war crimes, and aggression.<sup>48</sup> International criminal law, therefore, emphasizes accountability *after* harm has occurred rather than prevention. In addition to its preventative focus, this thesis limits its focus to IHL rather than international criminal law for three key reasons.

The first reason this thesis puts IHL at the centre of its analysis is because IHL captures more combatant deviance than international criminal law. While some violations of IHL are considered war crimes under international criminal law,<sup>49</sup> not all IHL violations are crimes under international criminal law. As Sivakumaran notes, “a war crime amounts to a *serious* violation of international humanitarian law.”<sup>50</sup> War crimes under international criminal law “are derived primarily from the Geneva Conventions of 12 August 1949 and their Additional Protocols I and II of 1977, and the Hague Conventions of 1899 and 1907.”<sup>51</sup> The Rome Statute of the International Criminal Court, the most recent codification of war crimes under international criminal law provides two categories of war crimes committed in non-international armed conflicts: (1) “serious violations of article 3 common to the four Geneva Conventions of 12 August 1949” including violence to life and person, outrages upon personal dignity, taking hostages, and “[t]he passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees”,<sup>52</sup> and (2) “[o]ther serious violations of the laws and customs applicable in armed conflicts not of an

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<sup>48</sup> See, e.g., Robert Cryer et al, *An Introduction to International Criminal Law and Procedure*, 3d ed (Cambridge, UK: Cambridge University Press, 2014) at 3.

<sup>49</sup> Sandesh Sivakumaran, “Re-envisioning the International Law of Internal Armed Conflict” (2011) 22:1 *European Journal of International Law* 219 at 238.

<sup>50</sup> Sivakumaran, *supra* note 46 at 81. See also Henckaerts & Doswald-Beck, *supra* note 5 at Rule 156.

<sup>51</sup> UN Office of the High Commissioner for Human Rights, *Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003* (Geneva: United Nations, 2010).

<sup>52</sup> *Rome Statute of the International Criminal Court*, 17 July 1998 [*Rome Statute*] at Article 8(2)(c).

international character, within the established framework of international law,” such as the use of child soldiers, attacks intentionally directed at the civilian population, forced displacement of the civilian population and pillage.<sup>53</sup> The Rome Statute does not include other IHL prohibitions addressing tactics such as the use of human shields or of certain weapons prohibited under IHL like chemical weapons or anti-personnel landmines. IHL therefore provides a broader scope of regulations for armed conflict than that found under international criminal law.

A second important reason for limiting the thesis’ scope to IHL is that the scope and application of rules of international criminal law are “not always coterminous with [those of] international humanitarian law.”<sup>54</sup> For example, on the issue of child soldiers, the prohibition under international criminal law criminalizes the use of children under fifteen years of age to “participate actively in hostilities.”<sup>55</sup> By contrast, the prohibition in IHL, as articulated in Additional Protocol II applicable only to NIACs, prohibits such children from “tak[ing] part in hostilities”<sup>56</sup> - a complete ban on their participation not restricted to “active” participation as in the international criminal law rule. Sivakumaran also notes the difference between the prohibition on disproportionate attacks under international criminal law and IHL:<sup>57</sup> IHL bans “attack[s] which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.”<sup>58</sup> The international criminal law prohibition is comparatively narrower as it bans only attacks that are “*clearly* excessive in relation to the concrete and direct *overall* military advantage anticipated.”<sup>59</sup> Violations of IHL captured by international criminal law will often “require[] consideration of additional principles [as compared to IHL] before personal guilt may be assigned.”<sup>60</sup> For example, the threshold of *mens rea* for international crimes tends to be quite high due to the severity of the acts being punished as well the stigma that a conviction for acts of genocide, crimes against humanity, or

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<sup>53</sup> *Ibid* at Article 8(2)(e).

<sup>54</sup> Sivakumaran, *supra* note 46 at 79.

<sup>55</sup> *Rome Statute*, *supra* note 52 at Article 8(2)(e)(vii).

<sup>56</sup> *Additional Protocol II*, *supra* note 5 at Article 4(3)(c).

<sup>57</sup> Sivakumaran, *supra* note 46 at 79–80.

<sup>58</sup> Henckaerts & Doswald-Beck, *supra* note 5 at Rule 14.

<sup>59</sup> *Rome Statute*, *supra* note 52 at Article 8(2)(b)(iv) (emphasis added).

<sup>60</sup> Darryl Robinson, “The Identity crisis of International Criminal Law” (2008) 21 *Leiden Journal of International Law* 925 at 995 fn 164.



war crimes carry.<sup>61</sup> By contrast, it has been suggested that the threshold for IHL violations is lower than that for war crimes under international criminal law.<sup>62</sup>

Finally, IHL is the focus of the thesis because its enforcement through the internal disciplinary systems of national armed forces and armed groups can be applied with greater temporal proximity to the occurrence of a violation than a criminal prosecution through an international criminal institution. Although there are indications that international criminal law has a deterrent effect on combatants,<sup>63</sup> there is also evidence that the likelihood of punishment affects deterrence more than the severity of potential punishments.<sup>64</sup> The need to address disciplinary issues quickly and efficiently is one reason for separate military justice systems in some Western countries.<sup>65</sup> The use of internal disciplinary systems can enforce disciplinary and IHL rules at an individual level in a direct and timely manner as well as in a manner visible to other combatants that will produce a positive deterrent effect.

While this thesis focuses on the realm of IHL, reference to international criminal law will be made as case law from international criminal courts and tribunals have contributed significantly to the development of IHL.<sup>66</sup> This is particularly the case with the identification of customary international law applicable to NIACs.<sup>67</sup> Although a separate body of law, international criminal

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<sup>61</sup> See, e.g., William Schabas, “The Jelisić Case and the Mens Rea of the Crime of Genocide” (2001) 14:1 *Leiden Journal of International Law* 125 at 138–39; Patricia M Wald, “Genocide and Crimes against Humanity” (2007) 6 *Washington University Global Studies Law Review* 621 at 627, 629; *The Prosecutor v Radislav Krstić, Appeal Judgment*, 19 April 2004, IT-98-33-A at para 36.

<sup>62</sup> Sivakumaran, *supra* note 46 at 264.

<sup>63</sup> See, e.g., Hyeran Jo & Beth Simmons, “Can the International Criminal Court Deter Atrocity?” (2016) 70:3 *International Organization* 443; Courtney Hillebrecht, “The Deterrent Effects of the International Criminal Court: Evidence from Libya” (2016) 42:4 *International Interactions* 616; Benjamin A Appel, “In the Shadow of the International Criminal Court, Does the ICC Deter Human Rights Violations?” (2018) 62:1 *Journal of Conflict Resolution* 3; Yvonne M Dutton & Tessa Alleblas, “Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya” (2017) 91 *St John’s Law Review* 105.

<sup>64</sup> Tibamanya Mwene Mushanga, *Criminology in Africa* (Nairobi, Kenya: Law Africa, 2011) at 10, 122, 266.

<sup>65</sup> See, e.g., *R v Généreux*, [1992] [1992] 1 SCR 259 (Supreme Court of Canada) at section 3(c); *Ex parte Milligan*, at 123; GR Rubin, “United Kingdom Military Law: Autonomy, Civilianisation, Juridification” (2002) 65:1 *Modern Law Review* 36 at 43; CF Blair, “Military Efficiency and Military Justice: Peaceful Co-Existence” (1993) 42 *University of New Brunswick Law Journal* 237 at 240; “Due Process in Criminal Courts Martial” (1953) 20:3 *University of Chicago Law Review* 700 at 703–704.

<sup>66</sup> See, e.g., Sivakumaran, *supra* note 49 at 228–32.

<sup>67</sup> See, e.g., *ibid*; Anthony Cullen, “Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law” (2005) 183 *Military Law Review* 66; Theodor Meron, “Revival of Customary Humanitarian Law” (2005) 99:4 *American Journal of International Law* 817; Yusuf Aksar, *Implementing*

law provides an important means of enforcing IHL and the application of international criminal law has necessitated that international courts and tribunals apply and interpret for the first time some of the provisions and concepts of the law of NIACs, such as when a NIAC comes into existence.<sup>68</sup> “[W]ar crime[s] [are] based” upon “underlying provision[s] of international humanitarian law”; therefore, the prosecution of war crimes require the interpretation and application of these underlying IHL provisions.<sup>69</sup> Consequently, international criminal courts and tribunals have therefore helped to “flesh[] out” the rules applicable in NIAC.<sup>70</sup> The judgments of these courts and tribunals have come to be widely relied upon by IHL scholars as one of, if not the, most important sources for understanding the substantive content of certain IHL rules for NIACs.<sup>71</sup>

Another body of international law with some overlap with IHL is international human rights law. International human rights law is the body of international law that protects the fundamental rights and freedoms, such as the right to life or the right to freedom of religion, of individuals from infringement by states.<sup>72</sup> There is overlap between some of the behaviours addressed by IHL and international human rights law.<sup>73</sup> For example, both bodies of law prohibit torture and

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*international humanitarian law: from the ad hoc tribunals to a permanent International Criminal Court* (London, UK: Frank Cass, 2004).

<sup>68</sup> See, e.g., *Prosecutor v Dusko Tadic aka “Dule” (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, 2 October 1995, IT-94-1.

<sup>69</sup> Sivakumaran, *supra* note 49 at 233.

<sup>70</sup> *Ibid* at 234.

<sup>71</sup> See, e.g., *ibid*; Jann Kleffner, “From ‘Belligerents’ to ‘Fighters’ and Civilians Directly participating in Hostilities - On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years after the Second Hague Peace Conference” (2007) 54 *Netherlands International Law Review* 315 at 326–27; David Turns, “At the Vanishing Point of International Humanitarian Law: Methods and Means of Warfare in Non-International Armed Conflicts” (2002) 45 *German Yearbook of International Law* 115 at 127–31; David Kretzmer, “Civilian Immunity in War: Legal Aspects” in Igor Primoratz, ed, *Civilian Immunity in War* (Oxford: Oxford University Press, 2007) at 86, 100; Jelena Pejic, “The protective scope of Common Article 3: more than meets the eye” (2011) 93:881 *International Review of the Red Cross* 189 at 192, 197–98; Jean-Marie Henckaerts, “Civil War, Custom and Cassese” (2012) 10 *Journal of International Criminal Justice* 1095 at 1100–03; Christine Byron, “International Humanitarian Law and Bombing Campaigns: Legitimate Military Objectives and Collateral Damage” (2010) 13 *Yearbook of international humanitarian law* 175 at 188–91, 2004–07; Yasmin Naqvi, “Enforcement of Violations of IHL: The ICTY Statute: Crimes and Foms of Liability” (2014) 33:1 *University of Tasmania Law Review* 1.

<sup>72</sup> See, e.g., Jan Klabbers, *International Law* (Cambridge, UK: Cambridge University Press, 2013) at 108–109.

<sup>73</sup> See, e.g., *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 8 July 1996, 1996 ICJ Reports, 226; Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Oxford: Hart, 2016); Katharine Fortin, *The accountability of armed groups under human rights law* (Oxford: Oxford University Press, 2017).

cruel treatment.<sup>74</sup> Traditionally, international human rights law has been seen as the peacetime equivalent of IHL and not as law applicable during times of war.<sup>75</sup> While this is no longer a completely accurate depiction of the temporal application of international human rights law, IHL remains the primary source for rules governing the protection of civilians during armed conflict.

The first important reason why this thesis limits its scope to IHL rather than international human rights law is, as noted, the manner in which international human rights law applies during armed conflict. International human rights law is no longer considered inoperative during armed conflict.<sup>76</sup> International human rights law is now considered to operate during armed conflict.<sup>77</sup> During armed conflict, international human rights law can serve as both a tool to aid in the interpretation of IHL<sup>78</sup> and a means of filling legal gaps if an issue arises in which IHL is silent.<sup>79</sup> Where there is direct conflict between a provision of IHL and a provision of

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<sup>74</sup> *Geneva Convention IV*, *supra* note 5 at Article 3; *Additional Protocol II*, *supra* note 5 at Article 4(2); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984 [*Torture Convention*].

<sup>75</sup> See, e.g., Jean Pictet, *Humanitarian Law and the Protection of War Victims* (Geneva: Henry Dunant Institute, 1975) at 15; Christopher Greenwood, “Historical Development and Legal Basis” in Dieter Fleck, ed, *The Handbook of Humanitarian Law in Armed Conflicts*, 2d ed (Oxford: Oxford University Press, 2008) 1 at 12; GIAD Draper, “The Relationship between the Human Rights Regime and the Law of Armed Conflicts” (1971) 1 *Israel Yearbook of Human Rights* 191 at 191–96; W Jenks, “The Conflict of Law-Making Treaties” (1953) 30 *British Yearbook of International Law* 401 at 446; AH Robertson, “Humanitarian Law and Human Rights” in C Swinarski, ed, *Studies and Essays on International Humanitarian Law and Red Cross Principles* (Geneva; The Hague: ICRC/Martinus Nijhoff, 1984) 793; Robert Kolb, “The Relationship between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Convention” (1998) 324 *International Review of the Red Cross* 409.

<sup>76</sup> See, e.g., *Nuclear Weapons Advisory Opinion*, *supra* note 73 at para 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 9 July 2004, 2004 ICJ Reports, 136 at para 106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, 19 December 2005, 2005 ICJ Reports, 168 at para 216; African Commission on Human and Peoples’ Rights, No 74/92, *Commission Nationale des Droits de l’Homme et des Libertés v Chad*, 9th Annual Activity Report at para 21; Human Rights Committee, 05/27/2008, HRI/GEN/1/Rev. 9 (Vol. I), *General Comment No 31* at para 11.

<sup>77</sup> *Nuclear Weapons Advisory Opinion*, *supra* note 73 at para 25; *ICJ Wall Case*, *supra* note 76 at para 106; *ICJ, Congo v Uganda*, *supra* note 76 at para 216; Yoram Dinstein, “Human Rights in Armed Conflict: International Humanitarian Law” in Theodor Meron, ed, *Human Rights in International Law* (Oxford: Oxford University Press, 1984) at 345; Louise Doswald-Beck & Sylvain Vité, “International Humanitarian Law and Human Rights Law” (1993) 33:293 *International Review of the Red Cross* 94; Cordula Droege, “The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict” (2007) 40:2 *Israel Law Review* 310.

<sup>78</sup> Droege, *supra* note 77 at 322–23.

<sup>79</sup> *Ibid* at 343.

international human rights law, the IHL rule will generally prevail due to its more specialized nature in the context of armed conflict.<sup>80</sup>

The second important reason to limit the thesis' scope to IHL rather than international human rights law is that international human rights law traditionally only governs the relationship between states and individuals, rather than relationships between non-state actors (such as armed groups) and individuals.<sup>81</sup> Some scholars have argued that international human rights law now creates obligations for armed groups in NIACs;<sup>82</sup> however, the extent to which international human rights law might apply to armed groups remains a debated topic.<sup>83</sup> Since this thesis focuses on armed groups under IHL, limitations on the applicability of international human rights law to these actors limits the utility of considering international human rights law in this thesis.

This thesis will, however, make reference to international human rights law where relevant. International human rights law is discussed in chapter 5, which considers the question of whether international human rights law creates obligations for armed groups and, if so, the extent of these obligations during armed conflict. International human rights law is also addressed in chapter 8, which advances recommendations for two new IHL regulations. In chapter 8, due to the ongoing application of international human rights law during armed conflict, there is value in considering whether, where existing IHL is silent on the regulation of, for example, the use of dehumanizing

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<sup>80</sup> *Nuclear Weapons Advisory Opinion*, *supra* note 73 at para 25; *ICJ Wall Case*, *supra* note 76 at para 106; Droege, *supra* note 77 at 340; Martti Koskenniemi, *Study on the Function and Scope of the Lex Specialis Rule and the Question of 'Self Contained Regimes'*, UN Doc. ILC(LVI)/SG/FIL/CRD.1 and Add.1 (2004) at 4.

<sup>81</sup> Zegveld, *supra* note 25 at 53; Moir, *supra* note 46 at 194; Inter-American Commission on Human Rights, 02/26/1999, OEA/Ser.L/V/II.102, Doc 9 rev 1, *Third Report on the Human Rights Situation in Columbia* at Ch 4, para 13; Inter-American Commission on Human Rights, 11/18/1997, Report No. 55/97, Case 11.137, OEA ser.L/V/II.98, doc. 6 rev. (1998), *Juan Carlos Abella v Argentina*, *Inter-Am CHR 271* at para 174.

<sup>82</sup> Murray, *supra* note 73 at 120–54; Annyssa Bellal & Ezequiel Heffes, “‘Yes, I Do’: Binding Armed Non-State Actors to IHL and Human Rights Norms through their Consent” (2018) 12:1 *Human Rights & International Legal Discourse* 120 at 129; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006) at 280; G Oberleitner, *Human Rights in Armed Conflict. Law, Practice, Policy* (Cambridge, UK: Cambridge University Press, 2015) at 211; Sivakumaran, *supra* note 49 at 253; Cedric Ryngaert, “Human Rights Obligations of Armed Groups” (2008) 41 *Belgian Review of International Law* 355 at 358; UN Office of the High Commissioner for Human Rights, *Report on the Question of Human Rights in Cyprus*, A/HRC/25/21 (2014) at para 11.

<sup>83</sup> See, e.g., Fortin, *supra* note 73 at 209–39.

language, existing international human rights law can fill the gap in lieu of creating a new IHL regulation.

The scope of this thesis is largely limited to the legal development of IHL, drawing on the related fields of international criminal law and international human rights law where these bodies of law can help clarify the interpretation and application of IHL. The focus of this thesis on IHL and its further development provides a deep look at how IHL protections for civilians can be strengthened. This leads to the identification of regulations that can both decrease harm to civilians and facilitate the work of other scholars and practitioners who focus on engaging armed groups for the purpose of compliance.

### 1.3 Contributions to Existing IHL Literature

This thesis draws on theories of social psychology and criminology to develop more conflict-specific behavioural regulation for civilian protection in an effort to better realize the humanitarian goals of IHL to prevent, in as much as possible, the suffering of people who do not take direct part in armed conflict. This thesis adds to existing IHL literature in four important ways: (1) by introducing an in-depth examination of combatant psychology into the IHL literature; (2) by identifying a gap within current IHL regulation and literature on combatant behaviour toward civilians; (3) by demonstrating that there are ways that IHL protection for civilians can and should be substantively developed; and, (4) by developing and recommending new IHL regulations to address the use of demeaning, degrading, or dehumanizing language by combatants during conflict as well as the use of non-diminutive and non-derivative nicknames by combatants during war. This section will discuss each of these contributions to existing IHL literature and practice.

The first way in which this thesis contributes to existing IHL literature is by providing an in-depth examination of combatant psychology that explains how combatants come to commit acts of violence against civilians during armed conflict. There is a developing body of literature applying socio-legal approaches, including social psychology, to international criminal law;<sup>84</sup>

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<sup>84</sup> See, e.g., Alette Smeulers, “Why Serious International Crimes Might Not Seem ‘Manifestly Unlawful’ to Low-level Perpetrators A Social Psychological Approach to Superior Orders” (2019) *mqz001 Journal of International Criminal Justice* 1; Marina Aksenova, Elies van Sliedregt & Stephen Parmentier, eds, *Breaking the Cycle of Mass Atrocities: Criminological and Socio-Legal Approaches in International Criminal Law* (Oxford: Hart, 2019);

however, similar literature using social psychology to develop the substantive content of IHL does not exist. There is a small body of literature that employs psychology to analyze and reflect on public perceptions of IHL,<sup>85</sup> public support for going to war,<sup>86</sup> and how governments convince people to go to war.<sup>87</sup> Other articles have focused on the psychology of war victims<sup>88</sup> or public perceptions of humanitarian organizations.<sup>89</sup> On the specific question of combatant

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Kerstin Bree Carlson, "Agents and Agency in International Criminal Law: Intent and the 'Special Part' of International Criminal Law" in Marina Aksenova, Elies van Sliedregt & Stephen Parmentier, eds, *Breaking the Cycle of Mass Atrocities: Criminological and Socio-Legal Approaches in International Criminal Law* (Oxford: Hart, 2019) 115; Matilde Gawronski, "International Criminalisation as a Pragmatic Institutional Process: The Cases of Dominic Ongwen at the International Criminal Court and Thomas Kwoyelo at the International Crimes Division in the Situation in Uganda" in Marina Aksenova, Elies van Sliedregt & Stephen Parmentier, eds, *Breaking the Cycle of Mass Atrocities: Criminological and Socio-Legal Approaches in International Criminal Law* (Oxford: Hart, 2019) 47; Anette Bringedal Houge, "Explaining (Away) Individual Agency: A Criminological Take on Direct Perpetrator Re-Presentations at the ICTY" in Marina Aksenova, Elies van Sliedregt & Stephen Parmentier, eds, *Breaking the Cycle of Mass Atrocities: Criminological and Socio-Legal Approaches in International Criminal Law* (Oxford: Hart, 2019) 181; Elies van Sliedregt, "Regional Criminal Justice, Corporate Liability and the Need for Non-Doctrinal Research" in Marina Aksenova, Elies van Sliedregt & Stephen Parmentier, eds, *Breaking the Cycle of Mass Atrocities: Criminological and Socio-Legal Approaches in International Criminal Law* (Oxford: Hart, 2019) 219; Herman van der Wilt, "Breaking the Cycle of Collective Violence: International Criminal Law's Contribution" in Marina Aksenova, Elies van Sliedregt & Stephen Parmentier, eds, *Breaking the Cycle of Mass Atrocities: Criminological and Socio-Legal Approaches in International Criminal Law* (Oxford: Hart, 2019) 237; Colleen Rohan, "The Hybrid System of International Criminal Law: A Work in Progress or Just a Noble Experiment?" in Marina Aksenova, Elies van Sliedregt & Stephen Parmentier, eds, *Breaking the Cycle of Mass Atrocities: Criminological and Socio-Legal Approaches in International Criminal Law* (Oxford: Hart, 2019) 95; Stefan Harrendorf, "Social identity and international crimes: legitimate and problematic aspects of the 'ordinary people' hypothesis" in Marina Aksenova, Elies van Sliedregt & Stephen Parmentier, eds, *Breaking the Cycle of Mass Atrocities: Criminological and Socio-Legal Approaches in International Criminal Law* (Oxford: Hart, 2019); Christopher Harding, "The Biology and Psychology of Atrocity and the Erasure of Memory" in Marina Aksenova, Elies van Sliedregt & Stephen Parmentier, eds, *Breaking the Cycle of Mass Atrocities: Criminological and Socio-Legal Approaches in International Criminal Law* (Oxford: Hart, 2019) 27.

<sup>85</sup> Brad A Gutierrez, Sarah DeCristofaro & Michael Woods, "What Americans Think of International Humanitarian Law" (2011) 93:884 *International Review of the Red Cross* 1009.

<sup>86</sup> Josh R Klein, "Toward a Cultural Criminology of War" (2012) 38:3 *Education, Militarism, and Community* 86; Douglas V Porpora & Alexander Nikolaev, "Moral muting in US newspaper op-eds debating the attack on Iraq" (2008) 2:2 *Discourse & Communication* 165; John Hagan, Joshua Kaiser & Anna Hanson, *Iraq and Crimes of Aggressive War* (Cambridge, UK: Cambridge University Press, 2015); Kjell Follingstad Anderson & Ingrid Veiden Brakstad, "The Impossibility to Protect? Media Narratives and the Responsibility to Protect" (2016) 9:3 *Genocide Studies and Prevention: An International Journal* 96; Leigh Dickey, *Citizen's Engagement with Torture: An Analysis of Neutralizations* (Honors Thesis Project, University of Tennessee.); Alfred L McAlister, Albert Bandura & Steven V Owen, "Mechanisms of Moral Disengagement in Support of Military Force: The Impact of Sept. 11" [2006] 25:2 *Journal of Social and Clinical Psychology* 141; Jeannie Grussendorf et al, "Resisting Moral Disengagement in Support for War: Use of the 'Peace Test' Scale Among Student Groups in 21 Nations" [2002] 8:1 *Peace and Conflict: Journal of Peace Psychology* 73.

<sup>87</sup> Paul G Kooistra & John S Mahoney, "The Road to Hell: Neutralization of Killing in War" (2016) 37:7 *Deviant Behavior* 761; Rosanna E Guadagno et al, "Social Influence in the online Recruitment of terrorists and terrorist Sympathizers: Implications for Social Psychology Research" (2010) 23 *Revue internationale de psychologie sociale* 25.

<sup>88</sup> Guy Elcheroth, "Individual-level and community-level effects of war trauma on social representations related to humanitarian law" (2006) 36:6 *European Journal of Social Psychology* 907.

<sup>89</sup> Dennis Dijkzeul & Claude Iguma Wakenge, "Doing good, but looking bad? Local perceptions of two humanitarian organisations in eastern Democratic Republic of the Congo" (2010) 34:4 *Disasters* 1139.

psychology, although a body of literature examining this issue exists within the disciplines of criminology and social psychology,<sup>90</sup> very minimal consideration has been given to combatant psychology by scholars and practitioners in IHL literature.<sup>91</sup> Within this IHL literature that considers combatant psychology, there has been no consideration of theories of criminology that explain combatant violence toward civilians and only a limited discussion of social psychology theories that address combatant deviance.<sup>92</sup> This thesis considers both criminology and social psychology and identifies four theories that are repeatedly referenced in both fields: techniques of neutralization, moral disengagement, deindividuation, and obedience to authority. This thesis further provides a detailed discussion of these four theories that emphasizes how certain behaviours, such as the dehumanization of civilians, affect combatant psychology and result in civilian harm. This discussion plays an essential role in this thesis by helping to identify and address gaps in existing IHL regulation of combatant behaviour; however, it also provides a useful resource for IHL practitioners to better understand the psyches of combatants with whom they engage.

The second important contribution made by this thesis to existing IHL literature is through the identification a need within the current regulation of combatant behaviour for the protection of civilians during armed conflict for new behavioural regulation addressing conflict-specific behaviours that pose a risk to civilians. This need is the result of current reliance within IHL on many of the same protections afforded to individuals during peace as the means to provide protection to civilians during war. Extensive bodies of literature exist on the protection of individuals during peace under international law<sup>93</sup> as well as under domestic law in different

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<sup>90</sup> See, e.g., Bandura, *supra* note 23; Bandura, *supra* note 23; Waller, *supra* note 22; Baumeister, *supra* note 32; Rothe & Mullins, *supra* note 32; Maier-Katkin, Mears & Bernard, *supra* note 32 at; Smeulers, *supra* note 32; Smeulers & Haveman, *supra* note 32; Zimbardo, *supra* note 23; Kelman & Hamilton, *supra* note 23; Milgram, *supra* note 23; Cohen, *supra* note 32; Grossman, *supra* note 32; Alvarez, *supra* note 23; Bryant et al, *supra* note 23; Staub, *supra* note 32; Staub, *supra* note 32; Ervin Staub, *The Psychology of Good and Evil: Why Children, Adults, and Groups Help and Harm Others* (Cambridge, UK: Cambridge University Press, 2003).

<sup>91</sup> Muñoz-Rojas & Frésard, *supra* note 12; Jean-Jacques Frésard, *The Roots of Behaviour in War, A Survey of the Literature* (Geneva: ICRC, 2004); Ben Clarke, Christian Rouffaer & François Sénéchaud, “Beyond the Call of Duty: Why Shouldn’t Video Game Players Face the Same Dilemmas as Real Soldiers” (2012) 94:886 *International Review of the Red Cross* 711; Frida Castillo, *Playing by the Rules: Applying International Humanitarian Law to Video and Computer Games* (Geneva & Zurich: Pro Juventute & TRIAL, 2009).

<sup>92</sup> Muñoz-Rojas & Frésard, *supra* note 12; Frésard, *supra* note 91; Clarke, Rouffaer & Sénéchaud, *supra* note 91.

<sup>93</sup> See, e.g., Louis B Sohn, “The New International Law: Protection of the Rights of Individuals Rather than States” (1982) 32 *American University Law Review* 1; Thomas Buergenthal, Dinah Shelton & David P Stewart, *International Human Rights in a Nutshell*, 4th ed (St Paul, MN: West, 2009); Alexander Orakhelashvili, “The

countries.<sup>94</sup> There is also an extensive body of literature examining existing IHL protections for civilians during armed conflict.<sup>95</sup> Scholars have reflected on the similarities between international human rights protections for individuals and IHL protections for civilians in terms of their overlap on certain subjects (e.g., prohibition on torture) and on the manner in which international human rights law applies during armed conflict.<sup>96</sup> The fact that protections for civilians during conflict are largely the same as those for individuals under domestic criminal law<sup>97</sup> is rarely acknowledged or discussed in IHL literature. The 1958 Commentary for the Geneva Conventions notes that the specific prohibited behaviours in armed conflict, such as torture and mutilation, apply regardless of whether an armed conflict exists because they are “essential rules which [a state] in fact observes daily, under its own laws, even when dealing with common criminals.”<sup>98</sup> The work of Clarke et al. has drawn on psychology to argue “that, for the sake of realism, IHL and [international human rights law] rules on the use of force should be

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Position of the Individual under International Law” (2000) 31 California Western International Law Journal 241; MW Janis, “Individuals as Subjects of International Law” (1984) 17 Cornell International Law Journal 61; Carl Wellman, “Solidarity, the Individual, and Human Rights” (2000) 22 Human Rights Quarterly 639; Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge, UK: Cambridge University Press, 2016) at 436–71; Bjarte Thorson, *Individual Rights in EU Law* (Switzerland: Springer International, 2016).

<sup>94</sup> See, e.g., Steven Gow Calabresi et al, “Individual Rights Under State Constitutions in 2018: What Rights Are Deeply Rooted in a Modern-Day Consensus of the States” (2018) 94 Notre Dame Law Review 49; Paul Van Aerschot, *Activation Policies and the Protection of Individual Rights: A Critical Assessment of the Situation in Denmark, Finland and Sweden* (London, UK: Routledge, 2010); William J Brennan, Jr, “State Constitutions and the Protection of Individual Rights” (1976) 90:3 Harvard Law Review 489; William J Brennan, Jr, “The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights” (1986) 61:4 New York University Law Review 535; Robert A Sedler, “Constitutional Protection of Individual Rights in Canada: The Impact of the New Canadian Charter of Rights and Freedoms” (1983) 59 Notre Dame Law Review 1191; Judith S Kaye, “Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights” (1991) 23 Rutgers Law Journal 727.

<sup>95</sup> See, e.g., Miriam Bradley, *Protecting Civilians in War: The ICRC, UNHCR, and their Limitations in Internal Conflict* (Oxford: Oxford University Press, 2016); Hitoshi Nasu, “The Protection of Civilians from Violence and the Effects of Attacks in International Humanitarian Law” in David W Lovell & Primoratz, Igor, eds, *Protecting Civilians During Violent Conflict: Theoretical and Practical Issues for the 21st Century* (Abingdon, UK: Routledge, 2016) 65; Jamie A Williamson, “Protection of Civilians under International Humanitarian Law” in Haidi Willmot et al, eds, *Protection of Civilians* (Oxford: Oxford University Press, 2016) 160; R Charli Carpenter, “*Innocent Women and Children*” *Gender, Norms and the Protection of Civilians* (Aldershot, UK: Ashgate, 2006) at 131–62.

<sup>96</sup> See, e.g., Chandra Lekha Sriram, Olga Martin-Ortega & Johanna Herman, *War, Conflict and Human Rights: Theory and Practice* (London, UK: Routledge, 2017) at 54–69; Doswald-Beck, Louise & Sylvain Vité, “International Humanitarian Law and Human Rights Law” (1993) 293 International Review of the Red Cross 94; Droege, *supra* note 77; Dinstein, *supra* note 77.

<sup>97</sup> The requirement to distinguish between combatants and civilians and the general requirement to take precautions to prevent civilian harm are the only distinct protections for civilians during conflict that do not have a peace time equivalent.

<sup>98</sup> Jean Pictet, *Commentary IV Geneva Convention relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958) at 36.



applied to scenes in video games that portray realistic battlefields”.<sup>99</sup> Clarke et al.’s work focuses on the regulation of a risk, impunity for IHL violations when playing video games, during peace; however, the idea that behaviour considered innocuous in peace can lead to IHL violations is similar to this thesis’ approach to identifying forms of speech and nicknames as risks requiring regulation within the context of armed conflict. Therefore, this thesis adds to the literature by identifying that the adoption of peacetime protections for individuals in IHL as protection for civilians has created a gap in how behaviour jeopardizing civilian safety in war is conceived. This thesis demonstrates that there are behaviours in peace, such as the use of dehumanizing language or nicknames, that are legal, but which threaten civilian safety during armed conflict in a manner which demands regulation.

The third important contribution this thesis makes to existing IHL literature is that it demonstrates that, contrary to existing IHL literature, there are ways in which the substantive content of IHL can be further developed to enhance civilian protection. As already discussed, practitioners and scholars currently seek to address violence toward civilians during armed conflict through engagement with armed groups to promote compliance and provide IHL education and training.<sup>100</sup> Other literature discussing individual protection in peace under national law has drawn on psychology with respect to members of the security sector and law enforcement to advocate for improved education and training.<sup>101</sup> This thesis therefore adds to the literature by demonstrating how combatant psychology, or the psychology of violence toward civilians, can be used not only to improve current IHL engagement and training, but also to identify weaknesses in existing IHL and as a tool to guide the substantive development IHL to address these weaknesses.

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<sup>99</sup> Clarke, Rouffaer & Sénéchaud, *supra* note 91 at 723.

<sup>100</sup> Muñoz-Rojas & Frésard, *supra* note 12 at 110; Daniel Muñoz-Rojas & Jean-Jacques Frésard, “The roots of behaviour in war: Understanding and preventing IHL violations” (2004) 86:853 *International Review of the Red Cross* 190 at 203–204; Elizabeth Stubbins Bates, “Towards effective military training in international humanitarian law” (2014) 96:895/896 *International Review of the Red Cross* 795; ICRC, *supra* note 26 at 7; Sassoli, *supra* note 26 at 46, 73; Inter-Parliamentary Union & ICRC, *supra* note 26 at 24; Rona, *supra* note 26 at 69; Amelia Hoover Green, *Learning Restraint: The Role of Political Education in Armed Group Behavior Toward Civilians* (School for International Studies, Simon Fraser University).

<sup>101</sup> Danielle Celermajer & Kiran Grewal, “Preventing Human Rights Violations ‘From the Inside’: Enhancing the Role of Human Rights Education in Security Sector Reform” (2013) 5:2 *Journal of Human Rights Practice* 2434; Gutierrez, DeCristofaro & Woods, *supra* note 85; Anja Bienert, “Action, Not Just Words: The Practical Implications of Human Rights Law for the Use of Force and Firearms by Law Enforcement Officials” (2016) 27 *Security and Human Rights* 200.

The fourth way in which this thesis contributes to IHL literature is through the specific recommendation of new IHL regulations to address the use of demeaning, degrading, or dehumanizing language by combatants during armed conflicts and the use of non-diminutive or non-derivative nicknames by combatants during armed conflict. While the use of dehumanizing language or nicknames by combatants has been widely recorded in conflicts such as the conflicts in Sierra Leone and the DRC,<sup>102</sup> there has been no discussion in IHL literature of a need to regulate these behaviours. The one exception is where the use of dehumanizing language constitutes the international crime of incitement to genocide or persecution as a crime against humanity.<sup>103</sup> This thesis contributes to existing IHL literature by demonstrating that not only do

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<sup>102</sup> See, e.g., *The Prosecutor v Lubanga*, Trial Transcript, ICC, 9 November 2006 [*Lubanga Trial Transcript ICC-01/04-01/06-T-30-EN 53/195 SZ PT*] at 33; *The Prosecutor v Bosco Ntaganda*, Trial Hearing Transcript, ICC, 2 September 2015 [*Ntaganda Trial Transcript ICC-01/04-02/06-T-23-ENG ET WT 02-09-2015 61/67 SZ T*] at 61; *The Prosecutor v Bosco Ntaganda*, Confirmation of Charges Hearing Transcript (2014), ICC, 11 February 2014 [*Ntaganda Confirmation of Charges ICC-01/04-02/06-T-8-Red-ENG WT 11-02-2014 42/53 SZ PT*] at 41; *The Prosecutor v Bosco Ntaganda*, Trial Hearing Transcript, ICC, 20 June 2016 [*Ntaganda Trial Hearing, P-0888 ICC-01/04-02/06-T-105-Red-ENG WT 20-06-2016 51/96 SZ T*] at 58; *The Prosecutor v Sam Hinga Norman, Moinina Fofana and Allieu Kondewa*, Trial Transcript, SCSL, 25 November 2004 [*The Prosecutor v Sam Hinga Norman, Moinina Fofana and Allieu Kondewa*, Trial Transcript] at para 11; Myriam Denov, *Child Soldiers: Sierra Leone's Revolutionary United Front* (Cambridge, UK: Cambridge University Press, 2010) at 127; "BBC News | AFRICA | Congo's war within a war", online: <<http://news.bbc.co.uk/2/hi/africa/648044.stm>>; Lucia, Civilian, in James Higbie & Bernard S Moigula, *Sierra Leone Inside the War History and Narratives* (Bangkok: Orchid Press, 2017) at 103; David Keen, *Conflict and Collusion in Sierra Leone* (Oxford: James Currey, 2005) at 76; Kieran Mitton, *Rebels in a Rotten State* (Oxford: OUP, 2015) referencing "Sierra Leone Web - Lasting Peace in Sierra Leone: The Revolutionary United Front Perspective and Vision", online: <<http://www.sierra-leone.org/AFRC-RUF/RUF-051199c.html>>; Sierra Leone Truth and Reconciliation Commission, *Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission, Vol 3A* (Accra, Ghana: Truth and Reconciliation Commission, Sierra Leone, 2004] at paras 52, 473; SA, RUF Child Soldier, *Sierra Leone Truth and Reconciliation Commission Statement [SA, TRC Statement]*; *The Prosecutor v Bosco Ntaganda*, Trial Transcript, ICC, 21 September 2016 [*Ntaganda Trial Transcript, ICC-01/04-02/06-T-136-Red-ENG WT 21-09-2016 36/72 NM T*] at 36; *Prosecution Memorandum to Accompany Indictment [Alex Tamba Brima]*, SCSL, 6 March 2003 [*SCSL Prosecution Memo [Alex Tamba Brima]*] at para 1; Baby Seiya, Civilian, in Higbie & Moigula, *supra* note; UN Security Council, *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of Congo, 14 November 2012*, S/2012/838 at para 26; Lotte Vermeij, 'The Bullets Sound Like Music To My Ears' Socialization of Child Soldiers within African Rebel Groups Wageningen University, 2014] [unpublished] at 74; Katrien Pype, "Fighting Boys, Strong Men and Gorillas: Notes on the Imagination of Masculinities in Kinshasa" (2007) 77:2 Africa: Journal of the International African Institute 250 at 264; Nina Strohlic, "Congo's Army of Jack Bauers", online: <<https://www.thedailybeast.com/congos-army-of-jack-bauers>>.

<sup>103</sup> See, e.g., *The Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Appeal Judgment, 28 November 2007, Case No ICTR-99-52-A; *The Prosecutor v Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi, Élie Ndayambaje*, Trial Judgment, 24 June 2011, Case No ICTR-98-42-T; *The Prosecutor v Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi, Élie Ndayambaje*, Appeal Judgment, 14 December 2015, Case No ICTR-98-42-A; MICT, 04/11/2018, MICT-16-99-A, *Prosecutor v Vojislav Seselj*, Appeal Judgment.

nicknames and dehumanizing language pose a threat to civilians during armed conflict, they can be addressed through the development of new IHL rules.

This thesis challenges the dominant paradigm in existing IHL scholarship and practice, which suggests that current widespread IHL violations of civilian protection during armed conflict by armed groups requires only engagement with armed groups and training and education for these armed groups on existing IHL. Instead, this thesis advances the claim that the current application of IHL to armed groups is flawed due to a gap between the protection afforded to individuals during peace and the protections that are required to ensure civilian protection during armed conflict. The thesis demonstrates how social psychology and criminology theories help to develop an understanding of combatant psychology that leads to violence toward civilians during armed conflict and recommends new regulations to inhibit the behaviours currently contributing to violations of existing IHL protections for civilians. In doing so, this thesis develops and adds to a very limited body of existing IHL literature that considers combatant psychology and demonstrates a way forward in the ongoing substantive development of IHL. The contributions made by this thesis to IHL literature and practice will not only enrich IHL scholarship but will also facilitate and improve the engagement of IHL practitioners with armed groups. Further, it will provide states with insight into possible behaviours to be cognizant of among their own national armed forces and an improved understanding of armed groups that can be used to develop rules of engagement and guidelines for interactions with armed groups during conflict.

#### 1.4 Organization of Thesis

The preceding sections in this chapter have been used to introduce the reader to the objectives and key concepts used in this thesis. This section will provide an outline as to how the thesis proceeds to develop its argument to support the claims that: (1) the application of IHL to armed groups is flawed due to a gap between protection for individuals in peace and the protections necessary for civilians during armed conflict, and (2) theories of social psychology and criminology can be used to develop substantive IHL rules to fill this gap.

In chapter 2, this thesis introduces the methodological approaches employed in the thesis. International legal doctrinal methodology is the dominant method used in thesis. The chapter introduces this methodology as well as the core sources of international law relied upon under

this method. The chapter then explains how the case study countries, Sierra Leone and the DRC, were selected. It describes the qualitative methodology employed in the fieldwork interviews conducted for the thesis. It provides demographic data for the interviewees and testimonies collected in each case study location. Finally, it addresses the method of data analysis and identifies limitations of the research methods employed in the thesis.

Chapter 3 begins the deeper discussion of IHL. It defines armed groups as a legal concept in IHL based on the requirement of organization. This identifies the specific actor, non-state armed groups, whose members are the primary focus of the thesis and the recommendations made in chapter 8. argues that armed groups, despite being non-state actors who cannot be party to IHL treaties, are nonetheless bound by IHL through a variety of different legal means. These means include the state's ability to bind its citizens by consenting to international law, limited international legal personality, and, in some cases, the state-like exercise of authority over territory by an armed group. The chapter argues that, despite arguments from some scholars that armed groups should only be bound to IHL to which they have consented to be bound, consent is not a legal requirement and armed groups are bound by IHL regardless of whether they consent or not. The chapter then addresses the relationship between IHL and international human rights law touched on in chapter one. It argues that at least some armed groups are also bound by international human rights law as it applies during armed conflicts. The fact that armed groups are bound by existing IHL and international human rights law protections for civilians during armed conflict means that armed groups would be likely to be bound by the new substantive rules of IHL developed in chapter 8 of this thesis.

Chapter 4 examines the principles and rules of IHL for the protection of civilians in NIACs. It begins with a discussion of the concept of humanity and humanitarian goals of IHL that, although balanced with military necessity, have provided and continue to provide the impetus for the protection of civilians during armed conflict. It argues that the humanitarian objectives of IHL support a review of existing IHL protections for civilians as well as the possible development of new rules in an effort to increase their protection. It then examines core IHL principles of distinction, precaution, proportionality, and humane treatment. Next, the chapter turns to more specific prohibited acts for civilian protection such as violence to life, torture and

cruel treatment, humiliating and degrading treatment, rape, and pillage. Knowledge of existing rules binding on armed groups for the protection of civilians is important because chapter 8 identifies specific gaps in behavioural regulation for the protection of civilians during armed conflict. The chapter argues that the existing specific protections represent acts that are equally prohibited or criminalized during peacetime in the national laws of states. It further argues that this suggests there may be a need to consider whether there are behaviours which, although legal during peace, pose a risk to civilians during war such that they warrant regulation.

Chapter 5 addresses the protection of civilians during armed conflict in practice using the two case studies of the Sierra Leone civil war and the series of conflicts in the DRC since the mid-1990s. The chapter provides some basic information about these conflicts; however, the focus of the chapter is on the violations committed during these conflicts by members of armed groups. Two key points are made in this chapter. First, the widespread violations of IHL protections for civilians during these conflicts indicate that the current status quo of IHL in practice is not providing sufficient protection for civilians during armed conflict. It would be easy to assume that these violations are purely an issue of non-compliance with existing IHL that can be addressed through engagement, education, and training with armed groups. However, the second key point of the chapter is that the violations do not in and of itself provide much, if any, insight into the psychology of combatants committing these IHL violations and that drives the commission of these IHL violations. This is important because the theories of social psychology and criminology discussed in chapter 7 explain how combatant deviance is adversely affected by psychological processes, such as dehumanization and the abdication of responsibility for one's actions, that reframe combatants' conceptions of right and wrong and, in doing so, fundamentally alter the way in which combatants view the IHL rules intended to protect civilians. This reinforces the fact that combatant psychology can provide information not otherwise readily available or apparent from mere awareness of the occurrence of IHL violations.

Chapter 6 examines three legal theories: Law and Economics, Behavioural Law and Economics, and Socialization and International Law. Legal theory does not traditionally examine the psychology of deviance. Rather, the psychology of deviance is generally left to the disciplines of social psychology and criminology. However, the three theories discussed in this chapter all

attempt to develop behavioural or psychological models to explain legal compliance or deviance. This chapter examines each of the three theories to demonstrate why they do not provide an adequate tool for understanding combatant violence toward civilians during armed conflict and, consequently, why a turn to theories of social psychology and criminology can provide the necessary theoretical framework for addressing the regulation of combatant behaviour for the protection of civilians. The chapter argues that Law and Economics theory bases its understanding of legal deviance on significantly flawed assumptions about human behaviour. While Behavioural Law and Economics attempts to address the flawed assumptions of Law and Economics, its consideration of human psychology is very limited and ill-suited to application in the exceptional circumstances of armed conflict. Socialization and International Law draws upon some theories from the field of sociology, including cognitive dissonance which is foundational to many of the social psychology and criminology theories employed in chapter 7. However, Socialization and International Law theory fails to explore how cognitive dissonance operates in detail. In particular, the theory fails to examine the psychological processes used by people to try to resolve cognitive dissonance. Consequently, Socialization and International Law, like Law and Economics and Behavioural Law and Economics, provides an inadequate theory to explore and understand combatant psychology in armed conflict.

Chapter 7 turns to theories of social psychology and criminology. Although the legal theories discussed in chapter 6 do not provide adequate models to explain combatant psychology, this chapter demonstrates how social psychologists and criminologists have spent decades exploring the question of how law-abiding citizens become law-breaking combatants who commit violations of IHL protections for civilians during armed conflict. Chapter 7 discusses the theories of techniques of neutralization, moral disengagement, deindividuation, and obedience to authority. The chapter argues that these theories, which are referenced broadly in the literature, provide a deep and nuanced understanding of combatant psychology that can be used to fill the gap between the protection of individuals during peace and the protections needed for civilians during conflict. The chapter identifies two key themes across the four theories: dehumanization and responsibility. These two themes are used to review the research and fieldwork on the conflicts in Sierra Leone and the DRC as well as existing IHL in chapter 8.

Chapter 8, guided by the themes of dehumanization and responsibility established in the preceding chapter, identifies the manifestation of these themes in two behaviours common in the conflicts in Sierra Leone and the DRC: 1) the use of degrading, othering, or dehumanizing language to refer to or address civilians, and (2) the use of nicknames by combatants as a possible means of abdicating responsibility for any IHL violations they commit. The chapter explains how these behaviours are representative of the themes of dehumanization and responsibility in the theories of techniques of neutralization, moral disengagement, deindividuation, and obedience to authority. The chapter explores whether the use of demeaning, degrading, or dehumanizing language or the use of nicknames are already adequately covered by existing IHL or international human rights law rules applicable during armed conflict. The chapter argues that neither of these behaviours are adequately captured by existing protections for civilians and proposes new rules and regulations to fully address these behaviours under IHL and prevent harms to civilians.

Finally, chapter 9 provides the conclusion to the thesis. It restates the research problem introduced in chapter 1 and revisits the key findings and contributions of each chapter of the thesis. It reiterates that international legal theories do not sufficiently consider or address factors that contribute to legal deviance in IHL and the potential to use theories of criminology and social psychology to address this weakness. The expertise of these other disciplines that are experienced in explaining deviant behaviour can be used as a lens to review IHL and such a review can help identify problematic combatant behaviours, some of which are suitable for regulation under IHL. The final chapter then addresses some of the limitations of this research and propose avenues for future research.

## Chapter 2

### 2 Methodology

The research conducted for this thesis employs multiple methodologies. This thesis uses legal doctrinal analysis to consider existing IHL protections for civilians during NIACs as applied to non-state armed groups. Given that this analysis forms the centre of the thesis, the primary methodology of the thesis is the legal doctrinal method. Legal doctrinal methodology provides the means of identifying, interpreting, and applying existing rules of IHL relevant to both civilian protection and the regulation of armed groups during NIACs. In addition to legal doctrinal methodology, this thesis uses qualitative case study analysis to examine violations of IHL rules for civilian protection committed by members of armed groups in practice. The two case study conflicts relied on in the thesis are the civil war in Sierra Leone (1991-2002) and the multiple armed conflicts that have occurred and remain ongoing in the DRC. These case studies are complemented by field research and data collection conducted by the author in Sierra Leone and the DRC. The thesis is further complemented by the use of theories and quantitative research drawn from the disciplines of social psychology and criminology to develop an understanding of legal deviance by combatants from IHL rules protecting civilians.

The aims of this thesis are three-fold. First, this thesis aims to demonstrate the need for different behavioural regulations in IHL in order to protect civilians during conflict as compared to peacetime behavioural regulation for the protection of individuals. The second aim of this thesis is to elucidate common behaviours during armed conflict that can result in violations of IHL rules for the protection of civilians, using social psychology and criminology theories. Third, this research aims to advance recommendations for new substantive rules of IHL to address behaviours that pose a particular risk to civilians during conflict with the goal of enhancing the overall protection of civilians during war.

This chapter explains the methodology employed in this thesis to achieve the three above-mentioned aims. The first section discusses legal doctrinal methodology, which serves as the primary methodology and framework for this thesis. Next, the chapter turns to the case studies



that are the focus of practical IHL application and violations in the thesis. Although the case studies and qualitative fieldwork interviews are secondary methodologies in this thesis employed within the larger legal doctrinal methodology framework, this discussion of these secondary methodologies comprises the majority of this chapter. This is due to the fact that legal doctrinal methodology is not as technical as qualitative methodology applied to fieldwork. Therefore, the qualitative methodology requires more extensive description to achieve full transparency. The discussion of case studies and qualitative methodology begins with consideration of my research in Sierra Leone, including the reasons for selecting this case study and details on the data collection and research population explored in the fieldwork. This is followed by a discussion of the DRC case study, which similarly sets out the reasons for selection of the case study, data collection and research population. The chapter concludes with a discussion of the data analysis process employed, with the goal of transparency.

## 2.1 Legal Doctrinal Methodology

The primary methodology employed in this thesis is legal doctrinal. Legal doctrinal methodology is the “dominant legal method in the common law world”.<sup>104</sup> However, it is common for legal research to include non-doctrinal methods in addition to doctrinal methods.<sup>105</sup> In such instances, non-doctrinal methods are generally “infus[ed] within ... [a] doctrinal research framework.”<sup>106</sup>

Doctrinal methodology is a “normative and interpretive discipline that looks at legal practices from a strong internalist point of view.”<sup>107</sup> Legal scholars employing doctrinal methodology “work from conceptions on how the elements of the law fit together in their respective fields, and this qualifies them for assessing whether current developments can be reconciled with the given normative structures of law.”<sup>108</sup> The purpose of doctrinal methodology is to identify what the law is in a given context.<sup>109</sup> In order to accomplish the identification of the law, legal doctrinal

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<sup>104</sup> Terry Hutchinson, “The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law” (2015) 8:3 *Erasmus Law Review* 130 at 131.

<sup>105</sup> *Ibid* at 133–34; Terry Hutchinson & Nigel Duncan, “Defining and Describing What We Do: Doctrinal Legal Research” (2012) 17 *Deakin Law Review* 83 at 99.

<sup>106</sup> Hutchinson, *supra* note 104 at 138.

<sup>107</sup> Matyas Bodig, “Legal Doctrinal Scholarship and Interdisciplinary Engagement” (2015) 8:2 *Erasmus Law Review* 43 at 46.

<sup>108</sup> *Ibid* at 45.

<sup>109</sup> Paul Chynoweth, “Legal Research” in Andrew Knight & Les Ruddock, eds, *Advanced Research Methods in the Built Environment* (Chichester, UK: Blackwell Publishing, 2008) 28 at 30.

methodology conducts an “interpretive, qualitative analysis” of the sources of law.<sup>110</sup> Therefore, within legal doctrinal methodology, “the primary data consist of the sources of the law.”<sup>111</sup>

The task of an academic employing legal doctrinal methodology is to take the sources of international law and “organise, analyse and re-present this information in such a way as to persuade [others] to follow their line of thought.”<sup>112</sup> Chynoweth has noted that “the validity of doctrinal research must inevitably rest upon developing a consensus within the scholastic community, rather than on an appeal to any external reality.”<sup>113</sup> The persuasiveness or strength of arguments based on legal doctrinal methodology require consideration of the normative persuasiveness of the argument as well as the concreteness of the argument grounded in the realities of the legal system.<sup>114</sup> Normative persuasiveness can be grounded in foundational concepts, such as humanity, but is grounded even more strongly by drawing on the “formal legal” sources (i.e., treaties, custom, and general principles) and “precedents and writings of publicists” (i.e., case law and scholarly literature).<sup>115</sup> Arguments must also take into consideration the realities of the legal system, in particular the “will and interests of international actors”; however, one must not adhere too rigidly to the will and interests of states because legal argumentation must also “must also provide a standpoint from which present power may be criticized and international transformation may be sought.”<sup>116</sup>

The authoritative sources of international law are those indicated above: treaties, custom, general principles, case law, and scholarly literature. The identification of these sources as the authoritative sources of international law stems from their articulation in Article 38(1) of the Statute of the International Court of Justice.<sup>117</sup> Treaties are legally binding written agreements

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<sup>110</sup> *Ibid.*

<sup>111</sup> Terry Hutchinson, “Doctrinal research: Researching the jury” in Dawn Watkins & Mandy Burton, eds, *Research Methods in Law* (London, UK: Routledge, 2017) 8 at 18.

<sup>112</sup> Philip Langbroek et al, “Methodology of Legal Research: Challenges and Opportunities” (2017) 13:3 *Utrecht Law Review* 1 at 2.

<sup>113</sup> Chynoweth, *supra* note 109 at 30.

<sup>114</sup> Martti Koskeniemi, “Methodology of International Law” in Rüdiger Wolfrum, ed, *Max Planck Encyclopedia of Public International Law*, Oxford Public International Law (Online) (2007).

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

<sup>117</sup> *Statute of the International Court of Justice*, [1946] 33 UNTS 993, UKTS 67 (1946) Cmd 7015, 3 Bevans 1179, 59 Stat 1055, 145 BSP 832 at Article 38(1).

between states.<sup>118</sup> The key treaties relied on in this thesis are the core treaties of IHL: the four Geneva Conventions of 1949<sup>119</sup> and the two 1977 Additional Protocols to the 1949 Geneva Conventions.<sup>120</sup> The second formal source of international law is custom, commonly referred to as customary international law, which is unwritten law identified based on widespread state practice accompanied by the belief on the part of states that this practice is legally required (referred to as *opinio juris*).<sup>121</sup> The case law of international courts and tribunals is often relied upon for the identification of rules of customary international law.<sup>122</sup> In the context of IHL, the 2005 International Committee of the Red Cross' *Customary IHL Study* is, in addition to international case law, an important source relied on to identify customary IHL rules.<sup>123</sup> The third formal source of international law is general principles of international which are “cardinal principles of the legal system, in the light of which international . . . law is to be interpreted and applied.”<sup>124</sup> General principles of international law may be identified within specific bodies of international law or treaty regimes.<sup>125</sup> Kleffner has suggested that, in the context of IHL, “[t]he principles of distinction, proportionality and protection as well as the prohibition of using means and methods of warfare which are of a nature to cause superfluous injury and unnecessary suffering” are general principles of IHL.<sup>126</sup> Other key sources of international law are case law and scholarly literature. This thesis draws extensively on the case law of the International Court of Justice, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the International Criminal Court to aid in the identification, interpretation, and application of existing IHL.

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<sup>118</sup> Malcolm N Shaw, *International Law*, 6th ed (Cambridge, UK: Cambridge University Press, 2008) at 88. Treaties are also referred to by many other names such as Statutes, Charters, Conventions, and Protocols.

<sup>119</sup> *Geneva Convention I*, *supra* note 5; *Geneva Convention II*, *supra* note 5; *Geneva Convention III*, *supra* note 5; *Geneva Convention IV*, *supra* note 5.

<sup>120</sup> *Additional Protocol I*, *supra* note 5; *Additional Protocol II*, *supra* note 5.

<sup>121</sup> Shaw, *supra* note 118 at 73–84.

<sup>122</sup> Antonio Cassese, *International Law*, 1st ed (Oxford: Oxford University Press, 2001) at 159; Lori Fisler Damrosch et al, eds, *International Law: Cases and Materials*, 4th ed (St Paul, MN: West Group, 2001) at 134–35.

<sup>123</sup> Henckaerts & Doswald-Beck, *supra* note 5.

<sup>124</sup> Bin Cheng, “The Meaning and Scope of Article 38(l)(c) of the Statute of the International Court of Justice” (1953) 38 *Grotius Society Transactions for the Year 1952* 125 at 132.

<sup>125</sup> Jann Kleffner, “Sources of the Law of Armed Conflict” in R Liivoja & T McCormack, eds, *Routledge Handbook of the Law of Armed Conflict* (Abingdon, UK: Routledge, 2016) 71 at 79; Rüdiger Wolfrum, “General International Law (Principles, Rules, and Standards)” in *Max Planck Encyclopedia of Public International Law*, Oxford Public International Law (Online) (2010); *Prosecutor v Zoran Kupreskic and others, Trial Judgment*, IT-95-16-T, 14 January 2000 at para 591.

<sup>126</sup> Kleffner, *supra* note 125 at 79.

Finally, this thesis makes extensive use of scholarly literature to engage with existing interpretations of IHL as well as ongoing debates about existing IHL.

The sources of international law provide both the object of doctrinal scholarship as well as the “conceptual framework” that must be employed to “make sense of the legal practice.”<sup>127</sup> Consequently, legal doctrinal methodology is often said to operate “from a strong internalist point of view.”<sup>128</sup> In legal doctrinal methodology, “[m]ore than in the exact sciences, the only form of ‘objectivity’ one may reach is the intersubjective consensus among legal scholars.”<sup>129</sup>

Legal doctrinal methodology has been criticized because it differs in method from the social sciences;<sup>130</sup> however, this criticism, as noted by Van Hoecke, “start[s] from false assumptions (unity and similarity of all scientific disciplines)”.<sup>131</sup> Legal doctrinal methodology is more similar to methodologies employed in disciplines in the humanities with its emphasis on interpretation, rather than the methodologies employed in social science disciplines.<sup>132</sup> Nonetheless, Brouwer has described legal doctrinal methodology as being between the methodologies employed in the humanities and those employed in social sciences.<sup>133</sup>

The legal doctrinal methodology employed in this thesis is appropriately situated between the humanities and the social sciences. It relies heavily on interpretation; however, in so doing it draws on research from the social sciences as supporting evidence. The thesis also uses qualitative case study analysis based on conflicts in Sierra Leone and the DRC to demonstrate the current status quo of IHL in practice and to find evidence in practice of the behaviours

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<sup>127</sup> Bodig, *supra* note 107 at 46. See also Pauline C Westerman, “Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law” in Marck Van Hoecke, ed, *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Oxford: Hart, 2011) 86 at 90–94.

<sup>128</sup> Bodig, *supra* note 107 at 46.

<sup>129</sup> Mark Van Hoecke, “Legal Doctrine: Which Method(s) for What Kind of Discipline?” in Mark Van Hoecke, ed, *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Oxford: Hart, 2011) 1 at 18.

<sup>130</sup> See, e.g., R Cotterrell, “Why Must Legal Ideas be Interpreted Sociologically” (1998) 25:2 *Journal of Law and Society* 171 at 173; JM Balkin, “Interdisciplinarity as Colonization” (1996) 53 *Washington and Lee Law Review* 949; Bodig, *supra* note 107 at 504–505; Rob van Gestel & HW Micklitz, “Revitalizing Doctrinal Legal Research in Europe: What About Methodology?” (2011) at 2.

<sup>131</sup> Van Hoecke, *supra* note 129 at 3.

<sup>132</sup> Langbroek et al, *supra* note 112 at 5; Chynoweth, *supra* note 109 at 32, 35, 37.

<sup>133</sup> Rene Brouwer, “The Study of Law as an Academic Discipline” (2017) 13:3 *Utrecht Law Review* 41 at 45–48.

identified within the social psychological and criminological theories and studies employed in the thesis. Though this thesis draws on work from the social sciences and includes the use of case studies, it remains motivated by the “normative perspective of ‘the law’.”<sup>134</sup> The reliance on disciplines other than law, therefore, is both “heuristic” and “auxiliary”.<sup>135</sup> The use of other disciplines is heuristic where the evidence from other disciplines is used merely to bolster or support the legal argument and interpretation of legal sources and auxiliary when a turn to social psychology and criminology is necessary to explain combatant psychology, a task that chapter 6 will demonstrate cannot be accomplished by relying solely on legal theories.

This section has explained the legal doctrinal methodology relied on in this thesis. Through the use of legal doctrinal methodology, this thesis grounds itself in the sources of IHL to identify the current IHL protections for civilians and how IHL applies to non-state armed groups. The reliance on formal sources of IHL, the formation of which is based on state consent to assume legal obligations, further grounds this thesis in the reality of the international system which is dominated by states who serve as the makers of international law. Where useful, recourse to sources from disciplines in the social sciences is made heuristically to bolster specific interpretations and applications of existing IHL. The thesis turns to the disciplines of social psychology and criminology for an understanding of combatant psychology and, more specifically, violence toward civilians in armed conflict. The insights provided by social psychology and criminology are then used within the normative legal framework of IHL, informed by the case studies of Sierra Leone and the DRC, to identify behaviours worthy of substantive legal attention for the further protection of civilians during armed conflict.

The next section will turn to a discussion of fieldwork conducted for this thesis in Sierra Leone and the DRC. While the case studies of Sierra Leone and the DRC, along with the fieldwork data collection conducted in these countries, is a secondary methodology drawn on in this thesis, the intricacies of this method require a much lengthier explanation than has been devoted to

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<sup>134</sup> Renee SB Kool, Jessy M Emaus & Daan M van Uhm, “The Victim’s Right to Intervene as an Injured party in Criminal Proceedings” (2017) 13:3 Utrecht Law Review 77 at 79.

<sup>135</sup> Sanne Taekema & Bart van Klink, “On the Border. Limits and Possibilities of Interdisciplinary Research” in Sanne Taekema & Bart van Klink, eds, *Law and method: interdisciplinary research into law* (Tünberg, GE: Mohr Siebeck, 2011) 7 at 9–10.

explaining the comparatively straightforward legal doctrinal methodology that is the primary methodology of this thesis.

## 2.2 Case Studies and Qualitative Fieldwork

The aims of this thesis are grounded in the legal doctrinal methodology discussed in the previous section. As noted, the legal doctrinal method is complemented through the use of case studies and qualitative fieldwork. This section will introduce the case study and fieldwork methodologies employed in the thesis.

Complete objectivity in qualitative research is not possible. Qualitative researchers must accept that their research is open to bias. As Galdas has noted, “[t]hose carrying out qualitative research are an integral part of the process and final product, and separation from this is neither possible nor desirable.”<sup>136</sup> Instead, transparency “about the processes by which data have been collected, analyzed, and presented” should be a standard by which researchers are evaluated.<sup>137</sup>

Consequently, this chapter and thesis aims for maximum transparency, in terms of conveying the manner in which research was conducted and data was collected, the approach used to analyze materials, and the presentation of the data collection. As with any research project, there are limitations to the methods and research choices made. These limitations have been identified and explained in the description of the methodology.

The use of the case study method allows a researcher to “to investigate and understand complex issues in real world settings.”<sup>138</sup> When using the case study method, “emphasis ... is placed on exploration and description of a phenomenon.”<sup>139</sup> The case studies of Sierra Leone and the DRC in this thesis are illustrative of contemporary NIACs characterized by widespread IHL violations committed by armed groups against civilians. Illustrative case studies describe and demonstrate “what a situation is like” and can serve as tools to “help in the interpretation of other data”.<sup>140</sup>

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<sup>136</sup> Paul Galdas, “Revisiting Bias in Qualitative Research: Reflections on Its Relationship with Funding and Impact” (2017) 16 *International Journal of Qualitative Methods* 1 at 2.

<sup>137</sup> *Ibid.*

<sup>138</sup> Helena Harrison et al, “Case Study Research: Foundations and Methodological Orientations” 18:1 *Forum: Qualitative Social Research* (Online).

<sup>139</sup> “Case Study Method - Center for Innovation in Research and Teaching”, online: <[https://cirt.gcu.edu/research/developmentresources/research\\_ready/descriptive/case\\_study](https://cirt.gcu.edu/research/developmentresources/research_ready/descriptive/case_study)>.

<sup>140</sup> United States General Accounting Office Program Evaluation and Methodology Division, *Case Study Evaluations*, GAO/PEMD-91-10.1.9 (Washington, DC: US GAO, 1990) at 31.

Illustrative case studies can “[m]ake the unfamiliar familiar” for readers and help to “avoid oversimplification of reality”.<sup>141</sup>

The Sierra Leone and DRC case studies in this thesis are developed through a combination of primary and secondary sources. Primary sources include fieldwork interviews conducted in Sierra Leone and the DRC (discussed later in this chapter), statements made by victims, witnesses, and perpetrators to the Sierra Leone Truth and Reconciliation Commission, and reports issued by institutions such as the UN Security Council contemporaneous to the events. Secondary sources are primarily scholarly accounts of these conflicts. Many sources provide a mixture of primary and secondary evidence. For example, the Final Report of the Sierra Leone Truth and Reconciliation Commission includes excerpts from first-hand accounts of the Sierra Leone civil war.<sup>142</sup> Other secondary evidence includes Human Rights Watch news releases and reports written by field operatives during the conflicts in Sierra Leone and the DRC, as well as the first-hand accounts of victims, witnesses, and perpetrators quoted in these documents from the conflict periods.<sup>143</sup>

One limitation of this method “is in selecting the instances” to be used as case studies as they “should adequately represent the situation” being examined.<sup>144</sup> This can be a challenge because sometimes, “[w]here considerable diversity exists, it may not be possible to select a ‘typical’ site”.<sup>145</sup> In many ways, this was not a significant challenge in this thesis. There are, unfortunately, many contemporary NIACs in which armed groups have perpetrated extensive violations of IHL protections for civilians, such as the Taliban in Afghanistan,<sup>146</sup> the FARC in

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<sup>141</sup> *Ibid* at 32.

<sup>142</sup> See, e.g., Sierra Leone Truth and Reconciliation Commission, *supra* note 102 at Ch 4, paras 22, 29-31, 43-46, 51-52, 57, 62-64, 67-70, 75-77, 79-80, 90-92, 95-97, 99-102, 109-13, 125.

<sup>143</sup> See, e.g., Corinne Dufka, *Getting Away with Murder, Mutilation, Rape New Testimony from Sierra Leone*, Vol 11 No 3(A) (New York: Human Rights Watch, 1999) at Section IV; Human Rights Watch, “Sexual Violence Rampant, Unpunished in DR Congo War”, (20 June 2002), online: *Human Rights Watch* <<https://www.hrw.org/news/2002/06/20/sexual-violence-rampant-unpunished-dr-congo-war>>; Human Rights Watch, “The Curse of Gold |”, (1 June 2005), online: *Human Rights Watch* <<https://www.hrw.org/report/2005/06/01/curse-gold>> at 25, 27–30, 43–44, 49.

<sup>144</sup> Linda G Morra & Amy C Friedlander, *Case Study Evaluations*, OED Working Paper No 2 (Washington, DC: World Bank, 1999) at 10.

<sup>145</sup> *Ibid*.

<sup>146</sup> See, e.g., Jessica A Stanton, *Violence and Restraint in Civil War Civilian Targeting in the Shadow of International Law* (Cambridge, UK: Cambridge University Press, 2016) at 84–88.

Colombia,<sup>147</sup> Hezbollah in Israel,<sup>148</sup> the NPFL in Liberia,<sup>149</sup> the LTTE in Sri Lanka,<sup>150</sup> and the LRA in Uganda.<sup>151</sup> What did provide a challenge in the selection of case studies was the desire to conduct fieldwork in the case study countries, which consequently imposed certain selection restrictions based primarily on the security of both myself and my potential interviewees. Therefore, the greatest limitation in case study selection was personal safety considerations.

Personal safety considerations, as well as other considerations discussed below, led to the selection of Sierra Leone and the DRC as case studies for this thesis. The qualitative fieldwork interviews conducted in Sierra Leone and the DRC were small-n studies with limited sample size. Small-n studies are essential in order to build larger studies. As Gerring notes, “[a] single case study is still a single shot – a single example of a larger phenomenon.”<sup>152</sup> Rather than aim to provide a picture that is generalizable on a large-scale, case studies aim to provide what Rosemary Nagy has described as a “slice across the spectrum”.<sup>153</sup> In the present study, the data provides a slice across the spectrum of a small sample of data on armed groups in two armed conflicts. The aim is not to provide outcomes generalizable to all armed groups in all conflicts, but to elucidate themes, points of interests, and gaps in existing law that may indicate useful patterns. This study attempts to explain the behaviour of a select number of members of armed groups in Sierra Leone and DRC by using theories of social psychology and criminology to help analyse and identify problematic behaviours not currently addressed by IHL.

Beyond the case study method, the research employed a Folk Bayesian approach. This approach is loosely derived from Bayes Theorem, a mathematical formula that addresses conditional probabilities; however, a Folk Bayesian approach is “largely intuitive” and is “more a matter of making research decisions in the spirit of Bayes than of consciously applying Bayesian

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<sup>147</sup> See, e.g., *ibid.*

<sup>148</sup> See, e.g., *ibid.*

<sup>149</sup> See, e.g., *ibid.*

<sup>150</sup> See, e.g., *ibid.*

<sup>151</sup> See, e.g., *ibid.*

<sup>152</sup> John Gerring, “The Case Study: What It Is and What It Does” in Carles Boix & Susan C Stokes, eds, *The Oxford Handbook of Comparative Politic* (Oxford: Oxford University Press, 2007) 90 at 101.

<sup>153</sup> Rosemary Nagy, “The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission” (2013) 7 *The International Journal of Transitional Justice* 52 at 59.



techniques.”<sup>154</sup> Folk Bayesianism is a multidirectional approach to analysis where researchers “move back and forth between theory and data, rather than taking a single pass through the data.”<sup>155</sup> Consequently, theory and data work together to generate the study’s hypotheses. In this study, I began with by considering a wide array of theories of criminology and social psychology, which might hold relevance for analysing the data collected through field interviews and other case study research. As the field data was collected, I went back and forth between the data and these numerous theories to identify the theories most applicable to the data collected. In this manner, the theories included in chapter 7 were narrowed to those relevant to the analysis of the data in subsequent chapters. This back-and-forth movement is critical to the Folk Bayesian approach, where “moving back and forth between theory formulation and empirical investigation – are all strategies that take into account the mutual dependence of understanding and observation.”<sup>156</sup> In this vein, “the research task is viewed as akin to extending a web or network, while being prepared to modify the prior web in order to accommodate new findings.”<sup>157</sup> This multidirectional process allowed for the refinement of theory and data to produce hypotheses that form the foundation of recommendations for the strengthening of international humanitarian law and the protection of civilians in armed conflict. Each part of the process – theory and data – was essential to the identification and generation of hypotheses.

### 2.3 Sierra Leone

The selection of case study location for the research prioritized safety, feasibility, and the nature of the conflict. The Sierra Leone civil war began in 1991 and ended in 2002. The country has been peaceful since that time. With the exception of street crime motivated by poverty, the capitol, Freetown, is quite safe. This was an important deciding factor in selecting Sierra Leone as a location for fieldwork. The relatively high levels of safety for both myself and my potential interviewees could be largely assured by the peaceful climate that existed in the country during the research period. Second, the feasibility of conducting research in Sierra Leone was an

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<sup>154</sup> Timothy J McKeown, “Case Studies and the Limits of the Quantitative Worldview” in Henry E Brady & David Collier, eds, *Rethinking Social Inquiry, Diverse Tools, Shared Standards* (Lanham, MD: Rowman & Littlefield Publishers, Inc, 2004) 139 at 159.

<sup>155</sup> Timothy J McKeown, “Case studies and the statistical Worldview: Review of King, Koehane, and Verba’s *Designing Social Inquiry: Scientific Interference in Qualitative Research*” (1999) 53:1 *International Organization* 161 at 180.

<sup>156</sup> *Ibid* at 188.

<sup>157</sup> *Ibid*.

important consideration. In particular, the official language spoken in Sierra Leone is English and all interviews could be conducted in English, therefore eliminating any need for a translator in interviews. Furthermore, conducting research in Sierra Leone was economically feasible. While airfare was quite expensive, actual living costs while in country were very low, thus permitting research to be conducted at a reasonable cost. Finally, the nature of the conflict was a consideration in case study location selection. My aim in choosing case studies was to select countries in the same region and with the same nature of conflict, in this case, non-international armed conflicts. Consequently, the nature of the Sierra Leone civil war as a non-international armed conflict was a factor in its selection.

### 2.3.1 Data Collection and Research Population

The first fieldwork research was conducted in Sierra Leone over a period of three weeks in April 2016. The first contact in Freetown, Sierra Leone was made via my Doctoral Supervisor. This contact was a former employee of the Special Court for Sierra Leone and current employee of the Residual Special Court for Sierra Leone. This individual was interviewed at the offices of the Residual Special Court for Sierra Leone and the interview lasted approximately one hour. Using the snowball method, this interviewee connected me with two further interviewees. The first interviewee was a victim of violence by armed groups, in particular the Revolutionary United Front (RUF). This interview took place at the premises of the Residual Special Court and lasted approximately 45 minutes. The second interviewee was a child soldier<sup>158</sup> who was interviewed at the premises of the YMCA (Young Men's Christian Organization) in Freetown. This interview lasted approximately one hour.

All efforts were made to conduct in person interviews in line with the Interview Guidelines established during the University of Western Ontario ethics review process. Interviews were conducted in English. This more structured interview style quickly revealed itself to be less than ideal. The structured questions interrupted the flow of the conversation, and literally interrupted

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<sup>158</sup> The definition of child soldier relied on in this thesis is children under the age of fifteen years when recruited to the armed group. This is the traditional age distinction made in IHL in both of the 1977 Additional Protocols to the Geneva Conventions. The 2000 Optional Protocol to the Convention on the Rights of the Child addresses this subject and, at Article 2, prohibits the compulsory recruitment of persons under 18 years into armed forces. The qualification of "compulsorily recruited" suggests that children between the ages of 15 and 18 may still legally participate in hostilities. The position taken by the ICRC in its Customary IHL Study is that the only agreement among states *vis à vis* the minimum age requirement in IHL is that it should not be lower than fifteen years old.

the interviewee. Questions would sometimes result in one word or very brief answers. This required me to adapt interview techniques in the field. A much more unstructured approach was therefore adopted. I would first introduce myself, the research project, and what was expected of the participant. In brief, the letter of information was orally delivered in accessible, lay terms so as to make the interviewee comfortable, while also conveying the necessary information about the study. After the introduction, the interviewee was given the opportunity to ask me any questions they might have. Prior to the beginning of the actual interview, I confirmed orally that the interviewee consented to participating in the interview and to their testimonies being recorded by hand. No audio recording equipment was used in interviews with victims, former combatants, or local human rights activists. This was done for the comfort of interviewees and due to the sensitive nature of the content of interviews. In interviews conducted in the Democratic Republic of Congo, I introduced the procedure of asking several thematic questions at the end of the interviewee's testimony. This procedure was adopted in order to gain potentially useful information which was not elucidated in the general testimony of the interviewee. It was an approach formulated after, and in reaction to, preliminary analysis of the in-person former combatant and victim interviews conducted in Sierra Leone. Consequently, the thematic questions posed to interviewees in the Democratic Republic of Congo were not posed to the interviewees in Sierra Leone.

Interview subjects were expanded to include victims and witnesses in addition to former combatants. This was due in part to difficulties in locating former combatants to interview through my existing contacts employing the snowball method. My interview with the RUF victim demonstrated to me that victims could provide a wealth of information about the external operations of armed groups and, in particular, their interactions with the civilian population. Unfortunately, a limitation of data from victims and witnesses is that they were unlikely to be able to provide insight into the internal operations, training, disciplinary measures, or other internal workings of armed groups. Nonetheless, I made the determination that the data and information they were able to provide was valuable to the project.

As noted, I struggled to find subsequent interviewees from the initial three in-person interviews. A visit to the Truth and Reconciliation Commission (TRC) Archives at the Peace Museum in

Freetown provided an alternative source of data collection, which required a special permit to access the archives for research purposes. This permit took several business days to acquire and involved paperwork, visits to the Human Rights Commission of Sierra Leone, and an access fee. Once the permit was received, I was granted three days of supervised access to the TRC Archives. There were limitations to the use of TRC testimonies in lieu of in-person interviews. I was limited to the information contained within the written testimony. I could not ask directed questions, including thematic questions like those posed to interviewees in the Democratic Republic of Congo, or seek clarification from the testimony giver. However, there were also advantages to the use of TRC testimonies. They provided first-hand accounts taken in close temporal proximity to the conflict. They also eliminated the potential for re-traumatization of the testimonial giver, which is always a risk in the case of in-person interviews.

The testimonies collected by the Sierra Leone TRC are kept in boxes in a storage room at the Peace Museum in Freetown. They are arranged by the district where the testimony was collected. I selected boxes at random and went through the files contained in that box. A particular effort was made to find testimonies from perpetrators or child soldiers. However, notes were also taken of testimonies of victims and witnesses. For the most part, testimonies were copied verbatim by hand. An attempt was still made to protect the identity of testimony givers. This was done by omitting certain information from the transcription of testimonies. This included the omission of names of the testimony giver, of family members, of locations of birth or habitation, and so on. A concerted attempt was made to select boxes from different districts of Sierra Leone. In total, seven districts are represented amongst the TRC files reviewed.<sup>159</sup> The regional breakdown of the 36 TRC testimonies is as follows: 14 testimonies from Kailahun district; seven testimonies from Western Area 1 (Urban); four testimonies from Koinadugu district; four testimonies from Western Area 2 (Rural); three testimonies from Moyamba district; two testimonies from Pujehun district; and, two testimonies from Tonkolili district. The scope of this distribution is only minimally useful as it denotes where the individual was located at the time their testimony was collected for the TRC. It does not automatically correlate to the location of the events described within the individual's testimony, nor of their actual habitation. Consequently, efforts to provide

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<sup>159</sup> Kailahun (KAI); Western Area 1 (WA1); Tonkolili (TON); Koinadugu (KOI); Western Area 2 (WA2); Moyamba (MOY); and, Pujehun (PUJ).

regional representation through the random selection of boxes of testimonies from different regions added very little to the geographic robustness of the collection of testimonies.

In total, 39 interviews or testimonies were collected in Sierra Leone. This includes one organizational interview with the former employee of the SCSL; two in-person interviews – one victim and one child soldier; and 36 TRC testimonials. Of the 39 testimonies collected, 38 were given by victims, witnesses, or perpetrators. Of these 38 testimonies, eight were given by females and 30 by males. In total, 20 testimonies fell under the category of victim, and three in the category of witness. The remaining 15 testimonies were given by perpetrators or child soldiers. Eight testimonies were given by child soldiers and seven by adult perpetrators. While there were 38 testimonies, individuals often reported interactions with more than one armed group during the conflict. Consequently, 49 interactions with armed groups were reported by the 38 victims, witnesses, and perpetrators. Interaction with the Revolutionary United Front (RUF) was most prolific with 24 reports of encounters with this group, or approximately 63% of respondents having interacted with the RUF. There were seven reports of encounters with the Armed Forces Revolutionary Council (AFRC); seven reports of encounters with the Kamajors; six reports of encounters with the Sierra Leone Army (SLA); and two reports of encounters with the Civil Defence Forces (CDF). These were the largest fighting forces in the civil war. In addition, there were two reports of encounters with the forces of the Economic Community of West African States Monitoring Group, and one report of an encounter with a Civil Defence Unit. The age breakdown amongst the 38 testimonies was ten people under the age of 15 years; 12 people between the ages of 15 and 30 years; eight people between the ages of 31 years and 45 years; two people between the ages of 46 years and 60 years; one person over 60 years; and, five adults of unspecified age.

Among the 15 testimonies collected from child soldiers and perpetrators, one was the result of an in-person interview and 14 were testimonies pulled from the archives of the Truth and Reconciliation Commission. All of the child soldiers and perpetrators were male. Of the seven adult perpetrators, five reported being forced recruits while two did not indicate whether they had been forcibly recruited or if they had joined the armed group willingly. Among the eight child soldiers, seven reported affiliation with the RUF while one reported affiliation with the

AFRC. Of the seven adult perpetrators, four were affiliated with the RUF, one with the AFRC, and two with the Kamajors. The age breakdown amongst the child soldiers and perpetrators were eight people under the age of 15 years; five people between the ages of 15 years and 30 years; and, two adults of unspecified age.

## 2.4 Democratic Republic of Congo

As described above, the selection of case study locations for the research prioritized safety, feasibility, and the nature of the conflict. An early organizational interviewee recommended that I consider an active conflict as one of my case studies in the project. This was difficult to accomplish, given the safety restrictions placed on me by my educational institution. The Democratic Republic of Congo was selected as a case study because of ongoing armed conflict in the country balanced with the relative safety of parts of the country, as compared to other active conflicts in Africa such as in the Central African Republic, Somalia, and South Sudan. Within the DRC, Goma, the Eastern capitol in the province of North Kivu and its immediate surroundings, is relatively safe and conflict free, while other areas of Eastern Congo still suffer from active conflict. In the interest of the safety of both myself and my interviewees, I restricted my research interviews to Goma and its immediate environs – towns that could be accessed as a day-trip from Goma. The second consideration for the selection of the DRC as a case study was the feasibility of conducting *in situ* research. This region consists mainly of French and Swahili speakers. I am fluent in French, which facilitated communication and ease of living in Goma. It also limited the occasions on which a translator would be necessary. Goma is also easily accessible by land from Rwanda, which made it more accessible because I could fly in and out of Kigali, Rwanda, therefore decreasing travel costs. Finally, the nature of the majority of conflicts in DRC as non-international armed conflicts was a consideration in selecting the DRC as a research location.

### 2.4.1 Data Collection and Research Population

Prior to conducting the first research trip to the Democratic Republic of Congo, I established a connection with the Human Rights Watch office in Goma, DRC. I relied on this office to help establish connections with local human rights activists and other local organizations working on armed group related issues, as well as to keep apprised of the security situation in the region. However, I did not have any official affiliation with Human Rights Watch during my research. I made a conscious decision not to affiliate with any organization during my research. This was a

decision made with the goal of preserving the integrity of the testimonies collected in the research. Organizations often have reputations amongst the local population. These reputations may be favourable or unfavourable. They may have a reputation for providing necessary services or resources to the community. An official affiliation with an organization may colour how the researcher is perceived and, consequently, colour the information an interviewee is willing to disclose or how they disclose information with the interviewer. An advantage of this decision was to minimize potential for bias in responses. A disadvantage of this approach was that it minimized the potential to access a greater number of interviewees. Ultimately, I chose to prioritize the quality of the interview responses over the potential for greater numbers of informants in the study.

In total, two research trips were conducted in the Democratic Republic of Congo. Initially, only one trip had been planned based on time and financial restrictions to the research project. However, the first trip in 2016 proved less fruitful than expected and a second trip was necessary in order to gather combatant interview data. The first research trip took place over three weeks in May 2016. Unfortunately, my arrival in Goma coincided with the kidnapping of three International Committee of the Red Cross (ICRC) employees in Eastern DRC. This made meeting with the ICRC in Goma impossible. Further, it created a situation in which I did not feel safe traveling outside Goma to conduct interviews. I made the decision early on that a second research trip would be necessary. As a result, the first research trip was used primarily to improve my local knowledge about Goma and to familiarise myself with the city and local dynamics. During this first research trip, three organizational interviews were conducted. The first interview was conducted with an intelligence officer for the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) well-versed in the dynamics of armed groups operating in Eastern DRC. This interview lasted approximately one hour and took place at the MONUSCO base in Goma. The other two interviews were conducted with local DRC human rights activists. The first interview took place at the Human Rights Watch office in Goma and lasted approximately 90 minutes. The second interview was much more extensive and lasted approximately three hours. It took place at a quiet local café at the request of the interviewee.

The second research trip took place over three weeks in April 2017. It must be noted that interview numbers were hampered on this trip by illness (I fell ill early on in this trip) as well as by the insecurity of roads to travel to certain locations outside of Goma to conduct interviews. Interviews conducted outside of Goma were restricted to locations where interviews could be completed as a day excursion from Goma, as per my agreed personal security plan with my home institution. Again, Human Rights Watch in Goma was used as a primary point of connection to local advocates. In this case, one advocate (G2312CM) became the focal point for the snowball method and the connection to all subsequent combatant interviews. He was able to connect me with a number of former combatants in and around Goma and accompanied me on interviews, serving, where necessary, as Swahili-French translator.

Combatant interviews were conducted in Goma, Sake, and Kibumba. In total, ten former combatants were interviewed. All ten interviewees were male. Two interviews with female combatants had been arranged, however, one fell ill and one had recently returned from a stay in hospital. I deemed these inappropriate conditions in which to conduct interviews and forewent the interviews. Of the ten combatants interviewed, two were former child soldiers, five joined an armed group by choice (though one of these was a child soldier), and five were forced recruits. Interviewees at the time of joining or being recruited into an armed group ranged in age from 13 years to 42 years.<sup>160</sup> Of the ten interviewees, two were under 15 years at the time of joining or being recruited into the armed group; five were between the age of 15 years and 30 years; one was between the age of 31 years and 45 years; and, two interviewees were adults but a specific age was not given. Among the ten interviewees, six different armed groups were represented. Some interviewees spent time in more than one armed group. The armed groups represented among the ten interviewees were the Alliance des forces démocratiques pour la libération du Congo (AFDL),<sup>161</sup> Alliance des patriotes pour un Congo libre (APCLS),<sup>162</sup> Forces armées de la

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<sup>160</sup> Note two interviewees did not reveal their age at the time of joining/being recruited into an armed group. However, it is known that they were both adults at the time of joining or being recruited into an armed group.

<sup>161</sup> Alliance of Democratic Forces for the Liberation of Congo.

<sup>162</sup> Alliance of Patriots for a Free and Sovereign Congo.



République Démocratique du Congo (FARDC),<sup>163</sup> Mai Mai,<sup>164</sup> Mouvement du 23 mars (M23),<sup>165</sup> and, Rassemblement congolais pour la démocratie (RCD).<sup>166</sup> The ten interviewees also represented different roles or ranks within the armed groups. Three interviewees were officers, six interviewees were foot soldiers or porters, and one interviewee's rank was unclear.

Building upon the lessons learned from in-person interviews conducted in Sierra Leone, I employed an unstructured interview model. I introduced myself, the research project, and what was expected of the participant. In brief, the letter of information was orally delivered in accessible, lay terms so as to make the interviewee comfortable while also conveying the necessary information about the study. After the introduction, the interviewee was given the opportunity to ask me any questions they might have. Prior to the beginning of the actual interview, I confirmed orally that the interviewee consented to participating in the interview and to their testimonies being recorded by hand. No audio recording equipment was used in interviews with victims, former combatants, or local human rights activists. This was done for the comfort of interviewees and due to the sensitive nature of the content of interviews. I took notes by hand in English and French.

One-on-one interviews were conducted in French, while other interviews were conducted in French and Swahili where the local human rights advocate accompanying me served as a Swahili translator. There are limitations to using a translator for interviews. First, it interrupts the flow of the interview, as the interviewee must pause while their comments are translated and recorded by the interviewer. Second, there is the risk of information being lost in translation. However, since I do not speak Swahili, these were necessary limitations to incur in the research process.

I stressed that the information important to my study was the collection of the interviewee's own personal story and experiences – how they came to be in an armed group and their time as a member of an armed group. I would only ask essential clarification questions while the

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<sup>163</sup> Armed Forces of the Democratic Republic of Congo. These are the national armed forces of the DRC.

<sup>164</sup> This is the general term used to refer to local militia groups. Consequently, it can refer to numerous different groups. Some Mai Mai groups have more specific names to designate their particular affiliation. For example, Mai Mai Simba, Mai Mai Kifuafua, etc.

<sup>165</sup> March 23 Movement.

<sup>166</sup> Rally for Congolese Democracy.

interviewee recounted their story. This approach led to more candid answers as well as unexpected information. All participants discussed the demobilisation process. This was originally not considered in the scope of the research and was not considered by the Interview Guide. Consequently, the decision to move to an unstructured interview style enhanced the quality and breadth of information gathered. After the interviewees had recounted their entire story, I asked permission to ask several more targeted questions, reiterating that they were not obligated to answer questions if they did not feel like answering and that they could end the interview without further questions if they chose to. This is where some structure was reintroduced to the interview process with similar thematic questions being posed to all interviewees if they had not already addressed the material in their personal statement.

The first theme addressed whether or not any training was received by the interviewee from the armed group(s) in which they had been members. In particular, they were asked whether they had received any training in IHL. It is interesting to note that the interviewees were more likely to identify with or understand the term ‘human rights’ rather than ‘international humanitarian law’. For example, where training of this nature did occur, interviewees spoke of human rights training, not training in IHL or the laws of war. The second theme addressed whether there were internal rules within the armed group and, if so, what those rules were and what, if any, were the consequences if those rules were broken. In particular, interviewees were asked whether there were rules regarding the treatment of civilians. The third theme asked interviewees how the armed groups interacted with the civilian population, in particular how they sensitized the civilian population to their presence. Finally, interviewees were asked if they encountered or had interaction with organizations such as the DRC Red Cross or International Committee of the Red Cross during their time in the armed group. These themes were focused upon as potentially useful to drawing conclusions about the internal operations of armed groups, including internal rules and discipline, and organizational engagement and influence, from the perspective of combatants.

Finally, one organizational interview was conducted during this research trip. It was the wish of the interviewee that the organization not be specifically named. The organization is a non-

governmental organization (NGO) that works with armed groups. The interview took place at the offices of the NGO in Goma and lasted approximately one hour.

## 2.5 Data Analysis

Once all fieldwork was completed, interviews were transcribed. Following this, the data was analysed. The transcripts were canvassed for common themes or points of particular relevance or interest in relation to the analytical criminology and social psychology theories explored earlier in the research process. Once themes were identified, quotes were organized along these themes. Often a single quote fit into multiple thematic categories. The themes identified were narrowed down on the basis of alignment with the criminological and social psychological theoretical frameworks explored and identified earlier in the research.

The first overarching theme emerging from the two countries was that of depersonalization and disassociation. This theme is related to both theories of social psychology and criminology, in particular the criminology theory of techniques of neutralization and the social psychology theories of deindividuation and moral disengagement. The data demonstrated the common practice of the use of anonymizing nicknames by members of armed groups, in particular nicknames that often evoke heroic or particularly violent self-images. This is a practice that disassociates the individual from their non-combatant identity. The use of anonymizing nicknames is shown to be common both to the conflicts in Sierra Leone and the Democratic Republic of Congo. A second overarching theme is dehumanization. Once again, this theme can be associated with both theories of social psychology and criminology. In fact, nearly all of the theories of criminology and social psychology considered in the research discussed dehumanization. Here, the information collected in the case study interviews revealed mistreatment of civilians by combatants and the failure to distinguish, as required by law, between combatant and civilian. In addition, another common theme was the use of denigrating and dehumanizing language and imagery to refer to the enemy, including civilians. Theories of social psychology have demonstrated that such practices facilitate participation in mass atrocities, in particular against the civilian population.<sup>167</sup>

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<sup>167</sup> Bandura, *supra* note 23 at 201–203; Bandura, *supra* note 23 at 84–89; Kelman & Hamilton, *supra* note 23 at 18–19; Zimbardo, *supra* note 23 at 17, 222–24; Albert Bandura, B Underwood & ME Fromson, “Disinhibition of aggression through diffusion of responsibility and dehumanization of victims” (1975) 9 *Journal of Research in Personality* 253.

## 2.6 Conclusion

This chapter has explained the methodology employed in this thesis. The methodology used is primarily legal doctrinal methodology, which relies on the sources of international law – treaties, custom, general principles, case law, and scholarly literature – to identify and interpret the existing content of IHL protections for civilians as they apply to armed groups in NIACs. The use of legal doctrinal methodology grounds this thesis in the normative framework of law. However, the thesis also makes use of non-doctrinal methods in the form of two illustrative case studies that describe the violation of IHL protections for civilians by members of armed groups in NIACs in Sierra Leone and the DRC. These two case study locations were selected based on prioritization of safety, feasibility, and the nature of the conflict. The Sierra Leone and DRC case studies are developed through a combination of primary and secondary data collection as well as primary and secondary sources. The primary data collection consists of qualitative fieldwork interviews and data collection in Sierra Leone and the DRC. Interviews conducted in Sierra Leone and the DRC were largely unstructured in order to gather the most authentic and complete account of each interviewee's experiences. Some minimal structure was introduced in interviews in the Democratic Republic of Congo by means of thematic questions asked after the interviewee had provided their entire testimony in order to provide details for potential comparison among interviewees. While complete objectivity in a qualitative study such as this is not possible, a concerted effort was made to avoid tainting the response of interviewees. This was done primarily through the unstructured interview format that allowed interviewees to freely recount their experiences without questions affecting or leading their story and by my decision to remain independent from any official organizational affiliation.

The legal doctrine and primary and secondary data used in this thesis lead to the construction of a legal argument that is both normatively persuasive and grounded in the realities of both the international legal system and the experiences of combatants and civilians in Sierra Leone and the DRC. Together, these methods permit this thesis to establish a problem with the current application of IHL to armed groups due to a gap between the protections currently afforded to civilians during conflict which are based largely on the protections afforded to individuals in peace and the protections necessary to achieve the humanitarian goal of civilian protection during NIACs.

The following chapter will begin the legal doctrinal analysis of IHL to establish the current content of the law. First, it establishes the legal concept of armed group, the regulation of whose members is the focus of this thesis. The chapter then proceeds to demonstrate the current legal basis for binding non-state armed groups under IHL and international human rights law. The fact that armed groups are bound by existing IHL indicates that new IHL regulations such as those recommended in chapter 8 are likely to affect the members of armed groups.

## Chapter 3

### 3 International Humanitarian Law and Non-State Armed Groups

This thesis advances the claim that an analysis of the IHL protections for civilians applicable to non-state armed groups, as compared to peacetime law applicable to all individuals, shows gaps: conflict-specific regulation of combatant behaviour for the protection of civilians, distinct from peacetime behavioural regulation for the protection of individuals, is needed. This chapter addresses two key concepts central to this thesis: who is considered to be part of a non-state armed group under IHL and the fact that IHL applies to these individuals. The manner in which armed groups are bound by IHL can alter the scope of rules applicable to them. For example, some approaches posit that armed groups are only bound to treaty law, while other approaches contend that they are only bound to customary rules of IHL.

This chapter begins by exploring the legal definition of an armed group under the law of NIACs. It is not all groups of persons with weapons who are the non-state addressees of IHL. Rather, only groups which fulfill the requisite legal elements of an organized armed group are bound by IHL.<sup>168</sup> With this understanding of the non-state addressees of the law of NIACs, the chapter turns to a discussion of the principle of the equality of belligerents. This principle requires all parties to the conflict to be bound by the same IHL rules as each other.<sup>169</sup> This principle is meant to create a sense of reciprocal obligations among parties to a conflict that will engender mutually reinforcing compliance with the law.<sup>170</sup> If armed groups are only bound by a portion of IHL rules, as opposed to the entire body of law, it could create a conflict with the principle of equality of belligerents. Consequently, the principle of equality of belligerents is often an important consideration in assessing different approaches that have been advanced to explain how IHL binds armed groups. Seven different approaches have been articulated in literature as means of explaining the legal application of IHL to armed groups: (1) legislative jurisdiction; (2) national law; (3) third party treaty application; (4) *de facto* authority; (5) claims to represent the state; (6)

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<sup>168</sup> See discussion in section 3.1 below.

<sup>169</sup> See discussion in section 3.2 below.

<sup>170</sup> See discussion in section 3.2 below.

customary international and international legal personality; and, (7) consent.<sup>171</sup> Each of these approaches is examined in turn in this chapter. Finally, this chapter addresses the application of international human rights law during times of armed conflict and whether, like IHL, it creates binding obligations for armed groups.

The establishment of how IHL is binding on armed groups in this chapter and what rules of IHL are binding (established in chapter 4) is critical in order to demonstrate that new rules or regulations proposed in chapter 8 would be likely to be applicable to these actors. Since IHL is binding on armed groups and their members, this justifies the focus on IHL in this thesis as a tool to address violence committed by armed groups toward civilians during NIACs. This chapter demonstrates that there are several solid legal bases for the binding application of IHL to armed groups. Armed groups are bound by the legislative jurisdiction of the states in which they operate and by their own limited international legal personality. A limited number of armed groups are also bound by IHL when they exercise *de facto* authority over civilians and/or territory. This chapter further demonstrates that international human rights law applies during armed conflict and creates binding obligations for some armed groups. Consequently, international human rights law must also be considered in the development of new IHL regulations in chapter 8.

### 3.1 Non-State Actors in the International Legal System

The question of how armed groups are bound by IHL has stemmed largely from the traditional structure of the international legal system, which, since the Peace of Westphalia in 1648, has been premised on states and state sovereignty.<sup>172</sup> This means that, for over three centuries, “international law [has been] primarily a law for the international conduct of states, and not their citizens ... [and] the subjects of the rights and duties arising from international law are states solely and exclusively.”<sup>173</sup> Since the mid-twentieth century, the subjects of international law have been expanded beyond states to include non-state actors such as international

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<sup>171</sup> See discussion in section 3.4 below.

<sup>172</sup> Antonio Cassese, *International Law*, 2d ed (Oxford: Oxford University Press, 2005) at 22–25.

<sup>173</sup> Sir Robert Jennings & Sir Arthur Watts, *Oppenheim's International Law*, 9th ed (Harlow, UK: Longman Group UK, 1992) at 16.

organizations<sup>174</sup> and individuals.<sup>175</sup> However, “states remain in ultimate control over the formal content of international law.”<sup>176</sup>

The nature of international law is such that treaties can only be concluded between states, and, more recently, between states and international organizations.<sup>177</sup> States remain the primary authors of international treaties. States parties to a treaty must provide their express consent to be bound by the terms of the treaty.<sup>178</sup> This is done through signature and ratification, or accession.<sup>179</sup> Critically, treaties generally do not apply to third parties.<sup>180</sup> In order to bind a third party to obligations in a treaty, they must expressly consent to be bound.<sup>181</sup> These foundational rules of treaty making raise questions about how non-state armed groups can be bound by Common Article 3 of the four Geneva Conventions of 1949 (Common Article 3)<sup>182</sup> and the 1977 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (Additional Protocol II).<sup>183</sup> Common Article 3 and Additional Protocol II are the two most important treaties governing NIACs and the protection of civilians during such conflicts. While Common Article 3 applies to all NIACs, the threshold for application of Additional Protocol II is, as will be discussed in this chapter, higher than that for Common Article 3. The rules applicable during an armed conflict may also come from customary international law: Common Article 3, as well as the core provisions of Additional Protocol II, are now considered to be part of customary IHL.<sup>184</sup> Further, the ICRC has

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<sup>174</sup> *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, 11 April 1949, 1949 ICJ Rep, 174 at 178.

<sup>175</sup> International human rights law creates rights for individuals under international law and international criminal law creates responsibilities for individuals under international law. See, e.g., Peters, *supra* note 93 at 117–152, 175–189.

<sup>176</sup> Peter Muchlinski, “Global Bukowina; Examined: Viewing the Multinational Enterprise as a Transnational Law-making Community” in Gunther Taubner, ed, *Global Law without a State* (Aldershot, UK: Dartmouth Publishing Company, 1997) 79 at 89.

<sup>177</sup> John Currie, *Public International Law* (Toronto: Irwin Law, 2008) at 109.

<sup>178</sup> *Ibid* at 119–21.

<sup>179</sup> *Ibid* at 120–21.

<sup>180</sup> Malgosia Fitzmaurice, “Third Parties and the Law of Treaties” (2002) 6 Max Plank UNYB 37 at 38–39; PCIJ, *Certain German Interests in Polish Upper Silesia, Germany v Poland*, 25 May 1926, PCIJ Series A no 7, ICGJ 241 (PCIJ 1926) at 13.

<sup>181</sup> See, e.g., Currie, *supra* note 177 at 120–21.

<sup>182</sup> See, e.g., *Geneva Convention IV*, *supra* note 5.

<sup>183</sup> *Ibid*; *Additional Protocol II*, *supra* note 5.

<sup>184</sup> *Tadic Interlocutory Appeal*, *supra* note 68 at para 117.



suggested that the content of some treaty rules for international armed conflicts is now also applicable during NIACs because it has become customary international law.<sup>185</sup>

### 3.2 The Definition of an Armed Group in International Humanitarian Law

There is no codified legal definition of a non-state armed group in IHL treaty law. However, an armed group under IHL is more than simply a group of people in possession of weapons.<sup>186</sup> Groups which take up arms in a NIAC are not automatically considered to be armed groups and therefore non-state parties to the conflict. Instead, Additional Protocol II explicitly requires that a group be an “*organized* armed group[.]” thereby requiring the armed group to possess a certain level of organization if it is to be considered a non-state party to a NIAC.<sup>187</sup> While Common Article 3 does not explicitly refer to “organized armed groups”, this phrase has been interpreted to also require that an armed group possess a certain level of organization in order to be considered a party to a NIAC.<sup>188</sup> The level of organization required under Common Article 3 is less than that required for the application of Additional Protocol II.<sup>189</sup> The language of Additional Protocol II requires armed groups to be sufficiently organized to be able to control territory as well as to carry out “sustained and concerted military operations”.<sup>190</sup> However, as discussed below, the exact degree of organization required under Common Article 3 is unclear.<sup>191</sup>

The case law of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has provided guidance on how to assess the level of organization possessed by a group. The ICTY considered the issue of the requisite level of organization in judgments addressing the question of

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<sup>185</sup> Henckaerts & Doswald-Beck, *supra* note 5.

<sup>186</sup> Non-legal definitions of ‘armed group’ tend to simplify the definition in this manner and fail to appreciate the requisite organizational element discussed in this section. For example, the UN Office for the Coordination of Humanitarian Affairs has defined non-state armed groups as “groups that: have the potential to employ arms in the use of force to achieve political, ideological or economic objectives; are not within the formal military structures of States, State-alliances or intergovernmental organizations; and are not under the control of the State(s) in which they operate.” UN Office for the Coordination of Humanitarian Affairs (OCHA), *Humanitarian Negotiations with Armed Groups: A Manual for Practitioners* (New York: United Nations, 2006) at 6.

<sup>187</sup> *Additional Protocol II*, *supra* note 5 at Article 1(1) [emphasis added].

<sup>188</sup> See, e.g., *Prosecutor v Fatmir Limaj, Haradin Bala, Isak Musliu*, (*Trial Judgment*), 30 November 2005, IT-03-66-T at para 89; Sassoli, *supra* note 26 at 56.

<sup>189</sup> Sassoli, *supra* note 25 at 56.

<sup>190</sup> Sassoli, *supra* note 26 at 56. This is because Additional Protocol II Article 1(1) possesses additional qualifiers requiring that the armed group “exercise such control over a part of [the state’s] territory as to enable [the armed group] to carry out sustained and concerted military operations and to implement this Protocol.”

<sup>191</sup> *Ibid.*

whether the Kosovo Liberation Army was an “organized armed group”. The court concluded that an “organized armed group” would require sufficient organization so that “as a minimum...the basic obligations of Common Article 3... may be implemented”.<sup>192</sup> This does not, however, mean that they are required to have the same degree of organization as state armed forces.<sup>193</sup> This is very important, because there is likely to be a significant difference between “an armed group that operates underground and state armed forces that are operating out in the open.”<sup>194</sup>

The criterion of sufficient organization to implement IHL turns on whether the group has the capacity to implement and enforce IHL, not whether it actually does implement or enforce IHL.<sup>195</sup> This consideration can be met by the existence of internal rules within the armed group as well as a process by which to enforce these rules. The process of enforcement - that is, an internal disciplinary system - “need not be greatly developed”; however, “at least a semblance [of internal discipline] is required”.<sup>196</sup> A higher degree of organization is required for a group to be considered an ‘organized armed group’ under Additional Protocol II than for Common Article 3 due to the “more detailed rules ... that apply in Additional Protocol II conflicts”.<sup>197</sup> The fact that an armed group commits frequent IHL violations does not inherently mean it lacks sufficient organization to fulfill this criterion.<sup>198</sup> A group may be sufficiently organized and adopt a policy of committing IHL violations.<sup>199</sup> The organization of a group may come into question, however, where “individual members act entirely on their own initiative, in total disregard of a countervailing policy espoused by the armed group”.<sup>200</sup> This is because such independent individual IHL violations may suggest a lack of internal discipline within the group.

While armed groups can also vary widely in the manner in which they are organized, two dominant forms of organization have been identified: (1) vertical chains of command that are

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<sup>192</sup> *The Prosecutor v Ljube Boskoski and Johan Tarculovski, Trial Chamber Judgment*, 10 July 2008, IT-04-82-T at para 195.

<sup>193</sup> *Ibid* at para 197.

<sup>194</sup> Sivakumaran, *supra* note 46 at 172.

<sup>195</sup> *Ibid* at 178–79.

<sup>196</sup> *Ibid* at 179.

<sup>197</sup> ICTY, *Boskoski Trial Judgment*, *supra* note 192 at para 197. See also, Sivakumaran, *supra* note 46 at 185.

<sup>198</sup> ICTY, *Boskoski Trial Judgment*, *supra* note 192 at para 205.

<sup>199</sup> See, e.g., Adrean Bianchi & Yasmin Naqvi, *International Humanitarian Law and Terrorism* (Oxford: Hart, 2011) at 163.

<sup>200</sup> Dinstein, *supra* note 46 at 45. See also, ICTY, *Boskoski Trial Judgment*, *supra* note 192 at para 205.

clearly established, centralized, hierarchical, and very similar to those traditionally seen in state regular armed forces; and, (2) more horizontally structured command with decentralized power and, frequently, “less clearly delineated roles and responsibilities.”<sup>201</sup> The level of organization of groups in the first category will likely be much more easily assessed, but groups within the second category are also capable of meeting the requirement to be considered an “organized armed group”.<sup>202</sup> A good example of an armed group that fit the second category is the Taliban in Afghanistan.<sup>203</sup>

The ICTY has also identified a non-exhaustive list of indicative factors to assess whether an armed group is sufficiently organized to be deemed an “organized armed group” under IHL. These factors are categorized into five broad groupings. The first set of factors looks for the existence of a command structure in the armed group, taking into consideration whether the group has a “chain of military hierarchy between the various levels of commanders”, whether the group has internal regulations, and how those regulations are disseminated to soldiers and commanders.<sup>204</sup> The second set of factors focuses on the capacities of the group and examines whether “the group could carry out operations in an organised manner”.<sup>205</sup> To determine this, one considers “the group’s ability to determine a unified military strategy and to conduct large scale

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<sup>201</sup> Sivakumaran, *supra* note 46 at 172–73.

<sup>202</sup> *Ibid* at 173; Bangerter, *supra* note 25 at 188–89; Yves Sandoz, Christophe Swinarski & Bruno Zimmermann, eds, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Gen: ICRC, 1986) at para 1352.

<sup>203</sup> Sivakumaran, *supra* note 46 at 173–74.

<sup>204</sup> *ICTY, Boskoski Trial Judgment, supra* note 192 at para 199. The first group of factors, as articulated by the ICTY Trial Chamber, in their entirety are “In the first group are those factors signalling the presence of a command structure, such as the establishment of a general staff or high command, which appoints and gives directions to commanders, disseminates internal regulations, organises the weapons supply, authorises military action, assigns tasks to individuals in the organisation, and issues political statements and communiqués, and which is informed by the operational units of all developments within the unit’s area of responsibility. Also included in this group are factors such as the existence of internal regulations setting out the organisation and structure of the armed group; the assignment of an official spokesperson; the communication through communiqués reporting military actions and operations undertaken by the armed group; the existence of headquarters; internal regulations establishing ranks of servicemen and defining duties of commanders and deputy commanders of a unit, company, platoon or squad, creating a chain of military hierarchy between the various levels of commanders; and the dissemination of internal regulations to the soldiers and operational units.”

<sup>205</sup> *Ibid* at para 200. The second group of factors, as articulated by the ICTY Trial Chamber, in their entirety are “Secondly, factors indicating that the group could carry out operations in an organised manner have been considered, such as the group’s ability to determine a unified military strategy and to conduct large scale military operations, the capacity to control territory, whether there is territorial division into zones of responsibility in which the respective commanders are responsible for the establishment of Brigades and other units and appoint commanding officers for such units; the capacity of operational units to coordinate their actions,<sup>814</sup> and the effective dissemination of written and oral orders and decisions.”

military operations, the capacity to control territory, ... the capacity of operational units to coordinate their actions, and the effective dissemination of ... orders”.<sup>206</sup> The capacity to control territory, although identified as a potential indicator of a group’s level of organization, is not a requirement under Common Article 3 for organized armed groups.<sup>207</sup> The capacity to control territory is, however, required under Additional Protocol II.<sup>208</sup> The consideration of capacity to control territory as an indicator of an armed group’s level of organization does not rest on a specific amount of territory being controlled but, rather, the ability of the armed group to carry out the requisite military operations and to implement the provisions of Additional Protocol II.<sup>209</sup> The amount of territorial control and location may vary during a conflict.<sup>210</sup> The third set of factors deals with the “level of logistics” of the group, taking into consideration “the ability to recruit new members; the providing of military training; the organized supply of military weapons; [and] the supply and use of uniforms”.<sup>211</sup> The fourth set of factors examines “whether an armed group possess[es] a level of discipline and the ability to implement the basic obligations of Common Article 3”.<sup>212</sup> Finally, the fifth set of factors looks at a group’s ability “to speak with one voice” such as “its ability to negotiate and conclude agreements such as cease fire or peace accords.”<sup>213</sup> Responsible command is an important requirement and is closely

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<sup>206</sup> *Ibid.*

<sup>207</sup> Lindsay Moir, “Concept of Non-International Armed Conflict” in Andrew Clapham, Paola Gaeta & Marco Sassoli, eds, *The 1949 Geneva Conventions: A Commentary* (Oxford: Oxford University Press, 2015) 391 at 407.

<sup>208</sup> *Additional Protocol II*, *supra* note 5 at Article 1(1).

<sup>209</sup> AP II Article 1 sets the requirement that a group “exercise such control over a part of its territory as to enable [it] to carry out sustained and concerted military operations and to implement the ... Protocol.” Articles 5 and 6 of AP II deal with persons detained or interned and the due process guarantees which requires some amount of territorial control: Sivakumaran, *supra* note 46 at 186.

<sup>210</sup> Only two obligations under Additional Protocol II require an armed group to have control over territory: (1) detention and internment, and (2) due process guarantees: *Ibid* at 186–87.

<sup>211</sup> *ICTY, Boskoski Trial Judgment*, *supra* note 192 at para 201. The third group of factors, as articulated by the ICTY Trial Chamber, in their entirety are “In the third group are factors indicating a level of logistics have been taken into account, such as the ability to recruit new members; the providing of military training; the organised supply of military weapons; the supply and use of uniforms; and the existence of communications equipment for linking headquarters with units or between units.”

<sup>212</sup> *Ibid* at para 202. The fourth group of factors, as articulated by the ICTY Trial Chamber, in their entirety are “In a fourth group, factors relevant to determining whether an armed group possessed a level of discipline and the ability to implement the basic obligations of Common Article 3 have been considered, such as the establishment of disciplinary rules and mechanisms; proper training; and the existence of internal regulations and whether these are effectively disseminated to members.”

<sup>213</sup> *Ibid* at para 203. The fifth group of factors, as articulated by the ICTY Trial Chamber, in their entirety are “A fifth group includes those factors indicating that the armed group was able to speak with one voice, such as its capacity to act on behalf of its members in political negotiations with representatives of international organisations and foreign countries; and its ability to negotiate and conclude agreements such as cease fire or peace accords.”

linked to the degree of organization of a group.<sup>214</sup> Responsible command merely requires that “there be some sort of relationship of effective control by which one individual has the power to control the acts of another, in particular the power to prevent or punish particular acts of that other individual.”<sup>215</sup> It does not, however, require a hierarchical, military chain of command.<sup>216</sup>

### 3.3 The Principle of Equality of Belligerents

The previous section addressed the legal concept of an armed group under IHL. It explained that Common Article 3 and Additional Protocol II are both addressed only to organized armed groups, a category which does not include unorganized non-state groups bearing weapons. In a NIAC, IHL also applies to the armed forces of a state involved in fighting an armed group. This section will discuss the principle of the equality of belligerents that is fundamental to international humanitarian law.<sup>217</sup> The fundamental nature of the principle of equality of belligerents is derived from the necessity that “each Party to the conflict ... be bound to apply [IHL]”<sup>218</sup> in order to realize the object and purpose of IHL: management of the problem of unrestrained violence between states and organized groups within states and the protection of individuals who do not directly participate in hostilities.<sup>219</sup>

Equality of belligerents means that all parties to a conflict are subject to the same rights and obligations under IHL, regardless of which party is the aggressor and regardless of the nature of the cause for which they are fighting.<sup>220</sup> Historically, this principle was tied to reciprocal

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<sup>214</sup> The ICTY Appeals Chamber, addressing the issue of command responsibility, stated in *The Prosecutor v Hadzihasanovic* that “there cannot be an organized military force save on the basis of responsible command”. *The Prosecutor v Enver Hadzihasanovic, Mehmed Alagic and Amir Kubara, Appeals Chamber Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility*, IT-01-47-AR72, 16 July 2003 at para 16. However, the ICTY Trial Chamber subsequently clarified that “some degree of organization by the parties will suffice to establish the existence of an armed conflict. This degree need not be the same as required for establishing the responsibility of superiors for acts of their subordinates”. *ICTY, Limaj et al Trial Judgment, supra* note 188 at para 89.

<sup>215</sup> Sivakumaran, *supra* note 46 at 175.

<sup>216</sup> *Ibid* at 175–76.

<sup>217</sup> Hersch Lauterpacht, “The Limits of Operation of the Law of War” (1953) 30 *British Yearbook of International Law* 206; Christopher Greenwood, “The Relationship between Jus ad Bellum and Jus in Bello” (1983) 9 *Review of International Studies* 221.

<sup>218</sup> *Geneva Convention IV, supra* note 5 at Common Article 3.

<sup>219</sup> See, e.g., ICRC, “Fundamentals of IHL”, online: *How Does Law Protect in War? Online Casebook* <<https://casebook.icrc.org/law/fundamentals-ihl>>.

<sup>220</sup> See, e.g., Sivakumaran, *supra* note 46 at 243; Jonathan Somer, “Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict” (2007) 89:867 *International Review of the Red Cross* 655; Adam Roberts, “The Equal Application of the Laws of War: A Principle under Pressure” (2008) 90:872 *International Review of the Red Cross* 931 at 932.

adherence to the law by parties to the conflict.<sup>221</sup> However, the principle has developed such that there is now “a recognition that there is an obligation to respect the law that does not depend completely on reciprocity.”<sup>222</sup> This is supported by the International Committee of the Red Cross’ (ICRC) *Customary IHL Study*, which cited significant state practice demonstrating this shift away from reciprocity.<sup>223</sup>

The principle of equality of belligerents applies equally to NIACs and international armed conflicts.<sup>224</sup> However, the application of the principle in NIACs may be problematic. First, many states are strongly opposed to any suggestion within IHL of equal status between their own armed forces and an armed group, which the principle of equality of belligerents assumes.<sup>225</sup> Second, the members of an armed group have no legal right to take up arms against the state.<sup>226</sup> Rather, they are often considered to be criminals by states under domestic law from the moment they engage the state in armed violence.<sup>227</sup> By contrast, the members of the state’s armed forces can legally take up arms to defend the state from such armed groups.<sup>228</sup>

IHL does not provide legal authority for an actor to take up arms against a state because it only regulates conduct during an armed conflict and is indifferent as to how the conflict came to exist. The fact it is illegal to take up arms against the state is a matter of domestic law. Consequently, Sassoli has argued that this inequality *vis à vis* who may legally take up arms in a NIAC does not jeopardize the principle because this inequality arises at the level of domestic law, rather than under international law.<sup>229</sup> IHL applicable to NIACs still treats state and non-state parties

<sup>221</sup> See, e.g., Roberts, *supra* note 220 at 943.

<sup>222</sup> See, e.g., *ibid.*

<sup>223</sup> Henckaerts & Doswald-Beck, *supra* note 5 at Rule 140.

<sup>224</sup> See, e.g., Sandoz, Swinarski, & Zimmermann, *supra* note 202 at para 1385; Francois Bugnion, “Jus ad Bellum and Jus in Bello and Non-International Armed Conflicts” (2003) 6 Yearbook of International Humanitarian Law 167; Marco Sassoli, “Jus ad Bellum and Jus in Bello: The Separation between the Legality of the Use of Force and Humanitarian Rules to be Respected in Warfare – Crucial or Outdated?” in Michael Schmitt & Jelena Pejic, eds, *International Law and Armed Conflict: Exploring the Faultlines, Essays in Honour of Yoram Dinstein* (Amsterdam, NLD: Martinus Nijhoff, 2007) 241 at 254–57.

<sup>225</sup> See, e.g., Somer, *supra* note 220 at 656.

<sup>226</sup> See, e.g., Lindsey Cameron et al, “Conflicts not of an international character” in Knut Dörmann et al, eds, *Commentary on the First Geneva Convention* (Cambridge, UK: Cambridge University Press, 2016) 126 at 186; Fleck, *supra* note 46 at 590.

<sup>227</sup> See, e.g., Cameron et al, *supra* note 226 at 186; Fleck, *supra* note 46 at 190.

<sup>228</sup> ICRC, “Non-international armed conflict | How does law protect in war? - Online casebook”, online: <[https://casebook.icrc.org/law/non-international-armed-conflict#\\_ftn\\_i\\_001](https://casebook.icrc.org/law/non-international-armed-conflict#_ftn_i_001)>.

<sup>229</sup> Sassoli, *supra* note 224 at 241. See also Sivakumaran, *supra* note 46 at 243.

equally.<sup>230</sup> It is logical to distinguish between equality under IHL and equality under domestic law as the principle of equality of belligerents is a principle of international law. While the fact that it is a principle of international law does not necessarily preclude its application to domestic law during armed conflict, the historical and current understanding of the principle is that it refers to equality specifically with regard to the application of *jus in bello* (i.e., IHL).<sup>231</sup> The principle could nonetheless be inhibited at the international level if the scope of IHL applicable to armed groups is not the same as that which binds states in a NIAC. Consequently, the legal principle of equality of belligerents is an important consideration in evaluating different approaches that attempt to explain how IHL is binding on armed groups and the scope of the rules which are binding on these groups.

### 3.4 Approaches to Explaining How Armed Groups are Bound by International Humanitarian Law

The previous sections have identified the type of armed group that is addressed by IHL as well as the fundamental principle of the equality of belligerent, which provides that parties to an armed conflict should be bound equally by the rules of IHL applicable to the conflict. The principle of equality of belligerents is an important reason for the necessity of armed groups being bound by IHL. Academic literature has identified many reasons as to why armed groups might deny that they are bound by IHL.<sup>232</sup> However, denial that one is bound does not prevent an individual or an armed group from, in fact, being bound by IHL.<sup>233</sup> There does, however, remain disagreement over the precise legal explanation for the fact that armed groups are bound by IHL.<sup>234</sup> This section will examine the seven approaches that exist to explain how armed groups are bound by IHL: 1) legislative jurisdiction; (2) national law; (3) third party treaty application; (4) *de facto*

<sup>230</sup> Sassoli, *supra* note 224 at 241; Sivakumaran, *supra* note 46 at 243.

<sup>231</sup> See, e.g., Somer, *supra* note 220 at 659; Nathaniel Berman, “Privileging Combat? Contemporary Conflict and the Legal Construction of War” (2004) 43:1 Columbia Journal of Transnational Law 1 at 12; Bugnion, *supra* note 224 at 174.

<sup>232</sup> See, e.g., Olivier Bangerter, “Reasons why armed groups choose to respect international humanitarian law or not” (2011) 93:882 International Review of the Red Cross 353.

<sup>233</sup> Sandesh Sivakumaran, “The Addressees of Common Article 3” in Andrew Clapham, Paola Gaeta & Marco Sassoli, eds, *The 1949 Geneva Conventions: A Commentary* (Oxford: Oxford University Press, 2015) 415 at 424; Cameron et al, *supra* note 226 at 181.

<sup>234</sup> Sivakumaran, *supra* note 233 at 424. For further discussion of the debate surrounding what mechanism binds armed groups to IHL see, for example, Sivakumaran, *supra* note 46 at 238–42; Moir, *supra* note 46 at 52–58; Jann K Kleffner, “The applicability of international humanitarian law to organized armed groups” (2011) 93:882 International Review of the Red Cross 443; Daragh Murray, “How International Humanitarian Law Treaties Bind Non-State Armed Groups” (2014) 20 Journal of Conflict and Security Law 101; Dinstein, *supra* note 46 at 63–73.

authority; (5) claims to represent the state; (6) customary international and international legal personality; and, (7) consent.<sup>235</sup> This section concludes that armed group consent to be bound is not legally required to explain the binding quality of IHL on them. This section suggests that the legislative jurisdiction and international legal personality are both solid legal explanations for the binding nature of IHL on armed groups and, through their application, provide an explanation for the binding effects of both treaty and customary IHL presumed by many academics, international organizations, and courts.

### 3.4.1 Legislative Jurisdiction

The approach of legislative jurisdiction relies on the argument that state ratification of a treaty “binds all individuals within its jurisdiction” to that treaty.<sup>236</sup> Thus, according to this approach, members of armed groups are bound by IHL treaty law through the ratification of an IHL treaty by the state of which they are nationals.<sup>237</sup> It is binding because treaty ratification is done “not just on behalf of the state but also on behalf of all individuals within its jurisdiction.”<sup>238</sup> While this approach is generally used to explain the binding application of IHL treaty law to armed groups, Kleffner has noted that this reasoning could also be employed to explain the binding force of customary IHL to armed groups.<sup>239</sup> Consequently, Murray has argued that this approach “ha[s] the potential to explain the direct—and immediate—attribution of the entire spectrum of international humanitarian law to all armed opposition groups”.<sup>240</sup>

The legislative jurisdiction approach has been described by some to be the dominant approach in the literature.<sup>241</sup> The approach received support from several states during the drafting of the

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<sup>235</sup> These seven approaches are drawn from various doctrinal sources, including case law and academic literature. See, e.g., Sandesh Sivakumaran, “Binding Armed Opposition Groups” (2006) 55 *International and Comparative Law Quarterly* 381; Kleffner, *supra* note 234; Moir, *supra* note 46 at 52–58, 96–99; Sivakumaran, *supra* note 46 at 236–42; *Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v United States of America) (Merits)*, 27 June 1986, 1986 ICJ Rep, 14 at paras 218-19; *The Prosecutor v Morris Kallon and Brima Bazzy Kamara, Appeals Chamber Decision on Challenge to Jurisdiction: Lomé Accord Amnesty*, SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), 13 March 2004 at 47; International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004* (Geneva: United Nations, 2005) at para 173.

<sup>236</sup> Sivakumaran, *supra* note 233 at 417–18. See also, e.g., Fleck, *supra* note 46 at 597; Moir, *supra* note 46 at 53.

<sup>237</sup> Sivakumaran, *supra* note 233 at 417–18.

<sup>238</sup> *Ibid* at 417. See also, e.g., Kleffner, *supra* note 234 at 445; Sivakumaran, *supra* note 235.

<sup>239</sup> Kleffner, *supra* note 234 at 445.

<sup>240</sup> Murray, *supra* note 234 at 103.

<sup>241</sup> See, e.g., Cameron et al, *supra* note 226 at 53–54; Morris Greenspan, *The Modern Law of Land Warfare* (Berkeley, CA: University of California Press, 1959) at 623; GIAD Draper, “The implementation and enforcement of the Geneva conventions of 1949 and of the two additional protocols of 1978” (1979) 64 *The Hague Academy*



Geneva Conventions,<sup>242</sup> and again during the drafting of Additional Protocol II,<sup>243</sup> as well as by the ICRC.<sup>244</sup> This approach does not, however, necessarily mean that an armed group will be bound by all IHL treaties. That is because the approach requires that the relevant state be party to an IHL treaty in order for the armed group to be bound by that treaty's rules. The Geneva Conventions, which contain Common Article 3, are universally ratified;<sup>245</sup> however, Additional Protocol II is not.<sup>246</sup> The content of Additional Protocol II, however, is now largely considered customary IHL; therefore, if the legislative doctrine argument is applied to customary IHL it would render the content of Additional Protocol II universally applicable. However, other IHL treaties, particularly those dealing with the prohibition or regulation of certain weapons are neither universally ratified nor are they necessarily customary IHL.<sup>247</sup> For example, the Antipersonnel Mine Ban Convention,<sup>248</sup> which has 164 states parties - though notably not the United States, Russia, China, Syria, Libya, and South Korea - is not yet considered to reflect customary IHL.<sup>249</sup> The legislative jurisdiction approach is nonetheless a strong approach to explain how armed groups are bound by IHL as it is the only approach that, on its own, would explain the binding nature of both treaty and customary IHL to armed groups while also preserving the principle of equality of belligerents, discussed above, to the greatest extent among the seven approaches.<sup>250</sup>

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Collected Courses 96 at 96; RR Baxter, "Ius in Bello Interno: the Present and Future Law" in JN Moore, ed, *Civil War in the Modern World* (Baltimore, MD: Johns Hopkins University Press, 1974) at 527; Dietrich Schindler, "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols" (1979) 63 *The Hague Academy Collected Courses* 151 at 151. Jean Pictet also cited this justification as applicable in addition to the others cited throughout the ICRC Commentaries: Jean Pictet, *Commentary on the Geneva Conventions of 1949, Volume II* (Geneva: ICRC, 1960) at 34.

<sup>242</sup> Sandoz, Swinarski, & Zimmermann, *supra* note 202 at para 4444.

<sup>243</sup> *Ibid.*

<sup>244</sup> *Final Record of the Diplomatic Conference of Geneva of 1949* (Berne: Switzerland Federal Political Dept, 1950) at vol II-B at 94 (Greece); *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974-1977)* (Bern: Switzerland Federal Political Dept, 1978) at vol VIII at 239 para 55 (ICRC), vol IX at 234 para 54 (ICRC), para 9 (Mongolia), vol XIV at 314 paras 22 and 24 (USSR); *Letter from the Vice-President of the ICRC to President, Front National de Libération du Sud-Vietnam, ICRC Archives B AG 202 223-005* (1965).

<sup>245</sup> The Geneva Conventions became universally ratified in 2000. They have continued to be universally ratified with the most recent ratification by the new state or South Sudan in 2014.

<sup>246</sup> While it has not achieved universal ratification, Additional Protocol II has been ratified by 168 states. While many major states, such as China, France, Germany, Russia, and the United Kingdom, have ratified Additional Protocol II, other states, including India, Pakistan, Syria, and the United States of America have not ratified the treaty.

<sup>247</sup> Kleffner, *supra* note 234 at 448.

<sup>248</sup> *Landmine Treaty*, *supra* note 8.

<sup>249</sup> Henckaerts & Doswald-Beck, *supra* note 5 at Rule 81.

<sup>250</sup> Kleffner, *supra* note 234 at 460.

The doctrine of legislative jurisdiction approach has been criticized for not differentiating between international and national law.<sup>251</sup> The suggestion is that this approach relies on the binding applicability of national law to members of armed groups and, as a result, the approach fails to provide justification for the binding nature of IHL on armed groups as a matter of international law.<sup>252</sup> The argument is that the binding quality of IHL with regards to armed groups relies on the implementation of these rules by the state into domestic law.<sup>253</sup> This argument is flawed for two key reasons. First, the argument ignores the distinction between monist and dualist nations. In the former, international obligations are automatically incorporated into national law whereas in the latter implementing legislation is required.<sup>254</sup> There are also variations on this dichotomy among states.<sup>255</sup> For example, Canada takes a dualist approach to international treaties and a monist approach to customary international law.<sup>256</sup> Second, it is not unprecedented for international law to create direct rights or obligations for individuals as a matter of international, rather than national, law.<sup>257</sup> For example, this is the case under international human rights law and international criminal law.

Other scholars have criticized the legislative jurisdiction approach because, in practice, armed groups may refuse “to comply with rules that have been formulated by the very governments with which they are in conflict.”<sup>258</sup> It is possible that armed groups may take such a stance, however, in practice, there is little evidence that armed groups actually do advance this argument.<sup>259</sup> Further, the application of a law to an individual does not rely on that individual’s acceptance that they are indeed bound.<sup>260</sup> Many scholars often evaluate the various approaches

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<sup>251</sup> Antonio Cassese, “The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts” (1981) 30 *International and Comparative Law Quarterly* 429.

<sup>252</sup> *Ibid.*

<sup>253</sup> Theodor Meron, “Human Rights in Internal Strife: Their International Protection” in *Sir Hersch Lauterpacht Memorial Lectures* (Cambridge, UK: Grotius Publications, 1987) at 39.

<sup>254</sup> Kleffner, *supra* note 234 at 447.

<sup>255</sup> *Ibid.*

<sup>256</sup> Gib van Ert, “Dubious Dualism: The Reception of International Law in Canada” (2010) 44:3 *Valparaiso University Law Review* 927 at 928.

<sup>257</sup> Kleffner, *supra* note 234 at 447; Sivakumaran, *supra* note 235 at 384–85; PCIJ, *Jurisdiction of the Courts of Danzig, Advisory Opinion*, 3 March 1928, PCIJ, Series B, No 15 at 18.

<sup>258</sup> See, e.g., Sivakumaran, *supra* note 233 at 418.

<sup>259</sup> *Ibid.*

<sup>260</sup> Fleck, *supra* note 46 at 597–98.

that have been advanced to explain how IHL binds armed groups based on how likely it is to engender compliance from armed groups, ignoring the fact that the force of a law does not rely on compliance. For example, speed limits remain legally binding on individuals regardless of how frequently they fail to observe them. Of course, if one accepts the argument that the requirement of consent to be bound under international law extends to non-state actors and not just states, then this argument takes on new meaning. However, as is argued in section 3.3.7, there is no evidence that such an extension of the consent requirement exists.

While Kleffner has suggested that the doctrine of legislative jurisdiction may be the “natural choice” for some among the seven approaches to explain how armed groups are bound by IHL, he has also argued that the approach suffers from a “fundamental conceptual defect”.<sup>261</sup> In his view, while this approach explains how individuals are bound by IHL, it does not explain how IHL can bind an armed group directly as a collective entity. This would be relevant for assigning responsibility for international wrongs to an armed group itself rather than one or more of the individual members of that group.<sup>262</sup> Further, it is armed groups, not individual members of armed groups, who are the addressees of Common Article 3 and Additional Protocol II and certain IHL obligations are directed at the armed group generally rather than individual combatants and commanders.<sup>263</sup> For example, the establishment of a “regularly constituted court” or the provision of education for children are collective rather than individual obligations.<sup>264</sup> It is for this reason that this thesis argues in favour of the joint application of the legislative jurisdiction and customary international law approaches to explain how IHL treaty law and customary law respectively bind armed groups.

#### 3.4.2 National Law

The second approach advanced to explain how armed groups are bound by IHL argues that armed groups are bound through national law.<sup>265</sup> Where treaties are automatically incorporated

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<sup>261</sup> Kleffner, *supra* note 234 at 449.

<sup>262</sup> It has been argued that the armed groups could be held responsible for international wrongs in a similar fashion to states. See, e.g., Ezequiel Heffes & Brian E Frenkel, “The International Responsibility of Non-State Armed Groups: In Search of the Applicable Rules” (2017) 8:1 Goettingen Journal of International Law 39.

<sup>263</sup> Kleffner, *supra* note 234 at 460.

<sup>264</sup> *Geneva Convention IV*, *supra* note 5 at Common Article 3; *Additional Protocol II*, *supra* note 5 at Article 4(3)(a).

<sup>265</sup> See, e.g., T Fleiner-Gerster & M Meyer, “New Developments in Humanitarian Law: A Challenge to the Concept of Sovereignty” (1985) 34 *International and Comparative Law Quarterly* 267 at 272; Sivakumaran, *supra* note 233 at 418–19.

into domestic law upon ratification or where the content of a treaty has been incorporated into domestic law through national procedures, armed groups will be bound by IHL based on the content of the national law.<sup>266</sup> Further, customary international law is often automatically considered to be national law by many states; therefore, rules of customary IHL would be binding through national law in such states.<sup>267</sup> Certainly, there is no question that a state may pass national legislation that binds actors on its territory to IHL norms. Also, this approach would ensure respect for the principle of equality of belligerents as both state armed forces and armed groups would be bound by the same national laws. However, if the national law approach is relied on as the sole explanation of how armed groups are bound by IHL then, if IHL treaty or customary international law were not implemented into domestic law, an armed group would not be bound to rules of IHL.<sup>268</sup> As a result, relying solely on this approach to bind armed groups would limit the scope of IHL rules binding on armed groups in a manner contrary to “clear international opinion” that armed groups are bound by the vast majority, if not all, rules of IHL applicable in NIACs.<sup>269</sup>

### 3.4.3 Treaties and Third Parties

The legal effect of treaties on third-parties is the third approach advanced to explain how IHL binds armed groups.<sup>270</sup> The *Vienna Convention on the Law of Treaties* (VCLT) codifies the rule of *pacta tertiis*, which is also a rule of customary international law and explains when and how a treaty can binding on a third-party.<sup>271</sup> The rules require an intent, on the part of states parties to the treaty in question, to create binding rights or obligations for the third party<sup>272</sup> and the consent of the third-party to assume the rights and/or obligations in question.<sup>273</sup> The VCLT, however, only applies to states.<sup>274</sup> Consequently, it is unclear whether the rule could be applied to non-state armed groups.<sup>275</sup> Since armed groups cannot legally be parties to IHL treaties, they would

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<sup>266</sup> Sivakumaran, *supra* note 233 at 418–19.

<sup>267</sup> *Ibid* at 419.

<sup>268</sup> *Ibid*.

<sup>269</sup> Moir, *supra* note 46 at 54–55.

<sup>270</sup> Cassese, *supra* note 251; Sivakumaran, *supra* note 233 at 419–20.

<sup>271</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969 [*Vienna Convention*] at Articles 34–36; Cassese, *supra* note 251 at 423–30.

<sup>272</sup> *Vienna Convention*, *supra* note 271 at Article 34; Cassese, *supra* note 251 at 423–30.

<sup>273</sup> *Vienna Convention*, *supra* note 271 at Article 35; Cassese, *supra* note 251 at 423–30.

<sup>274</sup> *Vienna Convention*, *supra* note 271 at Article 1.

<sup>275</sup> See, e.g., Kleffner, *supra* note 234 at 458; Sivakumaran, *supra* note 235 at 377.

necessarily be third parties to IHL treaties, though not third-party “states”.<sup>276</sup> Cassese has suggested that, while the rules of the VCLT apply only in the context of third party states, the customary rule of *pacta tertiis* applies to “the effects of treaties on any international subject taking the position of a third party *vis-a-vis* a treaty.”<sup>277</sup> He further argues that the “[the VCLT] does not rule out the applicability of its provisions to other international entities” such as armed groups.<sup>278</sup> If either or both of these assertions are correct - and Cassese provides no supporting evidence for either assertion - then the requisite intent to bind third parties can indeed be found in Common Article 3, which addresses “each Party to the conflict”. Since armed groups are non-state parties to a NIAC, it appears clear that they are one of the addressees of Common Article 3.<sup>279</sup> By contrast, Additional Protocol II does not explicitly address all the parties to a conflict nor was there any clear consensus among states during the drafting of the treaty as to whether they intended to bind armed groups or not.<sup>280</sup>

Cassese has argued that, though not explicit, the language of Additional Protocol II nonetheless suggests an intent to bind armed groups.<sup>281</sup> First, Additional Protocol II was intended to “develop[] and supplement[] Common Article 3”<sup>282</sup> and, as a result, “only expands and broadens the protection granted by it.”<sup>283</sup> It follows, therefore, according to Cassese, that since Common Article 3 clearly applies to armed groups, then Additional Protocol II also applies to these groups.<sup>284</sup> This is a convincing argument as, if Additional Protocol was not intended to create obligations for armed groups, this would necessarily limit the application of Additional Protocol II *vis-à-vis* Common Article in direct contradiction of Article 1(1) of the Additional Protocol. Cassese has also argued that Article 6(5) of Additional Protocol II, which places an obligation on the “authorities in power” at the end of hostilities, implicitly refers to both the State and armed group. The application of this provision to armed groups leads Cassese to conclude that “[i]f this

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<sup>276</sup> Kleffner, *supra* note 234 at 458.

<sup>277</sup> Cassese, *supra* note 251 at 423 [emphasis in original].

<sup>278</sup> *Ibid.*

<sup>279</sup> See, e.g. Sivakumaran, *supra* note 233 at 420; Moir, *supra* note 46 at 53.

<sup>280</sup> See, e.g., Cassese, *supra* note 251 at 420–23; GIAD Draper, “Humanitarian Law and Human Rights (1979) Acta Juridica 199” in MA Meyer & H McCoubrey, eds, *Reflections on Law and Armed Conflicts* (The Hague: Kluwer Law International, 1998) at 145–46.

<sup>281</sup> Cassese, *supra* note 251 at 424–28.

<sup>282</sup> *Additional Protocol II*, *supra* note 5 at Article 1(1).

<sup>283</sup> Cassese, *supra* note 251 at 424.

<sup>284</sup> *Ibid.*

duty [in Art. 6(5)] is made incumbent on the rebels once they seize power in the territory or in part of the territory, it is logical to maintain that the other rules of the Protocol also bind the rebels before that final moment.”<sup>285</sup> State parties to Additional Protocol II should therefore be understood to have intended the provisions of the treaty to apply to armed groups, thereby satisfying the first requirement of the VCLT test for third party application of treaties.<sup>286</sup>

The second requisite element of the *pacta tertiis* rule is the consent on an armed group to be bound by Common Article 3 and Additional Protocol II. As will be discussed further in chapter 5,<sup>287</sup> consent to be bound by international law on the part of non-state actors is not and should not be a requisite element to explain how armed groups are bound by IHL.

In addition to the problem of the consent to be bound requirement, the third-party approach remains weak because it lacks solid support to explain why the rule should be extended to armed groups. Cassese’s unsupported assertion that the application of these rules can be extended to third-party non-state actors fails to distinguish between types of non-state actors. While his focus is on armed groups, it is not clear why extension of these rules beyond states would be limited to non-state armed groups.<sup>288</sup> Application of this rule to individuals would, however, run contrary to the “widely accepted view that the consent of individuals is not required” for the acquisition of rights or obligations by individuals under international treaties.<sup>289</sup> For example, individual consent is not required for the creation of individual rights under international human rights law or for the creation of individual obligations under international criminal law.

Further, this approach would be inconsistent with the principle of equality of belligerents. This is because, at minimum, the protections in Common Article 3 and customary IHL for civilians and persons not taking direct part in hostilities are absolute and not dependent on reciprocity.<sup>290</sup> Therefore, if the binding application of IHL, including Common Article 3 and customary IHL, relied on an armed group to consent to be bound, a state would be bound by rules that would not

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<sup>285</sup> *Ibid* at 427.

<sup>286</sup> *Ibid* at 428.

<sup>287</sup> See section 5.4.7.

<sup>288</sup> Kleffner, *supra* note 234 at 458.

<sup>289</sup> *Ibid*.

<sup>290</sup> Pejic, *supra* note 71 at 217; *ICJ, Nicaragua Case, supra* note 235 at para 218.

be binding on the armed group. For this reason, and the reasons provided above, the third-party approach appears to lack a sufficient legal basis to explain how armed groups are bound by IHL.

#### 3.4.4 *De Facto* Authority

The fourth approach is based on the factual circumstance of an armed group exercising *de facto* authority over territory.<sup>291</sup> This approach argues that, where an armed group exercises *de facto* control over territory, it “is bound by certain obligations that attach to states”.<sup>292</sup> This is because its exercise of control over territory renders it “akin to a state”.<sup>293</sup> What is required is “stable territorial control” on the part of the armed group, which distinguishes it from situations during conflict where territorial control is constantly shifting between parties to the conflict.<sup>294</sup> This approach also requires the armed group to implement some form of “civilian administration” in the territory it controls.<sup>295</sup> This flows logically from the fact that treaties are binding on successive governments, even where they have gained power through armed conflict; the “legal personality of the State remains unchanged.”<sup>296</sup> However, other discussions of this approach rely only on *de facto* authority over persons and territory and do not include a requirement to exercise state-like functions.<sup>297</sup>

The ability to bind such armed groups to IHL is highly advantageous for the protection of civilians in NIACs because, while the law of international armed conflicts includes laws applicable to belligerent occupation, there are no equivalent rules of occupation for NIACs under either treaty or customary IHL.<sup>298</sup> It is also logical to require an armed group that is operating as a *de facto* state or sovereign authority to be held to the same standards as states. However, this approach is incomplete on its own and cannot form the sole explanation for how armed groups are bound by IHL. A conflict in which an armed group has stable territorial control will be an Additional Protocol II conflict; however, in most contemporary NIACs armed groups do not meet this territorial control standard.<sup>299</sup> Consequently, this approach would not explain how

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<sup>291</sup> See, e.g., Kleffner, *supra* note 234 at 451–54; Sivakumaran, *supra* note 233 at 423.

<sup>292</sup> Sivakumaran, *supra* note 233 at 421. See also, e.g., Baxter, *supra* note 241 at 527–28.

<sup>293</sup> Sivakumaran, *supra* note 233 at 421.

<sup>294</sup> See, e.g., Murray, *supra* note 234 at 103 fn 12; Kleffner, *supra* note 234 at 453.

<sup>295</sup> See, e.g., Murray, *supra* note 234 at 103 fn 12; Kleffner, *supra* note 234 at 453.

<sup>296</sup> Moir, *supra* note 46 at 55.

<sup>297</sup> See, e.g., Zegveld, *supra* note 25 at 15; Baxter, *supra* note 241 at 527–28.

<sup>298</sup> See, e.g., Dinstein, *supra* note 46 at 222.

<sup>299</sup> Kleffner, *supra* note 234 at 453.

armed groups in the majority of NIACs are bound by IHL.<sup>300</sup> It would only capture and explain how IHL binds a very small portion of armed groups. Further, even where an armed group does have stable territorial control, that group may not attempt to exercise state-like functions on that territory, in which case they, too, would not be captured by this approach. Consequently, this approach is very strong as a partial explanation for how armed groups are bound by IHL, but it is unsatisfactory as the sole approach to explain IHL's binding power on armed groups.

#### 3.4.5 Claims of the Armed Group to Represent the State

The fifth approach to explain how armed groups are bound by IHL only applies to armed groups that make claims to represent the state. Armed groups have also been said to be bound by IHL if they “claim to represent the state against which they are fighting.”<sup>301</sup> Treaty ratification and customary international law bind not only the government which ratifies the treaty or is in power when a customary rule crystallizes, but also subsequent governments under the principle that “extraconstitutional changes to the government do not affect the person of the state.”<sup>302</sup> Under this approach to binding armed groups, the group is bound by treaties ratified by the state not only if and when they win the conflict and form a new government, but before any victory if they “claim[] to be the government or to represent the state” and they “exercise effective sovereignty”.<sup>303</sup>

There may be overlap between this approach and the previous approach based on *de facto* authority where the group making such claims also has stable territorial control and is exercising state-like functions. Since this approach relies solely on whether the armed group claims to represent the state, there is no requirement of territorial control or the exercise of state-like functions. This may mean this approach is capable of capturing some of the armed groups not captured by the *de facto* authority approach. However, it would not explain how armed groups who do not claim to represent the state would be bound by IHL (assuming they also do not have stable control over territory or exercise state-like functions).<sup>304</sup> Many armed groups do not seek to take over the state's government.<sup>305</sup> For example, in the Democratic Republic of Congo, some

<sup>300</sup> See, e.g., *ibid*; Zegveld, *supra* note 25 at 15.

<sup>301</sup> Sivakumaran, *supra* note 233 at 422.

<sup>302</sup> *Ibid* at 422 fn 27.

<sup>303</sup> *Ibid* at 422; Pictet, *supra* note 241 at Vol 3 page 37.

<sup>304</sup> See, e.g., Moir, *supra* note 46 at 55–56.

<sup>305</sup> Kleffner, *supra* note 234 at 453.



groups have clearly aspired to take over the government, such as the Alliance des Forces Démocratiques pour la Libération du Congo-Zaïre, which ultimately did successfully take over the government. However, other groups in the Democratic Republic of Congo do not have political aspirations - for example, some have economic aspirations or seek only to protect their community or ethnic group.<sup>306</sup> Consequently, this approach has a solid legal foundation, but would be unsatisfactory as the sole approach to explain how armed groups are bound by IHL.

#### 3.4.6 Customary International Law

This sixth approach considers customary IHL rules binding on armed groups by virtue of the rules' status as customary international law. Consequently, it obviates any need to tie a non-state actor to treaty obligations. It does not face the same obstacles to binding non-state actors as treaty law. Dinstein has argued that, not only does customary IHL bind all states, it is also "capable of imposing obligations on all individuals".<sup>307</sup> The Special Court for Sierra Leone considered the Revolutionary United Front bound by IHL based on customary rules of IHL and the International Court of Justice found the same with respect to the Contras in Nicaragua.<sup>308</sup> Common Article 3 and the norms which stem from its text are "unquestionably of a customary international law status."<sup>309</sup> This is supported by case law from the International Court of Justice, International Criminal Tribunal for the Former Yugoslavia, International Criminal Tribunal for Rwanda, Special Court for Sierra Leone, and numerous domestic courts.<sup>310</sup> This approach is further supported by the ICRC 2016 Commentary on Common Article 3.<sup>311</sup> It is also favoured by many respected academics.<sup>312</sup> However, this approach again grounds its explanation, like the legislative jurisdiction explanation discussed earlier, in the fact that individual group members are bound by customary IHL. It fails to explain how customary IHL binds armed groups as collective entities.<sup>313</sup>

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<sup>306</sup> For example, some mai-mai groups operate only at the local level and some have focused their efforts on controlling profitable mining sites without aspirations to take control of the country. See, e.g., International Peace Information Service, *Analysis of the interactive map of artisanal mining areas in eastern DR Congo 2015 update* (Antwerp, BE: IPIS, 2016) at 12–13.

<sup>307</sup> Dinstein, *supra* note 46 at 72.

<sup>308</sup> *SCSL, Challenge to Jurisdiction*, *supra* note 235 at 47; *ICJ, Nicaragua Case*, *supra* note 235 at paras 218-19.

<sup>309</sup> Sivakumaran, *supra* note 233 at 424.

<sup>310</sup> *ICJ, Nicaragua Case*, *supra* note 235 at para 218; *Tadic Interlocutory Appeal*, *supra* note 68 at para 98; *SCSL, Challenge to Jurisdiction*, *supra* note 235 at para 47; *The Prosecutor v Jean-Paul Akayesu, Trial Chamber, ICTR-96-4-T*, 2 September 1998 at para 608.

<sup>311</sup> Cameron et al, *supra* note 226 at 183, 283.

<sup>312</sup> See, e.g., Dinstein, *supra* note 46 at 72–73.

<sup>313</sup> See, e.g., Fortin, *supra* note 73 at 204.

Other scholars have argued that the binding quality of customary IHL on armed groups rests on the fact that they have international legal personality.<sup>314</sup> This approach would explain how armed groups are directly bound by customary IHL. This was also the position taken by the UN-sponsored International Commission of Inquiry on Darfur, though the Commission included a territorial control component. The Commission stated in its report that “all insurgents that have reached a certain threshold of organization, stability and effective control of territory, possess international legal personality and are therefore bound by the relevant rules of customary international law on internal armed conflicts”.<sup>315</sup> Sassoli has argued that “IHL implicitly confers upon parties to non-international armed conflicts - whether they end up succeeding or not - the functional international legal personality necessary to have the rights and obligations foreseen by it”.<sup>316</sup> Consequently, territorial control is not, according to Sassoli, a requirement for an armed group to possess international legal personality. Zegveld has also taken this approach, though noting that armed groups have only “*limited legal personality*”.<sup>317</sup>

International legal personality is not limited to states. The International Court of Justice in 1949 identified the potential for non-state actors to acquire international legal personality and found that an international organization, the United Nations, did in fact have international legal personality.<sup>318</sup> The Court, in its 1980 Advisory Opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, stated that “subjects of international law ... are bound by any obligations incumbent upon them under general rules of international law” by virtue of their status as a subject of international law.<sup>319</sup> The Court has also noted that the extent and scope of rights and obligations possessed by subjects of international law could vary in different subjects of international law could vary based on the “needs of the [international]

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<sup>314</sup> See, e.g., Sassoli, *supra* note 25 at 46–47; Zegveld, *supra* note 25 at 57; Kleffner, *supra* note 234 at 454.

<sup>315</sup> International Commission of Inquiry on Darfur, *supra* note 235 at para 172.

<sup>316</sup> Sassoli, *supra* note 25 at 46–47.

<sup>317</sup> Zegveld, *supra* note 25 at 57 [emphasis added].

<sup>318</sup> *ICJ, Reparations Case*, *supra* note 174 at 8.

<sup>319</sup> *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion)*, ICJ Reports 1980, 20 December 1980, 73 at para 37. The Court used the phrase “general rules of international law” and not “customary international law”; however, Cassese has noted that these terms are often used interchangeably: Cassese, *supra* note 172 at 154.

community.”<sup>320</sup> This means the customary rules of international law applicable to states need not necessarily be identical to those of an armed group. This is important to explain how an armed group’s limited legal personality would not necessarily mean all of customary international law would apply to it.<sup>321</sup> The case law of the International Court of Justice demonstrates that it is possible for armed groups to have limited international legal personality and, based on that legal personality, they are bound by customary IHL.

An advantage of the customary international law approach to explain how armed groups are bound by IHL is that it binds the armed group directly as a collective entity as opposed to relying solely on the binding nature of rules on individual members of the group.<sup>322</sup> This approach, however, would bind armed groups only to customary IHL and not IHL treaty law. Much of the content of the core IHL treaties (e.g., Geneva Conventions of 1949 and Additional Protocols of 1977) are now customary international, therefore this would explain how armed groups are bound by most rules of IHL. However, not all IHL treaties have achieved customary legal status.<sup>323</sup> Where there is no equivalent customary rule, states would nonetheless be bound by the treaty obligations they have assumed. This poses a problem for the principle of equality of belligerents.<sup>324</sup> However, if we jointly consider both the legislative jurisdiction approach and customary international approach as explaining how armed groups are bound by IHL, this would mean armed groups would be bound by rules of customary IHL as well as treaty rules that have not achieved customary status where members of armed groups are citizens of a state party to such treaties.<sup>325</sup> It is for this reason that the phrase “shall not affect the legal status of the Parties

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<sup>320</sup> *ICJ, Reparations Case, supra* note 174 at 8. Murray has noted that “International legal persons and subjects of international law may be treated as equivalent.” Murray, *supra* note 234 at 106. See also Jan Klabbbers, *An Introduction to International Institutional Law* (Cambridge, UK: Cambridge University Press, 2003) at 43.

<sup>321</sup> See, e.g., Fortin, *supra* note 73 at 205.

<sup>322</sup> Kleffner, *supra* note 234 at 455.

<sup>323</sup> Weapons treaties such as the Cluster Munitions Treaty and likely the Anti-Personnel Landmine Convention have yet to achieve recognized customary international law status.

<sup>324</sup> See, e.g., Moir, *supra* note 46 at 86, 107–108.

<sup>325</sup> For example, strong statements were made by some states during negotiations for Additional Protocol II. Pakistan stated: “nothing in the Protocol should suggest that dissidents must be treated legally other than as rebels”. Official Records 1974-1977, *supra* note 244 at Vol VII, CDDH/SR.49, Draft Art. 1, 61, para 11 (Pakistan); The representative from Zaire used even stronger language during the same negotiations: “The mistake made in Protocol II, at least in some of its provisions> had been that of treating a sovereign State and a group of insurgent nationals, a legal Government and a group of outlaws, a subject of international law and a subject of domestic law, on an equal footing.” *Ibid* at Vol VII, CDDH/SR.49, Draft Art 1, 219, para 124.

to the conflict” was included in Common Article 3.<sup>326</sup> Kleffner has argued that “[t]he fact that a given entity enjoys certain rights under international law and is subject to certain obligations does not necessarily confer legitimacy on that entity.”<sup>327</sup> The question of whether entities are seen as “legitimate” “is divorced from the question of whether they are endowed with international legal personality.”<sup>328</sup> Therefore, state opposition to conferring legitimacy on armed groups does not necessarily conflict with the possession of international legal personality on the part of armed groups.

It is possible that the use of the phrase “shall not affect the legal status of the Parties to the conflict” was the drafters’ attempt to distinguish organized armed groups from the concept of recognition of belligerency. Recognition of belligerency arose in the mid-19<sup>th</sup> century and allowed for a non-state armed group fulfilling certain criteria in a civil war, if recognized by a state, to be entitled to the full protection of the laws of war which, prior to the Geneva Conventions of 1949, only governed international armed conflicts.<sup>329</sup> Recognition of belligerency accorded the members of the non-state armed group equal status with the state’s own soldiers.<sup>330</sup> Corn et al. note that “resistance to this form of recognition that brought a special status to non-State actors was strong” and it was rarely employed by states.<sup>331</sup> Indeed, by World War II, recognition of belligerency had fallen into disuse.<sup>332</sup> After the failure to invoke recognition of belligerency during the Spanish Civil War (1936-1939), commentators declared that “‘the antiquated and inadequate character of recognition of belligerency [had] bec[o]me manifest’ and [they] demanded the development of fundamental humanitarian rules that would regulate internal armed conflicts”.<sup>333</sup> In the wake of World War II, the international community

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<sup>326</sup> Pictet, *supra* note 241 at 44, 60.

<sup>327</sup> Kleffner, *supra* note 234 at 455.

<sup>328</sup> *Ibid.*

<sup>329</sup> See, e.g., Yair M Lotsteen, “The Concept of Belligerency in International Law” (2000) 166 *Military Law Review* 109 at 113–14; Geoffrey Corn, Ken Watkin & Jamie Williamson, *The Law in War – A Concise Overview* (Abingdon, UK: Routledge, 2018) at 29.

<sup>330</sup> See, e.g., Lotsteen, *supra* note 329 at 110; Corn, Watkin & Williamson, *supra* note 329 at 29.

<sup>331</sup> Corn, Watkin & Williamson, *supra* note 329 at 29.

<sup>332</sup> See, e.g., Sivakumaran, *supra* note 46 at 192; Corn, Watkin & Williamson, *supra* note 329 at 29, 37.

<sup>333</sup> Tilman Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law* (Oxford: Oxford University Press, 2018) at 32. See also, e.g., Richard Falk, “Janus Tormented: The International Law of Internal War” in James N Rosenau, ed, *International Aspects of Civil Strife* (Princeton: Princeton University Press, 1964) 185 at 191; Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge, UK: Cambridge University Press, 2010) at 22.

came together to draft the Geneva Conventions, including the first ever regulation for NIACs, Common Article 3. The framework of Common Article 3 and Additional Protocol II sought to regulate NIACs without altering the “legal status” of non-state armed groups and their combatants.<sup>334</sup> IHL rules applicable to NIACs do not accord non-state armed groups and their members equal status to Government soldiers.<sup>335</sup> The phrase “shall not affect the legal status of the Parties to the conflict” in Common Article 3 is an attempt to prevent an interpretation of the Article that would invoke either the historical concept of belligerency or the altered legal relationship between state and armed group that belligerency had created.<sup>336</sup>

Kleffner has argued that the reliance on legal personality to explain the binding nature of IHL on armed groups is problematic due to the argument’s “circularity”.<sup>337</sup> The attribution of international legal personality relies on an entity possessing rights and obligations under international law.<sup>338</sup> Therefore, Kleffner argues, an armed group’s legal personality relies on armed group having rights and obligations under IHL but this legal personality is also advanced as the reason for those same IHL rights and obligations.<sup>339</sup> I believe this seeming circularity may be remedied by clarifying that the international legal personality explanation is advanced to explain how customary IHL, but not treaty law, binds armed groups. The International Court of Justice’s decision in the *Reparations Case* demonstrated that states may accord rights and obligations to a non-state actor that implicitly bestows that actor with international legal personality.<sup>340</sup> That scope of that legal personality is limited to that which is necessary to allow the actor to carry out the duties that states have bestowed on them.<sup>341</sup> The language of Common Article 3 that addresses armed groups and creates obligations for them under IHL may then

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<sup>334</sup> See, e.g., Cameron et al, *supra* note 226 at paras 864-69.

<sup>335</sup> See, e.g., Zakaria Daboné, “International law: armed groups in a state-centric system” (2011) 93:882 *International Review of the Red Cross* 395 at 397.

<sup>336</sup> ICRC, “Legal status of the parties | How does law protect in war? - Online casebook”, online: <<https://casebook.icrc.org/glossary/legal-status-parties>>.

<sup>337</sup> Kleffner, *supra* note 234 at 456.

<sup>338</sup> *ICJ, Reparations Case, supra* note 174 at 178; Jan Klabbers, “The Concept of Legal Personality” (2005) 11 *Ius Gentium* 35; R Portmann, *Legal Personality in International Law* (Cambridge, UK: Cambridge University Press, 2010); Murray, *supra* note 234 at 104.

<sup>339</sup> Kleffner, *supra* note 234 at 456.

<sup>340</sup> *ICJ, Reparations Case, supra* note 174 at 178–79.

<sup>341</sup> *Ibid.*

arguably be considered to have given armed groups limited international legal personality, as does subsequent customary IHL<sup>342</sup> for NIACs and Additional Protocol II.<sup>343</sup>

Fortin has advanced an explanation of armed group international legal personality that fits with the argument made above. She has argued, as I have, that legal personality is bestowed by Common Article 3 and Additional Protocol II on armed groups.<sup>344</sup> This legal personality is, however, “abstract” because, according to Fortin, Common Article 3 and Additional Protocol II do not “give[], or seek[] to give, specific armed groups legal personality.”<sup>345</sup> Rather, the legal personality bestowed by these instruments is only activated, or becomes “concrete” when an armed group achieves the sufficient level of organization and participates in a NIAC against either a state or another armed group.<sup>346</sup> Therefore, “the application of the international humanitarian law precedes, or coincides with, the application of international legal personality.”<sup>347</sup> Fortin’s approach provides a logical means of understanding and assessing the existence of an armed group’s legal personality. This is consistent with the approach to international legal personality articulated by the International Court of Justice in the *Reparations* Case and limits the scope an armed group’s legal personality to that required to fulfill the obligations addressed to it under Common Article 3, Additional Protocol, and customary IHL.

Some scholars have suggested that a benefit of the customary international law-based international legal personality is that it does not rely on actions of the state against which the armed group is fighting to explain how the armed group is bound by IHL.<sup>348</sup> However, though this explanation is less obviously tied to the state, the fact the construction of rules of customary IHL rely on state practice and state *opinio juris* means that, in actuality, it is still the “international community of states at large that binds them.”<sup>349</sup> Therefore, the customary

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<sup>342</sup> Customary IHL for NIACs, by virtue of its intended application in a non-international armed conflict, implicitly addresses armed groups as an armed group will necessarily be party to any and all NIACs.

<sup>343</sup> Fortin, *supra* note 73 at 205.

<sup>344</sup> *Ibid.*

<sup>345</sup> *Ibid.*

<sup>346</sup> *Ibid* at 145.

<sup>347</sup> *Ibid* at 147 However, this approach, which limits legal personality to the norms or rules addressed to the entity, would be problematic for those who seek to bind armed groups to international human rights law whose treaties were conceived originally to only address states.

<sup>348</sup> See, e.g., Kleffner, *supra* note 234 at 454.

<sup>349</sup> *Ibid.*

international law explanation could still be perceived by armed groups as an imposition of the rules on the group rather than fostering “sense of ownership of those rules”.<sup>350</sup> As noted earlier and discussed in greater detail in the following section, how an armed group feels about the legal explanation for how IHL is binding on them is not relevant to the legality of the explanation. However, the fact that armed groups play no role in the formation of customary IHL has led some scholars to argue that, in order for armed groups to be bound by customary IHL, their practice should be considered in developing rules of customary IHL.<sup>351</sup> Further, others have argued that armed groups should only be bound by rules of customary international law whose creation armed groups played a role in.<sup>352</sup>

The fact that states were traditionally both subject and creator of rules of customary international law does not necessarily mean that armed groups must participate in law creation in order to be bound by the law. The ICJ has stated that the fact an entity, such as an international organization, has legal personality does not mean “that its rights and duties are the same as those of a State.”<sup>353</sup> Consequently, it is “possible that certain subjects of international law possess the right to create law, while others do not.”<sup>354</sup> For example, only state ratification is relevant to the entry into force of the *Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations*, even though international organizations can legally become parties to that Convention.<sup>355</sup> Finally, the ICJ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, stated that “subjects of international law ... are bound by any obligations incumbent upon them under general rules of international law” not only by rules of international law that they have had a role in forming.<sup>356</sup>

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<sup>350</sup> *Ibid.*

<sup>351</sup> See, e.g., Somer, *supra* note 220 at 661–62; Sassoli, *supra* note 25 at 21–22.

<sup>352</sup> See, e.g., ME Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden, NLD: Martinus Nijhoff, 2009) at 104; Sivakumaran, *supra* note 235 at 373.

<sup>353</sup> *ICJ, Reparations Case*, *supra* note 174 at 179. See also, e.g., Portmann, *supra* note 338 at 8–9.

<sup>354</sup> Murray, *supra* note 234 at 107. See also, e.g., Portmann, *supra* note 338 at 8–9.

<sup>355</sup> *Vienna Convention on the Law of treaties between States and International Organisations or between International Organisations*, 16 December 1982 [*VCLT States & IOs*] at Articles 84(1), 85.

<sup>356</sup> *ICJ, WHO & Egypt Opinion*, *supra* note 319 at para 37. The Court used the phrase “general rules of international law” and not “customary international law”; however, Cassese has noted that these terms are often used interchangeably: Cassese, *supra* note 172 at 154.

The customary international law explanation based on international legal personality provides strong legal grounds to explain how rules of IHL bind non-state armed groups. If only one explanation could be given, this might be the preferred explanation if the goal is to ensure that the maximum number of rules possible apply to armed groups. However, there can be multiple explanations as to how IHL binds armed groups. Thus, the customary international law explanation of how IHL binds individual members, coupled with the international legal personality explanation of how IHL binds the armed group as a whole, can be used in conjunction with legislative jurisdiction, national law, *de facto* authority, and claims to represent the state explanations.

#### 3.4.7 Consent of the Armed Group

The final approach that has been advanced to explain how IHL binds armed groups is based on the consent of the armed group to be bound. It has been advanced as an explanation unto itself, but it is also the determinative element for explaining how groups are bound under the third-party treaty application explanation discussed earlier. An armed group may consent to be bound by IHL rules or treaties either by unilateral declaration or through an agreement with the other party, or parties, to the conflict.<sup>357</sup> While traditionally in international law the issue of consent focuses on state consent to be bound by international legal rules, the idea that an armed group's consent can bind it to rules of IHL can be seen in Common Article 3. Common Article 3 expressly urges parties to a conflict to "endeavour to bring into force, by means of special agreements, all or part of the other provisions of the [Geneva] Convention[s]." This provision is addressed to both state and non-state parties to a NIAC and implies that these special agreements are capable of creating legally binding obligations, not only for states parties, but also for non-state armed groups.<sup>358</sup> Further, as Common Article 3 can apply to conflicts between armed groups, this suggests that the binding nature of such special agreements is not dependent on the legal power or status of the state.

In addition to special agreements, it has also been said that unilateral declarations issued by armed groups can both demonstrate their consent to be bound by rules referenced in such

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<sup>357</sup> Sivakumaran, *supra* note 233 at 420; Fleck, *supra* note 46 at 598.

<sup>358</sup> Dinstein, *supra* note 46 at 71; *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (RUF), Appeal Judgment*, Case No. SCSL-04-15-A, 26 October 2009 at para 49. For an argument that such agreements are treaties, see Ryngaert & Van de Meulebroucke, *supra* note 25 at 454.



declarations and can explain how some rules of IHL bind armed groups.<sup>359</sup> Some unilateral declarations are very formal, such as that issued by the Rwandan Patriotic Front in October 1992,<sup>360</sup> while others take the form of more informal statements of commitment, codes of conduct, and internal laws. For example, the Kosovo Liberation Army stated, in 2001, that it “recognize[d] the Geneva Conventions and the conventions governing the conduct of war, even though it ha[d] not been offered the chance of signing them, as it would have done”.<sup>361</sup> In practice, armed groups have often made “ad hoc commitments” to be bound by IHL generally or by certain rules of IHL.<sup>362</sup> An example of an ad hoc commitment can be seen in the 1991 declaration of the National Democratic Front of the Philippines and the 2002 Agreement on the Protection of Civilians and Civilian Facilities between the Sudanese government and the Sudan People’s Liberation Movement (SPLM).<sup>363</sup> In practice, an armed group may or may not abide by its commitments made in this fashion.<sup>364</sup> Groups, like some states, may make commitments to certain rules more for the reputational benefits than based on good faith.<sup>365</sup> Sivakumaran has suggested that where the “commitment is followed” or where “it is followed to an extent”, it should be “taken seriously”.<sup>366</sup> While not definitively established, the work of academics and international bodies appears to indicate that such declarations and agreements create legally binding obligations on armed groups and therefore can explain how they come to be bound by certain rules of IHL.<sup>367</sup> Dinstein has, however, suggested that the obligations flowing from these agreements or declarations are not international legal obligations but, rather, “obligations under

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<sup>359</sup> Anthea Roberts & Sandesh Sivakumaran, “Lawmaking by Non-State Actors: Engaging Armed Groups in the Creation of International Humanitarian Law” (2012) 37 *Yale Journal of International Law* 107 at 141–42.

<sup>360</sup> For example, the Rwandan Patriotic Front issued such a declaration in 1992: Churchill Ewumbue-Monono, “Respect for International Humanitarian Law by Armed Non-State Actors in Africa” (2006) 88:864 *International Review of the Red Cross* 905 at 908.

<sup>361</sup> KLA spokesman cited in Human Rights Watch, *Under Orders: War Crimes in Kosovo* (New York: Human Rights Watch, 2001).

<sup>362</sup> Sivakumaran, *supra* note 233 at 420.

<sup>363</sup> National Democratic Front of the Philippines, “NDFP Declaration of Undertaking to Apply the Geneva Conventions of 1949 and Protocol I of 1977 »”, (5 July 1996), online: <<https://www.ndfp.org/ndfp-declaration-of-undertaking-to-apply-the-geneva-conventions-of-1949-and-protocol-i-of-1977-3/>>; “Agreement between the Government of the Republic of Sudan and the Sudan People’s Liberation Movement to Protect Non-Combatant Civilians and Civilian Facilities from Military Attack | UN Peacemaker”, (31 March 2002), online: <<https://peacemaker.un.org/sudan-protection-civilians2002>>.

<sup>364</sup> Sivakumaran, *supra* note 233 at 421.

<sup>365</sup> Sivakumaran, *supra* note 46 at 108.

<sup>366</sup> *Ibid.*

<sup>367</sup> See, e.g., Sivakumaran, *supra* note 233 at 421; International Commission of Inquiry on Darfur, *supra* note 235 at para 174; *ICTR, Akayesu Trial Judgment*, *supra* note 310 at para 627.

the domestic law of the State”.<sup>368</sup> His argument appears to be that, because these agreements are not and cannot be treaties, a fact supported by international jurisprudence,<sup>369</sup> they are incapable of creating international legal obligations.<sup>370</sup> While I take no issue with the suggestion that these are not treaties, I do challenge the suggestion that, as a result, they can only bind armed groups under national as opposed to international law.<sup>371</sup> Dinstein’s discussion appears to assume the agreements in question will always be between a state and an armed group.<sup>372</sup> Yet, as noted above, the nature of these agreements is indicated by Common Article 3, which references the parties to the conflict and does not explicitly indicate that a state must be party to the agreement. Common Article 3 applies to all NIACs, including conflicts between armed groups without state involvement.

While it is possible that consent can explain how IHL comes to bind armed groups, there is nothing to suggest that consent on the part of armed groups is legally required to explain how they are bound by IHL. First, several of the preceding sections have provided legally sound explanations for how armed groups come to be bound by IHL which do not include consent as a requisite element.<sup>373</sup> Further, reliance solely on consent to explain how armed groups are bound by IHL could be highly problematic for the principle of equality of belligerents. In a NIAC between a state and an armed group, the state would remain bound by its own obligations under IHL, but the armed group could, in theory, withhold consent for any and all rules of IHL. Third, neither Common Article 3 nor Additional Protocol II contain language that suggests their binding authority on armed groups is dependent on those groups’ consent. Rather, an armed group is merely required to be capable of implementing the obligations they contain and, as such,

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<sup>368</sup> Dinstein, *supra* note 46 at 71.

<sup>369</sup> *SCSL, RUF Appeal Judgment*, *supra* note 358 at para 49.

<sup>370</sup> Dinstein, *supra* note 46 at 71.

<sup>371</sup> Unilateral declarations can create legally binding obligations distinct from treaty obligations. See, e.g., *Nuclear Tests (Australia v France)*, *Judgment*, ICJ Reports 1974, 253 at 267, para 43; *Nuclear Tests (New Zealand v France)*, *Judgment*, ICJ Reports 1974, 457 at 472, para 46.

<sup>372</sup> In his brief discussion Dinstein only refers to “Agreements between the incumbent Government and the insurgents”: Dinstein, *supra* note 45 at 71.

<sup>373</sup> Neither legislative jurisdiction nor national law require no consent. De facto authority and claims to represent the state also do not contain such a requirement, though it might be possible to argue that in behaving like or seeking to become a government the armed group is implicitly assuming state obligations. Only a small group of scholars suggest that the customary international law explanation should turn on armed group participation in the creation of the rules by which they are bound, which suggests a form of explicit or implicit consent is needed; however, consent is generally not considered a requirement of the customary international law explanation.

the groups' willingness to comply is irrelevant to the question of whether they are bound.<sup>374</sup> Consent to be bound is necessary for a state to be bound by international law;<sup>375</sup> however, there is nothing to suggest that consent is necessary on the part of non-state actors, such as armed groups. Certainly, under national law there is no requirement for express consent in order for individual citizens to be bound. Similarly, at the international level, individuals have been found to be bound, for example under international criminal law, without need for consent.<sup>376</sup> However, it could be suggested that collective entities, such as armed groups, are subject to different rules than individuals. This suggestion would, however, be incorrect. Again, under national law, states often create obligations for collective entities, notably corporations, that do not require corporate consent to be bound.<sup>377</sup> At the international level, international investment treaties can create rights for corporations.<sup>378</sup> More broadly and more akin to the obligations of armed groups under IHL, the draft for an international treaty on business and human rights contains obligations for transnational corporations but only provides for states to be parties to the treaty.<sup>379</sup> This all suggests that, while state consent to be bound is required under international law, consent to be bound is not required by either individuals or collective entities under international law.

While many have argued in favour of the consent explanation, they largely base their arguments on the positive effects consent may have on armed group compliance.<sup>380</sup> Yet, as already discussed, there is nothing in Common Article 3, Additional Protocol II, or under international law more generally that suggests consent is a requisite element of being bound. So, while armed group consent may increase armed group compliance with IHL, it is widely considered not to be

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<sup>374</sup> See, e.g., Sivakumaran, *supra* note 46 at 74, 188–89, 191. Additional Protocol II Article 1 requires armed groups to have territorial control that “enable them ... to implement this Protocol.” There is no equivalent language in Common Article 3; however, many have argued that Common Article 3 requires armed groups to merely be capable of implementing its provisions: see, e.g., Sassoli, *supra* note 26 at 56.

<sup>375</sup> Express consent to be bound is required for treaties to be binding and for customary international law consent may be express but can also be tacit. See, e.g., Jutta Brunnée, “Consent” in *Max Planck Encyclopedia of Public International Law*, Oxford Public International Law (Online) (2010).

<sup>376</sup> See, e.g., Fortin, *supra* note 73 at 184.

<sup>377</sup> For example, in Canada, corporations have obligations to do many things, including keeping a registered office in Canada as well as records of shareholder meetings and corporate by-laws: *Canada Business Corporations Act*, (RSC, 1985, c C-44) [*Canada Business Corporations Act*] at Sections 19 & 20.

<sup>378</sup> Julian Ku, “The Limits of Corporate Rights Under International Law” (2012) 12 *Chicago Journal of International Law* 729 at 732–33.

<sup>379</sup> UN Human Rights Council, *Report on the fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights* (2019) at 7–17.

<sup>380</sup> See, e.g., Bellal & Heffes, *supra* note 82 at 128; Heffes & Frenkel, *supra* note 262 at 55–58; Sassoli, *supra* note 25 at 29–32.

essential for IHL application to non-state parties. An armed group’s “obligation [to respect IHL, specifically Common Article 3] is not only independent of an express acceptance of common Article 3 by the non-State Party, but also of whether an opposing Party in practice adheres to the provisions of common Article 3.”<sup>381</sup> Further, regardless of the rules agreed to in a special agreement between parties to a NIAC, the parties to the conflict are bound by all applicable rules of IHL.<sup>382</sup> In other words, parties to a NIAC cannot attempt to avoid being bound by rules of IHL through mutual agreement. Consequently, a limited agreement will not exempt or constrain the parties’ obligations under IHL. IHL clearly seeks to separate issues of compliance from questions of binding obligations. While developing approaches to engaging armed groups that will increase compliance is very important in IHL, the degree to which any of the seven explanations for how armed groups come to be bound by IHL increases compliance is not determinative of the legal soundness of the explanation.

### 3.5 The Application of International Human Rights Law during Armed Conflicts

The preceding sections established that armed groups are bound by IHL and that they are bound regardless of whether or not they have consented to be bound. This section examines the application of international human rights law (IHRL) during armed conflict and whether it, too, creates binding obligations for armed groups. Although the focus of this thesis is on IHL, it is necessary to consider IHRL when identifying gaps and weaknesses in existing IHL. This is because IHRL, historically thought to only apply during peacetime, is now considered to continue to apply during armed conflict.<sup>383</sup> Historically, treaties and law beyond the scope of IHL were considered inoperative when armed conflict began.<sup>384</sup> Under this approach, IHRL stopped applying upon the outbreak of war and did not resume its application until after the conclusion of hostilities.<sup>385</sup> This approach to legal regulation during times of armed conflict was

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<sup>381</sup> Cameron et al, *supra* note 226 at 179.

<sup>382</sup> *Ibid* at 287–88.

<sup>383</sup> *ICJ Wall Case*, *supra* note 75 at para 106; *ICJ, Congo v Uganda*, *supra* note 75 at para 216; African Commission on Human and Peoples’ Rights, *ACHPR, Chad case*, *supra* note 75 at para 21; International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission*, A/CN.4/L.682, 4 Apr. 2006 at para 104; *Nuclear Weapons Advisory Opinion*, *supra* note 72 at para 25; UN Human Rights Council, *General Comment No 31*, HRI/GEN/1/Rev. 9 (Vol. I), 27 May 2008 at para 11; Michael N Schmitt, “Green War: An Assessment of the Environmental Law of International Armed Conflict” (1997) 22 *Yale Journal of International Law* 1 at 37.

<sup>384</sup> See, e.g., Pictet, *supra* note 75 at 15; Greenwood, *supra* note 75 at 12; Draper, *supra* note 75 at 191–96; Robertson, *supra* note 75 at 793; Jenks, *supra* note 75 at 446; Kolb, *supra* note 75.

<sup>385</sup> See, e.g., Pictet, *supra* note 75 at 15; Greenwood, *supra* note 75 at 12; Draper, *supra* note 75 at 191–96; Jenks, *supra* note 75 at 446; Robertson, *supra* note 75 at 793; Kolb, *supra* note 75.

based on the view that IHL in its entirety was *lex specialis* and, as a result, operated in a position of priority over all other law between the parties to a conflict.<sup>386</sup> It is no longer the case that IHRL is considered completely inoperative during armed conflict.<sup>387</sup> Rather, armed conflict is now considered “a continuation of interstate relation[s] and, thus, subject to legal limits”<sup>388</sup> and, therefore, IHRL continues to apply during armed conflict.<sup>389</sup> Consequently, IHL is no longer considered to suspend the operation of IHRL. Instead, IHL and other bodies of law can operate concurrently,<sup>390</sup> with IHL serving to “complement[ other areas of law] and [to] bring[] greater specificity to their applicability in conflict.”<sup>391</sup>

The ongoing application of IHRL during armed conflict was specifically addressed in the International Court of Justice’s (ICJ) Advisory Opinion on Nuclear Weapons.<sup>392</sup> In this opinion, the court clearly articulated its view that IHRL continues to operate during armed conflict. It stated: “The protection of the International Covenant on Civil and Political Rights [ICCPR] does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.”<sup>393</sup> Under the ICCPR, seven provisions are protected from derogation in all circumstances, including national emergencies such as an armed conflict. Rights protected even during armed conflict include the right not to be arbitrarily deprived of life,<sup>394</sup> the right to not be subjected to torture or cruel, inhuman or

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<sup>386</sup> See, e.g., Nancy Prud’homme, “Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship” (2007) 40 *Israel Law Review* 356 at 358; Jenks, *supra* note 75 at 446; W Karl, “Treaties, Conflicts between” in R Bernhardt, ed, *Encyclopaedia of Public International Law* (Amsterdam, NLD: Elsevier, 2000) at 937.

<sup>387</sup> *Additional Protocol I*, *supra* note 5 at Article 72; *Additional Protocol II*, *supra* note 5 at preamble; *Nuclear Weapons Advisory Opinion*, *supra* note 73 at para 25; *ICJ Wall Case*, *supra* note 76 at para 106; *ICJ, Congo v Uganda*, *supra* note 76 at para 216; African Commission on Human and Peoples’ Rights, *ACHPR, Chad case*, *supra* note 76 at para 21; International Law Commission, *supra* note 383 at para 104; UN Human Rights Council, *supra* note 383 at para 11.

<sup>388</sup> Schmitt, *supra* note 383 at 37.

<sup>389</sup> See, e.g., Dinstein, *supra* note 77 at 345; Doswald-Beck & Vité, *supra* note 77; Droege, *supra* note 77.

<sup>390</sup> See, e.g., *Nuclear Weapons Advisory Opinion*, *supra* note 73 at para 25; *ICJ Wall Case*, *supra* note 76 at para 106; *ICJ, Congo v Uganda*, *supra* note 76 at para 216; Dinstein, *supra* note 77 at 345; Doswald-Beck & Vité, *supra* note 77; Droege, *supra* note 77.

<sup>391</sup> Kirsten Stefanik, *Restoring Humanity to Humanitarian Law: Borrowing from Environmental Law to Protect Civilians and the Environment* University of Western Ontario, 2013) [unpublished] at 124.

<sup>392</sup> *Nuclear Weapons Advisory Opinion*, *supra* note 73.

<sup>393</sup> *Ibid* at para 25.

<sup>394</sup> *International Covenant on Civil and Political Rights*, 16 December 1966 [ICCPR] at Article 4(2). See also, e.g., Hans-Joachim Heintze, “On the relationship between human rights law protection and international humanitarian law” (2004) 86:856 *International Review of the Red Cross* 789; Tereya Koji, “Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights” (2001) 12:5 *European Journal of International Law* 917; Droege, *supra* note 77.

degrading treatment,<sup>395</sup> the right to not be subjected to slavery,<sup>396</sup> and the right to freedom of religion.<sup>397</sup>

The ability to derogate from the protection of certain human rights during armed conflict is strictly interpreted in IHRL. Derogation, according to the UN Human Rights Committee, is limited “to the extent strictly required by the exigencies of the situation”.<sup>398</sup> This means that derogation measures must be proportional to the state of emergency in terms of the “duration, geographical coverage and material scope of the state of emergency”.<sup>399</sup> Accordingly, the UN Human Rights Committee expressed the belief that “[i]n practice this will ensure that no provision of the Covenant, however validly derogated from, will be entirely inapplicable to the behaviour of a State party.”<sup>400</sup>

The International Court of Justice has further clarified how provisions of IHL and IHRL operate together because some provisions, such as the right not to be arbitrarily deprived of life, will differ in meaning depending on whether one is in the context of peace or war. The principle of *lex specialis* remains relevant, however. The Court stated that, while the right to life continues to operate during armed conflict, the meaning of “arbitrary deprivation of life” in armed conflict “can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the [ICCPR] itself.”<sup>401</sup> In the concurrent application of IHL and IHRL, the ICRC has stated that, in the case of NIACs, the interplay of IHL and IHRL requires consideration of customary IHL in addition to IHL treaty provisions in determining the proper application of specific rules from these bodies of law.<sup>402</sup>

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<sup>395</sup> ICCPR, *supra* note 393 at Article 7. Acts of torture or cruel, inhuman or degrading treatment are also prohibited under IHL in *Geneva Convention IV*, *supra* note 5 at Common Article 3; *Additional Protocol II*, *supra* note 5 at Article 4(2).

<sup>396</sup> ICCPR, *supra* note 394 at Article 8. Slavery is explicitly prohibited under Article 4(2) of *Additional Protocol II*, *supra* note 5.

<sup>397</sup> ICCPR, *supra* note 394 at Article 18.

<sup>398</sup> UN Human Rights Council, *CCPR General Comment No 29: State of Emergency (Article 4)*, 31 August 2001, CCPR/C/21/Rev.1/Add. 11 at para 4.

<sup>399</sup> *Ibid.*

<sup>400</sup> *Ibid.*

<sup>401</sup> *Nuclear Weapons Advisory Opinion*, *supra* note 73 at para 25.

<sup>402</sup> ICRC, *International humanitarian law and the challenges of contemporary armed conflicts*, Report (Geneva: ICRC, 2015) at 35; ICRC, *International Humanitarian Law and the challenges of contemporary armed conflicts* (Geneva: ICRC, 2011) at 13–20.

Traditionally, IHRL was considered to only apply to states,<sup>403</sup> however, some have argued that it is now also applicable to armed groups during NIACs.<sup>404</sup> Scholars who consider IHRL inapplicable to armed groups emphasize that, while IHL applicable to NIACs has always been intended to apply to armed groups, IHRL was developed to apply to states, not armed groups.<sup>405</sup> Fortin’s review of the *International Covenant on Civil and Political Rights*, *International Covenant on Economic, Social and Cultural Rights*, and the *Convention Against Torture*, found no evidence that anything in those instruments conveyed an intent to bind armed groups.<sup>406</sup> There are two human rights treaties that do manifest an intent to bind armed groups: the *Optional Protocol to the Convention on the Rights of the Child*, which addresses the participation of children in hostilities,<sup>407</sup> and the *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa*, which both explicitly address obligations to armed groups.<sup>408</sup> Some scholars have argued that “intent is one of the main determinants of international rights and obligations”<sup>409</sup> and that the absence of intent on the part of the drafters of IHRL treaties blocks the potential to bind armed groups to this body of law based on the legislative jurisdiction approach discussed earlier.<sup>410</sup> By contrast, Clapham has stated that legislative jurisdiction “could ... justify the application to individuals and non-state actors of

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<sup>403</sup> Zegveld, *supra* note 25 at 53; Moir, *supra* note 46 at 194; Inter-American Commission on Human Rights, *Third Report on the Human Rights Situation in Columbia*, OEA/Ser.L/V/II.102, Doc 9 rev 1, 26 February 1999 at ch 4, para 13; *Abella et al v Argentina (La Tablada)*, Case No. 11.137, 18 November 1997, OEA/Ser.L/V/II.98 doc. 6 rev. 13, April 1998 at para 174.

<sup>404</sup> Murray, *supra* note 73 at 120–54; Bellal & Heffes, *supra* note 82 at 129; Clapham, *supra* note 82 at 280; Oberleitner, *supra* note 82 at 211; Murray, *supra* note 234 at 121; Office of the High Commissioner for Human Rights (OHCHR), *Report on the Question of Human Rights in Cyprus*, A/HRC/25/21, 22 January 2014 at para 11; Sivakumaran, *supra* note 49 at 253; Annyssa Bellal, Gilles Giacca & Stuart Casey-Maslen, “International law and armed non-state actors in Afghanistan” (2011) 93:881 *International Review of the Red Cross* 47 at 47; B Rudolf, “Non-State Actors of Limited Statehood as Addressees of Public International Law Norms of Governance” (2010) 4 *Human Rights and International Legal Discourse* 127; Heintze, *supra* note 394 at 271; Zegveld, *supra* note 25 at 149; Ryngaert, *supra* note 82 at 358; UN, *Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka* (2011) at para 181.

<sup>405</sup> ICCPR, *supra* note 394; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966 [ICESCR]; Fortin, *supra* note 73 at 209–39.

<sup>406</sup> Fortin, *supra* note 73 at 209–39.

<sup>407</sup> *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, UN General Assembly, Sixth Committee, 25 May 2000 [CRC Optional Protocol] at Article 4(1).

<sup>408</sup> *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa* (“Kampala Convention”), African Union, 23 October 2009 [AU Kampala Convention] at Article 7(5).

<sup>409</sup> Jan Klabbbers, *The Concept of Treaty in International Law* (Alphen aan den Rijn: Kluwer Law International, 1996) at 68.

<sup>410</sup> See, e.g., Murray, *supra* note 73 at 109–10.

certain human rights obligations found in treaties” though he does not specify which human rights obligations could be justifiably applied to non-state actors.<sup>411</sup>

It has been argued that, in exceptional circumstances, IHRL obligations can create binding obligations for armed groups.<sup>412</sup> These arguments for the binding nature of IHRL on armed groups tend to rely predominantly on the “[armed group’s] relationship with the territorial State.”<sup>413</sup> The exercise of *de facto* authority on the part of an armed group, through territorial control and some form of administration over that territory, is said to warrant the assumption of human rights obligations because the group has *de facto* taken the place of the state *vis-à-vis* the population in the territory under its control.<sup>414</sup> It has been suggested that, when an armed group is a *de facto* authority, it is bound by “obligations of fundamental IHRL” because these fundamental rights, such as the right to life or the right to be free from torture and cruel, inhuman and degrading treatment, are customary international law.<sup>415</sup> The *de facto* authority argument tends to be viewed as the strongest, and perhaps only, legitimate explanation of how some armed groups may be legally bound by IHRL.<sup>416</sup> Indeed, even the ICRC, which has long taken the position that armed groups do not and cannot have human rights obligations, has recognized an exception to this position in “cases in which a group, usually by virtue of stable control of territory, has the ability to act like a state authority”.<sup>417</sup> In that case, then “[that armed group’s] human rights responsibilities may therefore be recognized *de facto*.”<sup>418</sup>

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<sup>411</sup> Andrew Clapham, “Human Rights Obligations of Non-State Actors in Conflict Situations” (2006) 88:863 *International Review of the Red Cross* 491 at 499.

<sup>412</sup> See, e.g., Murray, *supra* note 73 at 120–54.

<sup>413</sup> Bellal & Heffes, *supra* note 82 at 129. See also, e.g., Clapham, *supra* note 82 at 280; Oberleitner, *supra* note 82 at 211; Murray, *supra* note 234 at 121; Office of the High Commissioner for Human Rights (OHCHR), *supra* note 404 at para 11.

<sup>414</sup> See, e.g., Jochen A Frowein, “De Facto Regime” in *Max Planck Encyclopedia of Public International Law*, Oxford Public International Law (Online); Pictet, *supra* note 241 at 37; Kleffner, *supra* note 234 at 452; Sivakumaran, *supra* note 235; Fortin, *supra* note 73 at 268–72.

<sup>415</sup> See, e.g., Heintze, *supra* note 394 at 271–75; Nadarajah Pushparajah, *Human Rights Obligations of Armed Non-State Actors in Non-International Armed Conflicts* (Oisterwijk, NLD: Wolf Legal Publishers, 2016) at 40.

<sup>416</sup> See, e.g., Sivakumaran, *supra* note 49 at 253; Bellal, Giacca & Casey-Maslen, *supra* note 404 at 47; Rudolf, *supra* note 404; Zegveld, *supra* note 25 at 149; Heintze, *supra* note 394 at 271; Ryngaert, *supra* note 82 at 358; UN, *supra* note 404 at para 181; Clapham, *supra* note 82; Murray, *supra* note 234.

<sup>417</sup> ICRC, *supra* note 402 at 14–15.

<sup>418</sup> *Ibid.*



The fact that many armed groups do not exercise *de facto* authority means that, beyond the possibility of being bound to fundamental IHRL obligations under customary international law, a worrisome gap may exist in the protection of human rights.<sup>419</sup> It is well established that “the acts of unsuccessful insurrectional movements are not attributable to the State”.<sup>420</sup> That means that the state will not be responsible for human rights violations committed by members of an armed group that does not exercise *de facto* authority. It has been suggested that IHRL obligations may apply to armed groups that do not meet the “control of territory and some form of administration” requirement for the exercise of *de facto* authority.<sup>421</sup> This argument is made based on the fact that the acts of an armed group that successfully defeats the Government can incur international responsibility. The International Law Commission’s Draft Articles on State Responsibility state that, where an armed group goes on to form a new government, “[t]he situation requires that acts committed during the struggle for power by the [armed group] should be attributable to the state, alongside acts of the then established Government.”<sup>422</sup> Murray has argued that this means that:

the law of state responsibility accepts that international obligations can be directly imposed on a non-state armed group – including those existing below the *de facto* authority threshold – concurrent to the imposition of obligation on the territorial state.<sup>423</sup>

Murray further argues that armed groups below the *de facto* authority threshold must still meet the threshold of being beyond the control of the state;<sup>424</sup> however, this threshold can be met by the existence of a NIAC because this “[would] clearly indicate a state’s inability to reasonably impose its will”.<sup>425</sup> He states that an armed group beyond the control of the state that “exercise[s] control over an area or population ... should be regarded as a vertical authority” that is bound by IHRL obligations.<sup>426</sup> He appears to adopt a very loose understanding of “control over ...

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<sup>419</sup> Murray, *supra* note 73 at 128–30, 133–34, 136, 145–46, 159–60.

<sup>420</sup> *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, International Law Commission, 2001 [*ILC Draft Articles on State Responsibility*] at 50. The exception to this general rule is where the person or group is “exercising governmental authority in the absence or default of the official authorities” (Draft Article 9) or where the conduct of the group is directed or controlled by a state (Draft Article 8).

<sup>421</sup> Murray, *supra* note 73 at 131–34.

<sup>422</sup> *ILC Draft Articles on State Responsibility, supra* note 420 at 51.

<sup>423</sup> Murray, *supra* note 73 at 132.

<sup>424</sup> *Ibid* at 133–34.

<sup>425</sup> *Ibid* at 138–39.

<sup>426</sup> *Ibid* at 153.

population” based on the ability of an armed group in a NIAC to “exert unregulated authority” due to the fact that it is beyond state control.<sup>427</sup> It appears it is only the exercise of “government-like functions” that Murray deems non-essential for an armed group to possess *de facto* authority.<sup>428</sup>

Murray’s approach to the requisite elements of *de facto* authority provides a legal argument for the binding application of IHRL to armed groups under customary international law and international treaty law. However, Murray does not simply lower the traditional *de facto* authority threshold of territorial control and some form of administration: he essentially replaces it with the threshold for a NIAC. This would only require an armed group to have sufficient organization for the application of Common Article 3. Since an armed group under Common Article 3 need only have sufficient organization to implement its obligations under that provision and requires no territorial control whatsoever, its organizational capacity may be minimal. Some scholars have expressed concern that groups which lack territorial control or control over population are unlikely to have the capacity to implement many human rights beyond the basic ones under customary international law.<sup>429</sup> The lack of sufficient capacity concern is also the ICRC’s primary argument against the suggestion that armed groups, other than *de facto* authorities, can have IHRL obligations.<sup>430</sup> However, the lack of capacity does not necessarily mean that these armed groups could not be, or are not, bound by IHRL. Murray attempts to address this possible problem by advocating a “gradated application” of IHRL obligations to armed groups based on each group’s capacity to apply the rules of IHRL.<sup>431</sup>

International practice appears to support the argument that armed groups operating as *de facto* authorities have IHRL obligations.<sup>432</sup> For example, the UN Security Council has frequently

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<sup>427</sup> *Ibid.*

<sup>428</sup> *Ibid.*

<sup>429</sup> See, e.g., Moir, *supra* note 46 at 194; Marco Sassoli & LM Olson, “The Relationship between International Humanitarian Law and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflict” (2008) 90:87 *International Review of the Red Cross* 599 at 622–23.

<sup>430</sup> ICRC, *supra* note 402 at 14–15.

<sup>431</sup> Murray, *supra* note 73 at 172–202.

<sup>432</sup> See, e.g., UN Security Council, *Final Report of the Independent International Commission of Inquiry on the Central African Republic*, (22 December 2014) UN Doc S/2014/928; UN Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, Republic’ (15 August 2012) UN Doc A/HRC/21/50 at 47, Annex II; UN Human Rights Council, *Report of the Independent International*

called upon non-state parties to a conflict to “comply strictly with the obligations applicable to them under international humanitarian law, human rights law and refugee law”.<sup>433</sup> Fortin has noted that in international practice there are repeated references to the fact that “it is now increasingly accepted that non-state groups exercising de facto control over a part of a State’s territory must respect fundamental human rights of persons in that territory” international practice repeatedly references does not explicitly eliminate the requirement that an armed group exercise government functions in addition to territorial control in order to be bound as a *de facto* authority.<sup>434</sup> These references in international practice rarely mention the exercise of government functions requirement.<sup>435</sup> This would seem to suggest that, at the very least, territorial control accompanied by the exercise of government-like functions almost certainly leads to IHRL obligations for armed groups and it is possible, though not definitively established, that territorial control alone may be sufficient to bind armed groups to IHRL.

The fact that at least some armed groups appear to be bound by IHRL warrants consideration of this body of law when assessing whether a particular combatant behaviour is or is not currently regulated during armed conflict. Rules and principles of IHRL remain relevant in the context of armed conflict with respect to both state and at least some non-state parties. The ability to derogate to a certain degree from certain rules of IHRL may mean that, in times of conflict, certain rights may be largely inapplicable or may operate in a restricted manner. However, it is unclear whether armed groups have the ability to derogate from certain IHRL obligations as states can. Even where IHRL does or might address the behaviours identified through

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*Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahariya*, (1 June 2011) UN Doc A/HRC/17/44 at 32–33; UN, *supra* note 404; UN Human Rights Council, *Report of the Independent International Fact-Finding Mission on the Gaza Conflict, ‘Human Rights In Palestine And Other Occupied Arab Territories*, (23 September 2009) UN Doc A/HRC/12/48 at 80.

<sup>433</sup> UN Security Council, *Security Council resolution 1894 (2009) (on Protection of civilians in armed conflict)*, 11 November 2009, S/RES/1894 (2009)\*. See also, e.g., A Constantinides, “Human Rights Obligations and Accountability of Armed Opposition Groups: The Practice of the UN Security Council” (2010) 4 *Human Rights and International Legal Discourse* 89 at 101–103; C Tomuschat, “The Applicability of Human Rights Law to Insurgent Movements” in Horst Fischer, ed, *Crisis Management and Humanitarian Protection* (Berlin: Berliner Wissenschafts-Verlag, 2004) at 573–91.

<sup>434</sup> Fortin, *supra* note 73 at 343–45.

<sup>435</sup> UN Assistance Mission in Afghanistan, *Annual Report on the Protection of Civilians in Armed Conflict in Afghanistan 2016* (Kabul: UNAMA, 2017); United Nations Human Rights Office of the High Commissioner, *International Legal Protection of Human Rights in Armed Conflict* (New York & Geneva: UNOHCHR, 2011) at 25.

psychological insights in this thesis, new IHL regulations or approaches may still be needed if the application of existing IHRL during conflict is ambiguous or insufficient.

### 3.6 Conclusion

This thesis examines the issue of civilian protection from abuses committed by members of armed groups during NIACs. The thesis advances the claim that behavioural regulations distinct from regulations for the protection of individuals in peacetime are needed to prevent violations of IHL protections for civilians. This chapter has demonstrated to whom current IHL applies and, therefore, which armed groups may be captured or affected by the new rules and regulations proposed in chapter 8. It has also demonstrated that IHRL applies during armed conflict generally and creates binding obligations for some armed groups.

The chapter began by explaining that only armed groups that possess a requisite degree of organization are the addressees of this body of law. The object and purpose of IHL as well as the principle of equality belligerents necessitates that all parties to an armed conflict, including armed groups, be bound by IHL. The main focus of this chapter was the seven different explanations that have been advanced in the literature for the binding application of IHL to armed groups. The application of international law to armed groups is complicated by the fact that, traditionally, international law is made for and by states. Many discussions assessing the various explanations for how IHL binds armed groups have evaluated the explanations based in part on their anticipated effects on armed group compliance with the law. This is problematic because the strength of a legal explanation is distinct from the issue of compliance. Compliance is very important, but it is and should be considered separately from the question of legality. *De facto* authority and claims to represent the state will explain how IHL binds only a small portion of armed groups. They are good explanations, but should be used alongside other explanations rather than advanced as the sole explanation for the binding nature of IHL obligations for armed groups. The incorporation and implementation of IHL into national law can explain how armed groups are bound by many rules of IHL; however, it cannot explain how application of IHL binds directly as a matter of international, rather than national, law. Legislative jurisdiction provides a strong legal explanation for how armed groups are bound under international law based on state ratification and acceptance of IHL on behalf of its citizens. This explanation can also be used to explain how rules of customary IHL bind armed groups; however, the case law

from the International Court of Justice also supports the customary international law explanation based on the limited international legal personality. It is consistent with this case law to view Common Article 3 and subsequent regulation of NIACs also addressed to armed groups as creating the requisite international legal personality to fulfill the obligations assigned to them by states under IHL. There is nothing to prevent both legislative jurisdiction and international legal personality explanations from operating as legal explanations for how armed groups are bound by both treaty and customary IHL. This chapter has challenged the consent explanation and the third-party treaty application explanation (which turns on the issue of consent). The language of Common Article 3 suggests that consent may be a valid explanation for how some rules of IHL come to bind armed groups; however, it is by no means sufficient unto itself to fully explain how IHL more broadly binds armed groups. The suggestion from some scholars that consent is required for an armed group to be bound by IHL is unfounded. While consent is requisite for states to be bound by IHL, there is no evidence that the consent requirement extends to non-state actors. Finally, this chapter addressed the application of IHRL during armed conflict and demonstrated that it creates binding obligations for armed groups acting as *de facto* authorities.

This chapter established that organized armed groups are bound by IHL. The fact they are currently bound by IHL, and some are also bound by IHRL, suggests they would likely be affected by new rules and regulations recommended in later chapters of this thesis. The next chapter will turn to the specific protections for civilians available in IHL. An understanding of existing protections is essential, as it provides the existing framework that will be examined in chapter 8 to identify combatant behaviours not currently captured by IHL, but which require regulation for the protection of civilians.

## Chapter 4

### 4 International Humanitarian Law Protections for Civilians in Non-International Armed Conflicts

IHL is designed to operate in situations where all other legal order has broken down. It is an attempt to instill a modicum of order into a situation of chaos. It represents the effort of the international community to balance military necessity with the dictates of humanity.<sup>436</sup>

Unfortunately, and perhaps unsurprisingly, there is inherent tension between these two concepts. For example, whereas the dictates of humanity prohibits all harm to civilians unless the harm was unavoidable, the principle of proportionality permits harm to civilians that may be avoidable so long as it is incidental to an attack on a legitimate military target and the civilian harm does not outweigh the military advantage of the attack in question.<sup>437</sup> In NIACs, this tension is exacerbated by further friction between the dictates of humanity and state sovereignty, which has traditionally allowed states the right to control all matters within their territory with limited outside interference.<sup>438</sup> This right has been eroded in certain ways through the development of international law.<sup>439</sup> For example, international human rights law erodes state sovereignty through its regulation of how a state may treat its citizens.<sup>440</sup>

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<sup>436</sup> See, e.g., Michael N Schmitt, “Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance” (2010) 50:4 *Virginia Journal of International Law* 795; Yoram Dinstein, “The Principle of Proportionality” in Kjetil Mujezinovic Larsen, Camilla Guldahl Cooper & Gro Nystuen, eds, *Searching for a “Principle of Humanity” in international Humanitarian Law* (Cambridge, UK: Cambridge University Press, 2013) 72.

<sup>437</sup> See, e.g., Dinstein, *supra* note 436. Dinstein has observed that if humanity “were the only factor to be weighed in hostilities, war would have entailed no bloodshed, no human suffering, and no destruction of property; in short war would not be war. IHL must be predicated on a subtle balance – and compromise – between conflicting considerations of humanity, on the one hand, and the demands of military necessity on the other.” (73).

<sup>438</sup> Daud Hussan, “The Rise of the Territorial State and The Treaty of Westphalia” (2006) 9 *Yearbook of New Zealand Jurisprudence* 62; Cassese, *supra* note 172 at 98–123.

<sup>439</sup> See, e.g., Mohammed Ayoob, “Humanitarian Intervention and State Sovereignty” (2002) 6:1 *International Journal of Human Rights* 81; Mario Bettati, “The International Community and Limitations of Sovereignty” (1996) 44:4 *Diogenes* 91; Louis Henkin, “That ‘S’ Word: Sovereignty, and Globalization, and Human Rights, et cetera” (1995) 68:1 *Fordham Law Review* 79; Temple Fetters Kearns, “Breaking the Shackles of the Past: The Role and Future of State Sovereignty in Today’s International Human Rights Arena” (2001) 25:2 *Nova Law Review* 502; Ruth Lapidoth, “Redefining Authority” (1995) 17:3 *Harvard Law Review* 8.

<sup>440</sup> See, e.g., Ayoob, *supra* note 439 at 93; Bettati, *supra* note 439 at 92; Henkin, *supra* note 439 at 3–4; Kearns, *supra* note 439 at 522; Lapidoth, *supra* note 439.

Common Article 3 in the four Geneva Conventions of 1949 represents the first international codification of IHL rules applicable to NIACs.<sup>441</sup> These protections were elaborated upon and supplemented by Additional Protocol II to the Geneva Convention in 1977.<sup>442</sup> This treaty law is complemented by, and protections for civilians expanded through, the application of customary IHL in NIACs.<sup>443</sup> The previous chapter demonstrated to whom and how the rules of IHL are binding during these conflicts. This chapter explores the content of the rules in this body of law that aim to protect civilians from the worst effects of war.

This chapter begins by examining the foundational principles of customary IHL and treaty law applicable to NIACs. First, the chapter considers the humanitarian foundations of civilian protections in IHL, including the principle of humanity and the requirement of humane treatment which are at the core of Common Article 3 and Additional Protocol II. The chapter then turns to a consideration of the basis for all civilian protections in conflict: the principle of distinction. The principle of distinction requires parties to the conflict to distinguish between combatants, who are legal targets, and civilians, who may not be directly targeted.<sup>444</sup> This chapter therefore reviews how ‘civilian’ is defined in IHL, and how civilians are distinguished from combatants under this principle. This section is followed by discussion of the principle of proportionality in which the effort to balance between military necessity and humanity is most evident. The final section of the first part of this chapter reflects on the requirement that military actors take precautions in military operations for the protection of civilians.

The remainder of the chapter examines specific prohibited acts in the context of NIACs, such as murder, torture, and pillage. While the core prohibitions in Common Article 3 and AP II are identified, a more detailed discussion is only provided for the prohibitions most often violated in NIACs, in particular in the context of the two case study conflicts, Sierra Leone and the Democratic Republic of Congo, examined in this thesis. This section demonstrates how the

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<sup>441</sup> ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2d ed (Cambridge, UK: Cambridge University Press, 2016) at para 351.

<sup>442</sup> Additional Protocol II Article 1(1) states “This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application”.

<sup>443</sup> Henckaerts & Doswald-Beck, *supra* note 5 at Rules 1-24, 87-106, 134-35.

<sup>444</sup> See, e.g., Yoram Dinstein, “Distinction and Loss of Civilian Protection in International Armed Conflicts” (2008) 84 *International Law Studies* 183 at 183; Henckaerts & Doswald-Beck, *supra* note 5 at Rule 1.

existing specific protections for civilians largely prohibit behaviour that is also considered illegal under many domestic jurisdictions during peacetime. The chapter argues that there may be behaviours that have been accorded certain legal parameters in peacetime, and which may warrant IHL-specific regulation during armed conflict.

It must be noted that much of the existing understanding of the principles and specific prohibitions examined in this chapter comes from international criminal law decisions and judgments. This case law is extremely useful and rightly relied upon to help practitioners, academics, and parties to conflicts understand the content of crimes identified in IHL. International criminal law has helped to provide detail to an otherwise limited body of rules for NIACs.<sup>445</sup> However, it is critical to remember, particularly for the purposes of this thesis, that there is a distinction between IHL and international criminal law. First, not all violations of IHL are criminalized under international criminal law. Second, due to the nature of international criminal law, acts prohibited under IHL will often have more restrictive definitions and application under international criminal law: for example, a higher threshold of *mens rea* will often be required under international criminal law.<sup>446</sup> This means that new IHL rules developed for NIACs will not necessarily also be considered to be crimes under international criminal law. Further, even if new IHL rules are considered to be international crimes, the elements of a prohibition under IHL need not align with all of the same standards that would be required in international criminal law. Therefore, due to the differences between IHL and international criminal law, the latter's case law should be taken as "useful guidance in understanding the relevant international humanitarian law rule" rather than as a definitive expression of IHL.<sup>447</sup>

This thesis advances the claim that an examination of existing civilian protection provisions in IHL reveals a gap between the regulation of behaviour for the protection of individuals in peace and the regulations needed to protect civilians from combatant violence during war. This chapter argues that the current framework for civilian protection in NIACs is based largely on

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<sup>445</sup> See, e.g., Sivakumaran, *supra* note 49 at 233.

<sup>446</sup> See, e.g., Sivakumaran, *supra* note 46 at 78–81, 264 (discussing differences between IHL and international criminal law); Robinson, *supra* note 60 at 946–55 (discussing differences between IHL and international criminal law).

<sup>447</sup> Sivakumaran, *supra* note 49 at 238.



protections afforded to individuals during peacetime. It demonstrates that the substantive content of IHL is founded in the humanitarian objective of protecting individuals, in particular civilians, who do not take direct part in hostilities. Consequently, ongoing harm toward civilians in armed conflicts warrants consideration of whether the substantive content of IHL might be further developed in order to better achieve the humanitarian aim of protecting civilians during war. Ultimately, this chapter provides the framework that serves as the starting point for analysis in chapter 8 in order to determine what behaviours require regulation under IHL during NIACs.

#### 4.1 The Humanitarian Foundation of Civilian Protection in Armed Conflict

This section will discuss the humanitarian ideals that undergird much of modern IHL. These ideals serve as the basis in this thesis for the further substantive development of IHL in order to improve civilian protection during armed conflict. Inherent in the name ‘international humanitarian law’ is the idea of humanity. While some actors, particularly national armed forces, continue to refer to this body of law as the ‘law of armed conflict’,<sup>448</sup> ‘international humanitarian law’ has gained greater traction outside of that realm, including recognition by the International Court of Justice.<sup>449</sup> Similarly, the statutes of the International Tribunals for the Former Yugoslavia and Rwanda refer to ‘international humanitarian law’.<sup>450</sup>

The International Court of Justice has recognized the principle of humanity in IHL. The court first acknowledged the existence of a principle of humanity in war, albeit indirectly, in its 1949 judgment in the *Corfu Channel* case.<sup>451</sup> In that case, the court recognized an obligation of a principle of “elementary considerations of humanity, even more exacting in peace than in war”.<sup>452</sup> The court has since addressed the principle of humanity during war more directly in its Advisory Opinion on *Reservations to the Genocide Convention*,<sup>453</sup> its *Nuclear Weapons*

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<sup>448</sup> For example, the national armed forces of both Canada and the United States: Office of the Judge Advocate General, *Law of Armed Conflict at the Operational and Tactical Levels*, B-GJ-005-104/FP-021 (Ottawa: Dept of National Defense (Canada), 2001); LCDR Rachel S Mangas, MAJ Matthew Festa & MAJ Laura O’Donnell, eds, *Law of Armed Conflict Deskbook*, 16th ed (Charlottesville, VA: US Army, 2016).

<sup>449</sup> *Nuclear Weapons Advisory Opinion*, *supra* note 73 at 257.

<sup>450</sup> *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, 3 May 1993 [ICTY Statute]; *Statute of the International Tribunal for Rwanda*, 1 November 1995 [ICTR Statute].

<sup>451</sup> *Corfu Channel case (United Kingdom v Albania) (Merits)*, 9 April 1949, 1949 ICJ Reports 4.

<sup>452</sup> *Ibid* at 22.

<sup>453</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, 28 May 1951, 1951 ICJ Reports 15 at 15.

Advisory Opinion,<sup>454</sup> and its decisions in *Military and Paramilitary Activities in and Against Nicaragua*<sup>455</sup> and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*.<sup>456</sup> In *Military and Paramilitary Activities in and Against Nicaragua*, the court stated that the provisions of Common Article 3 “constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity.’”<sup>457</sup> More recently, in its *Nuclear Weapons* Advisory Opinion, the International Court of Justice noted the “intrinsic humanitarian character of legal principles [of IHL ...] which permeates the entire law of armed conflict”.<sup>458</sup>

Coupland has argued that a “fundamental and objective relationship exists between humanity, armed violence and international law and that this relationship has long been recognized.”<sup>459</sup> “[E]lementary considerations of humanity” have played a large role in the development of norms and “the elaboration of new standards”;<sup>460</sup> however, humanity is not the only consideration in the development of IHL. Humanity is often counterbalanced in IHL with military necessity. Schmitt has described the relationship between military necessity and the principle of humanity as a “symbiotic relationship [that] determines in which direction, and at what speed, IHL evolves.”<sup>461</sup> This relationship requires parties to a conflict to take both military necessity and humanity into consideration during armed conflict.<sup>462</sup> Consequently, “[a]n equilibrium between military necessity and humanitarian considerations underlies every norm of the law of international armed conflict”.<sup>463</sup>

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<sup>454</sup> *Nuclear Weapons Advisory Opinion*, *supra* note 73 at 226.

<sup>455</sup> *ICJ, Nicaragua Case*, *supra* note 235 at 14.

<sup>456</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v Yugoslavia) (Preliminary Objections)*, 11 July 1996, 1996 ICJ Reports 595.

<sup>457</sup> *ICJ, Nicaragua Case*, *supra* note 235 at para 218.

<sup>458</sup> *Nuclear Weapons Advisory Opinion*, *supra* note 73 at para 86.

<sup>459</sup> Robin Coupland, “Humanity: What is it and how does it influence international law?” (2001) 83:844 *International Review of the Red Cross* 969 at 988.

<sup>460</sup> Theodor Meron, “The Humanization of Humanitarian Law” (2000) 94:2 *American Journal of International Law* 239 at 243.

<sup>461</sup> Schmitt, *supra* note 436 at 796.

<sup>462</sup> See, e.g., *ibid.*

<sup>463</sup> Yoram Dinstein, “Military Necessity” in *Max Planck Encyclopedia of Public International Law* (Oxford Public International Law (Online), 2015); Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge, UK: Cambridge University Press, 2004) at 16–20; GIAD Draper, “Military Necessity and Humanitarian Imperatives” (1973) 12 *Revue de Droit Penal Militaire et Droit de la Guerre* 129 at 141; Marco

Some of the earliest origins of contemporary IHL have codified this desire to balance humanity and necessity. The 1868 St. Petersburg Declaration explicitly noted the need to “fix[] the technical limits at which the necessities of war ought to yield to the requirements of humanity.”<sup>464</sup> The preamble to the 1907 Hague Convention (IV) on the Laws and Customs of War on Land voiced a “desire to diminish the evils of war, as far as military requirements permit.”<sup>465</sup> The desire to balance these two concepts is, however, often easier said than done. Military necessity and humanity are often at odds with each other in armed conflict.<sup>466</sup> Military necessity seeks to allow anything and everything necessary for military success,<sup>467</sup> whereas humanity seeks to limit the destructiveness and suffering that can often accompany war. Military necessity can sometimes temper more humanitarian rules of IHL. For example, while the principle of distinction prohibits the direct targeting of civilians, the principle of proportionality allows for incidental injury or death to civilians when the military advantage outweighs the risk to civilians.<sup>468</sup> While military necessity can restrict the humanitarian aims of certain rules of IHL, this does not negate the existence of a principle of humanity undergirding IHL. Most IHL rules are characterized by a “consistent sensitivity to the balance between military necessity and humanity.”<sup>469</sup>

Meron has noted that the “growing protection [for civilians] extended by the laws of war ... rests on the requirements of humanity”.<sup>470</sup> Schmitt has suggested that the balance between military necessity and humanity has “gradually shifted in emphasis toward humanitarian

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Pertile, “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory”: A Missed Opportunity for International Humanitarian Law?” (2004) 14 *Italian Yearbook of International Law* 121 at 149–50.

<sup>464</sup> *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, 29 November 1868 [*1868 Declaration Explosive Projectiles*] at preamble.

<sup>465</sup> *Convention [No. IV] on the Laws and Customs of War on Land, with annex of regulations*, 18 October 1907 [*1907 Hague Convention IV*] at preamble.

<sup>466</sup> See, e.g., Schmitt, *supra* note 436 at 796.

<sup>467</sup> The American Military Tribunal defined ‘military necessity’ in its 1948 Hostage Case, stating “Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money.” *United States v List (Wilhelm) and ors (Hostage Case), Trial Judgment*, Case No 7, (1948) 11 TWC 757, (1950) 11 TWC 1230, (1948) 8 LRTWC 34, ICL 491 (US 1948), (1948) 15 ILR 632, 19 February 1948.

<sup>468</sup> Schmitt, *supra* note 436 at 803.

<sup>469</sup> *Ibid* at 803–804.

<sup>470</sup> Meron, *supra* note 460 at 251.

considerations.”<sup>471</sup> Not all states have embraced this shift. For example, the United States is not a state party to either Additional Protocol I or II, the Landmine Ban Convention, or the Cluster Munitions Convention.<sup>472</sup> There has also been resistance to what some states have considered misapplications of IHL in an effort to advance humanitarian goals.<sup>473</sup> For example, the United States has criticized the International Committee of the Red Cross’ customary IHL study, expressing the view that some of the rules lack sufficient evidentiary support.<sup>474</sup> While the balancing of military necessity and humanity has been criticized at times, the fact that there is balancing required is generally accepted.<sup>475</sup>

Humanitarian considerations for the protection of civilians continue to propel the development of IHL. States have continued to seek new agreements for the protection of civilians, for example, through treaties regulating or prohibiting the use of certain weapons, such as anti-personnel landmines and cluster munitions.<sup>476</sup> Thus, not only is the principle of humanity firmly established as part of IHL, it continues to be a motivating factor in the continuing development of this body of law.

#### 4.2 International Humanitarian Law Protections for Civilians

There are four general principles of IHL which apply regardless of the nature of the armed conflict: (1) the principle of distinction;<sup>477</sup> (2) the principle of proportionality;<sup>478</sup> (3) the requirement to take precautions to protect civilians;<sup>479</sup> and, (4) the principle of humane treatment.<sup>480</sup> While this thesis argues that specific prohibited acts, such as murder and torture, are

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<sup>471</sup> Schmitt, *supra* note 436 at 796.

<sup>472</sup> See, e.g., discussion in *ibid* at 812–16.

<sup>473</sup> *Ibid* at 835–36.

<sup>474</sup> The United States’ did not specify which rules it took issues with in the study. note 45.

<sup>475</sup> See, e.g., Schmitt, *supra* note 436 at 837–39.

<sup>476</sup> *Landmine Treaty*, *supra* note 8; *Convention on Cluster Munitions*, *supra* note 8.

<sup>477</sup> See, e.g., Dinstein, *supra* note 46 at 213–15; Sivakumaran, *supra* note 46 at 349–51; Henckaerts & Doswald-Beck, *supra* note 5 at Rule 14; Nils Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008) at 300–66; Kleffner, *supra* note 71.

<sup>478</sup> See, e.g., Dinstein, *supra* note 46 at 217–18; Dinstein, *supra* note 436; James Kilcup, “Proportionality in Customary International Law: An Argument Against Aspirational Laws of War” (2017) 17:1 *Chicago Journal of International Law* 244; Sivakumaran, *supra* note 46 at 349–51.

<sup>479</sup> See, e.g., Dinstein, *supra* note 46 at 218; Sivakumaran, *supra* note 46 at 351–57; Henckaerts & Doswald-Beck, *supra* note 5 at Rules 15 & 22; Jean-François Quéguiner, “Precautions under the Law Governing the Conduct of Hostilities” (2006) 88:864 *International Review of the Red Cross* 793.

<sup>480</sup> See, e.g., Yves Sandoz, “International Humanitarian Law in the Twenty-First Century” (2003) 6 *Yearbook of International Humanitarian Law* 3 at 7–8.

drawn from peacetime protections for individuals, the principles discussed in this section provide a necessary distinction in the regulation of behaviour during armed conflict. This distinction stems primarily from the first principle discussed, distinction, which is necessary for civilian protection in conflict due to the legality of killing enemy combatants, which erodes the generally absolute peacetime prohibition on murder. This section will examine the principles of distinction, proportionality, precaution, and humane treatment in turn.

#### 4.2.1 Distinction

The principle of distinction is a rule of customary international law applicable to both international armed conflicts and NIACs.<sup>481</sup> It is also implicit in Article 13 of Additional Protocol II, which protects the civilian population and individual civilians.<sup>482</sup> It has been said that there is no principle in IHL which is “more critical than the ‘principle of distinction’.”<sup>483</sup> This is because the principle embodies the “overarching and all-encompassing need in IHL to preserve the principles of humanity from being completely subordinated to interests of military necessity.”<sup>484</sup> It juxtaposes civilians and fighters, as opposed to civilians and members of armed forces, as it is sometimes articulated by the ICRC.<sup>485</sup>

The principle of distinction can be difficult to apply in NIACs, as members of armed groups “do not usually wear uniforms or use other external marks identifying them as fighters.”<sup>486</sup> Further, “[t]here is no authoritative guidance as to what an insurgent fighter is supposed to do in order to enable an adversary to tell him apart from civilians.”<sup>487</sup> Whereas combatants in international armed conflicts are required to wear a “fixed distinctive sign recognizable at a distance” and to “carry[] arms openly”,<sup>488</sup> there is no equivalent provision for NIACs. In spite of potential difficulties associated with distinction in NIAC, the principle is still applicable to such

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<sup>481</sup> See, e.g., Henckaerts & Doswald-Beck, *supra* note 5 at Rule 1.

<sup>482</sup> AP II Article 13 (1) and (2) read: “1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances. 2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”

<sup>483</sup> Dinstein, *supra* note 444 at 183. See also, *Nuclear Weapons Advisory Opinion*, *supra* note 73 at 257.

<sup>484</sup> Stefanik, *supra* note 391 at 16.

<sup>485</sup> Dinstein, *supra* note 444 at 183. For an example see Henckaerts & Doswald-Beck, *supra* note 5 at 17.

<sup>486</sup> Dinstein, *supra* note 46 at 214.

<sup>487</sup> *Ibid.*

<sup>488</sup> *Geneva Convention III*, *supra* note 5 at Article 4.

conflicts.<sup>489</sup> In other words, the principle of distinction is considered to apply at all times during a non-international armed conflict.<sup>490</sup> In order to properly apply the principle of distinction between civilians and fighters, however, it is necessary to understand how ‘civilian’ is defined in IHL.

#### 4.2.1.i Definition of Civilian in IHL

The question of who is a civilian in an armed conflict can be a highly contested issue.<sup>491</sup> The language of Common Article 3 “implies a concept of civilian comprising those individuals “who do not bear arms” on behalf of a party to the conflict.”<sup>492</sup> The final text of Additional Protocol II did not include an explicit definition of ‘civilian.’ Nonetheless, the language of the final text, as interpreted by the ICRC, supports the premise that the “civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations” conducted by “armed forces,” “dissident armed forces,” and “other organized armed groups,” “unless and for such time as they take a direct part in hostilities”.<sup>493</sup> While the legal definition of civilian as someone who is not a member of the armed forces or an armed group seems quite straightforward, in practice it is highly debated. For example, it is often questioned whether “civilian contractors working with the military, or terrorists, or certain part-time participants in a civil war, should or should not be considered civilians.”<sup>494</sup>

The definition of ‘civilian’ applicable to NIACs is drawn from IHL treaties applicable to IACs. While the use of the term ‘civilian’ in IHL originated between 1874 and 1970;<sup>495</sup> it was not until the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (Geneva Convention IV) that robust protections for civilians were codified in IHL.<sup>496</sup> The protection for civilians codified in this Convention focused on “the treatment of

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<sup>489</sup> Fleck, *supra* note 46 at 591.

<sup>490</sup> See, e.g., Henckaerts & Doswald-Beck, *supra* note 5 at Rule 1; Kleffner, *supra* note 71 at 323.

<sup>491</sup> A Roberts, “The Civilian in Modern War” (2009) 12 Yearbook of International Humanitarian Law 13 at 20.

<sup>492</sup> Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (Geneva: ICRC, 2009) at 28.

<sup>493</sup> *Ibid* at 29. In support of this interpretation, see Art. 13(1) and (3) of AP I. Additional support can be found in the contexts in which AP II refers to “civilians” (Articles 13, 14, 17 of AP II) and the “civilian population” (title Part IV AP II; Arts 5 [1] [b] and [e], 13, 14, 15, 17 and 18 of AP II).

<sup>494</sup> Roberts, *supra* note 491 at 20.

<sup>495</sup> Melzer, *supra* note 492 at 20 fn 11.

<sup>496</sup> Roberts, *supra* note 491 at 37.

civilians in the hands of the adversary, whether in occupied territory or in internment.”<sup>497</sup> It defined civilians as “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals”.<sup>498</sup> Legal protection for civilians was expanded in the 1977 Additional Protocols to the Geneva Conventions. Additional Protocol I provided a new and broader definition of civilian which encompass all persons ineligible for the protection of prisoner of war status.<sup>499</sup> Further, it created a presumption that, where there is doubt as to “whether a person is a civilian, that person shall be considered to be a civilian”.<sup>500</sup> It also included, at Article 48, a “Basic Rule” regarding civilian protection:

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.

Civilians who take part in hostilities may, however, be targeted while they participate actively/directly in hostilities.<sup>501</sup> Consequently, civilian protection is not absolute. On ratification, many states issued declarations or statements of understanding regarding the interpretation of provisions protecting civilians and civilian objects. In particular, many states took the position that civilian protection was dependent on the information available to a commander at the time of an operation and that, where civilian objects are used for a military purpose, the objects would lose their protection.<sup>502</sup>

While all armed conflicts inevitably place civilians in danger, certain tactics of modern armed conflicts, particularly non-international conflicts, present distinct risks of the direct targeting of civilians.<sup>503</sup> For example, the increasing occurrence of urban warfare has significantly increased

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<sup>497</sup> *Ibid* at 38.

<sup>498</sup> Note: this does not include individuals who already have protected status under one of the other Geneva Conventions of 1949: *Geneva Convention IV*, *supra* note 5 at Article 4.

<sup>499</sup> *Additional Protocol I*, *supra* note 5 at Article 50.

<sup>500</sup> *Ibid* at Article 50(1).

<sup>501</sup> See, e.g., Melzer, *supra* note 492; Dinstein, *supra* note 444 at 188–91.

<sup>502</sup> For example, Australia, Canada, France, Germany, Italy, the Netherlands, New Zealand, Spain and the United Kingdom all issued declarations or reservations on this issue.

<sup>503</sup> Roberts, *supra* note 491 at 48–51.

the risks to civilians.<sup>504</sup> Other tactics create significant ambiguity in the distinction between combatants and civilians, such as guerilla warfare and terrorism.<sup>505</sup> Regardless of the challenges in applying the standard, however, civilian protection and the principle of distinction remain cornerstones of international humanitarian law.

While the principle of distinction prohibits the direct targeting of civilians during armed conflict, not all civilian deaths or injuries during armed conflict amount to a violation of IHL: the principle of proportionality accepts the possibility of civilian death or injury under certain conditions. The next section will discuss the principle of proportionality in more detail.

#### 4.2.2 Proportionality

Where a military operation to attack a legitimate target poses the risk of death or injury to civilians, it will not necessarily be prohibited, provided the civilians are not directly targeted. The principle of proportionality provides guidance as to the circumstances in which such incidental death or injury will be an IHL violation. An attack on a legitimate military target will still be prohibited if it

may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.<sup>506</sup>

The phrase “excessive in relation to the concrete and direct military advantage anticipated” is the crux of the proportionality principle: it requires military actors to balance the risks to civilians with the advantages to the military and, only where the advantage is proportional to the risk, will the attack be legal. The proportionality of attacks must be evaluated on a case-by-case basis.<sup>507</sup> The principle of proportionality “is by its nature imprecise” and complicated.<sup>508</sup> This is because “[p]roportionality calculations are heterogeneous, ... dissimilar value genres – military and humanitarian – are being weighed against each other.”<sup>509</sup> Consequently, proportionality is often

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<sup>504</sup> Nathalie Durhin, “Protecting Civilians in Urban Areas: A Military Perspective on the Application of International Humanitarian Law” (2016) 98:1 *International Review of the Red Cross* 177 at 186.

<sup>505</sup> Roberts, *supra* note 491 at 48–49.

<sup>506</sup> *Additional Protocol I*, *supra* note 5 at Article 51(5)(b).

<sup>507</sup> Michael Schmitt, Charles HB Garraway & Yoram Dinstein, *The Manual on the Law of Non-International Armed Conflict With Commentary* (San Remo: International Institute of Humanitarian Law, 2006) at 25.

<sup>508</sup> Byron, *supra* note 71 at 207.

<sup>509</sup> Michael Schmitt, “The Principle of Discrimination in 21st Century Warfare” (1999) 2:1 *Yale Human Rights and Development Law Journal* 143 at 150–51.



likely to be assessed differently depending on the position of the decision maker, that is, whether they are on the “winning or losing side” at the time the assessment is conducted.<sup>510</sup>

There is nothing in Additional Protocol II that explicitly prohibits “excessive collateral damage”,<sup>511</sup> which has led some commentators to suggest the principle does not, or may not, apply to NIACs.<sup>512</sup> This assessment is widely considered to be incorrect. At minimum, the principle applies to NIACs as a rule of customary international law.<sup>513</sup> This is confirmed by the ICRC 1987 Commentary on Additional Protocol II, which clearly notes that “[the principle of proportionality] appl[ies] irrespective of whether the conflict is an international or an internal one.”<sup>514</sup> Furthermore, the Commentary on the San Remo Manual on the Law of Non-International Armed Conflict addresses the issue of proportionality, stating that: “[t]he relative absence of express mention of proportionality in instruments governing non-international armed conflict should not be construed as meaning that it is inapplicable in such conflict.”<sup>515</sup> This is further confirmed by other IHL treaties,<sup>516</sup> the ICRC *Customary IHL Study*,<sup>517</sup> and academic literature.<sup>518</sup>

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<sup>510</sup> Byron, *supra* note 71 at 207.

<sup>511</sup> *Ibid* at 206.

<sup>512</sup> See, e.g., Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge, UK: Cambridge University Press, 2004) at 125; Moir, *supra* note 46 at 117 fn 140; Françoise Hampson, *Study on Human Rights Protection during Situations of Armed Conflict, Internal Disturbances and Tensions* (Strasbourg: Council of Europe, Steering Committee for Human Rights, 2002) at para 54.

<sup>513</sup> Henckaerts & Doswald-Beck, *supra* note 5 at Rule 14; Harold Koh, “The Obama Administration and International Law, Speech at the Annual Meeting of the American Society of International Law, 25 March 2010”, online: *US Department of State* <<http://2009-2017.state.gov/s/l/releases/remarks/139119.htm>>; *ICTY Kupreskic Trial Judgment*, *supra* note 125 at para 524; *The Prosecutor v Hadžihasanovic and Kubura, Trial Judgment*, IT-01-47-T, 15 March 2006 at para 45.

<sup>514</sup> Sylvie Junod, “Additional Protocol II” in Yves Sandoz, Christine Swinarski & Bruno Zimmermann, eds, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Dordrecht, NLD: Martinus Nijhoff, 1987) at para 4772.

<sup>515</sup> Schmitt, Garraway & Dinstein, *supra* note 507 at 22 Rule 2.1.1.4.

<sup>516</sup> See, e.g., *Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) (As Amended on 3 May 1996)*, UN, 10 October 1980 [CCW Protocol II] at Article 3(8)(c); *Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO, 26 March 1999 [Second Protocol to 1954 Cultural Property Convention] at Article 7(3).

<sup>517</sup> Henckaerts & Doswald-Beck, *supra* note 5 at Rule 14.

<sup>518</sup> See, e.g., Byron, *supra* note 71 at 207; Turns, *supra* note 71 at 145; Theodor Meron, “The continuing role of custom in the formation of international humanitarian law” (1996) 90 *American Journal of International Law* 238 at 244.

The assessment of proportionality turns on the “excessive” threshold: only attacks where the damage to civilians and/or civilian objects would “be excessive in relation to the ‘concrete and direct military advantage anticipated’” are prohibited.<sup>519</sup> It is essentially a standard of “reasonableness”: excessive damage would “indicate[] unreasonable conduct in light of the circumstances prevailing at the time.”<sup>520</sup> It is both an objective and subjective assessment:

if the attacker knew or should have known that the civilian damage or injury caused would be excessive relative to the anticipated military advantage, the rule will have been violated.<sup>521</sup>

It is largely agreed that the ‘military advantage’ of the entire attack must be considered in proportion to anticipated damage and not the advantage of certain “isolated or particular parts of the attack.”<sup>522</sup> The assessment may not be based solely on that attack’s immediate or short-term effects, but must also consider the long-term consequences of the act.<sup>523</sup> Further, it will “include[] a broad range of issues extending from ‘force protection’ to diverting the attention of the enemy from an intended site of invasion.”<sup>524</sup> Again, this is why proportionality must be assessed on a case-by-case basis.<sup>525</sup> The fact that proportionality must be assessed case-by-case does, however, leave some ambiguity in the law as “precise parameters of this zone of proportionality are very much in dispute amidst the complexity of modern armed conflicts”.<sup>526</sup> Even where an operation satisfies the proportionality requirement, a military commander will also need to take certain additional precautions to protect civilians. The next section will briefly elaborate on the precaution requirement in IHL.

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<sup>519</sup> Schmitt, Garraway & Dinstein, *supra* note 507 at 23.

<sup>520</sup> *Ibid.*

<sup>521</sup> *Ibid.*

<sup>522</sup> United Kingdom, “Statement Made on Ratification of Additional Protocol I, January 28, 1998” in Adam Roberts & Richard Guelff, eds, *Documents on the Laws of War*, 3d ed (Oxford: Oxford University Press, 2000) 511.

<sup>523</sup> See, e.g., FJ Hampson, “Means and Methods of Warfare in the Conflict in the Gulf” in P Rowe, ed, *The Gulf War 1990-91 in International and English Law* (London, UK: Routledge, 1993) 89 at 100; Christopher Greenwood, “The Law of Weaponry at the Start of the New Millennium” (1998) 71 *International Law Studies* 185 at 202. Some commentators maintain that only short-term effects need to be taken into consideration, e.g., Judith Gardam, “Crimes Involving Disproportionate Means and Methods of Warfare under the Statute of the International Criminal Court” in Jose Doria, Hans-Peter Gasser & M Cherif Bassiouni, eds, *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (The Hague: Martinus Nijhoff, 2009) 537 at 547–48; Joseph Holland, “Military Objective and Collateral Damage: Their Relationship and Dynamics” (2004) 7 *Yearbook of International Humanitarian Law* 35 at 61–62.

<sup>524</sup> Schmitt, Garraway & Dinstein, *supra* note 507 at 24.

<sup>525</sup> *Ibid* at 25.

<sup>526</sup> Michael A Newton, “Reframing the Proportionality Principle” (2018) 51 *Vanderbilt Journal of Transnational Law* 867 at 869.

#### 4.2.3 Precaution

While not explicitly referenced in either Common Article 3 or Additional Protocol II, precautions must also be taken in NIACs to protect civilians and the civilian population. Precautions are necessitated by both the principle of distinction and the principle of proportionality.<sup>527</sup> Further, the customary nature of this rule precedes the adoption of Additional Protocol II.<sup>528</sup> Parties must take “all feasible precautions”, which are defined as “those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.”<sup>529</sup> This includes choosing, where multiple options are available, the “methods and means for conducting an attack... that [will] minimise civilian danger”.<sup>530</sup> Precautions, therefore, ensure that even where an attack is legal, additional steps will need to be taken to minimize the risk to civilians from that attack.

#### 4.2.4 Humane Treatment

The final key principle of IHL is the principle of humane treatment, which is required explicitly in the language of Common Article 3(1) as well as in Additional Protocol II, where Part II of the Protocol is titled “Humane Treatment”.<sup>531</sup> Humane treatment is not subject to a single exhaustive definition, but, rather, it is “context specific” and must be considered with due regard to “both objective and subjective elements, such as the environment, the physical and mental condition of the person, as well as his or her age, social, cultural, religious or political background and past experiences.”<sup>532</sup> That “humane treatment” was left open to interpretation could be beneficial for civilian protection because it allows for such a contextual analysis. Unlike the ambiguity in the principle of proportionality, which can sometimes be skewed in favour of military necessity, the principle of humane treatment cannot be restricted: the ambiguity will either have no effect on civilian protection, or it could be interpreted in a manner that provides greater protection to civilians.<sup>533</sup> This is because the principle of humane treatment, as codified in Common Article 3 and Additional Protocol II, is accompanied by certain specific prohibited acts. These acts include

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<sup>527</sup> *Prosecutor v Stanislav Galic, Trial Judgment*, IT-98-29-T, 5 December 2003 at para 58.

<sup>528</sup> Junod, *supra* note 514 at para 4772.

<sup>529</sup> *CCW Protocol II*, *supra* note 516 at Article 3(10).

<sup>530</sup> Schmitt, Garraway & Dinstein, *supra* note 507 at 27.

<sup>531</sup> Humane treatment is also found explicitly in articles 4(1) and 5(3) of Additional Protocol II.

<sup>532</sup> Cameron et al, *supra* note 226 at 193.

<sup>533</sup> See, e.g., Henckaerts & Doswald-Beck, *supra* note 5 at Rule 87.

torture and murder.<sup>534</sup> These prohibited acts, which are listed as examples and not as an exhaustive list, provide guidance as to the types of treatment considered to be inhumane.<sup>535</sup> These prohibited acts also create a base level of protection for civilians: humane treatment cannot be interpreted in a manner that impinges on those specific prohibitions because they are expressly identified as being “prohibited at any time and in any place whatsoever”.<sup>536</sup> However, the principle could be interpreted to include more protections for civilians than those specifically enumerated in these treaties because the specific prohibited acts are provided “[w]ithout prejudice to the generality of the [separate requirement that civilians ‘shall in all circumstances be treated humanely]’”.<sup>537</sup>

Humane treatment is required “in all circumstances” under IHL for NIACs.<sup>538</sup> While its precise nature may vary slightly based on different circumstances in different conflicts, the language of Common Article 3 indicates that there are no exceptions to its application in NIAC and that this requirement represents the “minimum standard of treatment to be accorded to all fellow human beings” in such conflicts.<sup>539</sup> Parties to a conflict may, however, provide treatment above and beyond the minimum standard required under Common Article 3.<sup>540</sup> The phrase “in all circumstances” has also been interpreted as indicating that “[m]ilitary necessity arguments ... do not justify acts or omissions inconsistent with the requirements of humane treatment.”<sup>541</sup> Further, “in all circumstances” serves to reinforce the fact that the rules of IHL, particularly those for the protection of civilians, are “non-reciprocal ” because they apply regardless of whether other parties to the conflict adhere to these rules or not.<sup>542</sup>

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<sup>534</sup> See Common Article 3 at sub-paragraphs (1)(a) and Article 4(2)(a) of Additional Protocol II.

<sup>535</sup> Cameron et al, *supra* note 226 at 193.

<sup>536</sup> This language is found in both Common Article 3(1) and Article 4(2) of Additional Protocol II.

<sup>537</sup> See Article 4(1) and (2) of Additional Protocol II. Common Article 3(1) also states that civilians “shall in all circumstances be treated humanely”.

<sup>538</sup> See Common Article 3(1) and Article 4(1) of Additional Protocol II.

<sup>539</sup> Cameron et al, *supra* note 226 at 196. See also *The Prosecutor v Zlatko Aleksovski, Trial Judgment*, IT—95-14/1-T, 25 June 1999 at paras 168, 173.

<sup>540</sup> Cameron et al, *supra* note 226 at 202.

<sup>541</sup> *Ibid* at 196. Jann K Kleffner, “Friend or Foe? On the Protective Reach of the Law of Armed Conflict: A Note on the SCSL Trial Chamber’s Judgment in the Case of ‘Prosecutor v. Sesay, Kallon and Gbao’” in Mariëlle Matthee, Brigit Toebees & Marcel Brus, eds, *Armed Conflict and International Law: In Search of the Human Face, Liber Amicorum in Memory of Avril McDonald* (The Hague: Asser Press, 2013) 285 at 327. Kleffner discusses the interpretation of the phrase “in all circumstances” in the context of article 12 of Geneva Convention I.

<sup>542</sup> Cameron et al, *supra* note 226 at 196–97.

The four core principles of IHL – distinction, proportionality, precaution, and humane treatment – further demonstrate the centrality of civilian protection in this body of law. The principle of distinction, as the cardinal principle of IHL, places civilian protection at the heart of IHL. While military necessity tempers the absolute protection for civilians by allowing for incidental death or injury to civilians if it is proportional to the military advantage, distinction, precaution and humane treatment indicate an effort on the part of states - the authors of this body of law - to protect civilians inasmuch as possible within armed conflict. This effort to protect civilians suggests that a review of IHL is warranted, particularly consideration of whether additional protections for civilians are necessary in order to implement the primary objectives of IHL. The next section will turn to an examination of some of the specific acts prohibited for the protection of civilians during armed conflicts. It will show that the acts, for the most part, are representative of existing domestic crimes during peace.

### 4.3 Specific Prohibited Acts

As noted above, the inclusion of the principle of humane treatment in Common Article 3 and Additional Protocol II is accompanied by certain specifically prohibited acts as examples of inhumane treatment. This part of the chapter will focus on an examination of some of these prohibited acts, based on those acts which were most prevalent in the case study conflicts in Sierra Leone and the Democratic Republic of Congo. The previous part of the chapter focused on general principles applicable to civilian protection during armed conflict. The aim of this part of the chapter is to outline certain specific protections for civilians, as well as to demonstrate that most of these prohibited acts exist in ordinary domestic criminal law.

Jean Pictet's 1958 Commentary on the fourth Geneva Convention noted that "[Common Article 3] merely demands respect for certain rules, which were already recognized as essential in all civilized countries, and enacted in municipal law of the States in question, long before the Convention was signed."<sup>543</sup> Pictet further notes that the specific prohibited behaviours of Common Article 3, such as torture and mutilation, apply regardless of whether an armed conflict

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<sup>543</sup> Pictet, *supra* note 98 at 36. ; Further evidence that these prohibitions are merely imported from domestic criminal law can be seen in the fact that certain countries, such as Canada and the UK, rather than explicitly list these prohibitions in domestic military law, incorporate these prohibitions by reference to their domestic criminal codes: *National Defence Act*, Canada [*Canada National Defence Act*]; *Armed Forces Act 2006*, United Kingdom [*UK Armed Forces Act 2006*].

exists because they are “essential rules which [a state] in fact observes daily, under its own laws, even when dealing with common criminals.”<sup>544</sup> Further evidence of the parallel between peacetime prohibited conduct and prohibited conduct during armed conflict can be seen in the International Criminal Court’s *Elements of Crimes* and in the drafting process for the *Elements of Crimes*. If one examines the elements of the war crimes of murder, rape, torture, etc., it is possible to see that the key distinction between these acts in peace and during armed conflict is based on the protected status of the victim<sup>545</sup> and on the context in which the act was committed, namely, the act was committed in the context of an armed conflict.<sup>546</sup> Further, the perpetrator must be aware of the existence of the armed conflict; an element deemed necessary if an individual was to be subjected to “greater international stigma [for a war crime] than for an ordinary crime”.<sup>547</sup> This last fact is extremely important as it indicates that the majority of states negotiating the *Elements of Crimes* felt that awareness of the existence of an armed conflict was crucial to the differentiation between the conduct prohibited in peacetime and the conduct prohibited during armed conflict. The fact that these existing specific IHL prohibitions for civilians are imported from domestic criminal laws for the protection of individuals establishes the starting point for the gap this thesis argues exists between the protections provided for the safety of individuals during peace and the additional protections required under IHL to protect civilians during war.

Common Article 3 and Additional Protocol II are designed to protect those who do not, or are no longer, actively/directly participating in hostilities during a NIAC. Common Article 3 accomplishes this primarily through prohibitions on certain acts, such as murder, torture, and outrages on personal dignity, in relation to these protected persons. Subparagraph 1 of Common Article 3 states:

... the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

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<sup>544</sup> Pictet, *supra* note 98 at 36.

<sup>545</sup> ICC, *Elements of Crimes of the International Criminal Court* (The Hague: ICC, 2011) at Articles 8(2)(c)(i)-1 (murder); 8(2)(c)(i)-2 (mutilation); 8(2)(c)(i)-3 (cruel treatment); 8(2)(c)(i)-4(torture);

<sup>546</sup> *Ibid* at Articles 8(2)(c)(i)-1 (murder); 8(2)(c)(i)-2 (mutilation); 8(2)(c)(i)-3 (cruel treatment); 8(2)(c)(i)-4(torture); 8(2)(e)(vi)-1 (rape).

<sup>547</sup> Knut Dörmann, Eva La Haye & Herman von Hebel, “The Context of War Crimes” in Roy S Lee, ed, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley, NY: Transnational Publishers, Inc, 2001) 112 at 121.

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Additional Protocol II includes these prohibitions, as well as other explicit prohibitions, including on corporal punishment, collective punishments, acts of terrorism, slavery, and pillage.<sup>548</sup> Article 4(2) of Additional Protocol II states:

- ... the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:
- (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
  - (b) collective punishments;
  - (c) taking of hostages;
  - (d) acts of terrorism;
  - (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
  - (f) slavery and the slave trade in all their forms;
  - (g) pillage;
  - (h) threats to commit any of the foregoing acts.

With respect to the prohibition on violence to life and person in Common Article 3, Additional Protocol II extends this to also prohibit violence to health and mental well-being.<sup>549</sup> It also explicitly prohibits threatening to commit any of the prohibited acts in article 4(2).<sup>550</sup> Threatening these prohibited acts would also likely be captured by the prohibition on violence to mental well-being.<sup>551</sup> Much as Common Article 3 applies in “all circumstances”, the prohibitions contained in Additional Protocol II article 4(2) are “prohibited at any time and in any place whatsoever”. Additional Protocol II also includes explicit protections for children,<sup>552</sup> most

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<sup>548</sup> *Additional Protocol II*, *supra* note 5 at Article 4(2).

<sup>549</sup> *Ibid* at Article 4(2)(a).

<sup>550</sup> *Ibid* at Article 4(2)(h).

<sup>551</sup> Junod, *supra* note 514 at 4543.

<sup>552</sup> *Additional Protocol II*, *supra* note 5 at Article 4(3).

notably it prohibits the recruitment or use in hostilities of children under 15 years of age under article 4(3)(c), which reads:

(c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.

Common Article 3 contains specific protections for civilians; however, it does not contain any explicit rules governing the manner in which military operations may be conducted.<sup>553</sup> One possible exception to this is the “prohibition of murder which has been found in some cases to apply to unlawful attacks in the conduct of hostilities.”<sup>554</sup> This exception does find some support in the literature,<sup>555</sup> but is strongly contested in the ICRC 2016 Commentary on Common Article 3, which notes that nothing in the four Geneva Conventions of 1949 was intended to govern the conduct of hostilities.<sup>556</sup> The Commentary’s position is supported by evidence of the intention of drafters of the Geneva Conventions and rearticulated during the drafting of Additional Protocol II.<sup>557</sup> Consequently, for regulation of the conduct of hostilities in NIAC, actors must rely

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<sup>553</sup> Cameron et al, *supra* note 226 at 189; Turns, *supra* note 71 at 115–16.

<sup>554</sup> Cameron et al, *supra* note 226 at 189. approach can be seen, e.g., in *Prosecutor v Pavle Strugar, Trial Judgment*, IT-01-42-T, 31 January 2005 at paras 234-40, 260-61, 277-83.

<sup>555</sup> James E Bond, “Application of the Law of War to Internal Conflict” (1973) 3:2 *Georgia Journal of International and Comparative Law* 345 at 348; William H Boothby, *The Law of Targeting* (Oxford: Oxford University Press, 2012) at 433; Antonio Cassese, “The Geneva Protocols of 1977 on the Humanitarian law of Armed Conflict and Customary International Law” (1984) 3 *UCLA Pacific Basin Law Journal* 55 at 107; APV Rogers, *Law on the Battlefield* (Manchester, UK: Manchester University Press, 2012) at 301.

<sup>556</sup> Cameron et al, *supra* note 226 at 190.

<sup>557</sup> Official Records 1974-1977, *supra* note 244 at Vol XV, at 363. Further support can be found in academic literature, e.g., GIAD Draper, “The Geneva Conventions of 1949” (1965) 114 *Collected Courses of the Hague Academy of International Law* 59 at 84–85; Hans-Peter Gasser, “Remarks of Hans-Peter Gasser’ in *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*” (1987) 2:2 *American University Journal of International Law and Policy* 477 at 478; Theodor Meorn, “Application of Humanitarian Law in Non-international Armed Conflicts: Remarks by Theodor Meron” (1991) 85 *Proceedings of the Annual Meeting of the American Society of International Law* 83 at 84; Kenneth Watkin, “21st Century Conflict and International Humanitarian Law: Status Quo or Change?” in Michael N Schmitt & Jelena Pejic, eds, *International Law and Armed Conflict: Exploring the Faultlines, Essays in Honour of Yoram Dinstein* (Leiden, NLD: Martinus Nijhoff, 2007) 265 at 271 fn 31; Zegveld, *supra* note 25 at 82–84; William Abresch, “A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya” (2005) 16:4 *European Journal of International Law* 741 at 748 fn 22.



primarily on customary international law,<sup>558</sup> though a few provisions of Additional Protocol II also regulate the conduct of hostilities.<sup>559</sup>

Common Article 3 and Additional Protocol II prohibit a number of specific acts directed toward civilians and there is considerable overlap between the prohibitions in each text. I will now turn to an examination of some of these specific prohibitions that were frequently violated in the conflicts in both Sierra Leone and the Democratic Republic of Congo.

#### 4.3.1 Violence to Life and Person

The prohibition on violence to life and person in subparagraph 1(a) of Common Article 3 is considered of “fundamental importance in ensuring humane treatment.”<sup>560</sup> This prohibition is also found in Article 4(2)(a) of Additional Protocol II, prohibiting violence to health and mental well-being. The violence is prohibited against those who do not, or are no longer, actively participating in the conflict. Violence against such persons is not militarily necessary and would therefore be “gratuitous” and “is irreconcilable with the imperative of humane treatment”.<sup>561</sup> Violence is considered to refer to both injury and/or death and is considered to capture certain omissions, such as the failure to provide food or medical care to those under one’s control.<sup>562</sup> The provision contains a non-exhaustive list of acts captured by “violence to life and person”, such as “murder of all kinds, mutilation, cruel treatment and torture”. Since this list is non-exhaustive, other acts may be captured by “violence to life and person”, “for example, [an act that] does not amount to torture or cruel treatment can still be prohibited as an act of violence to person.”<sup>563</sup> While not explicit in Common Article 3, it is widely accepted that the “prohibition of torture and cruel treatment under Common Article 3 ... includes acts detrimental to the mental integrity of the person” and is not limited to physical violence.<sup>564</sup> Consequently, the

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<sup>558</sup> See, e.g., Henckaerts & Doswald-Beck, *supra* note 5 at Rules 2, 5-21, 42-48, and 53-54. The ICTY Appeals Chamber in *Tadic* stated that “[C]ustomary rules have developed to govern internal strife. These rules [...] cover such areas as [...] [a] prohibition of means of warfare proscribed in international armed conflicts and [a] ban of certain methods of conducting hostilities.” *Tadic Interlocutory Appeal*, *supra* note 68 at para 520.

<sup>559</sup> For example, Article 13(1) of Additional Protocol II embodies the principle of distinction, which places limits on who may be targeted in armed conflict. *Additional Protocol II*, *supra* note 5.

<sup>560</sup> Cameron et al, *supra* note 226 at 203.

<sup>561</sup> *Ibid.*

<sup>562</sup> *Ibid* at 204–205.

<sup>563</sup> *Ibid* at 203.

<sup>564</sup> *Ibid* at 204.

interpretation of Common Article 3 captures the added prohibitions explicitly listed in Article 4(2)(a) of Additional Protocol II.

### 3.3.2 Murder

Common Article 3(1)(a) prohibits “murder of all kinds”. This prohibition is also found in Article 4(2)(a) of Additional Protocol II and has long existed under customary international law.<sup>565</sup>

Murder in this context refers to the “intentional, unjustified killings of those not actively participating in armed conflict”.<sup>566</sup> Under Common Article 3, “murder clearly includes killings committed with direct intent, whether by act or omission, of both civilians and members of the armed forces taking no active part in hostilities who are physically captured, detained, or otherwise in the physical control of the relevant party to the armed conflict.”<sup>567</sup> It is also likely that recklessness constitutes sufficient intent for a violation of the prohibition of murder to have occurred.<sup>568</sup> While this suggestion has been contested by some,<sup>569</sup> Knuckey has argued that “indirect intent or recklessness better comports with the broad protection for life provided by the language of Common Article 3, domestic criminal law, and early war crimes cases.”<sup>570</sup> The inclusion of a standard of recklessness in this prohibition is supported by the ICRC’s 2016 Commentary on Common Article 3.<sup>571</sup> Further, both “acts and omissions are prohibited”.<sup>572</sup> What is not included under this prohibition, however, is “killing during the conduct of hostilities.”<sup>573</sup> Such deaths must be considered with regard to the particular rules governing the conduct of hostilities, in particular “rules of distinction, proportionality and precautions.”<sup>574</sup>

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<sup>565</sup> See, e.g., *United States of America v Otto Ohlendorf et al (Einsatzgruppen Case)*, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No 10, Volume IV, October 1946-April 1949 (Washington, DC: US Gov’t, , at 459; *The Prosecutor v Zejnil Delalic et al (‘Celibici Case’)*, *Appeals Judgment*, IT-96-21-A, 20 February 2001 at para 143; *Constitutional Case No C-291/07, Judgment of 25 April 2007* at 112; Henckaerts & Doswald-Beck, *supra* note 5 at Rule 89.

<sup>566</sup> Sarah Knuckey, “Murder in Common Article 3” in Andrew Clapham, Paola Gaeta & Marco Sassoli, eds, *The 1949 Geneva Conventions: A Commentary* (Oxford: Oxford University Press, 2015) at 449–50.

<sup>567</sup> *Ibid* at 466.

<sup>568</sup> *Ibid* at 460, 466.

<sup>569</sup> See, e.g., *The Prosecutor v Naser Oric, Trial Chamber Judgment*, IT-03-68-T, 30 June 2006 at para 1020. For support of the inclusion of indirect intent or recklessness as sufficient intent, see, e.g., *The Prosecutor v Sefer Halilovic, Trial Chamber Judgment*, IT-01-48-T, 16 November 2005 at para 35 fn 80; *The Prosecutor v Charles Taylor, Trial Chamber Judgment*, SCSL-03-01-T, 18 May 2012 at para 412; UN, *supra* note 404 at paras 206, 251.

<sup>570</sup> Knuckey, *supra* note 566 at 460.

<sup>571</sup> Cameron et al, *supra* note 226 at 207.

<sup>572</sup> *Ibid*.

<sup>573</sup> *Ibid*. See also, e.g., Knuckey, *supra* note 566 at 452–56.

<sup>574</sup> Cameron et al, *supra* note 226 at 207.

### 4.3.3 Mutilation

Mutilation is also expressly prohibited as violence to life and person under Common Article 3, as well as being prohibited under customary international law.<sup>575</sup> The term itself is not defined in international humanitarian law. The ICRC’s 2016 Commentary on Common Article 3 draws upon the International Criminal Court’s Elements of Crimes document addressing mutilation to provide a basic definition for the purpose of Common Article 3.<sup>576</sup> The Commentary defines mutilation as “‘permanently disfiguring the person or persons’ or ‘permanently disabling or removing an organ or appendage’”.<sup>577</sup> It defines “permanent” as “lasting or remaining unchanged indefinitely, or intended to be so; not temporary” and concludes that this means the injury need not last forever.<sup>578</sup> Disfiguring” is defined as “[t]o ‘spoil’” and “[it] requires a certain degree of severity.”<sup>579</sup> Practices in recent conflicts that constituted mutilation include the “amputati[on] of hands or feet, cutting off other body parts, mutilation of sexual organs, or carving somebody’s body.”<sup>580</sup> One exception would be medical grounds, “such as the amputation of a gangrenous limb.”<sup>581</sup> Finally, the mutilation of dead bodies is not captured by the prohibition on mutilation.<sup>582</sup> It is, however, captured by the prohibition on outrages on personal dignity in Common Article 3(1)(c) and under customary international law.<sup>583</sup>

<sup>575</sup> Henckaerts & Doswald-Beck, *supra* note 5 at Rule 92.

<sup>576</sup> Cameron et al, *supra* note 226 at 208–209.

<sup>577</sup> *Ibid* at 208.; Cameron et al. use the language as it appears in the ICC’s Elements of Crimes: ICC, *supra* note 544.

<sup>578</sup> Cameron et al, *supra* note 226 at 208.

<sup>579</sup> *Ibid* at 209. Here, the Commentary also draws on reference to severity with regard to mutilation in international case law: *Prosecutor v Issa Hassan Sesay, Morris Kallon, Augustine Gbao, Trial Judgment*, SCSL-04-15-T, 2 March 2009 at para 179; *The Prosecutor v Clément Kayishema and Obed Ruzindana, Trial Judgment*, ICTR-95-1-T, 21 May 1999 at para 108; *The Prosecutor v Clément Kayishema and Obed Ruzindana, Appeal Judgment*, ICTR-95-1-A, 1 June 2001 at para 361; *ICTR, Akayesu Trial Judgment, supra* note 310 at paras 706-707.

<sup>580</sup> Cameron et al, *supra* note 226 at 209. Cameron et al. draw on international case law: *The Prosecutor v Johnny Paul Koroma, Indictment*, Case No SCSL-03-01, 7 March 2003 at para 31; *The Prosecutor v Juvénal Kajelijeli, Trial Judgment*, ICTR-98-44A-T, 1 December 2003 at paras 935-36; *The Prosecutor v Théoneste Bagosora, Gratién Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva, Trial Judgment*, ICTR-98-41-T, 18 December 2008 at para 2266.

<sup>581</sup> Cameron et al, *supra* note 226 at 209. This exception draws on an explicit exception articulated in Geneva Convention III article 13(1) and AP I article 11(1) and (2), as well as *The Prosecutor v Alex Tamba Brima (AFRC), Brima Bazzy Kamara, Santigie Borbor Kanu, Trial Judgment*, SCSL-04-16-T, 20 June 2007 at para 725; *SCSL RUF Trial Judgment, supra* note 579 at para 181.

<sup>582</sup> Cameron et al, *supra* note 226 at 210.

<sup>583</sup> Henckaerts & Doswald-Beck, *supra* note 5 at Rule 113.

#### 4.3.4 Torture and Cruel Treatment

Torture and cruel treatment or punishment are unquestionably prohibited under NIAC in both Common Article 3 and Additional Protocol II article 4(2)(a) and (e).<sup>584</sup> These acts are equally prohibited under customary international law and are considered to rise to the level of *jus cogens* norms.<sup>585</sup> There are no exceptions, such as national security, to this prohibition.<sup>586</sup> The definition of torture under Article 1 of the Convention Against Torture has been considered largely applicable to armed conflict.<sup>587</sup> It defines torture as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>588</sup>

The only element of this definition that has been considered unnecessary or not applicable to torture under IHL is the requirement of the “presence of a state official or of any other authority-wielding person in the torture process”.<sup>589</sup> The omission of this element is particularly important in the context of NIAC to ensure that armed groups are equally prohibited from committing acts of torture.

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<sup>584</sup> Manfred Nowak & Ralph Janik, “Torture, Cruel, Inhuman or Degrading Treatment or Punishment” in Andrew Clapham, Paola Gaeta & Marco Sassoli, eds, *The 1949 Geneva Conventions: A Commentary* (Oxford: Oxford University Press, 2015) 317 at 335–36.

<sup>585</sup> Henckaerts & Doswald-Beck, *supra* note 5 at Rule 90; *ICTY Celibici Appeals Judgment*, *supra* note 565 at para 454.

<sup>586</sup> Cameron et al, *supra* note 226 at 211.

<sup>587</sup> *ICTY Celibici Appeals Judgment*, *supra* note 565 at para 459; *Prosecutor v Anto Furundzija*, *Trial Judgment*, IT-95-17/1-T, 10 December 1998 at paras 160-61.

<sup>588</sup> *Torture Convention*, *supra* note 74.

<sup>589</sup> *Prosecutor v Dragoljub Kunarac and Zoran Vukovic*, *Trial Judgment*, IT-96-23-T & IT-96-23/1-T, 22 February 2001 at paras 496-97. See also *Prosecutor v Blagoje Simic, Miroslav Tadic, Simo Zaric*, *Trial Judgment*, IT-95-9-T, 17 October 2003 at para 82; *Prosecutor v Radoslav Brdanin*, *Trial Judgment*, IT-99-36-T, 1 September 2004 at para 488; *Prosecutor v Miroslav Kvocka, Mlado Radic, Zoran Zigic, Dragoljub Prcać*, *Appeal Judgment*, IT-98-30/1-A, 28 February 2005 at para 284; *ICTY, Limaj et al Trial Judgment*, *supra* note 188 at para 240; *Prosecutor v Mile Mrksic, Miroslav Radic, Veselin Sljivancanin*, *Trial Judgment*, IT-95-13/1-T, 27 September 2007 at para 514; *Prosecutor v Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj*, *Retrial Judgment*, IT-04-84bis-T, 29 November 2012 at para 419; *The Prosecutor v Jovica Stanisic, Franko Simatovic*, *Trial Judgment*, IT-03-69-T, 30 May 2013 at para 49.

While official involvement is not required, the act or acts must still be done for a “specific purpose or motive.”<sup>590</sup> There is no exhaustive list of purposes or motives which will satisfy this requirement; however, the three purposes articulated in the definition of torture above – “(a) to obtain[] information or a confession, (b) punishing, intimidating or coercing the victim or a third person, and (c) discriminating, on any ground, against the victim or a third person” – are widely accepted.<sup>591</sup> The purpose or motive that satisfies the requirement “need be neither the sole nor the main purpose of inflicting the severe pain or suffering”.<sup>592</sup>

The threshold for pain and suffering under torture is “severe”, and is contrasted with the lower threshold of “serious” for cruel treatment.<sup>593</sup> The severity of pain or suffering should be assessed on a case-by-case basis with due consideration to “both the objective elements related to the severity of the harm and the subjective elements related to the condition of the victim.”<sup>594</sup> In particular, consideration should be given to “‘the nature and context of the infliction of pain’, ‘the premeditation and institutionalisation of the ill-treatment’, ‘the physical condition of the victim’, ‘the manner and method used’, and ‘the position of inferiority of the victim’.”<sup>595</sup> Torture can consist of one act or it may be the consequence of multiple acts over time.<sup>596</sup> It does not have a “durational requirement”,<sup>597</sup> nor does it require permanent injury.<sup>598</sup> Consequently, “evidence

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<sup>590</sup> Cameron et al, *supra* note 226 at 220–21.

<sup>591</sup> *Ibid* at 220; *ICTY Kunarac Trial Judgment*, *supra* note 589 at para 485.

<sup>592</sup> *Prosecutor v Miroslav Kvočka, Mlado Radic, Zoran Zigic, Dragoljub Prcac, Trial Judgment*, IT-98-30/1-T, 2 November 2001 at para 153. See also *Prosecutor v Zejnil Delalic, Zdrakov Mucic, Hazim Delic, Esad Landzo, Trial Judgment*, IT-96-21-T, 16 November 1998 at para 470; *Prosecutor v Milorad Krnojelac, Trial Judgment*, IT-97-25-T, 15 March 2002 at 184; *ICTY Kunarac Trial Judgment*, *supra* note 589 at para 155; *ICTY, Limaj et al Trial Judgment*, *supra* note 188 at para 128; *ICTY Haradinaj Retrial Judgment*, *supra* note 589 at para 418; *ICTY, Limaj et al Trial Judgment*, *supra* note 188 at para 239; *Prosecutor v Milan Martić, Trial Judgment*, IT-95-11-T, 12 June 2007 at para 77; *ICTY Mrksic Trial Judgment*, *supra* note 589 at para 515; *ICTY Brdanin Trial Judgment*, *supra* note 589 at para 487.

<sup>593</sup> Cameron et al, *supra* note 226 at 216.

<sup>594</sup> *Ibid* at 217. On this point, Cameron et al. reference *ICTY Kvočka Appeal Judgment*, *supra* note 589 at para 140; *ICTR, Akayesu Trial Judgment*, *supra* note 310 at para 682.

<sup>595</sup> Cameron et al, *supra* note 226 at 218. On this point, Cameron et al. reference *ICTY Krnojelac Trial Judgment*, *supra* note 592 at para 182; *ICTY Mrksic Trial Judgment*, *supra* note 589 at para 514.

<sup>596</sup> Cameron et al, *supra* note 226 at 218; *ICTY Krnojelac Trial Judgment*, *supra* note 592 at para 182; *ICTY, Limaj et al Trial Judgment*, *supra* note 188 at para 237.

<sup>597</sup> *The Prosecutor v Mladen Naletilic, aka “Tuta”, Vinko Martinovic, a.k.a “Stela”, Appeal Judgment*, IT-98-34-A, 3 May 2006 at para 300.

<sup>598</sup> *ICTY Kvočka Trial Judgment*, *supra* note 592 at paras 148-49; *ICTY Brdanin Trial Judgment*, *supra* note 589 at para 484; *ICTY, Limaj et al Trial Judgment*, *supra* note 188 at para 236; *ICTY Mrksic Trial Judgment*, *supra* note 589 at para 514; *ICTY Haradinaj Retrial Judgment*, *supra* note 589 at para 417.

of the suffering need not even be visible after the commission of the crime”.<sup>599</sup> Acts that have been deemed torture include “suffocation by or under water” and “mock executions”.<sup>600</sup>

Cruel treatment and inhuman treatment are essentially indistinguishable from one another.<sup>601</sup> They have been defined as “[forms of] treatment which cause[] serious mental or physical suffering or injury or constitute[] a serious attack on human dignity”.<sup>602</sup> Unlike torture, cruel or inhuman treatment does not require that the suffering or injury be inflicted with a specific purpose.<sup>603</sup> The threshold for the severity of suffering under cruel or inhuman treatment is also lower than that under torture.<sup>604</sup> More often than not, cruel treatment will consist of “a combination or accumulation of several acts which, taken individually, may not amount to cruel treatment.”<sup>605</sup> In assessing whether an act or acts amount to cruel treatment, the ICTY has considered “the nature of the act or omission, the context in which it occurs, its duration and/or repetition, the physical, mental and moral effects of the act on the victim and the personal circumstances of the victim, including age, sex and health.”<sup>606</sup> While the suffering does “not need to be lasting”, it does need to be “real and serious”.<sup>607</sup> The duration of the effects of the cruel treatment may, however, contribute to the determination of seriousness.<sup>608</sup> Examples of acts that have been deemed cruel treatment include beatings and attempted murder.<sup>609</sup> Corporal

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<sup>599</sup> *ICTY Brdanin Trial Judgment*, *supra* note 589 at para 484.

<sup>600</sup> Cameron et al, *supra* note 226 at 219.

<sup>601</sup> Nowak & Janik, *supra* note 584 at 321; Cameron et al, *supra* note 226 at 212.

<sup>602</sup> *ICTY Delalic Trial Judgment*, *supra* note 592 at para 551.

<sup>603</sup> Nowak & Janik, *supra* note 584 at 321; Cameron et al, *supra* note 226 at 212.

<sup>604</sup> *ICTY Delalic Trial Judgment*, *supra* note 592 at para 542.

<sup>605</sup> Cameron et al, *supra* note 226 at 212. On this point, Cameron et al. reference *Dougoz v Greece, Judgment*, Application no 40907/98, 6 March 2001 at para 46; *Jovchev v Bulgaria, Trial Judgment*, Application no 41211/98 2 February 2006 at para 137; UN Committee against Torture, *Considerations of reports submitted by States parties under Article 19 of the Convention: Israel*, UN Doc A/52/44, 10 September 1997 at para 257.

<sup>606</sup> *ICTY Krnojelac Trial Judgment*, *supra* note 592 at para 131. Some or all of these considerations are also relied on in other ICTY cases, *ICTY Hadzihasanovic Trial Judgment*, *supra* note 513 at para 33; *ICTY Oric Trial Judgment*, *supra* note 569 at para 352; *ICTY Martić Trial Judgment*, *supra* note 592 at para 80; *The Prosecutor v Rasim Delić, Trial Judgment*, IT-04-83-T, 15 September 2008 at para 51; *The Prosecutor v Milan Lukic, Sredoje Lukic, Trial Judgment*, IT-98-32/1-T, 20 July 2009 at para 957; *The Prosecutor v Zdravko Tolimir, Trial Judgment*, IT-05-88/2-T, 12 December 2012 at para 854.

<sup>607</sup> Cameron et al, *supra* note 226 at 213. Here Cameron et al. quote *ICTY Krnojelac Trial Judgment*, *supra* note 592 at para 131. See also *ICTY Martić Trial Judgment*, *supra* note 592 at para 80; *ICTY Lukic Trial Judgment*, *supra* note 606 at para 957.

<sup>608</sup> *The Prosecutor v Mitar Vasiljevic, Trial Judgment*, IT-98-32-T, 29 November 2002 at para 235.

<sup>609</sup> On beatings as cruel treatment see *The Prosecutor v Goran Jelisić, Trial Judgment*, IT-95-10-T, 14 December 1999 at paras 42-45; *ICTY Oric Trial Judgment*, *supra* note 569 at para 352; *ICTY Hadzihasanovic Trial Judgment*, *supra* note 513 at para 35. On attempted murder as cruel treatment see *ICTY Vasiljevic Trial Judgment*, *supra* note 608 at para 239; *ICTY Oric Trial Judgment*, *supra* note 569 at para 352.

punishment is explicitly prohibited in Additional Protocol II as well as under customary international law.<sup>610</sup>

#### 4.3.5 Outrages upon Personal Dignity and Humiliating and Degrading Treatment

The prohibition on “outrages upon personal dignity” under Common Article 3 and Article 4(2)(e) of Additional Protocol II includes, but is not limited to, “humiliating and degrading treatment,” although “it is hard to conceive of ‘outrages’ which would not be humiliating or degrading.”<sup>611</sup> This prohibition is also considered to be customary international law.<sup>612</sup> While acts prohibited under outrages upon personal dignity may be related to cruel treatment or torture, it is its own distinct prohibition. Although the phrase is not defined in either the Geneva Conventions or the Additional Protocols, the ICTY defined “outrages upon personal dignity” as requiring that

the accused intentionally committed or participated in an act or an omission which would be generally considered to cause serious humiliation, degradation or otherwise would be a serious attack on human dignity.<sup>613</sup>

The assessment of whether an act satisfies this definition should consider both “subjective criteria related to the sensitivity of the victim” and “objective criteria related to the gravity of the act.”<sup>614</sup> A violation of the prohibition on outrages upon personal dignity may be the result of a single act or an aggregation of acts: “the seriousness of an act and its consequences may arise either from the nature of the act *per se* or from the repetition of an act or from a combination of different acts”.<sup>615</sup> There is no need for the humiliation and degradation to be long-lasting;

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<sup>610</sup> Henckaerts & Doswald-Beck, *supra* note 5 at Rule 91.

<sup>611</sup> Cameron et al, *supra* note 226 at 228.

<sup>612</sup> Henckaerts & Doswald-Beck, *supra* note 5 at Rule 90.

<sup>613</sup> *ICTY Kunarac Trial Judgment*, *supra* note 589 at para 514; *Prosecutor v Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic, Appeal Judgment*, IT-96-23 & IT-96-23/1-A, 12 June 2002 at paras 161, 163. See also *Prosecutor v Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj, Trial Judgment*, IT-04-84-T, 3 April 2008 at para 132; *ICTR Bagosora Trial Judgment*, *supra* note 580 at para 2250; *The Prosecutor v Tharcisse Renzaho, Trial Judgment*, Case No ICTR-98-42-T, 24 June 2011 at para 809; *ICTR, Nyiramasuhuko Trial Judgment*, *supra* note 103 at para 6178; *SCSL Charles Taylor Trial Judgment*, *supra* note 569 at para 431; *SCSL RUF Trial Judgment*, *supra* note 579 at para 175; *SCSL AFRC Trial Judgment*, *supra* note 581 at para 716.

<sup>614</sup> Cameron et al, *supra* note 226 at 227. On this point Cameron et al. reference *ICTY Aleksovski Trial Judgment*, *supra* note 539 at para 556; *ICTY Kunarac Trial Judgment*, *supra* note 589 at para 504; *ICTY Kunarac Appeal Judgment*, *supra* note 613 at paras 162-63.

<sup>615</sup> Cameron et al, *supra* note 225 at 227.; Here Cameron et al. are quoting *ICTY Aleksovski Trial Judgment*, *supra* note 538 at para 57.

however, it must be “real and serious”.<sup>616</sup> It has been suggested that this threshold only applies to the prohibition under international criminal law and that, while a threshold must still be met under IHL, it is likely to be lower than that found in international criminal law.<sup>617</sup>

No distinction has been made between humiliating treatment and degrading treatment in international case law and “their ordinary meaning is nearly identical.”<sup>618</sup> “[T]he severity of the suffering imposed is of less importance than the humiliation of the victim, regardless of whether this is in the eyes of others or those of the victim himself or herself.”<sup>619</sup> Acts which have been considered to violate the prohibition include “forced public nudity”<sup>620</sup> and “rape and sexual violence”.<sup>621</sup>

#### 4.3.6 Rape and Other Forms of Sexual Violence

Rape and other forms of sexual violence are not explicitly prohibited under Common Article 3; however, they are captured by both the prohibition on “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” and the prohibition on “outrages upon personal dignity, in particular humiliating and degrading treatment”.<sup>622</sup> These prohibitions also exist under article 4(2) of Additional Protocol II, which includes explicit prohibitions on “rape, enforced prostitution and any form of indecent assault”. While enforced prostitution and indecent assault are not explicitly noted in Common Article 3, they are listed as forms of inhumane treatment in article 27 of Geneva Convention IV and thus can be considered prohibited under Common Article 3’s requirement that all protected persons be treated humanely and without distinction. Rape and sexual violence were defined by the Trial Chamber of the International Criminal Court as:

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<sup>616</sup> *ICTY Kunarac Trial Judgment*, *supra* note 589 at para 501; *ICTY Kvočka Trial Judgment*, *supra* note 592 at para 168.

<sup>617</sup> Sivakumaran, *supra* note 46 at 264.

<sup>618</sup> Cameron et al, *supra* note 226 at 228.

<sup>619</sup> Nowak & Janik, *supra* note 584 at 322. Nowak and Janik reference *Tyler v United Kingdom, Judgment*, 25 April 1978 at para 32; Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2d ed (Kehl: Norbert Paul Engel Verlag, 2005) at 165.

<sup>620</sup> Cameron et al, *supra* note 226 at 228. See also *ICTY Kunarac Trial Judgment*, *supra* note 589 at paras 766-74.

<sup>621</sup> Cameron et al, *supra* note 226 at 228. See also paras 270-75 *ICTY Furundzija Trial Judgment*, *supra* note 587; *The Prosecutor v Augustin Ndingiyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye, Innocent Sagahutu, Trial Judgment*, Case No ICTR-00-56-T, 17 May 2011 at para 2158.

<sup>622</sup> Patricia Viseur Sellers & Indira Rosenthal, “Rape and Other Sexual Violence” in Andrew Clapham, Paola Gaeta & Marco Sassoli, eds, *The 1949 Geneva Conventions: A Commentary* (Oxford: Oxford University Press, 2015) 360 at 360.



1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent...<sup>623</sup>

Circumstances which are coercive can include, but are not limited to, “force, threat of force, or coercion cause, for example, by fear of violence, duress, detention, psychological oppression or abuse of power.”<sup>624</sup> Rape and sexual violence can constitute torture where the requisite elements of the prohibition on torture are met.<sup>625</sup>

While historically this prohibition addressed the protection of women from sexual violence and rape,<sup>626</sup> it is now understood to protect all persons, regardless of gender.<sup>627</sup> This can be seen in the language of Additional Protocol II article 4(2)(e) and article 75(2)(b) of Additional Protocol I. The gender-neutral prohibition of rape and sexual violence is also a rule of customary international law.<sup>628</sup>

#### 4.3.7 Collective Punishment

Collective punishment is not prohibited under Common Article 3; however, certain acts commonly used as forms of collective punishment, such as taking hostages or outrages on personal dignity, are prohibited.<sup>629</sup> Collective punishment is explicitly prohibited under Article

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<sup>623</sup> ICC, *supra* note 544 at Articles 7(1)9g)-1, also see Article 8(2)(b)(xxii)-1; *Situation in the Central African Republic in the Case of Prosecutor v Jean-Pierre Bemba Gombo, Trial Judgment*, ICC-01/05-01/08, 21 March 2016 at paras 99, 102. See also Phillip Weiner, “The Evolving Jurisprudence of the Crime of Rape in International Criminal Law” (2013) 54:3 Boston College Law Review 1207.

<sup>624</sup> Cameron et al, *supra* note 226 at 237.

<sup>625</sup> *ICTY Delalic Trial Judgment*, *supra* note 592 at paras 494-96.

<sup>626</sup> For example, the explicit language in Article 27(2) of Geneva Convention IV reads: “Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”

<sup>627</sup> Sandesh Sivakumaran, “Sexual Violence against Men in Armed Conflict” (2007) 18 *European Journal of International Law* 253; Cameron et al, *supra* note 226 at 238, fn 614, noting “With the exception of forced pregnancy, forced abortion and forced inspection of virginity, which, by their nature, can only be committed against women and girls.”

<sup>628</sup> Henckaerts & Doswald-Beck, *supra* note 5 at Rule 93.

<sup>629</sup> Shane Darcy, “The Prohibition of Collective Punishment” in Andrew Clapham, Paola Gaeta & Marco Sassoli, eds, *The 1949 Geneva Conventions: A Commentary* (Oxford: Oxford University Press, 2015) 1155 at 1164.

4(2)(b) of Additional Protocol II. It was also purposely included under Article 4, “Fundamental Guarantees”, as opposed to Article 6, “Penal Prosecutions”, to ensure that this prohibition was not limited to penalties issued by courts.<sup>630</sup> The prohibition is also considered customary international law in NIACs.<sup>631</sup> Collective punishment refers to “penalties of any kind inflicted on persons or entire groups of persons, in defiance of the most elementary principles of humanity, for acts that these persons have not committed”.<sup>632</sup> The prohibition on collective punishment applies to “civilians in the hands of the enemy, both in occupied territories and in the territories of the parties” to the conflict.<sup>633</sup> Collective punishment can be distinguished from other collective measures on the basis of the purpose for which the act is undertaken: the purpose is to punish in “response to a prior unlawful or hostile act”.<sup>634</sup> Consequently, collective punishment may consist of a wide range of acts including “property destruction, murder of civilians, detention, prolonged curfews, and inhuman treatment”.<sup>635</sup>

#### 4.3.8 Pillage

Pillage is prohibited under Article 4(2)(g) of Additional Protocol II, as well as under customary international law applicable to NIACs.<sup>636</sup> It has not been clearly defined in international humanitarian law; however, the ICTY Trial Chamber has provided this definition:

all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as “pillage”.<sup>637</sup>

The prohibition of pillage includes “both organized pillage and pillage resulting from isolated acts of indiscipline.”<sup>638</sup> Even though this prohibition is firmly established in IHL, pillage tends to be quite prevalent in armed conflicts.<sup>639</sup> While the ICTY definition above provides clarity, the

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<sup>630</sup> Junod, *supra* note 514 at paras 4535-4536.

<sup>631</sup> Henckaerts & Doswald-Beck, *supra* note 5 at Rule 103; UN, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, UN Doc S/2000/915, 14 October 2000 at para 14.

<sup>632</sup> Oscar M Uhler & Henri Coursier, eds, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958) at 225.

<sup>633</sup> Darcy, *supra* note 629 at 1164.

<sup>634</sup> *Ibid* at 1170.

<sup>635</sup> *Ibid*. See also Junod, *supra* note 514 at paras 4535-4536.

<sup>636</sup> Henckaerts & Doswald-Beck, *supra* note 5 at Rule 52.

<sup>637</sup> *ICTY Delalic Trial Judgment*, *supra* note 592 at para 591. This definition was subsequently adopted by the Appeals Chamber in *Prosecutor v Dario Kordic and Mario Cerkez*, *Trial Judgment*, IT-95-14/2-A, 17 December 2004 at para 79. Black’s Law Dictionary provides a very clear and concise definition of *Pillage*.

<sup>638</sup> Junod, *supra* note 514 at para 4542.

<sup>639</sup> See Section 5.3.1 in the following chapter.

question of whether pillage is limited to appropriation for personal or private use, thereby permitting appropriation for reasons of military necessity, is still under debate.<sup>640</sup> This question arises due to the differences between international criminal law and IHL: this focus on personal or private use is an element of the crime under the Rome Statute of the International Criminal Court,<sup>641</sup> but the idea that it applies to IHL has been strongly contested by some commentators.<sup>642</sup>

#### 4.3.9 Recruitment or Use of Children under 15 Years Old

Of the specific protection of civilians prohibitions in Common Article 3 and Additional Protocol II, the prohibition of the recruitment or use of children under 15 years in hostilities is the one most directly linked to the specific context of armed conflict. Although peacetime protections for children prohibit kidnapping and forced labour,<sup>643</sup> the IHL prohibition captures the particular harm of causing a child to perform the functions of a soldier within an armed conflict, which has been labelled one of the “worst forms of child labour”.<sup>644</sup> The prohibition on the recruitment and use of children under 15 years of age in hostilities is absolute in NIACs because children cannot directly participate in hostilities as a combatant, nor can they participate indirectly, such as to deliver food or to serve as a domestic servant for combatants.<sup>645</sup> It is a rare example of a rule of IHL that seems to provide stronger protection in NIACs than in IACs. This is because, while the prohibition is absolute in NIACs, in international armed conflicts parties are only required to take “all feasible measures” to avoid the recruitment of children.<sup>646</sup> Additionally, their “direct participation” is prohibited in international armed conflicts as opposed to *any* participation in hostilities in Additional Protocol II.<sup>647</sup> Customary IHL applicable to both international armed conflicts and NIACs prohibits both the recruitment of children and participation of children in

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<sup>640</sup> See, e.g., Sivakumaran, *supra* note 46 at 426–28; Kerrin Geoffrey Buck, “Displacement and dispossession: redefining forced displacement and identifying when forced displacement becomes pillage under international humanitarian law” (2017) 2 *Journal of International Humanitarian Action* Article 5 at 13.

<sup>641</sup> ICC, *supra* note 545 at Article 8(2)(e)(v).

<sup>642</sup> Buck, *supra* note 640 at 13; James G Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources* (New York: Open Society Foundations, 2011) at 19–22.

<sup>643</sup> *Convention on the Rights of the Child*, UN, 20 November 1989 [*Convention on the Rights of the Child*] at Articles 32, 38; ICESCR, *supra* note 405 at Article 10(3).

<sup>644</sup> *Worst Forms of Child Labour Convention, C182*, International Labour Organization, 17 June 1999 [*Worst Forms of Child Labour Convention, C182*].

<sup>645</sup> See, e.g., Sivakumaran, *supra* note 46 at 317–17.

<sup>646</sup> *Additional Protocol I*, *supra* note 5 at Article 77(2).

<sup>647</sup> *Ibid* at Article 77.

hostilities.<sup>648</sup> The Additional Protocol II prohibition includes not only conscription, but also the voluntary enlistment of children under fifteen years.<sup>649</sup> The prohibition on participation in hostilities includes activities such as “gathering information, transmitting orders, transporting ammunition and foodstuffs, or acts of sabotage.”<sup>650</sup>

The minimum age for participation in armed conflict set by Additional Protocol II was the subject of considerable debate during the drafting of the provision.<sup>651</sup> Some felt that the age limit should be set at 18 years of age.<sup>652</sup> Under international human rights law, persons under the age of 18 are considered children.<sup>653</sup> While the *Convention on the Rights of the Child* (CRC) does not change the 15 year age limit in IHL, it states that, when recruiting children between the ages of 15 and 18, “States Parties shall endeavour to give priority to those [children] who are oldest.”<sup>654</sup> The 2000 *Optional Protocol on the Involvement of Children in Armed Conflict* sets the age for recruitment and participation in armed conflict as 18 years.<sup>655</sup> Eighteen years of age is also used in the Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups.<sup>656</sup> Despite the wide ratification of this Protocol as well as domestic legislation implementing the 18 year old standard,<sup>657</sup> the use of children under 18 years, as well as under 15 years, continues to be common in armed conflicts, such as in the ongoing conflict in the Democratic Republic of Congo.

#### 4.4 Conclusion

Protections for civilians in NIACs appear fairly robust given the extensive list of prohibitions in Common Article 3 and Additional Protocol II, and particularly their expansion through rules of customary IHL. Yet, while there are many examples of compliance with these protections by

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<sup>648</sup> Henckaerts & Doswald-Beck, *supra* note 5 at Rules 136 and 137.

<sup>649</sup> Junod, *supra* note 514 at para 4557.

<sup>650</sup> *Ibid.*

<sup>651</sup> *Ibid* at para 4556.

<sup>652</sup> *Ibid.*

<sup>653</sup> *Convention on the Rights of the Child*, *supra* note 643 at Article 1.

<sup>654</sup> *Ibid* at Article 38(3).

<sup>655</sup> *CRC Optional Protocol*, *supra* note 407 at Articles 2-4. As of November 4, 2018 there were 168 States Parties to the Protocol. Countries who are not party to the Protocol include Liberia, Myanmar, Somalia, and Zambia.

<sup>656</sup> *Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, UNICEF, February 2007 [*Paris Principles and Guidelines on Children and Armed Forces or Armed Groups*] at 2.0.

<sup>657</sup> *Loi No 09/001 du 10 Janvier 2009 Portant Protection de l'enfant*, DRC [*Loi No 09/001 du 10 Janvier 2009 Portant Protection de l'enfant*] at Articles 2(1) and 71.

armed groups,<sup>658</sup> there is also evidence of numerous violations.<sup>659</sup> The first part of this chapter focused on the foundational principles and concepts of IHL. It demonstrated the centrality of humanitarian concerns, particularly for the protection of civilians. It also highlighted how military necessity will sometimes temper the extent to which civilians are protected in certain circumstances in armed conflict. This first part of the chapter also discussed the foundational principles of IHL applicable to NIACs: distinction, proportionality, precaution, and humane treatment. These principles limit both the methods and means by which conflicts can be conducted. These principles provide basic protection for civilians distinct from that provided to individuals during peace insofar as they require combatants to distinguish between legal targets in the form of enemy combatants and illegal targets in the form of civilians. However, military necessity means that this protection for civilians in conflict is not absolute. The second part of the chapter focused on some acts specifically prohibited in NIACs, such as murder, torture, and rape. The point was made that these prohibited acts, with the possible exception of the recruitment and use of child soldiers, are drawn from acts criminalized in domestic criminal law. In other words, they provide civilians in armed conflict with the same protections afforded to individuals in peacetime.

This thesis identifies a gap between the protections for individuals in peacetime and the protections needed to better protect civilians from combatant violence during armed conflict. The thesis argues that new substantive IHL rules are needed in order to address this distinction between peace and war and to better realize the humanitarian goals of IHL. This chapter has helped advance this argument by showing that: (1) a review of existing IHL is consistent with its humanitarian objective and (2) existing specific protections for civilians during conflict are largely imported from domestic criminal law protections for individuals in peacetime. Existing IHL protections fail to account for the exceptional context of armed conflict and, consequently, ignore certain problematic behaviours that pose a particular risk to civilians in conflict. Chapter 8 will examine combatant behaviours that are regulated in some forms during peacetime but are currently unregulated under IHL and must be addressed for civilian protection.

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<sup>658</sup> ICRC, “IHL in Action | Respect for the law on the battlefield”, online: *IHL in Action* <<https://ihl-in-action.icrc.org/>>.

<sup>659</sup> For examples, see Section 5.3 in the following chapter.

The next chapter turns to the two case studies examined in this thesis, Sierra Leone and the Democratic Republic of Congo. It examines the widespread violations directed against civilians by non-state armed groups that occurred during the internal armed conflicts in these two countries. The mere existence of these violations does not usually provide any insight into psychological factors that may have contributed to their commission. However, an examination of cognitive factors that may be contributing to these violations could be one means of identifying new ways to realize the humanitarian objective of civilian protection in IHL.

## Chapter 5

### 5 International Humanitarian Law Violations in Sierra Leone and the Democratic Republic of Congo

The preceding chapter outlined the existing IHL rules for the protection of civilians during NIACs and demonstrated that existing IHL protections for civilians are based largely on protections equally afforded to individuals during peacetime. This chapter is intended to demonstrate the prevalence of violations of specific acts prohibited in IHL for the protection of civilians during armed conflict in practice. This chapter examines violations of these specific prohibited acts in case studies of two conflict-affected countries: Sierra Leone and the DRC. In the last three decades, these countries have experienced long-term armed conflict. First, Sierra Leone experienced a violent civil war from 1991-2002. In the DRC, escalating levels of violence in the early 1990s led to the First Congo War (1996-1997), the Second Congo War (1998-2003), and ongoing conflict between the national armed forces and armed groups or between multiple armed groups in the eastern provinces of the country. Chapter 2 discussed some of the reasons behind the selection of these two countries as case studies in this thesis. This chapter focusses specifically on the widespread IHL violations of civilian protections for which these conflicts have become known.

This chapter begins with a brief introduction to the two countries, first Sierra Leone and then the DRC, and the conflicts they have experienced. These introductory sections provide basic demographic and geographic information, as well as brief histories of the conflicts in each of the two case study countries. This provides the context to explain the widespread IHL violations that are the focus of this chapter. The chapter then turns to an examination of IHL violations directed against civilians in Sierra Leone and the DRC. Although chapter 4 discussed existing specific IHL protections for civilians separately,<sup>660</sup> during armed conflict violations of these IHL protections do not occur in isolation from one another. Rather, during conflict, some or all of the

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<sup>660</sup> The specific prohibitions discussed in chapter 4 are violence to life and person, murder, mutilation, torture and cruel treatment, outrages upon personal dignity and humiliating and degrading treatment, rape and other sexual violence, collective punishment, pillage, and the recruitment or use of children under 15 years old.

civilian IHL protections may be violated concurrently during one military operation<sup>661</sup> and/or the cumulation of different prohibited acts can amount to other violations, such as a violation of the prohibition on terrorizing the civilian population.<sup>662</sup> Consequently, to structure the discussion of IHL violations, I have organized the violations that occurred in Sierra Leone and the DRC into three categories, which are inclusive of the prohibited acts discussed in chapter 4. The three categories I use are (1) theft of civilian and public goods; (2) forced recruitment of individuals for various tasks; and, (3) violation of bodily integrity and/or terrorization of civilians. The chapter examines IHL violations in each of these three categories in order to demonstrate how little insight mere knowledge of IHL violations provides to understand the psychology behind the violations.

The discussion of IHL violations in this chapter serves two key purposes in this thesis. First, the chapter demonstrates the prevalence of violations of IHL protections for civilians, which indicates that, in practice, the current status quo of IHL is not providing sufficient protection for civilians during armed conflict. It would be easy to assume that these violations are purely an issue of non-compliance with existing IHL that can be addressed through engagement, education, and training with armed groups. However, the second key point of the chapter is that the prevalence of violations in practice does not in and of itself provide much, if any, insight into the psychology of combatants committing these IHL violations, even though that psychology influences the commission of these IHL violations. This is important because the theories of social psychology and criminology discussed in chapter 7 explain how combatant behaviour is adversely affected by psychological processes, such as dehumanization and the abdication of responsibility for one's actions, that reframe combatants' conceptions of right and wrong and, in so doing, fundamentally alter the way in which combatants view the IHL rules intended to protect civilians. This reinforces the fact that combatant psychology can provide information not

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<sup>661</sup> For example, in the DRC, an attack on Bogoro on 24 February 2003 included acts of direct attacks on civilians, murder, rape and sexual slavery, the use of children under the age of 15 years, destruction of property and pillage: *Situation in the Democratic Republic of Congo in the Case of The Prosecutor v Germain Katanga, Judgment pursuant to article 74 of the Statute*, ICC-01/04-01/07, 7 March 2014 at paras 809-41, 915-24, 925-32, 985-1019, 1051-65. In Sierra Leone, the AFRC attack on Freetown beginning on 6 January 1999 included the unlawful killing of civilians, rape, outrages on personal dignity, violence to life, health and physical or mental suffering, the use of children under the age of 15 years, abductions and forced labour, pillage, and acts of terrorism.

<sup>662</sup> See, e.g., *SCSL AFRC Trial Judgment*, *supra* note 581 at paras 1579-84. Among other acts the cumulation of murder, looting, destruction of property, and mutilation during the AFRC's attack on Freetown in January 1999 were found to amount to a violation of the prohibition on terrorizing the civilian population.



otherwise readily available or apparent from mere awareness of the occurrence of IHL violations. Thus, this chapter's discussion of the prevalence of IHL violations in the context of the Sierra Leone Civil War and the conflicts in the DRC, demonstrates that the psychology of IHL violations can provide a new means of examining such violations and can reveal deeper insight than mere knowledge of the existence of widespread IHL violations.

### 5.1 Sierra Leone: Demographics and Civil War

The first focus conflict in this thesis is the Sierra Leone Civil War. This section will provide some brief demographics for Sierra Leone and facts about the conflict to provide context for the subsequent discussion of IHL violations during this armed conflict.

Sierra Leone, a former British colony that gained independence in 1961, is a small country in West Africa. It is bordered by Guinea to the northeast, Liberia to the southeast, and the North Atlantic Ocean to the southwest. It is divided into four provinces and one area,<sup>663</sup> sixteen districts,<sup>664</sup> and 190 chiefdoms.<sup>665</sup> The capital, Freetown, is located in the Western Area on the coast of Sierra Leone. Its current population is approximately 7.4 million people.<sup>666</sup> There are sixteen different ethnic groups in Sierra Leone, the largest of which are the Temne, located primarily in the north and around Freetown, and the Mende, who are predominantly located in southeastern Sierra Leone and the Kono district.<sup>667</sup> The most recent figures on poverty in Sierra Leone date from 2011, when the World Bank found that over 50% of the country's population was living in extreme poverty (i.e., living on U.S. \$1.90 or less a day).<sup>668</sup> According to data from

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<sup>663</sup> Eastern Province, Northern Province, North West Province (created in August 2017), Southern Province, and the Western Area.

<sup>664</sup> Kailahun, Kenema, and Kono in Eastern Province; Bombali, Falaba (created in August 2017), Koinadugu, and Tonkolili in the Northern Province; Kambia, Karene (created August 2017), and Port Loko in the North West Province; Bo, Bonthe, Moyamba, and Pujehun in the Southern Province; and, Western Rural and Western Urban in the Western Area.

<sup>665</sup> Prior to August 2017 there were only 149 chiefdoms in Sierra Leone. For a list of all chiefdoms see: "Sierra Leone Web - Districts and Chiefdoms of Sierra Leone", online: <<http://www.sierra-leone.org/chiefdoms.html>>.

<sup>666</sup> BBC News, "Sierra Leone country profile - BBC News", (5 April 2018), online: <<https://www.bbc.com/news/world-africa-14094194>>. In 1991 at the beginning of the civil war, Sierra Leone's population was around four million: "Sierra Leone - Population 1991 | countryeconomy.com", online: <<https://countryeconomy.com/demography/population/sierra-leone?year=1991>>; "Population Pyramids of the World from 1950 to 2100 - Sierra Leone 1991", online: *PopulationPyramid.net* <<https://www.populationpyramid.net/sierra-leone/1991/>>.

<sup>667</sup> The other ethnic groups are, in alphabetical order: Bullon, Creole (or Krio), Fula, Gola, Kissi, Koranko, Krim, Limba, Loko Madingo, Sherbro, Soso, Yalunka, and Vai: Human Rights Watch, *supra* note 18 at 9.

<sup>668</sup> World Bank, "Poverty headcount ratio at \$1.90 a day (2011 PPP) (% of population) - Sierra Leone", online: *World Bank* <<https://data.worldbank.org/indicator/SI.POV.DDAY?locations=SL>>.

the International Monetary Fund published in 2018, Sierra Leone ranked as the tenth poorest country in the world.<sup>669</sup>

In early 1991, a Sierra Leonean armed group, the Revolutionary United Front (RUF) crossed into Sierra Leone from Liberia where it had been training for several months.<sup>670</sup> The RUF was supported by members of the Liberian armed group, the National Patriotic Front of Liberia.<sup>671</sup> This marked the beginning of the Sierra Leone Civil War, which would last until 2002. Between 1991 and 2002, as many as 75,000 people were killed, as well as a further 20,000 people mutilated, and approximately half the country's population were displaced.<sup>672</sup> Although the conflict began with only two parties, the RUF and the Sierra Leone Army, other armed groups emerged during the conflict. Many of these groups had their origins in local defense groups and traditional hunting societies,<sup>673</sup> the largest of which were the Kamajors who fought on the side of the Sierra Leone government.<sup>674</sup> Control of the government switched hands several times during the conflict. A successful coup d'état installed a military junta government in 1992,<sup>675</sup> then a democratically elected government, the Sierra Leone People's Party (SLPP), in 1996.<sup>676</sup> That

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<sup>669</sup> International Monetary Fund, "World Economic Outlook (April 2019) - GDP based on PPP, share of world", online: *International Monetary Fund* <<https://www.imf.org/external/datamapper/PPPSH@WEO>>; Will Martin, "The poorest countries in the world - Business Insider", (1 June 2018), online: *Business Insider* <<https://www.businessinsider.com/poorest-countries-in-the-world-2018-5/?r=nordic>>.

<sup>670</sup> See, e.g., Daniel Byman et al, *Trends in Outside Support for Insurgent Movements* (Santa Monica, CA & Arlington, VA: RAND, 2001) at 74–75; Sierra Leone Truth and Reconciliation Commission, *supra* note 102 at para 126; Ibrahim Abdullah, "Bush Path to Destruction: The Origin and Character of the Revolutionary United Front/Sierra Leone" (1998) 36:2 *Journal of Modern African Studies* 203.

<sup>671</sup> Byman et al, *supra* note 670 at 74–75; Sierra Leone Truth and Reconciliation Commission, *supra* note 102 at para 126; Abdullah, *supra* note 670.

<sup>672</sup> Danny Hoffman, "The Civilian Target in Sierra Leone and Liberia: Political Power, Military Strategy, and Humanitarian Intervention" (2004) 103:111 *African Affairs* 211 at 216; Mary Kaldor & James Vincent, *Evaluation of UNDP Assistance to Conflict-Affected Countries* (New York: United Nations Development Programme Evaluation Office, 2006) at 4. However, more conservative estimates place non-combatant deaths (as compared to all deaths, both soldiers and civilians, in Kaldor & Vincent) between 10,000 – 30,000 and displaced persons at approximately 1.5 million: Tammy Guberek et al, *Truth and Myth in Sierra Leone: An Empirical Analysis of the Conflict, 1991-2000*, A Report by the Benetech Human Rights Data Analysis Group and the American Bar Association (Benetech-ABA, 2006) at 4.

<sup>673</sup> See, e.g., Joe Alie, "The Kamajor Militia in Sierra Leone: Liberators or Nihilists?" in David J Francis, ed, *Civil Militia: Africa's Intractable Security Menace?* (Abingdon, UK: Ashgate, 2005) 51 at 56; Sierra Leone Truth and Reconciliation Commission, *supra* note 102 at Ch 4, para 289; *SCSL RUF Trial Judgment*, *supra* note 579 at para 16.

<sup>674</sup> See, e.g., Alie, *supra* note 673 at 56; *The Prosecutor v Moinina Fofana, Allieu Kondewa (CDF)*, *Trial Judgment*, SCSL-04-14-T, 2 August 2007 at para 80.

<sup>675</sup> See, e.g., *SCSL RUF Trial Judgment*, *supra* note 579 at para 13; Sierra Leone Truth and Reconciliation Commission, *supra* note 102 at Ch 3, paras 273-74.

<sup>676</sup> See, e.g., *SCSL RUF Trial Judgment*, *supra* note 579 at para 18; Amnesty International, *Sierra Leone Toward a future founded on human rights* (New York: Amnesty International, 1996) at 2.

government operated in exile after a second coup d'état in 1997 by members of the national armed forces who formed the new armed group, the Armed Forces Revolutionary Council (AFRC).<sup>677</sup> The local defence groups, including the Kamajors, came to be known collectively as the Civil Defence Forces (CDF) and were directed by the SLPP Government in exile. The CDF continued to fight on behalf of the SLPP Government after it was restored to power in 1998. The Lomé Peace Accord was signed between the SLPP Government, the AFRC, and RUF in 1999<sup>678</sup> and the end of the war was officially declared on 18 January 2002.<sup>679</sup> The eleven year-long civil war was characterized by widespread IHL violations against civilians recorded by international organizations, such as Human Rights Watch,<sup>680</sup> the Sierra Leone Truth Commission,<sup>681</sup> and the Special Court for Sierra Leone which tried the leaders of the three armed groups, the AFRC,<sup>682</sup> CDF,<sup>683</sup> and RUF<sup>684</sup> in the aftermath of the conflict.

## 5.2 Democratic Republic of Congo: Demographics and Civil Wars

The second case study in this thesis is the series of conflicts experienced in the DRC since the mid-1990s. This section will provide some brief demographics about the DRC and facts about these conflicts to provide context for the subsequent discussion of IHL violations during this civil war.

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<sup>677</sup> See, e.g., Amnesty International, *Sierra Leone, 1998 – a year of atrocities against civilians* (Amnesty International, 1998) at 4; Sierra Leone Truth and Reconciliation Commission, *supra* note 102 at Ch 3, para 695.

<sup>678</sup> *SCSL RUF Trial Judgment*, *supra* note 579 at para 41.

<sup>679</sup> See, e.g., *ibid* at para 44; Beth K Dougherty, “Sierra Leone” in Lavinia Stan & Nadya Nedelsky, eds, *Encyclopedia of Transitional Justice, Volume 2* (Cambridge, UK: Cambridge University Press, 2013) 426 at 427; Sierra Leone Truth and Reconciliation Commission, *supra* note 102 at Ch 3, paras 1505-1506.

<sup>680</sup> See, e.g., Human Rights Watch, “Shocking War Crimes in Sierra Leone”, (24 June 1999), online: *Human Rights Watch* <<https://www.hrw.org/news/1999/06/24/shocking-war-crimes-sierra-leone>>; Human Rights Watch, “The Armed Conflict in Sierra Leone”, (11 April 2012), online: *Human Rights Watch* <<https://www.hrw.org/news/2012/04/11/armed-conflict-sierra-leone>>; Human Rights Watch, *supra* note 18 at 10; Dufka, *supra* note 143; Human Rights Watch, “Sierra Leone: Sowing Terror - Atrocities against Civilians in Sierra Leone”, (July 1998), online: *Human Rights Watch* <<https://www.hrw.org/legacy/reports98/sierra/>>.

<sup>681</sup> Sierra Leone Truth and Reconciliation Commission, *Witness to Truth: Final Report of the TRC* (Accra, Ghana: Truth and Reconciliation Commission, Sierra Leone, 2004). See also, e.g., Rahmin Lamin, “Building Peace Through Accountability in Sierra Leone: The Truth and Reconciliation Commission and the Special Court” (2003) 38:2-3 *Journal of Asian and African Studies* 295; Dougherty, *supra* note 679.

<sup>682</sup> *SCSL AFRC Trial Judgment*, *supra* note 581; *The Prosecutor of the Special Court v Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu (AFRC), Appeal Judgment*, SCSL-2004-16-A, 22 February 2008.

<sup>683</sup> *SCSL CDF Trial Judgment*, *supra* note 674; *The Prosecutor v Moinina Fofana, Allieu Kondewa (CDF), Appeal Judgment*, SCSL-04-14-A, 28 May 2008.

<sup>684</sup> *SCSL RUF Trial Judgment*, *supra* note 579; *SCSL, RUF Appeal Judgment*, *supra* note 358.

The Democratic Republic of Congo (DRC) (formerly Zaire), in Central Africa, is a former Belgian colony that gained independence in 1960. It is the second largest country in Africa and the eleventh largest country in the world. Due to its size and location in Central Africa, it is bordered by numerous countries: Republic of Congo (and Atlantic Ocean) to the west; Angola to the southwest; Zambia to the south; the Central African Republic and South Sudan to the north; and Burundi, Rwanda, Tanzania, and Uganda to the east. It is divided into twenty-six provinces,<sup>685</sup> though prior to the 2006 constitution it consisted of only ten provinces and one city.<sup>686</sup> The capital, Kinshasa, is located in the far west of the country on the Congo River opposite the capital of the Republic of Congo, Brazzaville. The capital of the province of North Kivu, Goma, on the far east border with Rwanda is 1,573km (977 miles) by plane from Kinshasa or over 2,500km by road. The current population of the DRC is approximately 81.5 million.<sup>687</sup> There are over two hundred ethnic groups in the country and over two hundred languages, though many people speak one of the four “national” languages: Swahili, Tshiluba, Lingala, and Kongo.<sup>688</sup> The official language used in the DRC is French. The most recent figures on poverty in the DRC date from 2012 when the World Bank found that over 77% of the country’s population was living in extreme poverty (i.e., living on U.S. \$1.90 or less a day).<sup>689</sup> According to data from the International Monetary Fund published in 2018, the DRC ranked as the seventh poorest country in the world.<sup>690</sup>

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<sup>685</sup> Bas-Uele (Lower Uele), Equateur, Haut-Katanga (Upper Katanga), Haut-Lomami (Upper Lomami), Haut-Uele (Upper Uele), Ituri, Kasai, Kasai-Central, Kasai-Oriental (East Kasai), Kinshasa, Kongo Central, Kwango, Kwilu, Lomami, Lualaba, Mai-Ndombe, Maniema, Mongala, Nord-Kivu (North Kivu), Nord-Ubangi (North Ubangi), Sankuru, Sud-Kivu (South Kivu), Sud-Ubangi (South Ubangi), Tanganyika, Tshopo, Tshuapa.

<sup>686</sup> The ten provinces were Bandundu, Bas-Congo, Équateur, Kasai-Occidental, Kasai-Oriental, Katanga, Maniema, North Kivu, Orientale, and South Kivu. The one city (or city-province) was the capital of Kinshasa.

<sup>687</sup> BBC News, “DR Congo country profile - BBC News”, (1 August 2018), online: *BBC News* <<https://www.bbc.com/news/world-africa-13283212>>. “Population growth in the Democratic Republic of the Congo”, online: *WorldData.info* <<https://www.worlddata.info/africa/congo-kinshasa/populationgrowth.php>>; In 1996, at the official start of the First Congo War, the country’s population was approximately 43 million:

“Democratic Republic of the Congo Population size - data, chart”, online: *GlobalEconomy.com* <[https://www.theglobaleconomy.com/Democratic-Republic-of-the-Congo/Population\\_size/](https://www.theglobaleconomy.com/Democratic-Republic-of-the-Congo/Population_size/)>.

<sup>688</sup> René Lemarchand et al, “Democratic Republic of the Congo | Culture, History, & People”, online: *Britannica.com* <<https://www.britannica.com/place/Democratic-Republic-of-the-Congo>> at 3.

<sup>689</sup> World Bank, “Poverty headcount ratio at \$1.90 a day (2011 PPP) (% of population) - Congo, Dem Rep”, online: *World Bank* <<https://data.worldbank.org/indicator/SI.POV.DDAY?locations=CD>>.

<sup>690</sup> International Monetary Fund, *supra* note 669; Martin, *supra* note 669.

Armed conflict in the Democratic Republic of Congo is extremely complex and has spanned decades. Beginning in the early- to mid-1990s,<sup>691</sup> the violence continues today and seems, to some, destined to never end.<sup>692</sup> These decades have encompassed multiple armed conflicts, both international and non-international in nature. Some of these conflicts have been between the national armed forces of numerous countries in the region, though the most involved has been, without question, Rwanda.<sup>693</sup> The First Congo War was initiated in 1996 by the armed group Alliance des forces démocratiques pour la libération du Congo-Zaïre (Alliance of Democratic Forces for the Liberation of Congo; AFDL), supported by Rwanda,<sup>694</sup> and ended in 1997 with the successful overthrow of the government.<sup>695</sup> The Second Congo War, also known as Africa's World War due to the many foreign nations that were parties to the conflict, began in 1998 with a mutiny within the national armed forces (known currently as the Forces armées de la République Démocratique du Congo or FARDC) that led to the formation of the armed group, the Rassemblement congolais pour la démocratie (Rally for Congolese Democracy; RCD).<sup>696</sup>

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<sup>691</sup> See, e.g., Gérard Prunier, *Africa's World War Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe* (Oxford: Oxford University Press, 2009) at 37–72.

<sup>692</sup> Jason Burke, “‘The wars will never stop’ - millions flee bloodshed as Congo falls apart”, *The Guardian* (3 April 2018), online: <<https://www.theguardian.com/world/2018/apr/03/millions-flee-bloodshed-as-congos-army-steps-up-fight-with-rebels-in-east>>.

<sup>693</sup> See, e.g., David Shearer, “Africa's Great War” (1999) 41:2 *Survival* 89; Herbert Weiss, “Civil War in the Congo” (2001) 38:3 *Society* 67; Jeremy Weinstein, “Africa's ‘Scramble for Africa’: Lessons of a Continental War” (2000) 17:2 *World Policy Journal* 11; Jason Stearns, *Dancing in the Glory of Monsters: The Collapse of the Congo and the Great War of Africa* (New York: PublicAffairs, 2011) at 93–180; Roger Winter, “Lancing the Boil: Rwanda's Agenda in Zaire” in Howard Adelman & Govind C Rao, eds, *War and Peace in Zaire-Congo: Analyzing and Evaluating Intervention, 1996-1997* (Trenton, NJ: Africa World Press, 2004) 109; Ogenda Otunnu, “Uganda as a Regional Actor in Zairian War” in Howard Adelman & Govind C Rao, eds, *War and Peace in Zaire-Congo: Analyzing and Evaluating Intervention, 1996-1997* (Trenton, NJ: Africa World Press, 2004) 31; Filip Reyntjens, *The Great African War: Congo Regional Geopolitics, 1996-2006* (Cambridge, UK: Cambridge University Press, 2009) at 45–57; Prunier, *supra* note 691 at 113–48.

<sup>694</sup> See, e.g., Stearns, *supra* note 693 at 93–180; Shearer, *supra* note 693; Weiss, *supra* note 693; Weinstein, *supra* note 693; Winter, *supra* note 693; Reyntjens, *supra* note 693 at 45–57.

<sup>695</sup> See, e.g., William G Thom, “Congo-Zaire's 1996-97 Civil War in the Context of Evolving Patterns of Military Conflict in Africa in the Era of Independence”; Howard Adelman & Govind C Rao, “The Zairian War and Refugee Crisis 1996-1997: Creating a Culture of Conflict Prevention” in Howard Adelman & Govind C Rao, eds, *War and Peace in Zaire-Congo: Analyzing and Evaluating Intervention, 1996-1997* (Trenton, NJ: Africa World Press, 2004) 1; Heinrich Mathee, “State Collapse or New Politics? the Conflict in Zaire 1996-1997” (1999) 21:1 *Strategic Review for Southern Africa*.

<sup>696</sup> See, e.g., Human Rights Watch, “Human Rights Watch Condemns Civilian Killings by Congo Rebels”, (27 August 1998), online: *Human Rights Watch* <<https://www.hrw.org/news/1998/08/27/human-rights-watch-condemns-civilian-killings-congo-rebels>>; World Peace Foundation, “Democratic Republic of Congo (Zaire) | Mass Atrocity Endings”, (18 September 2015), online: *Mass Atrocity Endings* <<https://sites.tufts.edu/atrocityendings/2015/09/18/democratic-republic-of-congo-zaire/>>.

While the Second Congo War officially ended in 2003,<sup>697</sup> armed groups have continued to operate and clash frequently with the FARDC<sup>698</sup> and with each other.<sup>699</sup> Although violence has, for the most part, decreased since 2003 and many parts of the country have returned to relative peace and stability, the conflict, violence, and instability have never completely ended in the eastern part of the DRC, particularly in the provinces of North Kivu, South Kivu and Ituri (formerly part of Orientale province).<sup>700</sup> As in Sierra Leone's civil war, many small armed groups, known as mai-mai,<sup>701</sup> have formed under the pretense of protecting the local population in different areas in the East;<sup>702</sup> however, they also commit IHL violations against civilians.<sup>703</sup> Armed conflict in the DRC has been characterized by fluctuation and fragmentation in the nature and existence of non-state armed groups.<sup>704</sup> Groups have alternated between existing as non-state

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<sup>697</sup> See, e.g., Reyntjens, *supra* note 693 at 194–206; Stearns, *supra* note 693 at 181–306; Prunier, *supra* note 691 at 181–284.

<sup>698</sup> See, e.g., Thom, *supra* note 695; Jason Stearns, Judith Verweijen & Maria Eriksson Baaz, *The national army and armed groups in the eastern Congo: Untangling the Gordian knot of insecurity* (London, UK: Rift Valley Institute & Usalama Project, 2013); Reyntjens, *supra* note 693 at 45–57; Mathee, *supra* note 695; Adelman & Rao, *supra* note 695. Upon its renewal of the UN peacekeeping mission's mandate in the DRC in 2018, the Security Council noted: "the DRC has continued to suffer from recurring and evolving cycles of conflict and persistent violence by armed groups": UN Security Council, *Security Council Resolution 2409 (2018) (on extending the UN mission in DRC)*, 27 March 2018, S/RES/2409 (2018).

<sup>699</sup> For example, in Ituri province ethnic Lendu armed groups have fought ethnic Hema armed groups: see, e.g., Reyntjens, *supra* note 693 at 207–20. Another example has been clashes between armed groups for control of resource rich mining sites in Eastern Congo: see, e.g., UN Security Council, *Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of DR Congo*, 12 April 2001, S/2001/357; UN Security Council, *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, 16 October 2002, S/2002/1146; UN Security Council, *Report of the Secretary-General on the Organization Stabilization Mission in the Democratic Republic of Congo, 5 March 2014*, S/2014/15 at para 86; Human Rights Watch, *supra* note 143.

<sup>700</sup> See, e.g., Prunier, *supra* note 691 at 281–81. UN Secretary-General Reports to the UN Security Council on the UN's peacekeeping mission in the DRC have continued to contain a special section devoted to security issues in the Eastern Provinces of the country: see, e.g., UN Security Council, *United Nations Organization Stabilization Mission in the Democratic Republic of the Congo* "Report of the Secretary-General, 4 January 2019", S/2019/6; UN Security Council, *Third special report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, 16 August 2004*, S/2004/650 at paras 27–32, 34–46; UN Security Council, *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, 12 May 2011*, S/2011/298 at paras 12–28; UN Security Council, *supra* note 699 at paras 18–28.

<sup>701</sup> Mai-Mai is sometimes spelled Mayi-Mayi.

<sup>702</sup> See, e.g., Luca Jourdan, "Mayi-Mayi: Local Rebels in Kivu, DRC" (2011) 35:3–4 *Africa Development* 89 at 94–95; Franck van Acker & Koen Vlassenroot, "The Mai-Mai and the function of militia violence in eastern Congo" (2001) 4 *Politique Africaine* 103; Koen Vlassenroot, "Violence et Constitution de Milices dans l'Est du Congo: Le Cas des Mayi-Mayi" (2001) *Afrique des Grands Lacs Annuaire* 115.

<sup>703</sup> See, e.g., Jason Stearns, *Mai-Mai Yakutumba: Resistance and Racketeering in Fizi, South Kivu* (London, UK: Rift Valley Institute, 2013); UN Security Council, *Final Report of the Group of Experts on the Democratic Republic of Congo, 4 June 2018*, S/2018/531 at para 22; Jourdan, *supra* note 702; van Acker & Vlassenroot, *supra* note 702.

<sup>704</sup> See, e.g., Joanne Richards, "Implementing DDR in Settings of Ongoing Conflict: The Organization and Fragmentation of Armed Groups in the Democratic Republic of Congo (DRC)" (2016) 5:1 *Stability: International Journal of Security and Development* 11.

armed groups and existing as, or integrated into, the national armed forces.<sup>705</sup> Non-state armed groups have also frequently splintered in separate groups as a result of disputes among leaders and commanders.<sup>706</sup> This has led to the proliferation of armed groups in Eastern Congo and, as of December 2017, around 120 armed groups of varying sizes and levels of organization were believed to be operating in the eastern provinces of North and South Kivu.<sup>707</sup>

### 5.3 IHL Violations of Civilians Protections

As noted above, the conflicts in Sierra Leone and the DRC were and, in the case of the DRC, continue to be characterized by widespread IHL violations against civilians.<sup>708</sup> The following sections will discuss in more detail the specific IHL violations committed against civilians in practice during the Sierra Leone Civil War and the conflicts in the DRC. The substantive legal content of IHL protections for civilians was discussed in chapter 4. The reality of IHL violations in practice is that many violations often occur concurrently during a single operation.<sup>709</sup> For

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<sup>705</sup> For example, in 2009 Bosco Ntaganda, at the time the subject of an arrest warrant issued by the International Criminal Court, negotiated to integrate his Congrès national pour la defense du peuple (National Congress for the Defense of the People) into the FARDC and he himself received the rank of General in the FARDC: see, e.g., Human Rights Watch, “DR Congo: Chronology”, (21 August 2009), online: *Human Rights Watch* <<https://www.hrw.org/news/2009/08/21/dr-congo-chronology>>; UN Security Council, *Twenty-seventh report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, 27 March 2009, S/2009/160 at para 4; UN Security Council, *Letter dated 21 June 2012 from the Chair of the Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council* (2012) at para 66.

<sup>706</sup> For example, tension among leadership led to a split within the RCD in May 1999 and two groups emerged, the RCD and RCD-Goma. A further split within RCD-Goma would lead to the formation of RCD-ML in July-August 1999. See, e.g., Prunier, *supra* note 691 at 221, 225, 229.

<sup>707</sup> “Armed Actors in North and South Kivu”, (December 2017), online: *Kivu Security Tracker | Crisis Mapping in Eastern Congo* <<https://kivusecurity.nyc3.digitaloceanspaces.com/reports/3/Armed%20Actor%20Area%20of%20Control%20Map%20Eng%20Dec%202017.pdf>>.

<sup>708</sup> See, e.g., Anneke Van Woudenberg & Ida Sawyer, *You Will Be Punished: Attacks on Civilians in Eastern Congo* (New York: Human Rights Watch, 2009) at 52; Kirsten Johnson et al, “Association of Sexual Violence and Human Rights Violations with Physical and Mental Health in Territories of the Eastern Democratic Republic of the Congo” (2010) 304:5 *Journal of American Medical Association* 553 at 559; UN Security Council, *Security Council resolution 2098 (2013) (on extension of the mandate of the UN Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) until 31 Mar. 2014)*, 28 March 2013, S/RES/2098 (2013); UN Security Council, *Security Council Resolution 2053 (2012) (on extension of the mandate of the UN Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) until 30 June 2013)*, 27 June 2012, S/RES/2053(2012); Amelia Bookstein, *Beyond the Headlines: An Agenda for Action to Protect Civilians in Neglected Conflicts* (OXFAM, 2003) at 6, 20.

<sup>709</sup> For example, the Kamajors attack and capture of Koribondo, Sierra Leone on 15-16 February 1998, which included unlawful killings, terrorizing the civilian population, collective punishment, assault, destruction of property, and pillage: *SCSL CDF Trial Judgment*, *supra* note 674 at paras 420-30. The AFRC attack on Freetown, Sierra Leone beginning on 6 January 1999 included the unlawful killing of civilians, rape, outrages on personal dignity, violence to life, health and physical or mental suffering, the use of children under the age of 15 years, abductions and forced labour, pillage, and acts of terrorism: *SCSL AFRC Trial Judgment*, *supra* note 581 at paras 951, 1068, 1170, 1243, 1277, 1389, 1429, 1610.

example, in the DRC, an attack on Bogoro carried out on 24 February 2003 included direct attacks on civilians, murder, rape and sexual slavery, the use of children under the age of 15 years in hostilities, destruction of property and pillage.<sup>710</sup> Therefore, for the purposes of framing the discussion of IHL violations in the Sierra Leone and DRC conflicts in the following sections, I have grouped the most common IHL violations committed against civilians into three categories: (1) theft of civilian and public goods; 2) forced recruitment of individuals for various tasks; and, (3) violations of bodily integrity and/or terrorization of civilians.

### 5.3.1 Theft of Civilian or Public Goods

Pillage, the “unlawful appropriation of property in armed conflict”,<sup>711</sup> has been particularly prevalent in practice among armed groups in both Sierra Leone and the DRC.<sup>712</sup> This IHL violation was used by armed groups both as personal sources of income as well as a means to finance the activities of the armed group.<sup>713</sup> Members of armed groups were often unpaid and

<sup>710</sup> *ICC Katanga Trial Judgment*, *supra* note 661 at paras 809-41, 915-24, 925-32, 985-1019, 1051-65.

<sup>711</sup> *ICTY Delalic Trial Judgment*, *supra* note 592 at para 591.

<sup>712</sup> With regards to Sierra Leone see, e.g., UN Security Council, *Fifth Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone, 4 March 1999*, S/1999/237 at para 27; UN Security Council, *Special Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone, 7 January 1999*, S/1999/20 at para 19; David Keen, “Sierra Leone: War and its Functions” in Frances Stewart & Valpy Fitzgerald, eds, *War and Development, Volume 2: Country Experiences* (Oxford: Oxford University Press, 2001) 155 at 182–63; Sierra Leone Truth and Reconciliation Commission, *supra* note 102 at Ch 4, para 90. With regards to the DRC, see, e.g., *ICC Katanga Trial Judgment*, *supra* note 661 at paras 516, 519; UN Security Council, *Midterm report of the Group of Experts on the Democratic Republic of Congo, 19 July 2013*, S/2013/433\* at Annex 7; Human Rights Watch, “Congo: Rebel Fighting Imperils Beni Residents”, (12 June 2001), online: *Human Rights Watch* <<https://www.hrw.org/news/2001/06/12/congo-rebel-fighting-imperils-beni-residents>>; Human Rights Watch, “Eastern Congo Ravaged”, (15 May 2000), online: *Human Rights Watch* <<https://www.hrw.org/news/2000/05/15/eastern-congo-ravaged>>; Human Rights Watch, “What Kabila Is Hiding: Civilian Killings and Impunity in Congo (October 1997)”, (October 1997), online: *Human Rights Watch* <<https://www.hrw.org/legacy/reports/1997/congo/>>; Human Rights Watch, “DR Congo: Massive Increase in Attacks on Civilians”, (2 July 2009), online: *Human Rights Watch* <<https://www.hrw.org/news/2009/07/02/dr-congo-massive-increase-attacks-civilians>>; Human Rights Watch, “Renewed Crisis in North Kivu”, (23 October 2007), online: *Human Rights Watch* <<https://www.hrw.org/report/2007/10/23/renewed-crisis-north-kivu>>; UN Security Council, *supra* note 699; UN Security Council, *supra* note 699; Human Rights Watch, *supra* note 143; UN Security Council, *supra* note 699 at para 86.

<sup>713</sup> See, e.g., UN Security Council, *supra* note 712 at Annex 7; Jake Sherman, “Profit vs. Peace: The Clandestine Diamond Economy” (2000) 53:2 *Journal of International Affairs* 699 at 699; UN Environment Programme, *Sierra Leone Environment, Conflict and Peacebuilding Assessment, Technical Report* (Geneva: UNEP, 2010) at 15; David Pratt, *Sierra Leone: The Forgotten Crisis, Report to the Minister of Foreign Affairs, the Honourable Lloyd Axworthy, PC, MP from David Pratt, MP, Nepean-Carleton, Special Envoy to Sierra Leone* (Ottawa, 1999); *SCSL AFRC Trial Judgment*, *supra* note 581 at para 238; Sierra Leone Truth and Reconciliation Commission, *Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission, Vol 2* (Accra, Ghana: Truth and Reconciliation Commission, Sierra Leone, 2004) at Ch 2, para 93.



expected to pillage in order to ‘pay’ themselves.<sup>714</sup> In the DRC, Human Rights Watch identified pillage as not only a means of enriching the armed group or members of the group, but also as a means of punishing or deterring civilians from supporting enemy combatants.<sup>715</sup> Pillage could be an extremely profitable means of supporting an armed group: for example, the Mouvement du mars 23 (M23; March 23 Movement) in the DRC is believed to have stolen as much as \$3,000,000 US worth of goods during its occupation of Goma in November 2012.<sup>716</sup>

After pillaging property, combatants often destroyed whatever was left behind.<sup>717</sup> For example, in Sierra Leone there were many reports of houses being burned, sometimes with their inhabitants locked inside.<sup>718</sup> In fact, this was something that the RUF did so frequently that it became known as “a signature of RUF attacks on villages.”<sup>719</sup> Similar reports of civilians being burned alive in their homes have emerged from the DRC, as well.<sup>720</sup>

In both Sierra Leone and the DRC, pillage was not limited to the theft of civilian possessions but, rather, also extended to the pillage of natural resources.<sup>721</sup> In both countries, the pillage of natural

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<sup>714</sup> *SCSL AFRC Trial Judgment*, *supra* note 581 at para 238; Sierra Leone Truth and Reconciliation Commission, *supra* note 713 at Ch 2, para 93; Zoë Marriage, “Flip-flop rebel, dollar soldier: demobilisation in the Democratic Republic of Congo” (2007) 7:2 *Conflict, Security & Development* 281 at 287; Thom, *supra* note 695.

<sup>715</sup> Human Rights Watch, *supra* note 712.

<sup>716</sup> UN Security Council, *supra* note 712 at Annex 7.

<sup>717</sup> In Sierra Leone see, e.g. Sierra Leone Truth and Reconciliation Commission, *supra* note 713 at Ch 2, paras 86, 93; *SCSL AFRC Trial Judgment*, *supra* note 581 at para 418; *Report of the United Nations High Commissioner for Human Rights* (New York: UN, 2000) at para 38; Amnesty International, “Amnesty International Report 2000 - Sierra Leone”, (1 June 2000), online: *Refworld* <<https://www.refworld.org/docid/3ae6aa127.html>>. In the DRC see, e.g., *ICC Katanga Trial Judgment*, *supra* note 661 at paras 915-24; Human Rights Watch, *supra* note 712.

<sup>718</sup> Sierra Leone Truth and Reconciliation Commission, *supra* note 102 at Ch 4, para 91; Human Rights Watch, “Sierra Leone Human Rights Development”, (1999), online: *Human Rights Watch* <<https://www.hrw.org/legacy/wr2k/Africa-09.htm#TopOfPage>>; Kieran Mitton, *Rebels in a Rotten State: Understanding Atrocity in Sierra Leone* (Oxford: Oxford University Press, 2015) at 4.

<sup>719</sup> Mitton, *supra* note 718 at 4.

<sup>720</sup> See, e.g., OHCHR, “DRC: Victims’ harrowing accounts indicate Government complicity in ethnic-based massacres in Kasai – UN report”, (4 August 2017), online:

<<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21937&LangID=E>>; World Food Programme, “Fleeing murder, arson and rape - DRC refugees struggle to make a new start”, (2005), online: <<https://www.wfp.org/stories/fleeing-murder-arson-and-rape-drc-refugees-struggle-make-new-start>>; MONUSCO & UNOHCHR, *Report of the United Nations Joint Human Rights Office on Human Rights Violations Perpetrated by Armed Groups during Attacks on Villages in Ufamandu I and II, Nyamaboko I and II and Kibabi Groupements, Masisi Territory, North Kivu Province, between April and September 2012* (2012) at 10–13; note 19.

<sup>721</sup> On the pillage of natural resources in the DRC see, e.g., UN Security Council, *supra* note 699; UN Security Council, *supra* note 699; Human Rights Watch, *supra* note 143; UN Security Council, *supra* note 699 at para 86; UN Security Council, *Seventeenth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, 15 March 2005*, S/2005/1167 at paras 11-12; Human Rights Watch, *supra* note 712. On the pillage of natural resources in Sierra Leone see, e.g., Sherman, *supra* note 713 at 699; UN

resources directly fuelled and funded the conflict.<sup>722</sup> In Sierra Leone, parties to the conflict fought for control over diamonds and diamonds mines, in order to benefit financially from these resources.<sup>723</sup> In the DRC, armed groups as well as units of the national armed forces have fought for control of, in particular, gold mines,<sup>724</sup> but also diamond mines<sup>725</sup> and mining sites for tungsten, tantalum, and tin.<sup>726</sup> These are often referred to as conflict minerals.<sup>727</sup>

In addition to theft of possessions and natural resources, two common forms of pillage employed by members of armed groups have been extortion and illegal taxation in territories under armed

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Environment Programme, *supra* note 713 at 15; Sierra Leone Truth and Reconciliation Commission, *supra* note 713 at Ch 2, para 553, 563; John Hirsch, “War in Sierra Leone” (2001) 43:3 *Survival*, Global Politics and Strategy 145 at 150; Pratt, *supra* note 713; Greg Campbell, *Blood Diamonds: Tracing the Deadly Path of the World’s Most Precious Stones* (New York: Basic Books, 2012).

<sup>722</sup> UN Security Council, *supra* note 699; UN Security Council, *supra* note 699; Human Rights Watch, *supra* note 143; UN Security Council, *supra* note 699 at para 86.

<sup>723</sup> On the pillage of natural resources in Sierra Leone see, e.g., Sierra Leone Truth and Reconciliation Commission, *supra* note 713 at Ch 2, para 241; Ian Smillie, Lansana Gberie & Ralph Hazleton, *The Heart of the Matter: Sierra Leone, Diamonds and Human Security* (Ottawa: Partnership Africa Canada, 2000); Pratt, *supra* note 713; Hirsch, *supra* note 721 at 150.

<sup>724</sup> On the pillage of gold in the DRC see, e.g., UN Security Council, *Final report of the Group of Experts on the DRC submitted in accordance with paragraph 5 of Security Council resolution 1952 (2010), 2 December 2011*, S/2011/738 at paras 227, 236; Human Rights Watch, *supra* note 143.

<sup>725</sup> On the pillage of diamonds in the DRC see, e.g., UN Security Council, *Interim report of the Group of Experts on the DRC submitted in accordance with paragraph 5 of Security Council resolution 1952 (2010), 7 June 2011*, S/2011/345 at para 45.

<sup>726</sup> See, e.g., Ken Matthysen & Andrés Zaragoza Montejano, ‘*Conflict Minerals’ initiatives in DR Congo: Perceptions of local mining communities* (Antwerp, BE: IPIS, 2013) at 33; Emily Veale, “Is there Blood on your Hands-Free Device: Examining Legislative Approaches to the Conflict Minerals Problem in the Democratic Republic of Congo” (2012) 21 *Cardozo Journal International & Comparative Law* 503 at 512–15; Global Witness, “Conflict Minerals in East Congo”, (2 March 2015), online: *Global Witness* <<https://www.globalwitness.org/fr/campaigns/conflict-minerals/conflict-minerals-eastern-congo/>>; Enough Project, “Progress and Challenges on Conflict Minerals: Facts on Dodd-Frank 1502”, (2017), online: *The Enough Project* <<https://enoughproject.org/special-topics/progress-and-challenges-conflict-minerals-facts-dodd-frank-1502/>>; Washikala Malango, “Armed Groups and Mineral Extraction in the DRC – World Policy”, (8 March 2016), online: <<https://worldpolicy.org/2016/03/08/armed-groups-and-mineral-extraction-in-the-drc/>>.

<sup>727</sup> On the pillage of other conflict minerals in the DRC see, e.g., UN Security Council, *Final report of the Group of Experts on the Democratic Republic of Congo, 23 January 2014*, S/2014/42\* at para 45; Léonce Ndikumana & Kisangani Emizet, *The Economics of Civil War: The Case of the Democratic Republic of Congo*, Working Paper Series Number 63, Political Economy Research Institute, University of Massachusetts Amherst (2003) at 24–25; Ingrid Samset, “Conflict of Interests or Interests in Conflict? Diamonds & War in the DRC” (2002) 29:93/94 *Review of African Political Economy* 463; John F Clark, “Explaining Ugandan Intervention in Congo: Evidence and Interpretations” (2001) 39:2 *Journal of Modern African Studies* 261; Dena Montague, “Stolen Goods: Coltan and Conflict in the Democratic Republic of Congo” (2002) 22:1 *SAIS Review* 103; Nadira Lalji, “The Resource Curse Revised: Conflict and Coltan in the Congo” (2007) 29:3 *Harvard International Review* 34; Peter Eichstaedt, *Consuming the Congo: War and Conflict Minerals in the World’s Deadliest Place* (Chicago: Lawrence Hill Books, 2011); Dev Nathan & Sandip Sarkar, “Blood on Your Mobile?” (2010) 45:43 *Economic and Political Weekly* 22.

group control.<sup>728</sup> These groups often create checkpoints or roadblocks along roads under their control, where they will extort money, food, and other goods or charge illegal ‘customs duties’ to all people travelling the road.<sup>729</sup> In 2011 in the DRC, the Forces démocratiques de libération du Rwanda (FDLR; Democratic Forces for the Liberation of Rwanda) were reported as having specific units devoted to producing income for the group from, among other things, illegal taxation.<sup>730</sup> Illegal taxation and extortion can be extremely profitable for armed groups: in the DRC in early 2013, members of the M23 were believed to be earning \$180,000 US a month from these IHL violations.<sup>731</sup>

### 5.3.2 Forced Recruitment of Individuals for Various Tasks

Armed groups in Sierra Leone and the DRC have also used abduction and forced recruitment of both adults and children to serve as combatants,<sup>732</sup> or for forced labour.<sup>733</sup> Women and girls have

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<sup>728</sup> On extortion in the DRC see, e.g., UN Security Council, *supra* note 721 at paras 11-12; UN Security Council, *Report of the Group of Experts submitted pursuant to resolution 1771 (2007), 13 February 2008*, S/2008/43 at paras 60-61; UN Security Council, *supra* note 724 at paras 227, 236; Human Rights Watch, *supra* note 712. Sierra Leone Truth and Reconciliation Commission, *supra* note 102 at Ch 4, paras 95-97; Human Rights Watch, *supra* note 680.

<sup>729</sup> In the DRC see, e.g., UN Security Council, *supra* note 721 at paras 11-12; Human Rights Watch, “Briefing to the UN Security Council on the Situation in the Democratic Republic of the Congo”, (25 November 2008), online: *Human Rights Watch* <<https://www.hrw.org/news/2008/11/25/briefing-un-security-council-situation-democratic-republic-congo>>; Human Rights Watch, “DR Congo: M23 Rebels Committing War Crimes”, (11 September 2012), online: *Human Rights Watch* <<https://www.hrw.org/news/2012/09/11/dr-congo-m23-rebels-committing-war-crimes>>. In Sierra Leone see, e.g., Sierra Leone Truth and Reconciliation Commission, *supra* note 102 at Ch 4, paras 95-97; Human Rights Watch, *supra* note 680.

<sup>730</sup> UN Security Council, *Final report of the Group of Experts on the Democratic Republic of Congo, 16 August 2017*, S/2017/672/Rev.1 at para 22.

<sup>731</sup> UN Security Council, *supra* note 712 at para 47.

<sup>732</sup> On forced recruitment in Sierra Leone see, e.g., Krijn Peters, “Group Cohesion and Coercive Recruitment: Young Combatants and the Revolutionary United Front of Sierra Leone” in Alpaslan Özerdem & Sukanye Podder, eds, *Child Soldiers: From Recruitment to Reintegration* (New York: Palgrave Macmillan, 2011) 76; Dougherty, *supra* note 679 at 427; Valerie Oosterveld, “The Special Court for Sierra Leone, Child Soldiers and Forced Marriage: Providing Clarity or Confusion?” (2007) 45 *Canadian Yearbook of International Law* 131; Sierra Leone Truth and Reconciliation Commission, *supra* note 713 at Ch 2, para 467. On forced recruitment in the DRC see, e.g., UN Security Council, *Report of the Secretary-General on children and armed conflict in the Democratic Republic of the Congo, 13 June 2006*, S/2006/389 at paras 22, 46; UN Security Council, *Twenty-second report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, 21 September 2006*, S/2006/759 at para 72; Human Rights Watch, “Reluctant Recruits: Children and Adults Forcibly Recruited for Military Service in North Kivu”, (May 2001), online: *Human Rights Watch* <<https://www.hrw.org/legacy/reports/2001/drc3/>>; Human Rights Watch, “Covered in Blood - Ethnically Targeted Violence in Northern DRC”, (7 July 2003), online: *Human Rights Watch* <<https://www.hrw.org/report/2003/07/07/covered-blood/ethnically-targeted-violence-northern-drc>>; Human Rights Watch, *supra* note 712; UN News, “DR Congo: UN mission says recruitment of child soldiers is surging”, (14 December 2007), online: *UN News* <<https://news.un.org/en/story/2007/12/243652-dr-congo-un-mission-says-recruitment-child-soldiers-surging>>; UN Security Council, *Report of the Secretary-General on children and armed conflict in the Democratic Republic of Congo, 30 June 2014* at para 21.

<sup>733</sup> On forced labour in Sierra Leone see, e.g., UN Security Council, *Second Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone, 16 October 1998* at para 22; Sierra Leone Truth and Reconciliation Commission, *supra* note 102 at Ch 4, para 56. On forced labour in the DRC see, e.g., UN Security

been targeted in particular for domestic and sexual enslavement.<sup>734</sup> The use of child soldiers was extremely prevalent in both Sierra Leone and the DRC.<sup>735</sup> Indeed, the armed conflict in “Sierra Leone ... bec[a]me synonymous with child soldiering.”<sup>736</sup> Abduction and forced recruitment of children was widespread among all four of the primary parties to the conflict in Sierra Leone (i.e., the AFRC, CDF, RUF, and SLA).<sup>737</sup> These children were then forced to fight for these armed groups.<sup>738</sup> It is possible that “as many as half of the RUF’s combatants were between eight and fourteen years old” and the vast majority “reported being forcibly abducted”.<sup>739</sup> Abducted children in Sierra Leone were also required to do forced labour and subjected to “rape, sexual slavery and other forms of sexual abuse.”<sup>740</sup> In the DRC, while armed groups have often pledged to discontinue the practice of recruiting children, these commitments have been frequently short-

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Council, *Report of the Secretary-General pursuant to paragraph 8 of resolution 1698 (2006) concerning the Democratic Republic of the Congo*, 8 February 2007, S/2007/68 at para 47; Human Rights Watch, *supra* note 712; Human Rights Watch, “DR Congo: Army Abducts Civilians for Forced Labor”, (15 October 2006), online: *Human Rights Watch* <<https://www.hrw.org/news/2006/10/15/dr-congo-army-abducts-civilians-forced-labor>>; Human Rights Watch, “War Crimes in Kisangani - The Response of Rwandan-backed Rebels to the May 2002 Mutiny”, (20 August 2002), online: *Human Rights Watch* <<https://www.hrw.org/report/2002/08/20/war-crimes-kisangani/response-rwandan-backed-rebels-may-2002-mutiny>>; Human Rights Watch, *supra* note 143; UN Security Council, *supra* note 703 at para 87.

<sup>734</sup> On domestic and sexual slavery in Sierra Leone, now more commonly referred to as forced marriage see, e.g., Valerie Oosterveld, “Forced Marriage during Conflict and Mass Atrocity” in Fionnuala Ní Aoláin et al, eds, *The Oxford Handbook of Gender and Conflict* (Oxford: Oxford University Press, 2018); Dougherty, *supra* note 679 at 427; Sierra Leone Truth and Reconciliation Commission, *supra* note 713 at Ch 2, paras 496-97. On domestic and sexual slavery in the DRC see, e.g., Malokele Nanivazo, “Sexual violence in the Democratic Republic of the Congo”, online: *United Nations University* <<https://unu.edu/publications/articles/sexual-violence-in-the-democratic-republic-of-the-congo.html>>; while Katanga was acquitted of charges related to rape and sexual slavery, the Court did find that these acts had been committed during the Bogoro attack in February 2003] *ICC Katanga Trial Judgment*, *supra* note 661 at paras 985-1019.

<sup>735</sup> On the use of children under 15 years of age in the DRC see, e.g., UN General Assembly, Sixth Committee, *Report of the Special Representative of the Secretary General for Children and Armed Conflict*, 13 August 2007, A/62/228 at paras 111, 41-43; Child Soldiers International, “Child Soldiers Global Report 2004 - Congo, Democratic Republic of the”, (2004), online: *Refworld* <<https://www.refworld.org/docid/49880668c.html>>; Refugees International, “Child soldiers in DR Congo: Business as usual - Democratic Republic of the Congo”, (1 April 2003), online: *ReliefWeb* <<https://reliefweb.int/report/democratic-republic-congo/child-soldiers-dr-congo-business-usual>>. On the use of children under 15 years of age in Sierra Leone see, e.g., Human Rights Watch, *Forgotten Children of War: Sierra Leonean Refugee Children in Guinea*, 11:5(A) (New York: HRW, 1999); Coalition to Stop the Use of Child Soldiers, “The Use of Children as Soldiers in Africa: A Country Analysis of Child Recruitment and Participation in Armed Conflict”, (1 August 2000), online: *ReliefWeb* <<https://reliefweb.int/report/world/use-children-soldiers-africa-country-analysis-child-recruitment-and-participation-armed>>.

<sup>736</sup> Noah Benjamin Novogrodsky, “After the Horror: Child Soldiers and the Special Court for Sierra Leone” in Charles Jalloh, ed, *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (Cambridge, UK: Cambridge University Press, 2013) 361 at 363.

<sup>737</sup> Sierra Leone Truth and Reconciliation Commission, *supra* note 713 at Ch 2, para 465; Peters, *supra* note 732.

<sup>738</sup> Sierra Leone Truth and Reconciliation Commission, *supra* note 713 at Ch 2, para 467.

<sup>739</sup> Dougherty, *supra* note 679 at 427.

<sup>740</sup> Sierra Leone Truth and Reconciliation Commission, *supra* note 713 at Ch 2, para 467.

lived and unrealized.<sup>741</sup> In both conflicts, children caught trying to escape were, at best, severely beaten, and at worst, killed immediately.<sup>742</sup> In 2000, it was estimated that 15-30 percent of new recruits in the DRC were under 18 years of age, with a significant number of these children under the age of 12 years.<sup>743</sup>

Armed groups in Sierra Leone and the DRC frequently used forced labour to support their activities during the conflict.<sup>744</sup> For example, in both conflicts, armed groups forced (and, in the DRC continue to force) both children and adults to transport their supplies or to undertake manual labour in mining camps.<sup>745</sup> In Sierra Leone, the RUF and CDF forced people to conduct agricultural work and turn the proceeds over to their leaders.<sup>746</sup> In both Sierra Leone and the DRC, captives were often forced to perform domestic work for both senior and junior combatants, such as preparing food and cleaning.<sup>747</sup>

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<sup>741</sup> Human Rights Watch, *supra* note 732; ICRC, “Democratic Republic of the Congo: Tackling child recruitment by armed groups”, (11 February 2015), online: <<https://www.icrc.org/en/document/democratic-republic-congo-tackling-child-recruitment>>; Child Soldiers International, *supra* note 735; UN Security Council, *Children and armed conflict in the Democratic Republic of the Congo Report of the Secretary-General, 25 May 2018, S/2018/502* at paras 18-25.

<sup>742</sup> Human Rights Watch, *supra* note 732.

<sup>743</sup> *Ibid.*

<sup>744</sup> On forced labour in Sierra Leone see, e.g., UN Security Council, *supra* note 733 at para 22. On forced labour in the DRC see, e.g., See, e.g., UN Security Council, *supra* note 733 at para 47; Human Rights Watch, *supra* note 712; Human Rights Watch, *supra* note 733; Human Rights Watch, *supra* note 733.

<sup>745</sup> See, e.g., UN Security Council, *supra* note 733 at para 47; Human Rights Watch, *supra* note 712; Human Rights Watch, *supra* note 733; Human Rights Watch, *supra* note 733; Sierra Leone Truth and Reconciliation Commission, *supra* note 713 at Ch 2, paras 555, 570.

<sup>746</sup> Sierra Leone Truth and Reconciliation Commission, *supra* note 102 at Ch 4, para 56.

<sup>747</sup> On domestic servitude in Sierra Leone see, e.g., *ibid* at Ch 4, para 55; Amnesty International, “Sierra Leone: Rape and Other Forms of Sexual Violence Against Girls and Women”, (2000), online: *Amnesty International* <<https://www.amnesty.org/en/documents/document/?indexNumber=AFR51%2f035%2f2000&language=en>>; Susan McKay & Dyan Mazurana, *Where Are the Girls? Girls in Fighting Forces in Northern Uganda, Sierra Leone and Mozambique: Their Lives During and After War* (Montreal: International Centre for Human Rights and Democratic Development, 2004); Chris Coulter, *Bush wives and girl soldiers: Women’s lives through War and Peace in Sierra Leone* (New York: Cornell University Press, 2009). On domestic servitude in the DRC see, e.g., Milfrid Tonheim, “Who will comfort me?” Stigmatization of girls formerly associated with armed forces and groups in eastern Congo” (2012) 16:2 *International Journal of Human Rights* 278 at 282; Child Soldiers International, “Mai Mai child soldier recruitment and use: entrenched and unending”, (February 2010), online: *Refworld* <<https://www.refworld.org/docid/4b8b7c492.html>>.

### 5.3.3 Violations of Bodily Integrity and/or Terrorization of Civilians<sup>748</sup>

During the conflicts in Sierra Leone and the DRC, amputations,<sup>749</sup> rape and other forms of sexual violence,<sup>750</sup> torture,<sup>751</sup> and murder<sup>752</sup> were all used to violate the bodily integrity of and/or terrorize civilians. Amputation was particularly prominent during the Sierra Leone civil war,<sup>753</sup> where the Truth and Reconciliation Commission found the RUF to be responsible for nearly 40 percent of the amputations they recorded, and the AFRC to be responsible for a further 27 percent of recorded amputations.<sup>754</sup> Amputation has not been a common feature of conflict in the DRC in the same manner as in Sierra Leone; however, mutilation through the use of machetes to attack civilians has been recorded.<sup>755</sup>

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<sup>748</sup> Feminist approaches can also help to develop an understanding of the context in which many crimes, in particular acts of sexual and gender-based violence, are perpetrated in armed conflict. Feminist scholars, such as Boesten, Baaz & Stern, and Ní Aoláin et al, warn against “the exceptionalization of rape [and other forms of sexual violence] in war as divorced from peacetime violence and inequality and of other war-related gendered harms” (Boesten 2018 at 460). The perpetration of violence against women and girls in conflict cannot be “neatly categorized” as occurring before, during, or after conflict (Ní Aoláin et al 2011 at 46). Many feminist scholars emphasize that sexual violence in wartime is linked to the treatment of women in peacetime including power imbalances, inequality, differential access to resources, and other sources of structural violence that predate armed conflicts. These feminist approaches provide greater insight into the varied causes of sexual violence during armed conflict, which can be useful for developing strategies to address and prevent these forms of violence during war. However, as previously noted, the focus of this thesis is on IHL and the regulation of armed conflict. IHL addresses the methods and means of warfare between the beginning of a conflict and its termination. Structural violence, poverty, power relations, etc. during peacetime are beyond the scope of this body of law. Consequently, these feminist insights demonstrate that the problem of sexual violence during armed conflict is more complex and the most effective preventative strategies will likely need to move beyond mere IHL regulation to consider other areas of legal regulation under international and domestic law, such human rights law. On feminist approaches to and discussion of sexual and gender-based violence during armed conflict see, e.g., Fionnuala Ní Aoláin, Dina Francesca Haynes & Naomi Cahn, *On the Frontlines: Gender, War, and the Post-Conflict Process* (Oxford: Oxford University Press, 2011) at 27–39; Baaz Baaz Maria Eriksson & Maria Stern, *Sexual Violence as a Weapon of War? Perceptions, Prescriptions, Problems in the Congo and Beyond* (New York: Zed Books, 2013); Jelke Boesten, “Revisiting Methodologies and Approaches in Researching Sexual Violence in Conflict” (2018) 25:4 *Social Politics* 457; Sara E Davies & Jacqui True, “Reframing conflict-related sexual and gender-based violence: Bringing gender analysis back in” (2015) 46:6 *Security Dialogue* 495; Charlotte Lindsey, “The Impact of Armed Conflict on Women” in Helen Durham & Tracey Gurd, eds, *Listening to Silences: Women and War* (Leiden, NLD: Martinus Nijhoff, 2005) 21; Helen Durham, “International Humanitarian Law and the Protection of Women” in Helen Durham & Tracey Gurd, eds, *Listening to Silences: Women and War* (Leiden, NLD: Martinus Nijhoff, 2005) 95; Judith Gardam, “Women and Armed Conflict: The Response of International Humanitarian Law” in Helen Durham & Tracey Gurd, eds, *Listening to Silences: Women and War* (Leiden, NLD: Martinus Nijhoff, 2005) 109; Natalie Browes, “How gender inequalities fuel rape in war”, online: *Dr Denis Mukwege Foundation* <<https://www.mukwegefoundation.org/2017/03/gender-norms-rape-war-sexual-violence/>>.

<sup>749</sup> See, e.g., Macartan Humphreys & Jeremy Weinstein, “Handling and Manhandling Civilians in Civil War” (2006) 100:3 *American Political Science Review* 429; Human Rights Watch, *supra* note 680; Sierra Leone Truth and Reconciliation Commission, *supra* note 102 at Ch 4, paras 25–49.

<sup>750</sup> With regards to Sierra Leone see, e.g., Sierra Leone Truth and Reconciliation Commission, *supra* note 713 at Ch 2, para 496–97; Dougherty, *supra* note 679 at 427; Dara Kay Cohen, “Female Combatants and the Perpetration of Violence: Wartime Rape in the Sierra Leone Civil War” (2013) 65:3 *World Politics* 383; Zoe Marks, “Sexual Violence Inside Rebellion: Policies and Perspectives of the Revolutionary United Front of Sierra Leone” (2013) 15:3 *Civil Wars* 359; Carroll Bogert & Corinne Dufka, “Sexual violence in Sierra Leone” (2001) 357:9252 *The*

Rape and other forms of sexual violence were particularly widespread during the conflicts in both Sierra Leone and the DRC.<sup>756</sup> In Sierra Leone, women and girls were subjected rape, sexual slavery, and what would come to be known through the jurisprudence of the Special Court for Sierra Leone as forced marriage.<sup>757</sup> As many as an “estimated 250,000 women and girls were

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Lancet 304; Human Rights Watch, *supra* note 18; Zoe Marks, “Sexual violence in Sierra Leone’s civil war: ‘Virgination’, rape, and marriage” (2014) 113:450 *African Affairs* 67. With regards to the DRC see, e.g., UN Security Council, *Report of the Secretary-General on conflict-related sexual violence, 23 March 2018, S/2018/250*; Amber Peterman, Tia Palermo & Caryn Bredekamp, “Estimates and Determinants of Sexual Violence Against Women in the Democratic Republic of Congo” (2011) 101:6 *American Journal of Public Health* 1060; Katharina Goetze, “No Sign of End to Epidemic”, (17 October 2008), online: *Institute for War and Peace Reporting* <<https://iwpr.net/global-voices/no-sign-end-epidemic>>; Peter Eichstaedt, “Militias Seen as Main Perpetrators”, (17 October 2008), online: *Institute for War and Peace Reporting* <<https://iwpr.net/global-voices/militias-seen-main-perpetrators>>; Sara Meger, “Rape of the Congo: Understanding sexual violence in the conflict in the Democratic Republic of Congo” (2010) 28:2 *Journal of Contemporary African Studies* 119; Dennis Mukwege & Cathy Nangini, “Rape with Extreme Violence: The New Pathology in South Kivu, Democratic Republic of Congo” (2009) 6:12 *PLoS Medicine* 1; Maria Eriksson Baaz & Stern Maria, *The Complexity of Violence: A critical analysis of sexual violence in the Democratic Republic of Congo (DRC)* (Uppsala: Nordiska Afrikainstitutet, 2010).

<sup>751</sup> See, e.g., Helga Malmin Binningsbo & Kendra Dupuy, “Using Power-Sharing to Win a War: The Implementation of the Lomé Agreement in Sierra Leone” (2009) 44:3 *Africa Spectrum* 87 at 88; Human Rights Watch, *supra* note 680.

<sup>752</sup> On murder in the Sierra Leone Civil War see, e.g., UN Security Council, *supra* note 712 at para 19; Sierra Leone Truth and Reconciliation Commission, *supra* note 102 at Ch 4, paras 106-14; *SCSL AFRC Trial Judgment, supra* note 581 at paras 902-16, 1229. On assault and murder in the DRC see, e.g., Human Rights Watch, *supra* note 732; Human Rights Watch, “Civilian Killings By Warring Parties In Kisangani”, (18 August 1999), online: *Human Rights Watch* <<https://www.hrw.org/news/1999/08/18/civilian-killings-warring-parties-kisangani>>; Human Rights Watch, *supra* note 712; Human Rights Watch, *supra* note 712; Human Rights Watch, *supra* note 712; Human Rights Watch, “DR Congo: Hold Army to Account for War Crimes”, (19 May 2009), online: *Human Rights Watch* <<https://www.hrw.org/news/2009/05/19/dr-congo-hold-army-account-war-crimes>>; Human Rights Watch, *supra* note 712.

<sup>753</sup> See, e.g., Lansana Gberie, *A Dirty War in West Africa: The RUF and the Destruction of Sierra Leone* (Bloomington, IN: Indiana University Press, 2005) at 4–15, 127, 134–37; Ebrima Sall, “The Perpetration and Survival of Violence: With Examples from Sierra Leone” (2004) 5:1–2 *Identity, Culture and Politics* 87 at 95–98; Dufka, *supra* note 143; Kate Fogelberg & Alexandra Thalmann, “Amputation as a Strategy of Terror in Sierra Leone” (2004) 2:24 *High Plains Applied Anthropologist* 158.

<sup>754</sup> Sierra Leone Truth and Reconciliation Commission, *supra* note 713 at Ch 2, para 150, fn 27.

<sup>755</sup> See, e.g., *ICC Katanga Trial Judgment, supra* note 661 at para 826.

<sup>756</sup> With regards to Sierra Leone see, e.g., Sierra Leone Truth and Reconciliation Commission, *supra* note 713 at Ch 2, paras 496-97; Dougherty, *supra* note 679 at 427; Cohen, *supra* note 750; Marks, *supra* note 750; Marks, *supra* note 750; Bogert & Dufka, *supra* note 750; Valerie Oosterveld, “Lessons from the Special Court for Sierra Leone on the Prosecution of Gender-Based Crimes” (2009) 17 *American University Journal of Gender Social Policy and the Law* 407; Valerie Oosterveld, “The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments” (2011) 44 *Cornell Journal of International Law* 49 at 53–72. With regards to the DRC see, e.g., UN Security Council, *supra* note 750; Peterman, Palermo & Bredekamp, *supra* note 750; Goetze, *supra* note 750; Meger, *supra* note 750; Mukwege & Nangini, *supra* note 750; Baaz & Stern Maria, *supra* note 750; Stacy Banwell, “Rape and sexual violence in the Democratic Republic of Congo: a case study of gender-based violence” (2013) 23:1 *Journal of Gender Studies* 45.

<sup>757</sup> Sierra Leone Truth and Reconciliation Commission, *supra* note 713 at Ch 2, paras 496-97; Dougherty, *supra* note 679 at 427. On forced marriage specifically see, e.g., Micaela Frulli, “Advancing International Criminal Law: The Special Court for Sierra Leone Recognizes Forced Marriage as a ‘New’ Crime against Humanity” (2008) 6:5 *Journal of International Criminal Justice* 1033; Augustine SJ Park, “Other Inhumane Acts’: Forced Marriage, Girl

raped and forced into sexual slavery, or, experienced other crimes of sexual violence” during the Sierra Leone civil war.<sup>758</sup> In the DRC, conflict-related rape and other forms of sexual violence, such as sexual mutilation, have also been particularly endemic, with a 2011 report stating that 48 women in the DRC were raped every hour.<sup>759</sup> In March 2019, the UN Secretary General reported that approximately 70 per cent of the documented cases of conflict-related sexual violence in the DRC in 2018 were perpetrated by members of armed groups.<sup>760</sup>

Other IHL violations have also been used as a means of punishing or terrorizing civilians, in particular assault and murder.<sup>761</sup> Beatings and murder were often used to control and punish civilians, and deter disobedience among civilians.<sup>762</sup> Torture was another terror tactic,<sup>763</sup> often carried out in public for maximum effect on communities.<sup>764</sup> Assault was a common tool used by armed groups to punish civilians, as well as to coerce compliance from civilians.<sup>765</sup> Killing civilians was also a means of controlling civilians by creating and enhancing the terror of civilians and to serve as an example to others of what could happen to them if they disobeyed combatants.<sup>766</sup>

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Soldiers and the Special Court for Sierra Leone” (2006) 15:3 *Social & Legal Studies* 315; Oosterveld, *supra* note 756 at 64–68; Jennifer Gong-Gershowitz, “Forced Marriage: A New Crime against Humanity” (2008) 8 *Northwestern Journal of International Human Rights* 53; Valerie Oosterveld, “Forced Marriage and the Special Court for Sierra Leone: Legal Advances and Conceptual Difficulties” (2011) 2:1 *Journal of International Humanitarian Law* 127; Annie Bunting, “Forced Marriage in Conflict Situations: Researching and Prosecuting Old Harms and New Crimes” (2012) 1 *Canadian Journal of Human Rights* 165.

<sup>758</sup> UN Security Council, *Conflict-related sexual violence Report of the Secretary-General, 13 January 2012*, A/66/657\*–S/2012/33 at para 72; Dougherty, *supra* note 679 at 427.

<sup>759</sup> Note this statistic includes all incidents of rape in the DRC, both conflict-related and not. Peterman, Palermo & Bredekamp, *supra* note 750 at 1064–65.

<sup>760</sup> UN Security Council, *Report of the Secretary-General on conflict-related sexual violence, 29 March 2019*, S/2019/280 at para 46.

<sup>761</sup> See, e.g., Human Rights Watch, *supra* note 732; UN Security Council, *supra* note 102 at paras 50, 56; UN Security Council, *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, 24 October 2011*, S/2011/656 at paras 46, 48; Human Rights Watch, *supra* note 752; Human Rights Watch, *supra* note 712; Human Rights Watch, *supra* note 712; Human Rights Watch, *supra* note 712; Human Rights Watch, *supra* note 752; Human Rights Watch, *supra* note 712.

<sup>762</sup> Human Rights Watch, *supra* note 732; UN Security Council, *supra* note 102 at paras 50, 56; UN Security Council, *supra* note 761 at paras 46, 48; Human Rights Watch, *supra* note 712; Human Rights Watch, *supra* note 712; Human Rights Watch, *supra* note 752.

<sup>763</sup> Sierra Leone Truth and Reconciliation Commission, *supra* note 102 at Ch 4, para 67.

<sup>764</sup> *Ibid* at Ch 4, para 67.

<sup>765</sup> UN Security Council, *supra* note 102 at para 50; Sierra Leone Truth and Reconciliation Commission, *supra* note 102 at Ch 4, paras 62–63; Human Rights Watch, *supra* note 680; Van Woudenberg & Sawyer, *supra* note 708.

<sup>766</sup> MONUSCO & UNOHCHR, *supra* note 720 at 6, 12–14; Amnesty International, “Democratic Republic of Congo: Torture: A weapon of war against unarmed civilians”, (26 June 2001), online: *Refworld* <<https://www.refworld.org/docid/3b83b6e37.html>>; Human Rights Watch, *supra* note 712; Human Rights Watch, *supra* note 680; Sierra Leone Truth and Reconciliation Commission, *supra* note 102 at Ch 4, para 108.



## 5.2 Conclusion

Although the discussion of IHL protections for civilians in chapter 4 suggested that extensive protections do exist for civilians, this chapter's discussion of the conflicts in Sierra Leone and the DRC has demonstrated that, in practice, civilians often suffer from the widespread perpetration of IHL violations. This chapter has demonstrated two key points. First, the prevalence of violations of IHL protections for civilians during these conflicts indicates that, in practice, the current status quo of IHL is not providing sufficient protection for civilians during armed conflict. Second, the identification and description of these violations does not provide insight into the psychology of the commission of these violations. The lack of understanding of the perpetration of IHL violations by members of armed groups has been discussed by IHL practitioners.<sup>767</sup> These discussions have drawn primarily on practical experiences of physical engagement with armed groups. These works by IHL practitioners attempt to understand IHL violations for the purpose of improving strategies for engaging with armed groups. IHL practitioners appreciate how an understanding of IHL violations can help them to do their jobs – engaging with armed groups to promote compliance and provide IHL training – more effectively. Vincent Bernard, Editor-in-Chief of the ICRC's International Review of the Red Cross, has stated that “[i]t is vital to comprehend why armed groups choose to respect or flout the law.”<sup>768</sup> Therefore, the idea that it is both possible and beneficial to have a deeper understanding of IHL violations already exists. However, the addition of an understanding of the psychology underlying IHL violations has rarely been examined.<sup>769</sup> Psychology has entered into IHL literature aimed at using effective persuasion to secure armed group compliance with IHL.<sup>770</sup>

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<sup>767</sup> See, e.g., Geneva Academy of International Humanitarian Law and Human Rights, *Reactions to Norms Armed Groups and the Protection of Civilians*, Policy Briefing No 1 (Geneva: Geneva Academy of International Humanitarian Law and Human Rights, 2014); Muñoz-Rojas & Frésard, *supra* note 12; Bangerter, *supra* note 232.

<sup>768</sup> Vincent Bernard, “Editorial: Understanding Armed Groups and the Law” (2011) 93:882 *International Review of the Red Cross* 261 at 264.

<sup>769</sup> One study that did examine the psychology of combatants was the ICRC's “Roots of Behaviour” study, which focused on using the psychological insights to improve ICRC engagement strategies. Muñoz-Rojas & Frésard, *supra* note 12.

<sup>770</sup> See, e.g., Olivier Bangerter, “Comment - Persuading Armed Groups to Better Respect International Humanitarian Law” in Heike Krieger, ed, *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (Cambridge, UK: Cambridge University Press, 2015) 112; Steven R Ratner, “Persuading to Comply: On the Development and Avoidance of Legal Argumentation” in Jeffrey L Dunoff & Mark A Pollack, eds, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge, UK: Cambridge University Press, 2013) 568; Ulrich Schneckener & Claudia Hofmann, “The Power of Persuasion” in Heike Krieger, ed, *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (Cambridge, UK: Cambridge University Press, 2015) 79; Claudia Hofmann & Ulrich Schneckener,

This thesis argues that understanding the psychology behind IHL violations is vital, not only for engaging with armed groups, but also for identifying and devising ways to develop the substantive regulation of armed conflicts under IHL. Understanding combatant psychology allows IHL academics and practitioners alike to further develop IHL policy and practice to prevent violations.

The next chapter examines whether legal theory can provide a deeper understanding of the perpetration of violence toward civilians by members of armed groups. While legal theories tend to leave questions of compliance and deviance to other academic disciplines, such as social psychology and criminology, there are three legal theories that address the psychology of individuals and their interaction with the law: Law and Economics theory, Behavioural Law and Economics theory, and the theory of Socialization and International Law. The chapter will assess the viability of using any of these theories to provide an adequate explanation of the psychology of combatant deviance from IHL protections for civilians.

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“Engaging non-state armed actors in state- and peace-building: options and strategies” (2011) 93:883 *International Review of the Red Cross* 1 at 10–11.

## Chapter 6

### 6 The Limitations of Existing Legal Theory to Explain Combatant Behaviour

This thesis advances the claim that there is a gap between the regulation of behaviour for the protection of individuals in peace and the regulations needed to protect civilians from combatant violence during war. The previous chapters examined existing IHL protections for civilians during NIACs as they apply to armed groups in both theory and practice. Those chapters demonstrated that existing civilian protections are based largely on the same protections afforded to individuals in peace and that the widespread existence of violence toward civilians in practice provides little to no insight into the psychology of the perpetrators of that violence.

The purpose of this chapter is to examine whether legal theory can provide an explanation for combatant deviance from the IHL provisions designed to protect civilians during armed conflict. Legal theories typically focus on the function and formation of law,<sup>771</sup> with legal theorists addressing questions such as “what is law”,<sup>772</sup> “what should the law be”,<sup>773</sup> “who gets to make law and for whose benefit”.<sup>774</sup> In most international law-focused legal theories, the behaviour of

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<sup>771</sup> For example, international legal positivism, which focuses on the source and authoritative nature of law and the legal system: see, e.g., Bruno Simma & Andreas Paulus, “The Responsibility of Individuals for Human Rights Abuses in International Conflicts: A Positivist View” (1999) 93:2 *American Journal of International Law* 302. Marxist International Law and Third World Approaches to International Law, which focus on greater involvement of non-state actors in law-making: see, e.g., BS Chimni, “An outline of a Marxist course on public international law” in Susan Marks, ed., *International Law on the Left: Re-examining Marxist Legacies* (Cambridge, UK: Cambridge University Press, 2008) 53; Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge, UK: Cambridge University Press, 2003). Feminist International Law, which seeks to change the actors involved in law-making by increasing women’s representation and promoting legal reform to address gender inequalities inherent in existing law: see, e.g., Hilary Charlesworth & Christine Chinkin, *The boundaries of international law: A feminist analysis* (Manchester, UK: Manchester University Press, 2000). Interactional legal theory promotes inclusion of state and non-state actors in international law making and promotes the importance of factors such as generality, clarity, constancy and congruence in the content of law; however, without addressing factors contributing to legal compliance and deviance: see, e.g. Jutta Brunnée & Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge, UK: Cambridge University Press, 2010).

<sup>772</sup> Craig Forcese, *What is Law - Legal Theory in a Nutshell (Podcast)* at 01m:43s. See also, e.g., HLA Hart, *The Concept of Law*, 2d ed (Oxford: Oxford University Press, 1994) at 7–8; Joseph Raz, “Legal Principles and the Limits of Law” (1972) 81 *Yale Law Journal* 823 at 842.

<sup>773</sup> Danny Priel, “The Boundaries of Law and the Purpose of Legal Philosophy” (2008) 27:6 *Law and Philosophy* 643 at 646.

<sup>774</sup> Forcese, *supra* note 772 at 02m:14s.

states and not individuals is addressed. Further, the behaviour of states is generally only considered for the purpose of determining what the law is or should be. International legal positivism is focused on the formal sources of international law and considers state behaviour only so far as is necessary to identify ““international law as it is””.<sup>775</sup> Most other international legal theories use international legal positivism “as their starting point to ascertain *lex lata*, even if their purpose is primarily to critique any such concept.”<sup>776</sup> Other international legal theories tend to focus on the need to include actors other than states or other than American and European states.<sup>777</sup> Consequently, Marxist International Legal theory and Third World Approaches to International Law argue that existing international law is imperialist and the voices of different classes and developing states need to be incorporated into both the formation of international law and the functioning of the international legal system.<sup>778</sup> Feminist International Legal theory advocates for greater inclusion of women in international law-making and institutions.<sup>779</sup> Interactional legal theory promotes inclusion of both state and non-state actors in international law making and promotes the importance of factors such as generality, clarity, constancy and congruence in the content of law.<sup>780</sup> However, while these theories address what the law should be, they do not seek to explain why individuals do or do not comply with the law. Where international legal theories do broach the topic of compliance, they generally target macro-level, that is, state, compliance with international law based on the process of international law formation.<sup>781</sup> The issue of individual combatant deviance is, however, far removed from the

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<sup>775</sup> Simma & Paulus, *supra* note 771 at 303.

<sup>776</sup> Anne-Marie Slaughter & Steven R Ratner, “The Method is the Message” (1999) 93:2 *American Journal of International Law* 410 at 415.

<sup>777</sup> See, e.g., Chimni, *supra* note 771 (Marxist International Legal Theory); China Miéville, “The commodity-form theory of international law” in Susan Marks, ed, *International Law on the Left: Re-examining Marxist Legacies* (Cambridge, UK: Cambridge University Press, 2008) 92 (Marxist International Legal Theory); James Thuo Gathii, “TWAAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography” (2011) 3:1 *Trade, Law and Development* 26 (Third World Approaches to International Law); Luis Eslava & Sundhya Pahuja, “Between Resistance and Reform: TWAAIL and the Universality of International Law” (2011) 3:1 *Trade, Law and Development* 103 (Third World Approaches to International Law); Charlesworth & Chinkin, *supra* note 771 (Feminist International Legal Theory); Karen Knop, “Re/Statements: Feminism and State Sovereignty in International Law” (1993) 3 *Transnational Law and Contemporary Problems* 293 (Feminist International Legal Theory).

<sup>778</sup> See, e.g., Miéville, *supra* note 777; Chimni, *supra* note 771; Gathii, *supra* note 777; Eslava & Pahuja, *supra* note 777.

<sup>779</sup> See, e.g., Charlesworth & Chinkin, *supra* note 771; Knop, *supra* note 777.

<sup>780</sup> See, e.g., Brunnée & Toope, *supra* note 771.

<sup>781</sup> See, e.g., Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1996); Harold Koh, “Why Do Nations Obey

state-driven process of international law formation. There is also, a body of theories in International Law and International Relations theory that address compliance drawing on mechanisms of either coercion and material inducement<sup>782</sup> or persuasion.<sup>783</sup> The focus of these theories tends to be on the behaviour and compliance of states; however, these schools of thought are incorporated into the three-mechanisms that form Socialization and International Law theory. Consequently, they will be addressed through the discussion of material inducement and persuasion under Socialization and International Law theory in section 6.3 of this chapter.

In this chapter, I focus on three international legal theories that address the psychology of individuals in their interaction with law: Law and Economics theory, Behavioural Law and Economics theory, and Socialization and International Law theory. Law and Economics and Behavioural Law and Economics theories both develop an individual behavioural model to explain individual decision-making and interaction with the law. Socialization and International Law theory is primarily focused on addressing state compliance with international law; however, I have included it in this chapter because the theory draws heavily on individual psychology to understand how individuals interact with the law. This chapter examines the psychological explanations for compliance and deviance provided by each of these three theories (Law and

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International Law?" (1997) 106 Yale Law Journal 2599; Harold Koh, "Transnational Legal Process" (1996) 75 Nebraska Law Review 181.

<sup>782</sup> See, e.g., Robert O Keohane, *Neorealism and Its Critics* (New York: Columbia University Press, 1986); Stephen D Krasner, "Sovereignty, Regimes, and Human Rights" in Volker Rittberger, ed, *Regime Theory and International Relations*, (New York: Oxford University Press, 1993) 139; AM Weisburd, "Implications of International Relations Theory for the International Law of Human Rights" (1999) 38 Columbia Journal of Transnational Law 45; Jack L Goldsmith & Eric A Posner, "A Theory of Customary International Law" (1999) 66 University of Chicago Law Review 1113; Jack L Goldsmith & Eric A Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005); Eric A Posner & Alan O Sykes, *Economic Foundations of International Law* (Cambridge, MA: Harvard University Press, 2013); Emilie Hafner-Burton, David G Victor & Yanatan Lupu, "Political Science Research on International Law: The State of the Field" (2012) 106 American Journal of International Law 47.

<sup>783</sup> See, e.g., Rodger A Payne, "Persuasion, Frames, and Norm Construction" (2001) 7:1 European Journal of International Relations 37; Kal Raustiala, "The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law" (2002) 43 Virginia Journal of International Law 1; Thomas Risse, "Let's Argue! Communicative Action in World Politics" (2000) 54:1 International Organization 1; Margaret E Keck & Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY: Cornell University Press, 1998); Martha Finnemore, *National Interests in International Society* (Ithaca, NY: Cornell University Press, 1996); Martha Finnemore & Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52 International Organization 887; Alistair Ian Johnston, "Treating International Institutions as Social Environments" (2001) 45 International Studies Quarterly 487; Jeffrey T Checkel, "Norms, Institutions, and National Identity in Contemporary Europe" (1999) 43 International Studies Quarterly 83; Jeffrey T Checkel, "Why Comply? Social Learning and European Identity Change" (2001) 55 International Organization 553; Koh, *supra* note 779.

Economics, Behavioural Law and Economics, and Socialization and International Law) in order to determine whether or not they can provide an adequate explanation of the psychology of combatant deviance from IHL protections for civilians.

The chapter begins with a discussion of Law and Economics theory. It examines and critiques the three key components of individual psychology advanced by Law and Economics theory to explain how individuals interact with law: (1) individuals are rational, self-interested actors; (2) individual preferences are both quantifiable and universal; and, (3) individual decision-making is consistent in all contexts. The chapter next turns to a discussion of Behavioural Law and Economics theory, a derivative of Law and Economics theory, premised on addressing existing critiques of Law and Economics theory. It examines how Behavioural Law and Economics theorists have drawn on insights from psychology to develop a more nuanced understanding of how individuals interact with law based on concepts of bounded rationality and bounded self-interest. This section of the chapter evaluates whether the psychological insights used by Behavioural Law and Economics theorists provide an adequate explanation of individual psychology that can be used to understand and explain combatant violence toward civilians. The final section of the chapter discusses Socialization and International Law theory. The chapter examines the three components of this theory that are said to influence behaviour: (1) material inducement; (2) persuasion; and, (3) acculturation. Each of these components is analysed to assess whether they provide the necessary framework to understand and explain psychological processes that lead to deviance.

Ultimately, this chapter argues that none of the three legal theories discussed provide an explanation for combatant deviance from the IHL provisions designed to protect civilians during armed conflict. The failure of these theories to provide an adequate explanation of combatant deviance is linked in large part to the fact that these theories are designed to be broadly applicable to the legal system, whether national or international, in a typical context. The typical context is peacetime. Therefore, just as there is a gap between the legal protections afforded to individuals in peace and the protections required for the safety of civilians in war, there is a similar gap in existing legal theories that seek to explain the psychology of individual interaction with law. A broadly applicable behavioural model based largely on individual legal compliance

and deviance in peacetime is inadequate for the exceptional context of armed conflict. This thesis advocates for the use of psychological and behavioural insights specific to the context of armed conflict, rather than insights more generalizable to human behaviour in a multitude of contexts as is done in Law and Economics, Behavioural Law and Economics, and Socialization and International Law. This chapter is important because it demonstrates the absence of a legal theory that provides the necessary specificity about individual deviance in armed conflict. The inadequacy of existing behavioural models from Law and Economics, Behavioural Law and Economics, and Socialization and International Law, which will be established in this chapter, supports the approach to the examination of IHL employed in this thesis: a turn to theories of criminology and social psychology that have been used to explain individual deviance during armed conflicts.<sup>784</sup>

### 6.1 Law and Economics Theory

Law and Economics argues that principles of economics can be used to explain individual legal compliance and deviance.<sup>785</sup> This is because, according to Law and Economics theory, individuals make decisions about whether to follow or break the law based on an economic evaluation of the personal costs and benefits of compliance.<sup>786</sup> Consequently, if laws are made that increase the costs of negative behaviour and decrease the benefits, individuals should be more likely to comply with a law.<sup>787</sup> Law and Economics theory relies on several key assumptions a both about the world and human nature: (1) all people are rational and self-

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<sup>784</sup> Although this chapter takes issue with the adequacy of legal theories to provide an understanding of the psychological dynamics of combatant violence toward civilians during armed conflict, this should not be interpreted as a general criticism of the validity of the theories of Law and Economics, Behavioural Law and Economics, or Socialization and International Law. The validity of these three theories as general theories of law is not the subject of this chapter.

<sup>785</sup> See, e.g., Werner Z Hirsch, *Law and Economics: An Introductory Analysis*, 2d ed (San Diego, CA: Academic Press Inc, 1988) at 262–82; Lewis A Kornhauser, “The New Economic Analysis of Law: Legal Rules as Incentives” in Nicholas Mercurio, ed, *Law and Economics* (Norwell, MA: Kluwer Academic Publishers, 1989) 27; Richard A Posner, *Economic Analysis of Law*, 9th ed (New York: Walter Kluwers Law & Business, 2014) at 253–58; Dan M Kahan, “Social Meaning and the Economic Analysis of Crime” (1998) 27:S2 *Journal of Legal Studies* 609.

<sup>786</sup> See, e.g., Hirsch, *supra* note 785 at 262–82; Kornhauser, *supra* note 785; Posner, *supra* note 785 at 253–58; Kahan, *supra* note 785.

<sup>787</sup> See, e.g., Samuel Kramer, “An Economic Analysis of Criminal Attempt: Marginal Deterrence and the Optimal Structure of Sanctions” (1990) 81:2 *Journal of Criminal Law and Criminology* 398 at 402–407; Talia Fisher, “Economic Analysis of Criminal Law” in Markus D Dubber & Tatjana Hornle, eds, *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014) 28 at 40–41.

interested;<sup>788</sup> (2) utility maximization is people's ultimate goal;<sup>789</sup> (3) all people assign the same value to specific preferences and that value is quantifiable;<sup>790</sup> and, (4) context does not play a role in the construction of individual preferences.<sup>791</sup> These assumptions have been heavily criticized by Behavioural Law and Economics scholars.<sup>792</sup> For example, the work of Amos Tversky and Daniel Kahneman has demonstrated how individuals are not entirely rational in their decision-making.<sup>793</sup> This section will examine these flawed assumptions of Law and Economics theory in order to demonstrate that it cannot provide a useful model for understanding combatant violence toward civilians during armed conflict.

#### 6.1.1 People are Rational and Self-Interested

Law and Economics theory assumes that individuals are both rational and self-interested and are guided by these characteristics in everything that they do.<sup>794</sup> While people's ability to maximize their goals (preferences) will be limited by their access to resources and external restrictions placed on their ability to act, they will nonetheless evaluate available options based on a cost-benefit analysis.<sup>795</sup> On the basis of such an analysis, the rational choice is considered to be the

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<sup>788</sup> See, e.g., Michael Freeman, *Lloyd's Introduction to Jurisprudence*, 9th ed (London, UK: Thomas Reuters, 2014) at 518, 522; Gregory Mitchell, "Alternative Behavioral Law and Economics" in Eyal Zamir & Doron Teichman, eds, *The Oxford Handbook of Behavioral Economics and the Law* (Oxford: Oxford University Press, 2014) 167 at 168; Posner & Sykes, *supra* note 782 at 12; DL McFadden, "Rationality for Economists" (1999) 19 *Journal of Uncertainty* 73.

<sup>789</sup> See, e.g., Richard A Posner, *Economic Analysis of Law*, 7th ed (New York: Aspen Publishers, 2007) at 10–15; Richard A Posner, "Utilitarianism, Economics, and Legal Theory" (1979) 8:1 *Journal of Legal Studies* 103; Freeman, *supra* note 788 at 520.

<sup>790</sup> See, e.g., David D Friedman, *Law's Order: What Economics Has to Do with Law and Why it Matters* (Princeton: Princeton University Press, 2000) at 20–21, 33, 39–40; Jeffrey L Dunoff & Joel P Trachtman, "Economic Analysis of International Law" (1999) 24 *Yale Journal of International Law* 1 at 48; Richard A Posner, "Wealth Maximization Revisited" (1985) 2 *Notre Dame Journal of Law, Ethics and Public Policy* 85 at 86; Posner & Sykes, *supra* note 782 at 13.

<sup>791</sup> See, e.g., Friedman, *supra* note 790 at 19.

<sup>792</sup> See, e.g., Christine Jolls, Cass R Sunstein & Richard H Thaler, "A Behavioral Approach to Law and Economics" (1998) 50 *Stanford Law Review* 1471; Christine Jolls, "Behavioral Law and Economics" in Alain Marciane, ed, *Law and Economics: A Reader* (New York: Routledge, 2009) 71; Russell B Korobkin & Thomas S Ulen, "Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics" (2000) 88 *California Law Review* 1051; Russell B Korobkin, "What Comes After Victory for Behavioral Law and Economics?" (2011) 2011:5 *University of Illinois Law Review* 1653; Anne van Aaken, "Behavioral International Law and Economics" (2014) 55:2 *Harvard International Law Journal* 421.

<sup>793</sup> Amos Tversky & Daniel Kahneman, "Judgment Under Uncertainty: Heuristics and Biases" in Daniel Kahneman, Paul Slovic & Amos Tversky, eds, *Judgment under Uncertainty: Heuristics and Biases* (Cambridge, UK: Cambridge University Press, 1982); Amos Tversky & Daniel Kahneman, "The framing of decisions and the psychology of choice" (1981) 30:4481 *Sciences* 453; Daniel Kahneman & Amos Tversky, "Prospect Theory: An Analysis of Decision Under Risk" (1979) 47 *Econometrica* 263.

<sup>794</sup> Freeman, *supra* note 788 at 522.

<sup>795</sup> Posner & Sykes, *supra* note 782 at 12.



option for which the benefits are outweighed by the costs. Further, because the individual is self-interested, the costs and benefits will be based solely on the individual's personal interests and preferences. As Freeman describes it, the value ascribed to a thing by an individual "is said to be 'measured' by the maximum that person would be willing to pay for it, or the minimum for which the person would be willing to take to give it up."<sup>796</sup> The utility of assuming that people are rational and self-interested is that it allows Law and Economics scholars to make predictions about how individuals will behave in a given situation. It means that, based on the information available to an individual, we can assume that they will "make[s] consistent and logical choices".<sup>797</sup> Self-interest, along with Law and Economics' assumption of utility maximization, allow Law and Economics theorists to make predictions about individuals' goals and preferences.

Issacharoff notes that assuming all people are rational and self-interested is a "highly reductionist view of human psyche".<sup>798</sup> The assumption in Law and Economics theory that individuals are rational and self-interested is problematic for three important reasons. First, people often make decisions that are irrational due to an array of flawed cognitive processes.<sup>799</sup> For example, people often have flawed memories and relying on flawed memories can lead to irrational choices or which may limit their rationality.<sup>800</sup> This is addressed in Behavioural Law and Economics theory discussed below. Second, Law and Economics theory makes assumptions about the availability of information to a decision-maker and about the stability of individual preferences.<sup>801</sup> It assumes that people's preferences are both fixed and stable.<sup>802</sup> This assumption "is not so much

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<sup>796</sup> Freeman, *supra* note 788 at 518.

<sup>797</sup> Mitchell, *supra* note 788 at 168. See also McFadden, *supra* note 788.

<sup>798</sup> Samuel Issacharoff, "Can There Be a Behavioral Law and Economics?" (1998) 51 *Vanderbilt Law Review* 1729 at 1730.

<sup>799</sup> See, e.g., Herbert A Simon, "A Behavioral Model of Rational Choice" (1955) 69 *Quarterly Journal of Economics* 99; Jolls, Sunstein & Thaler, *supra* note 792 at 1477; Tversky & Kahneman, *supra* note 793.

<sup>800</sup> Jolls, Sunstein & Thaler, *supra* note 792 at 1477; Freeman, *supra* note 788 at 522; Korobkin & Ulen, *supra* note 792 at 1074.

<sup>801</sup> Freeman, *supra* note 788 at 522; Gary Becker, *The Economic Approach to Human Behavior* (Chicago: Chicago University Press, 1976) at 14; Matthew D Adler, *Rational Choice, Rational Agenda-Setting, and Constitutional Law: Does the Constitution Require Basic or Strengthened Public Rationality?* (2013) at 113.

<sup>802</sup> Matthew Rabin, "Incorporating Fairness Into Game Theory and Economics" (1993) 83 *American Economic Review* 1281 at 13–16; Yulia Foka-Kavalieraki & Aristides N Hatzis, "Rational After All: Toward an Improved Theory of Rationality in Economics" (2011) 12:1 *Revue de Philosophie Economique* 2 at 7.

empirically informed, but rather a methodological aid”,<sup>803</sup> which adds to the flawed behavioural model produced by Law and Economics theory. People do not always have access to all of the information necessary to make the rational choice in a particular situation.<sup>804</sup> Also, people’s preferences are not static but can change over time and be affected by many internal and external variables.<sup>805</sup> Finally, the assumption that individuals will always make a choice based on their own self-interest ignores the fact that people are sometimes motivated by, or their decisions influenced by, other considerations such as “altruism, a concern for the community, [or] an interest in the environment.”<sup>806</sup> Not only are these flawed assumptions relevant in ordinary, everyday types of decisions (e.g., to go to work or to call in sick; to give someone your seat on the bus or to remain seated), but they are often magnified in situations of armed conflict when, arguably, the rational, self-interested choice would be to remain home and let someone else risk their life on the battlefield. Once a combatant, individuals may often lack complete information about their situation and/or possible outcomes of their choices.<sup>807</sup> They may jeopardize their own safety, or even life, to help a fallen comrade. They may choose to treat unarmed civilians or detainees violently when those civilians pose no threat to themselves or their fellow combatants. Other times, an order from a commanding officer may seem to present combatants with no option for choice at all,<sup>808</sup> while some combatants (albeit a minority) may choose to disobey a command and risk punishment. Even if the rational, self-interested, informed actor with stable preferences was an accurate model in the peacetime context (which Behavioural Law and Economics demonstrates is not the case),<sup>809</sup> it is difficult to see how the rational actor model could ever be a reliable framework for understanding individual decision-making in armed conflict.

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<sup>803</sup> Markus Englerth, “Behavioral Law and Economics” in Emanuel V Towfigh & Niels Petersen, eds, *Economic Methods for Lawyers* (Cheltenham, UK: Edward Elgar, 2015) 177 at 190.

<sup>804</sup> See, e.g., Joshua S Gans, “On the Impossibility of Rational Choice under Incomplete Information” (1996) 29:2 *Journal of Economic Behavior and Organization* 287.

<sup>805</sup> Amos Tversky & Richard H Thaler, “Preference Reversals” in Richard H Thaler, ed, *The Winner’s Curse: Paradoxes and Anomalies of Economic Life* (Princeton: Princeton University Press, 1994) 79 at 91; Jolls, Sunstein & Thaler, *supra* note 792 at 1488, 1535–36.

<sup>806</sup> Freeman, *supra* note 788 at 522.

<sup>807</sup> Karl von Clausewitz, *Principles of War* (London, UK: Stephen Austin & Sons Ltd, 1943) at 51.

<sup>808</sup> This was the argument advanced by the defendant in *The Prosecutor v Drazen Erdemovic*, *Sentencing Judgment*, 5 March 1998, IT-96-22-Tbis.

<sup>809</sup> See, e.g., Simon, *supra* note 799; Jolls, Sunstein & Thaler, *supra* note 792 at 1477; Tversky & Kahneman, *supra* note 793.

### 6.1.2 Utility Maximization and the Quantification and Universality of Preferences

Another assumption of Law and Economics theory is that preferences can always be quantified. Law and Economics theory states that individuals make decisions based on an end goal of utility maximization.<sup>810</sup> Utility maximization “assumes that all choices are made to maximize the chooser’s utility, happiness, or pleasure” and “what maximizes a chooser’s utility, happiness, or pleasure is achieving his or her goals.”<sup>811</sup> Some economists, such as Posner, use wealth maximization as an end goal as opposed to utility maximization and argue that wealth provides a greater guide for decision-making than ‘utility’ since “utility whether as welfare or happiness is both difficult to discover and to measure”.<sup>812</sup> The basis for this is that “[m]oney is easier to measure than utility.”<sup>813</sup> Regardless of whether wealth maximization or utility maximization is used as an end goal, both require some means evaluating and predicting the extent to which individuals value (either monetarily or based on utility) the different courses of action between which they are choosing. Law and Economics theory nonetheless “presupposes the ability to measure and compare the ‘costs’ and ‘benefits’ of various types of transactions”.<sup>814</sup> Reliance on utility maximization in lieu of wealth maximization helps to overcome the problem of incommensurability, where a choice must be made between values which are not all easily quantified, such as a choice between money and respect.<sup>815</sup> Law and Economics theory does not provide guidance on how to measure values that are not readily quantifiable, such as national pride or friendship.<sup>816</sup>

Law and Economics theory considers a law to be efficient and “desirable even though it produces losers as well as winners, as long as winners gain more than the losers lose.”<sup>817</sup> In addition to assuming the ability to quantify values or measure usefulness, as already mentioned, this assumes an ability to universalize this measurement. To assume that a law can be used to

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<sup>810</sup> See, e.g., Posner, *supra* note 789 at 10–15.

<sup>811</sup> Jonathan E Leightner, “Utility Maximization, Morality, and Religion” (2005) 39:2 *Journal of Economic Issues* 375 at 375.

<sup>812</sup> Posner, *supra* note 789.

<sup>813</sup> Freeman, *supra* note 788 at 520.

<sup>814</sup> Dunoff & Trachtman, *supra* note 790 at 48.

<sup>815</sup> This is referred to as the incommensurability thesis: see, e.g., Jane B Baron & Jeffrey L Dunoff, “Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory” (1996) 17 *Cardozo Law Review* 431; Cass R Sunstein, “Incommensurability and Valuation in Law” (1993) 92 *Michigan Law Review* 779 at 796–97.

<sup>816</sup> See, e.g., Sunstein, *supra* note 815 at 783, 797–98, 805, 812–13.

<sup>817</sup> Posner & Sykes, *supra* note 782 at 13.

direct the behaviour of individuals within a society requires an assumption that at least a significant number of individuals will react similarly to the same legal incentives and disincentives.<sup>818</sup> However, such an assumption requires that individuals quantify the values and goals affected, or intended to be affected, by the law in the same manner.<sup>819</sup> This fails to account for evidence that there are individual variations in preferences within a single society. It assumes comparable, if not equal, valuation by both rich and poor, young and old, male and female or even by two random people that cannot be classified into binary dichotomies such as these.

The assumption that all preferences are identifiable and quantifiable, and that such quantification is universal, is problematic in two important ways. First, not all values can be monetized or quantified.<sup>820</sup> Second, even if a particular value can or could be quantified, it cannot be assumed that this quantification is universal or generalizable within a group or a society.<sup>821</sup>

The assumption that all values are quantifiable is simply inaccurate. Law and Economics theorists' attempt to simplify the complexity of quantifying values has led to a tendency to evaluate choices based on the monetization of preferences.<sup>822</sup> However, not all preferences can be easily monetized or monetized at all. For example, while a price may be assigned to the cost of tuition for a four-year bachelor's degree, a price for the knowledge gained from such an education cannot easily be monetized. This is because, while most, if not all, societies provide a framework or metric for objectively assessing the value of some goods, such as a car or a house,<sup>823</sup> other goods – such as abstract goods like friendship or the eradication of discrimination – have no such standardized framework or metric for valuation.<sup>824</sup> Some decisions may involve a single metric for valuation, such as money, distance or weight, while some “[k]inds of valuation

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<sup>818</sup> Dan Danielsen, “Letting Go of ‘The Normal’ in Pursuit of an Ever- Elusive Real” in Anne Orford & Florian Hoffmann, eds, *The Oxford Handbook of the Theory of International Law* (Oxford: Oxford University Press, 2016) 452 at 459.

<sup>819</sup> See, e.g., Freeman, *supra* note 788 at 519; Danielsen, *supra* note 818 at 459.

<sup>820</sup> Sunstein, *supra* note 815 at 796–97.

<sup>821</sup> See, e.g., Freeman, *supra* note 788 at 519.

<sup>822</sup> See, e.g., Posner, *supra* note 790 at 86; Friedman, *supra* note 790 at 20, 33, 39–40; Freeman, *supra* note 788 at 520.

<sup>823</sup> For example, in Canada, there are provincial authorities, such as Ontario's Municipal Property Assessment Corporation (MPAC), BC Assessment (BCA), that assess the value of homes and properties for the purpose of calculating property taxes.

<sup>824</sup> Sunstein, *supra* note 815 at 796–97.

- love, respect, wonder and worship - embody no metric at all.”<sup>825</sup> When dealing with values, preferences, and goals for which there is no metric or which cannot be monetized, a cost-benefit analysis is not possible and cannot accurately depict human decision-making.<sup>826</sup> Even where Law and Economics theory may adequately explain and describe market behaviours, it has difficulty “accurately explain[ing] and predict[ing] non-market behavior.”<sup>827</sup> Even where there is an objective framework to assess the value of a particular good, this does not account for individual variation, as will be discussed below. Further, goods and values may be valued either instrumentally or intrinsically and the value assigned can often vary based on which form of valuation is applied.<sup>828</sup> It may be that a single actor may assign two (or more) values to a single act. For example, a military operation may be assigned a monetary value based on the cost of soldiers’ salaries, of weapons used, fuel for transport, and so on, but the same operation may also possess an intangible value that cannot be monetized, such the value of a military victory or defeat.

Finally, under Law and Economics theory, a law-maker must assume that the valuation of specific preferences can be generalized across individuals in society because a single law or body of laws is intended to produce a specific outcome from most, if not all, of these individuals. Law and Economics effectively “assumes that the worth of £1 is the same to everyone”.<sup>829</sup> A person who is poor may value a dollar much more than a person who is rich. A person who is starving may value acquiring food, even by theft, over a personal desire to be a law-abiding citizen. An assumption that there will be no variation among individuals in their cost-benefit analysis of a situation and that all people value all things equally is an untenable assumption. This is because there are many different kinds or different modes of valuation: “[people] care about things and [other] people in different ways, ... such as love, respect, and admiration.”<sup>830</sup> Not only do people generally care about things in different ways, they also often care about things differently from one another and this can result in valuation differences between individuals. While the former is

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<sup>825</sup> *Ibid.*

<sup>826</sup> See, e.g., Margaret J Radin, “Market-Inalienability” (1987) 100 *Harvard Law Review* 1849 at 1905–1906.

<sup>827</sup> Thomas S Ulen, “Growing Pains of Behavioral Law and Economics” (1998) 51 *Vanderbilt Law Review* 1747 at 1759.

<sup>828</sup> Sunstein, *supra* note 815 at 782–83.

<sup>829</sup> Freeman, *supra* note 788 at 519.

<sup>830</sup> Elizabeth Anderson, *Value in Ethics and Economics* (Cambridge, MA: Harvard University Press, 1993) at 6.

often affected by context, which will be discussed more below, the latter may be influenced by any number of factors. For example, a person who is spendthrift may value a dollar more than a person is not particularly frugal, even if there is no disparity between their personal wealth. My brother who dislikes Brussel sprouts likely values them less than I who love them. This is not to say that there are never instances where certain values may be generalized to a particular society or group of persons. Societies often have shared values such as “liv[ing] in ... harmony with nature” or cultural or racial purity.<sup>831</sup> The argument here is that, while there will be times when valuation of preferences may be generalizable, there will also be times when it is not and an assumption to the contrary inhibits an accurate understanding of human behaviour.

### 6.1.3 Context

Finally, the omission of consideration of context within Law and Economics theory suggests a flawed assumption that context is not relevant to individual decision-making, choices, or preferences. The assumption is that social situations reveal human preferences and values, but that social situations do not influence their construction.<sup>832</sup> However, context is highly relevant:<sup>833</sup> “People do not value goods acontextually.”<sup>834</sup> The choices I make while grocery shopping are very different when my budget is small than when it is large. If my choices are relied on to reveal my preferences, as is the practice according Law and Economics theory, failure to consider the context, or situational factors, in which I am operating can lead to erroneous conclusions about my preferences. Similarly, it is likely that assuming an individual’s preferences during war are consistent with their preferences during peacetime is also likely to lead to erroneous behavioural predictions of behaviour during armed conflict.

As a result of its flawed assumptions about human psychology and how individuals interact with law, Law and Economics theory cannot provide an adequate understanding of combatant behaviour during armed conflict. Even without these assumptions, Law and Economics theory - in an effort to create a broadly generalizable theory - focuses on individual decision-making in

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<sup>831</sup> *Ibid.*

<sup>832</sup> See, e.g., Friedman, *supra* note 788 at 19 (on revealed preferences). Behavioural Law and Economics directly contradicts this assumption by asserting that social situations construct human preferences and values: Cass R Sunstein, “Behavioral Law and Economics: A Progress Report” (1999) 1 *American Law and Economics Review* 115 at 117.

<sup>833</sup> See, e.g., Korobkin & Ulen, *supra* note 792 at 1102–26.

<sup>834</sup> Sunstein, *supra* note 815 at 784.

typical, day-to-day, peacetime contexts, which cannot satisfactorily provide for the manner in which the exceptional context of armed conflict affects individual behaviour. In an effort to address the flawed assumptions of Law and Economics theory, scholars have developed the derivative theory of Behavioural Law and Economics. Behavioural Law and Economics has attempted to use the work of psychologists to develop a more nuanced, and more accurate, understanding of human behaviour. The following section will examine Behavioural Law and Economics and assess whether it can provide an adequate model for understanding and explaining combatant violence toward civilians during armed conflict.

## 6.2 Behavioural Law and Economics

Behavioural Law and Economics scholars attempt "to model and predict behavior relevant to law with the tools of traditional economic analysis, but with more accurate assumptions about human behavior" than Law and Economics theorists.<sup>835</sup> The field emerged from scholars' arguments that, while people often "violated[d] the predictions of rational choice theory", their "reliance on cognitive heuristics and on-the-spot preference construction [still led] to predictable biases in judgment and choice".<sup>836</sup> Behavioural Law and Economics' model for understanding individual decision-making and interaction with law directly challenges Law and Economics' assumptions of pure rationality and pure self-interest while giving consideration to the influence of context on individual preferences and values. The following sections will examine the manner in which Behavioural Law and Economics challenges these assumptions.

### 6.2.1 Bounded Rationality

Behavioural Law and Economics has qualified Law and Economics' depiction of humans as rational beings. Instead, these theorists consider humans to possess "bounded rationality".<sup>837</sup> Jolls has categorized bounded rationality as either "judgment errors" or "departures from expected utility theory."<sup>838</sup> Judgment errors are the result of inherent limitations on the human ability to think, learn, understand, and process information.<sup>839</sup> The work of many cognitive psychologists has found "that people are myopic in their decisions, may lack skill in predicting

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<sup>835</sup> Jolls, Sunstein & Thaler, *supra* note 792 at 1476.

<sup>836</sup> Mitchell, *supra* note 788 at 169.

<sup>837</sup> See, e.g., Jolls, Sunstein & Thaler, *supra* note 792 at 1477.

<sup>838</sup> Jolls, *supra* note 792 at 76.

<sup>839</sup> Simon, *supra* note 799. See also, e.g., Gerd Gigerenzer, "Is the Mind Irrationally or Ecologically Rational?" in Francesco Parisi & Vernon L Smith, eds, *The Law and Economics of Behavior* (Stanford, CA: Stanford University Press, 2005) 37 at 38–39; Jolls, Sunstein & Thaler, *supra* note 792 at 1477.

their future tastes, and can be led to erroneous choices by fallible memory and incorrect evaluation of past experiences.”<sup>840</sup> Furthermore, “irrational ideas or prejudices will often persist over time.”<sup>841</sup> These limitations often lead to departures from the Law and Economics assumption of unbounded rationality.<sup>842</sup> Behavioural Law and Economics theorists do not argue that people are always irrational but, rather, that the idea of unbounded rationality is an excessively and unnecessarily limited understanding of human behaviour.<sup>843</sup> The work of Tversky and Kahneman has shown that these departures are often the result of the methods of processes people use to form judgments and make decisions.<sup>844</sup> People often use mental shortcuts when forming a judgment, thereby differentiating actual judgments from unbiased forecasts.<sup>845</sup> For example, Tversky and Kahneman demonstrate that, in situations of uncertainty, people will often estimate the frequency of an event based on how easily they remember other instances of this event, which can result in false conclusions.<sup>846</sup> Similarly, how a problem is framed often “leads the individual to focus on certain characteristics of a problem (whilst neglecting others) and points towards certain decisions (and not to others).”<sup>847</sup> The use of these shortcuts can also contribute to how a problem is framed. How a problem is framed often “leads the individual to focus on certain characteristics of a problem (whilst neglecting others) and points towards certain decisions (and not to others).”<sup>848</sup>

Tversky and Kahneman’s work found that there is a certain predictability to people’s judgment errors.<sup>849</sup> While the use of a shortcut may be “rational[] in the sense of economizing on thinking time” it may nonetheless “lead to errors in particular circumstances” meaning that the person employing the shortcut still “make[is] forecasts that are different from those that emerge from the standard [law and economics] rational choice model.”<sup>850</sup> However, although there may be a

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<sup>840</sup> Freeman, *supra* note 788 at 524 discussing; Daniel Kahneman, “New Challenges to the Rationality Assumption” (1997) 3:2 *Legal Theory* 105.

<sup>841</sup> Freeman, *supra* note 788 at 524.

<sup>842</sup> Jolls, Sunstein & Thaler, *supra* note 792 at 1477.

<sup>843</sup> Korobkin & Ulen, *supra* note 792 at 1074.

<sup>844</sup> Tversky & Kahneman, *supra* note 793.

<sup>845</sup> Jolls, Sunstein & Thaler, *supra* note 792 at 1477.

<sup>846</sup> See, e.g., Tversky & Kahneman, *supra* note 793 at 11.

<sup>847</sup> van Aaken, *supra* note 792 at 428.

<sup>848</sup> *Ibid.*

<sup>849</sup> Tversky & Kahneman, *supra* note 793 at 11; Jolls, Sunstein & Thaler, *supra* note 792 at 1477.

<sup>850</sup> Jolls, Sunstein & Thaler, *supra* note 792 at 1478. See also, e.g., John Conlisk, “Why Bounded Rationality” (1996) 34 *Journal of Economic Literature* 671 at 682–83.



certain predictability to people's use of heuristics, there is also variability in how these heuristics affect, or the extent to which they affect, people. The manner in which a choice is framed may be used to predict how some people will respond but some people will also be unaffected, or less affected, by the frame such that their decision will differ from those affected by the frame.<sup>851</sup> Korobkin has argued that this heterogeneity requires greater consideration to understand its consequences for the scope of bounded rationality.<sup>852</sup>

Whereas past choices are assumed under Law and Economics theory to have either a negative influence on future choices or no influence at all,<sup>853</sup> Behavioural Law and Economics theorists have demonstrated that people have habits and will "often repeat behaviors (or repeatedly choose the same good or service) ... as a way of reducing the costs of decision making."<sup>854</sup> People have a bias for the status quo.<sup>855</sup> For example, they tend to ascribe greater value to things they already possess than those they do not (known as the endowment effect).<sup>856</sup> This more nuanced conception of the individual provided by Behavioural Law and Economics is a necessary step forward from traditional Law and Economics' flawed conception of the individual; however, as will be discussed in Section 6.2.4, Behavioural Law and Economics unfortunately tends to limit the extent to which it draws insights from psychology.

The second category of bounded rationality - departures from expected utility theory - addresses Law and Economics' assumption of wealth maximization as everyone's end goal. Some Behavioural Law and Economics scholars speak of utility maximization rather than wealth maximization,<sup>857</sup> while others continue to frame their theory around wealth maximization.<sup>858</sup> Although there may be times when individuals seek to maximize utility, there are also many times when they exhibit "satisficing behaviour" whereby they "aim to make a satisfactory

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<sup>851</sup> See, e.g., Korobkin, *supra* note 792 at 1669; Daniel Kahneman & Amos Tversky, "Choices, Values and Frames" (1984) 39 *American Psychologist* 341 at 343.

<sup>852</sup> Korobkin, *supra* note 792 at 1674.

<sup>853</sup> See, e.g., Gary Becker, "Habits, Addictions, and Traditions" (1992) 45 *Kyklos* 327 at 327.

<sup>854</sup> Korobkin & Ulen, *supra* note 792 at 1114.

<sup>855</sup> See, e.g., William Samuelson & Richard Zeckhauser, "Status Quo Bias in Decision Making" (1988) 1 *Journal of Risk and Uncertainty* 7.

<sup>856</sup> See, e.g., Richard H Thaler, "Toward a Positive Theory of Consumer Choice" (1980) 1 *Journal of Economic Behavior and Organization* 39 at 44.

<sup>857</sup> See, e.g., Korobkin & Ulen, *supra* note 792.

<sup>858</sup> See, e.g., Jolls, Sunstein & Thaler, *supra* note 792.

choice-one that meets a specified aspiration level rather than one that maximizes their utility.”<sup>859</sup> Failure to maximize utility is also often the result of the use of heuristics which contribute to judgment errors.<sup>860</sup> As it is Law and Economics’ assumption of unbounded rationality that “permits the application of maximizing methods”, limitations on an individual’s rationality similarly limit “the application of maximizing methods”.<sup>861</sup> For example, the complexity of a situation may render it impossible for an individual to cognitively assess which outcome will maximize utility or an individual may chose “to limit her search for information or consideration of the decision short of reaching a utility-maximizing decision.”<sup>862</sup> People often use a combination of different decision-making strategies rather than employ a single strategy.<sup>863</sup>

In the criminal law context, Behavioural Law and Economics does provide some useful insights for IHL in its discussion of unbounded rationality. Behavioural Law and Economics suggests that, in the calculation of costs and benefits of committing a criminal act, people “may make systematic (as opposed to random) errors in computing these costs and benefits” as a result of bounded rationality.<sup>864</sup> As discussed, people make errors as to the frequency and probability of events, such as the possibility of being caught committing a crime. This supports “making law enforcement highly visible, holding constant the actual probability that offenders will be caught”.<sup>865</sup> Similarly, Behavioural Law and Economics identifies limits to people’s individual self-control or will-power. In the criminal context, this means that emphasis among offenders tends to be on the immediate benefits accruing from the criminal act rather than future (potential) costs.<sup>866</sup> The need for consistent enforcement of rules, perhaps at lower levels of severity in

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<sup>859</sup> Korobkin & Ulen, *supra* note 792 at 1076. The concept of “satisficing behaviour” was first developed by Herbert A Simon, “Rational Choice and the Structure of the Environment” (1956) 63:2 *Psychological Review* 129 at 129, 136.

<sup>860</sup> See, e.g., Korobkin & Ulen, *supra* note 792 at 1076.

<sup>861</sup> David Laibson & Richard Zeckhauser, “Amos Tversky and the Ascent of Behavioral Economics” (1998) 16 *Journal of Risk and Uncertainty* 7 at 7.

<sup>862</sup> Korobkin & Ulen, *supra* note 792 at 1077.

<sup>863</sup> See, e.g., John W Payne, James R Bettman & Eric J Johnson, *The Adaptive Decision Maker* (Cambridge, UK: Cambridge University Press, 1993) at 28–29.

<sup>864</sup> Jolls, Sunstein & Thaler, *supra* note 792 at 1538. Even some more traditional law and economics scholars recognize that cost-benefit analysis may be problematic in criminal contexts as individuals often fail to accurately calculate costs and benefits in these contexts: see, e.g., Dunoff & Trachtman, *supra* note 790 at 401.

<sup>865</sup> Jolls, Sunstein & Thaler, *supra* note 792 at 1538.

<sup>866</sup> *Ibid.* See also on self-control and criminal behaviour, e.g., Michael R Gottfredson & Travis Hirschi, *A General Theory of Crime* (Stanford, CA: Stanford University Press, 1990) at 85–120; James Q Wilson & Allan Abrahamse, “Does Crime Pay?” (1992) 9:3 *Justice Quarterly* 359 at 372–74.

terms of punishment or perceived seriousness of the offence, can be useful in the context of IHL, the enforcement of which under international criminal law internationally has tended to focus only the most grave or serious violations of IHL. Behavioural Law and Economics analysis in the criminal context also suggests that enforcement of IHL and sanctions for violations that are more proximate to the time of the violation may have greater deterrent value as they will be factored into short-term evaluations rather than downplayed as a distant, future potential cost. This idea will be revisited in chapter 8.

### 6.2.2 Bounded Self-Interest

Behavioural Law and Economics has qualified Law and Economics theory's assumption that people always strive to maximize their self-interest. Conformity with social norms, defined by Sunstein as "social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done",<sup>867</sup> may sometimes be the rational, self-interested choice; however, it is often the case that compliance with a social norm will result in behaviour that is inconsistent with self-interest. For example, a man may take his hat off in a church even if his preference is to always wear a hat or a person will leave a tip in a restaurant in to which they will never return based on social norms that say men should not wear hats in churches and people should tip for good service.<sup>868</sup> The power of social norms can be attributed to either a "desire for social approval"<sup>869</sup> or the "internalization [of norms]"<sup>870</sup> or both.<sup>871</sup> Thus, "[t]he primary deterrent effect many laws have on undesirable behavior might not be the direct increase in the price of the behavior ... but the encouragement of a social norm against the activity."<sup>872</sup>

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<sup>867</sup> Cass R Sunstein, "Social Norms and Social Roles" (1996) 96 *Columbia Law Review* 903 at 914.

<sup>868</sup> Robert D Cooter, "Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant" (1996) 144 *University of Pennsylvania Law Review* 1643 at 1656; Robert D Cooter, "Normative Failure Theory of Law" (1997) 82 *Cornell Law Review* 947 at 854; Jolls, Sunstein & Thaler, *supra* note 792 at 1492–93.

<sup>869</sup> Korobkin & Ulen, *supra* note 792 at 1131. See also, e.g., Richard H McAdams, "The Origin, Development, and Regulation of Norms" (1997) 96 *Michigan Law Review* 338 at 355–56.

<sup>870</sup> Korobkin & Ulen, *supra* note 792 at 1131. See also, e.g., Robert D Cooter, "Expressive Law and Economics" (1998) 27 *Journal of Legal Studies* 585 at 585–86; Cooter, *supra* note 868 at 1667; Robert C Ellickson, "Law and Economics Discovers Social Norms" (1998) 27 *Journal of Legal Studies* 537 at 539–40.

<sup>871</sup> See, e.g. Korobkin & Ulen, *supra* note 792 at 1131; Cass R Sunstein, "On the Expressive Function of Law" (1996) 144 *University of Pennsylvania Law Review* 2021 at 2031.

<sup>872</sup> Korobkin & Ulen, *supra* note 792 at 1131–32.

Behavioural Law and Economics theorists have focused in particular on the social norm of fairness,<sup>873</sup> or reciprocity.<sup>874</sup> The unbounded self-interest of the actor in Law and Economics theory precludes the potential for people to act based on “unenforced notions of fairness”.<sup>875</sup> However, ‘fairness’ is a vague term.<sup>876</sup> For Behavioural Law and Economics scholars, “fairness” is understood to refer to the idea that “people will judge outcomes as unfair if they depart substantially from the terms of a ‘reference transaction’ – a transaction that defines the benchmark for the parties’ interactions”.<sup>877</sup> Yet, ‘reference transactions’ “[are] not always unique” and the use of different reference transactions by people can lead to disagreements about what is fair in a particular situation.<sup>878</sup> When an individual perceives someone’s actions or something to be unfair, there is equal potential for that person to be motivated to retaliate.<sup>879</sup> The influence of social norms and variability of individual perception is one way in which Behavioural Law and Economics incorporates consideration of the effect of context into its model of human behaviour.

### 6.2.3 Context

Behavioural Law and Economics has given greater consideration to the role of context with regards to individual behaviour through the idea of “context-dependent preferences”.<sup>880</sup> The existence of context-dependent preferences directly challenges Law and Economics theory’s assumption that an individual’s preferences are stable and exist outside of situational factors (discussed above). Instead, Behavioural Law and Economics considers social situations to play a role in constructing human values and preferences: “preferences can be a product of procedure,

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<sup>873</sup> See, e.g., *ibid* at 1135–38; Jolls, Sunstein & Thaler, *supra* note 792 at 1493–97; Rabin, *supra* note 802; Daniel Kahneman, Jack L Knetsch & Richard H Thaler, “Fairness as a Constraint on Profit Seeking: Entitlements in the Market” (1986) 76 *American Economic Review* 728 at 729–30; Elizabeth Hoffman & Matthew L Spitzer, “Entitlements, Rights, and Fairness: An Experimental Examination of Subjects’ Concepts of Distributive Justice” (1985) 14 *Journal of Legal Studie* 259 at 261.

<sup>874</sup> See, e.g., Ernst Fehr & Simon Gächter, “Fairness and Retaliation: The Economics of Reciprocity” (2000) 14:3 *Journal of Economic Perspectives* 159.

<sup>875</sup> Korobkin & Ulen, *supra* note 792 at 1135.

<sup>876</sup> See, e.g., Richard Posner, “Behavioral Law and Economics: A Critique” (2002) 42:8 *Economic Education Bulletin* 1 at 13.

<sup>877</sup> Jolls, *supra* note 792 at 80. See also, e.g., Kahneman, Knetsch & Thaler, *supra* note 873.

<sup>878</sup> Kahneman, Knetsch & Thaler, *supra* note 873 at 730.

<sup>879</sup> See, e.g., Fehr & Gächter, *supra* note 874.

<sup>880</sup> See, e.g., Steven M Sheffrin, “Behavioral Law and Economics Is Not Just a Refinement of Law and Economics” (2017) 7–3 *Economia History, Methodology, Philosophy* 331.

description, and context at the time of choice.”<sup>881</sup> Behavioural Law and Economics theory demonstrates that “the ‘frame’ or the way options are presented will influence choices.”<sup>882</sup> For example, Tversky and Kahneman’s framing effect shows that, when outcomes are uncertain, people are more likely to be risk averse when options are presented as gains and more risk-seeking when options are presented as losses.<sup>883</sup> Thus, Behavioural Law and Economics has been able to identify contexts in which people will tend to shape their preferences in the similar ways and based on the same predictable heuristics.

#### 6.2.4 Limitations of Behavioural Law and Economics

Behavioural Law and Economics’ behavioural model represents a useful step forward from Law and Economics’ flawed assumptions of unbounded rationality and self-interest as well as the failure to consider the role of context on behaviour. However, Behavioural Law and Economics’ behavioural model remains limited in two key ways that render it an inadequate lens through which to assess combatant behaviour in armed conflict. First, Behavioural Law and Economics has, as yet, drawn only on a very limited sphere of insights from psychology to create its more nuanced behavioural model. The tendency has been to draw only on “phenomena that have reasonably precise implications for legal issues.”<sup>884</sup> Hanson and Yosifon have criticized this, stating that Behavioural Law and Economics scholars “pick and choose among psychological findings, and select only those that seem directly applicable to a pre-existing policy debate within the law and economics paradigm.”<sup>885</sup> Behavioural Law and Economics scholars, such as Jolls, Sunstein, and Thaler, have strived to create “an approach spare enough to generate predictions across a range of contexts, but not so spare that its predictions about behavior are often incorrect” over a deeper and more robust behavioural model.<sup>886</sup> The focus has been on behavior patterns that generate distinct predictions, setting aside those that “fail to point in

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<sup>881</sup> Sunstein, *supra* note 832 at 117. See also, e.g., Paul Slovic, “The Construction of Preference” (1995) 50 *American Psychologist* 364; Amos Tversky, “Rational Theory and Constructive Choice” in Kenneth Arrow et al, eds, *The Rational Foundations of Economic Behaviour* (London, UK: MacMillan, 1996) 185.

<sup>882</sup> Sheffrin, *supra* note 880.

<sup>883</sup> Kahneman & Tversky, *supra* note 793; Daniel Kahneman, “Reference Points, Anchors, Norms, and Mixed Feelings” (1992) 51:2 *Organizational Behavior and Human Decision Processes* 296.

<sup>884</sup> Jolls, Sunstein & Thaler, *supra* note 792 at 1481.

<sup>885</sup> Jon Hanson & David Yosifon, “The Situational Character: A Critical Realist Perspective on the Human Animal” (2003) 93 *Georgetown Law Journal* 1 at 168.

<sup>886</sup> Jolls, Sunstein & Thaler, *supra* note 792 at 1480.

systematic directions”.<sup>887</sup> This approach limits the degree to which the Behavioural Law and Economics behavioural model can reflect the spectrum of human behavioural complexities.

The second key limitation of the current Behavioural Law and Economics behavioural model is the extent or manner in which considerations of context have been incorporated into the model. Behavioural Law and Economics is correct to note that context often, if not always, plays an important role in constructing individual preferences and values which, in turn, affects their decision-making and choices. However, context is incorporated into Behavioural Law and Economics in a very broad and generalizable manner. Behavioural Law and Economics has focused on context in terms such as the way a choice is framed,<sup>888</sup> the influence of the status quo,<sup>889</sup> the influence of existing social norms,<sup>890</sup> and the “temporal distance of the rule's effects.”<sup>891</sup> Behavioural Law and Economics’ insights have been applied to a variety of domestic legal contexts such as tort,<sup>892</sup> contracts,<sup>893</sup> and corporations.<sup>894</sup> However, those are relatively stable domestic contexts during peace. Behavioural Law and Economics contemplates law-making during and for peacetime and therefore insights from psychology that may provide insights unique or particularly relevant for a behavioral model of combatants in an armed conflict context. This is not to say that the judgment heuristics used to develop the concepts of bounded rationality and bounded self-interest are irrelevant in a behavioural model for armed conflict. However, there may be - and the following chapter demonstrates that there are - psychological theories supported by empirical studies that can be employed to develop a more armed conflict-specific behavioural model.

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<sup>887</sup> *Ibid* at 1481.

<sup>888</sup> See, e.g., Daniel Kahneman, Jack L Knetsch & Richard H Thaler, “Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias” (1991) 5:1 *Journal of Economic Perspectives* 193; Kahneman, *supra* note 883; Anton Kühberger, “The Influence of Framing on Risky Decisions: A Meta-Analysis” (1998) 75 *Organizational Behavior and Human Decision Processes* 23.

<sup>889</sup> See, e.g., Kahneman, Knetsch & Thaler, *supra* note 888; Samuelson & Zeckhauser, *supra* note 855; Russell B Korobkin, “The Status Quo Bias and Contract Default Rules” (1998) 83 *Cornell Law Review* 608.

<sup>890</sup> See, e.g., Korobkin & Ulen, *supra* note 792 at 1130–31; McAdams, *supra* note 869 at 355–56; Cooter, *supra* note 870 at 585–86; Cooter, *supra* note 868 at 1667; Ellickson, *supra* note 870 at 539–40.

<sup>891</sup> Korobkin & Ulen, *supra* note 792 at 1069.

<sup>892</sup> See, e.g., Michael G Faure, “Calabresi and Behavioural Law and Economics” (2008) 1:4 *Erasmus Law Review* 75.

<sup>893</sup> See, e.g., Korobkin, *supra* note 889.

<sup>894</sup> See, e.g., Kent Greenfield, “Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as Regulatory Tool” (2001) 35 *UC Davis Law Review* 581.

There are, however, some Behavioural Law and Economics scholars, such as Korobkin and Ulen, who have advocated that, rather than “a single unified theory designed to explain or predict the full realm of human decision-making behavior”, the focus of Behavioural Law and Economics should be on “a pragmatic collection of situation-specific insights that can assist policymakers dealing with relevant problems.”<sup>895</sup> Korobkin and Ulen consider a “collection of situation-specific minitheories [of behaviour]” that can be used in the “analysis of discrete legal problems” is far more preferable than a theory which has been drastically simplified to provide for universal application.<sup>896</sup> This approach of using situation-specific theories is used in this thesis. Any model of human behaviour generalized or simplified to the point that it may be applied to all contexts is likely to be dominated by understandings of human behaviour based on day-to-day lives during peacetime, rather than armed conflict. The “average behavior of actors”<sup>897</sup> in such contexts will often stand in stark contrast to how people behave within the extraordinary and exceptional context of armed conflict. Ultimately, the greatest utility of Behavioural Law and Economics for this thesis is the approach of turning to other disciplines such as psychology to help understand the how individuals interact with law. The final theory discussed in the following section, Socialization and International Law, similarly draws on another discipline, social psychology, to provide insight into individual behaviour and decision-making.

### 6.3 Socialization and International Law

The third theory of interest in the search to find a model to explain combatant violence toward civilians is Ryan Goodman and Derek Jinks’ Socialization and International Law.<sup>898</sup> Goodman and Jinks’ theory examines mechanisms for influencing state behaviour, specifically state compliance with international human rights law.<sup>899</sup> The primary focus of Goodman and Jinks’

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<sup>895</sup> Korobkin & Ulen, *supra* note 792 at 1075.

<sup>896</sup> *Ibid* at 1072.

<sup>897</sup> Anne van Aaken, “Rationalist and Behavioral Approaches to International Law” in Jeffrey L Dunoff & Mark A Pollack, eds, *International Legal Theory: Foundations and Frontiers* (Cambridge, UK: Cambridge University Press, 2019) at 6.

<sup>898</sup> Ryan Goodman & Derek Jinks, *Socializing States: Promoting Human Rights through International Law* (Oxford: Oxford University Press, 2013); Ryan Goodman & Derek Jinks, “How to Influence States: Socialization and International Human Rights Law” (2004) 54 *Duke Law Journal* 621; Ryan Goodman & Derek Jinks, “International Law and State Socialization: Conceptual, Empirical, and Normative Challenges” (2005) 54:4 *Duke Law Journal* 983; Ryan Goodman & Derek Jinks, “Incomplete Internalization and Compliance with Human Rights Law” (2008) 19:4 *European Journal of International Law* 725.

<sup>899</sup> Goodman & Jinks, *supra* note 898 at 4, 6.

theory is on the interaction between “rights-regarding actors—including states, international organizations, and nongovernmental organizations—and rights-disregarding actors.”<sup>900</sup> Actors in these interactions states are either influencers or the target of influence and which of these two roles a state fulfills can vary depending on the behaviour at issue.<sup>901</sup> For example, the United States can be considered an influencer in the context of human rights compliance in the Syrian civil war and a target of influence with respect to “the treatment of detainees in the ‘global war on terror’.”<sup>902</sup>

Socialization and International Law turns to the “social and behavioral sciences” because those disciplines “have developed an increasingly nuanced conception of the human actor.”<sup>903</sup> This conception of human behaviour developed in the social and behavioral sciences provides an understanding that “qualifies both the oversimplified model of actors as wealth maximizers and the idealized conception of actors as rational, deliberative agents.”<sup>904</sup> Therefore, Goodman and Jinks incorporate insights from sociology, psychology, anthropology, etc. to provide a more accurate model of human behaviour than that used in the Law and Economics theories discussed above.<sup>905</sup>

They identify two prominent mechanisms for influencing state behaviour in existing academic literature: material inducement<sup>906</sup> and persuasion.<sup>907</sup> According to material inducement and persuasion, the “international regime alters human rights practices ... either by *materially inducing* states (and individuals) or by *persuading* states (and individuals) of the validity and legitimacy of human rights law.”<sup>908</sup> Like the theorists of Behavioural Law and Economics,

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<sup>900</sup> *Ibid* at 5.

<sup>901</sup> *Ibid* at 5–6 [emphasis in original].

<sup>902</sup> *Ibid* at 6.

<sup>903</sup> *Ibid* at 10.

<sup>904</sup> *Ibid*.

<sup>905</sup> *Ibid*.

<sup>906</sup> See, e.g., Daniel W Drezner, “Introduction: The Interaction of Domestic and International Institutions” in Daniel W Drezner, ed, *Locating the Proper Authorities: The Interaction of Domestic and International Institutions* (Ann Arbor, MI: University of Michigan Press, 2003) 1 at 12–13; Johnston, *supra* note 783 at 489–90; Lisa L Martin, “Credibility, Costs, and Institutions: Cooperation on Economic Sanctions” (1996) 45 *World Politics* 406 at 413; Leonard J Schoppa, “The Social Context in Coercive International Bargaining” (1999) 53 *International Organizations* 307 at 310.

<sup>907</sup> See, e.g., Rodger A Payne, “Persuasion, Frames, and Norm Construction” (2001) 7 *European Journal of International Relations* 37; Raustiala, *supra* note 783; Risse, *supra* note 783; Johnston, *supra* note 783 at 495.

<sup>908</sup> Goodman & Jinks, *supra* note 898 at 4.



Goodman and Jinks advocate for “more sociologically plausible models of law’s influence”.<sup>909</sup> Consequently, to the mechanisms of material inducement and persuasion, Goodman and Jinks introduce the mechanism of acculturation, drawn from the fields of sociology and psychology, to explain how international actors (international organizations and institutions as well as other states) can induce or influence states to comply with international human rights norms.<sup>910</sup>

### 6.3.1 Material Inducement

The first mechanism discussed by Goodman and Jinks is material inducement, which is a “process whereby target actors are influenced to change their behavior by the imposition of material costs or the conferral of material benefits.”<sup>911</sup> International institutions can employ material inducement to influence state behaviour through the manipulation of “material rewards and punishments”.<sup>912</sup> Consequently, material inducement is largely premised on the model of individual cost-benefit based decision-making developed in Law and Economics.<sup>913</sup> Although Goodman and Jinks refer to this mechanism as “material inducement” they discuss not only the use of economic incentives and disincentives, but also the use of military power.<sup>914</sup>

Material inducement is already present in the context of IHL violations by armed groups. Material incentives exist in the incentives provided to leaders of armed groups in order to influence them into signing peace treaties. For example, in the DRC, rebel leaders are often rewarded with high level positions in government or the national armed forces.<sup>915</sup> This has included high level military positions for rebel leaders - such as Bosco Ntaganda, subject to arrest warrants from the International Criminal Court for war crimes and crimes against humanity - at the time they received their prestigious military appointments.<sup>916</sup> Rather than

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<sup>909</sup> *Ibid* at 5.

<sup>910</sup> *Ibid* at 4–6.

<sup>911</sup> *Ibid* at 22.

<sup>912</sup> *Ibid* at 23.

<sup>913</sup> *Ibid* at 23–24. In earlier works, Goodman and Jinks use the term ‘coercion’ in lieu of ‘material inducement’: see, e.g., Goodman & Jinks, *supra* note 898; Goodman & Jinks, *supra* note 898.

<sup>914</sup> Goodman & Jinks, *supra* note 898 at 125.

<sup>915</sup> For example, the agreement to end the Second Congo War provided the leaders of the three most powerful armed groups (MLC, RCD-Goma, and RCD-ML), all alleged to have committed serious IHL violations against civilians during the conflict, with political positions as Vice-Presidents of the DRC. See, e.g., Prunier, *supra* note 691 at 277; Reyntjens, *supra* note 693 at 260–61; Laura Davis & Priscilla Haynor, *Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC* (New York: International Center for Transitional Justice, 2009) at 12–13.

<sup>916</sup> Jason Stearns, *From CDNP to M23: The evolution of an armed movement in eastern Congo* (London & Nairobi: Rift Value Institute: Usalama Project, 2012) at 34–35; Leslie Massicotte, “Violence of the Name: How Naming the M23 Rebel has perpetuated conflict in the Eastern Congo” (2014) 1:1 *Journal of Peace and Conflict Studies* 80 at

incentivize IHL compliance, this style of incentivized peace negotiation has given combatants in the DRC the impression that joining an armed group is their best chance for gaining power and social mobility.<sup>917</sup>

A different form of material inducement used to influence the behaviour of combatants exists in disarmament, demobilization, and reintegration programs aimed at creating incentives for combatants to leave armed groups, relinquish their weapons, and reintegrate into society. These programs usually have a monetary component as well as a re-training component to provide the former combatant with skills and means to reintegrate into society.<sup>918</sup> It is possible for disarmament, demobilization, and reintegration programs to be successful. For example, the program in Sierra Leone at the end of the civil war is considered to have succeeded beyond the expectations of international actors at the time<sup>919</sup> even though it faced obstacles such as limited resources.<sup>920</sup> Other programs have seen “limited success”, such as the disarmament, demobilization, and reintegration program in the DRC.<sup>921</sup> Where programs are unsuccessful there is a risk that, rather than incentivize laying down one’s arms, it may not only disincentivize relinquishing arms, but also lead to previously demobilized ex-combatants taking up arms once again.<sup>922</sup>

It is very difficult to explain violent acts toward civilians, though it may help to explain acts of pillage, by members of armed groups as the product of material inducement. This is because frequently members of armed groups receive little to no pay for their services as fighters.<sup>923</sup> In

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85–86; Penny Dale, “Profile: Bosco Ntaganda the Congolese ‘Terminator’”, (25 August 2015), online: *BBC News* <<https://www.bbc.com/news/world-africa-17689131>>.

<sup>917</sup> Judith Verweijen, *Stable Instability Political settlements and armed groups in the Congo* (London & Nairobi: Rift Value Institute: Usalama Project, 2016) at 10; Stearns, *supra* note 916 at 39–40; Jourdan, *supra* note 702 at 95.

<sup>918</sup> See, e.g., Lilli Banholzer, *When do Disarmament, Demobilization and Reintegration programs succeed?* (Bonn, DE: German Development Institute, 2014) at 16–17, 20, 22; Jairo Munive & Finn Stepputat, “Rethinking Disarmament, Demobilization and Reintegration Programs” (2015) 4:1 *International Journal of Security & Development Art* 48 at 8.

<sup>919</sup> Banholzer, *supra* note 918 at 18.

<sup>920</sup> W Andy Knight, “Disarmament, Demobilization, and Reintegration and Post-Conflict Peacebuilding in Africa: An Overview” (2008) 1:1 *24* at 41–42.

<sup>921</sup> *Ibid* at 36.

<sup>922</sup> This was the sentiment expressed by all former combatants interviewed in the DRC during the fieldwork portion of this thesis.

<sup>923</sup> See, e.g., *SCSL AFRC Trial Judgment*, *supra* note 581 at para 238; Sierra Leone Truth and Reconciliation Commission, *supra* note 713 at Ch 2, para 93; Marriage, *supra* note 714 at 287; Macartan Humphreys & Jeremy Weinstein, “Demobilization and Reintegration” (2007) 51:4 *Journal of Conflict Resolution* 531 at 535.

spite of combatant poverty, however, the academic literature provides mixed views as to whether economic incentives play a role in individuals joining armed groups. Although there are scholars who advance a “greed” theory to explain that members of armed groups are economically motivated to join armed groups,<sup>924</sup> empirical studies in Liberia and Colombia suggest otherwise.<sup>925</sup> In one study, only four per cent of combatants interviewed identified money as the reason they joined an armed group.<sup>926</sup> Consequently, it is difficult to say whether material inducement plays a role in affecting combatant behaviour and even more difficult to see how this mechanism could adequately explain combatant violence toward civilians during armed conflict.

### 6.3.2 Persuasion

The second mechanism for influencing state behaviour discussed by Goodman and Jinks is persuasion. This mechanism of persuasion explains how through “argument and deliberation” states may come to “‘internalize’ new norms and rules of appropriate behavior and redefine their interests and identities accordingly.”<sup>927</sup> International actors employing persuasion to alter the behaviour of states will center their approach around the “content of a norm” that they want the target of influence to adopt and internalize.<sup>928</sup> Successful use of the mechanism of persuasion leads the target of influence not only to adapt their behaviour to correspond to the norm in question, but also to completely internalize the norm into their value system.<sup>929</sup>

Goodman and Jinks discuss two microprocesses of persuasion: framing and cuing.<sup>930</sup> The process of framing explains that arguments are likely to have more “persuasive appeal” if influencers structure their argument to “resonate” with norms already accepted by the target of influence.<sup>931</sup> Persuasion may also be successful where the microprocess of “cuing” is used. Influencers can cue the target of influence through the “introduction of new information” which

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<sup>924</sup> Jeremy Weinstein, “Resource and the Information Problem in Rebel Recruitment” (2005) 49:4 *Journal of Conflict Resolution* 598; Aderoju Oyefusi, “Oil and the Probability of Rebel Participation Among Youths in the Niger Delta of Nigeria” (2008) 45:4 *Journal of Peace Research* 539.

<sup>925</sup> James Pugel, *What the Fighters Say: A Survey of Ex-combatants in Liberia February-March 2006* (UNDP & African Network for the Prevention and Protection against Child Abuse and Neglect, 2007) at 36; Ana M Arjona & Stathis N Kalyvas, *Preliminary Results of a Survey of Demobilized Combatants in Columbia* (unpublished manuscript) (New Haven, CT, 2006).

<sup>926</sup> Pugel, *supra* note 925 at 36.

<sup>927</sup> Goodman & Jinks, *supra* note 898 at 24; Goodman & Jinks, *supra* note 898 at 635.

<sup>928</sup> Goodman & Jinks, *supra* note 898 at 26 [emphasis omitted].

<sup>929</sup> *Ibid* at 29.

<sup>930</sup> *Ibid* at 25.

<sup>931</sup> *Ibid*.

can lead the target of influence to “engage in a high intensity process of cognition, reflection, and argument” that can ultimately lead to “changes in opinion”.<sup>932</sup>

Persuasion is the primary mechanism employed by international organizations, such as the ICRC, that engage with armed groups to promote compliance with IHL norms.<sup>933</sup> The use of persuasion to influence armed group behaviour is also widely discussed in academic literature.<sup>934</sup> Persuasion can be an effective tool to induce members of armed groups to comply with IHL norms for the protection of civilians during armed conflict. For example, the non-governmental organization Geneva Call, which engages armed groups on specific thematic issues, such as landmines or child protection, has had significant success through dialogue and persuasion.<sup>935</sup> Geneva Call has succeeded in getting 50 armed groups to commit to ban the use of anti-personnel landmines by their combatants.<sup>936</sup> Most of these 50 armed groups having participated in, “carried out[,] or cooperated in humanitarian mine action” and often the destruction of stockpiled landmines since they made this commitment with Geneva Call.<sup>937</sup> Geneva Call has also successfully engaged 26 armed groups which have committed to “protecting children in armed conflict, and have taken measures to enforce their obligations.”<sup>938</sup> Persuasion can

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<sup>932</sup> *Ibid.*

<sup>933</sup> Anne-Marie La Rosa, “ICRC and ICC: two separate but complementary approaches to ensuring respect for international humanitarian law - ICRC”, (3 March 2009), online: *ICRC* <<http://eng/resources/documents/interview/international-criminal-court-interview-101008.htm>>; ICRC, “How does law protect in war? - Online casebook - Introduction”, online: *ICRC* <<https://casebook.icrc.org/law/icrc>>; Geneva Call, *Engaging Armed Non-State Actors in a Landmine Ban - The Geneva Call Progress Report 2000-2007* (Geneva: Geneva Call, 2008) at 2, 12, 32; Stefanie Herr, *Constraining the Conduct of Non-State Armed Groups: Comparing the Prospects of Success of Governmental and Non-Governmental Governance Initiatives* (Reykjavik, Iceland: European Consortium for Political Research, 2012) at 15; Heike Krieger, *A Turn to Non-State Actors: Inducing Compliance with International Humanitarian Law in War-Torn Areas of Limited Statehood*, SFB-Governance Working Paper Series, No 62, Collaborative Research Center (SFB) 700 (Berlin: DFG Collaborative Research Center (SFB) 700, 2013) at 31–35; Margit Bussmann & Gerald Schneider, “A Porous Humanitarian Shield: The Laws of War, the Red Cross and the Killing of Civilians” (2016) 11:3 *Review of International Organizations* 337 at 3.

<sup>934</sup> See, e.g., Ratner, *supra* note 770; Bangerter, *supra* note 770; Hofmann & Schneckener, *supra* note 770; Claudia Hofmann & Ulrich Schneckener, “The Power of Persuasion: The Role of International Non-Governmental Organizations in Engaging Armed Groups” in Heike Krieger, ed, *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (Cambridge, UK: Cambridge University Press, 2015); Schneckener & Hofmann, *supra* note 770; Claudia Hofmann, *Reasoning with Rebels International NGOs’ Approaches to Engaging Armed Groups* (Berlin: Stiftung Wissenschaft und Politik, 2012).

<sup>935</sup> Geneva Call, *supra* note 933; Geneva Call, “Landmine ban”, online: *Geneva Call* <<https://genevacall.org/what-we-do/landmine-ban/>>; Geneva Call, “Child Protection”, online: *Geneva Call* <<https://genevacall.org/what-we-do/child-protection/>>.

<sup>936</sup> Geneva Call, *supra* note 935.

<sup>937</sup> *Ibid.*

<sup>938</sup> Geneva Call, *supra* note 935.

therefore be used to put an end to combatant deviance from IHL norms much in the same manner as persuasion can be used to induce state compliance with human rights norms. However, it provides limited insight into the psychology of how law-abiding citizens in peacetime become law-breaking combatants during armed conflict. Although it is possible that combatants could be persuaded to internalize norms advocating violence toward civilians, Goodman and Jinks' work on Socialization and International Law merely provides the mechanism of behavioural change rather than providing a detailed understanding of the psychological shift from compliance to deviance.

### 6.3.3 Acculturation

Acculturation, the third mechanism discussed by Goodman and Jinks, represents the central component of Socialization and International Law theory. Goodman and Jinks seek to demonstrate how “legal institutions at times influence actors through acculturation”.<sup>939</sup>

Acculturation is the “the process by which actors adopt the beliefs and behavioral patterns of the surrounding culture”.<sup>940</sup> As opposed to focussing on the content of a norm, as is the case with the mechanism of persuasion, “acculturation emphasizes the relationship of the actor to a reference group or wider cultural environment.”<sup>941</sup> The focus on relationship as opposed to content means that, unlike persuasion, where the target of influence internalizes a norm, acculturation could lead to either complete or incomplete internalization of a norm even while altering an actor's behaviour.<sup>942</sup>

The process of acculturation includes both internal “[c]ognitive pressures” and external “social pressures” that influence the state's choices.<sup>943</sup> Cognitive pressures exist when “individuals - experience discomfort-including anxiety, regret, and guilt-whenver they confront cognitions about some aspect of their behavior inconsistent with their self-concept (including any social roles central to their identity)” which is referred to as cognitive dissonance by social psychologists.<sup>944</sup> Actors will try to address this discomfort by “either changing their behavior or

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<sup>939</sup> Goodman & Jinks, *supra* note 898 at 22.

<sup>940</sup> *Ibid.*

<sup>941</sup> *Ibid* at 26 [emphasis omitted].

<sup>942</sup> *Ibid* at 28–31.

<sup>943</sup> *Ibid* at 22.

<sup>944</sup> Goodman & Jinks, *supra* note 898 at 640.

finding ways to justify their past behavior.”<sup>945</sup> Social pressures emerge through the actor’s desire to conform to a group and to “minimize social costs”.<sup>946</sup> Social pressure can be manipulated by influencers through the “imposition of social-psychological costs through shaming or shunning” or through the “conferral of social-psychological benefits through displays of public approval.”<sup>947</sup>

The “identification” of an actor with a “reference group” plays an integral role in the acculturation process.<sup>948</sup> The “varying degrees of identification with a reference group” will affect the extent to which the target of influence feels “cognitive and social pressures to conform.”<sup>949</sup> Additionally, the question of whether or not an actor will respond positively to social pressure from external influencers can be affected by the “the strength, immediacy, and size of the group.”<sup>950</sup>

Goodman and Jinks focus their discussion of acculturation on two microprocesses of the mechanism: status maximization and mimicry.<sup>951</sup> The microprocess of status maximization exists where actors are “compelled by reputation- and status-based concerns”, rather than “[material] cost-benefit calculations” to adapt their behaviour.<sup>952</sup> Actors seek to gain or maintain the “approval of, or status in, [a] reference group”,<sup>953</sup> while also “minimiz[ing] social disapproval.”<sup>954</sup> Mimicry is linked to efforts for status maximization as actors are more likely to “‘mimic’ the behavior of other highly legitimated actors”.<sup>955</sup> Where states “value their position in the group “they are more inclined to “‘identify’ with, or mimic, the group”.<sup>956</sup> These microprocesses of acculturation, like acculturation more generally, turn on pressures to conform,

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<sup>945</sup> *Ibid.*

<sup>946</sup> Goodman & Jinks, *supra* note 898 at 22. See also Goodman & Jinks, *supra* note 898 at 641.

<sup>947</sup> Goodman & Jinks, *supra* note 898 at 27–28.

<sup>948</sup> *Ibid* at 26.

<sup>949</sup> *Ibid.*

<sup>950</sup> *Ibid* at 28.

<sup>951</sup> *Ibid* at 26.

<sup>952</sup> Goodman & Jinks, *supra* note 898 at 988, fn 18.

<sup>953</sup> Goodman & Jinks, *supra* note 898 at 684.

<sup>954</sup> *Ibid* at 641.

<sup>955</sup> *Ibid* at 641, fn 67.

<sup>956</sup> *Ibid* at 654.

which drive an actor “to behave and think in ways consistent with the highly legitimated purposes and attributes of that role” they have assumed.<sup>957</sup>

The manner in which acculturation captures internal and external pressures on an individual to adopt certain behaviours makes acculturation the most useful of the three mechanisms examined by Goodman and Jinks to help understand the psychology of combatant violence toward civilians. The recognition in Socialization and International Law theory that multiple mechanisms – material inducement, persuasion, and acculturation – can affect an actor’s behaviour is similarly useful as it provides a more nuanced approach to understanding behavioural change than that provided by Behavioural Law and Economics theorists. However, Socialization and International Law theory remains an inadequate theory for understanding combatant violence toward civilians and, more importantly, the process by which law-abiding individuals transform into law-breaking combatants for one important reason specific to the discussion of acculturation.

The reason Socialization and International Law theory’s acculturation mechanism is inadequate for understanding the transition from law-abiding citizen to law-breaking combatant who commits violent acts is the extent to which the theory draws on socio-psychological theories and mechanisms to explain behavioural change. Goodman and Jinks themselves implicitly and explicitly acknowledge this limitation. Acculturation is but one of “various social processes” that contribute to “socialization processes”.<sup>958</sup> The microprocesses of acculturation discussed by Goodman and Jinks – mimicry and status maximization – are but two of an unknown (based on Goodman and Jinks’ discussion) number of processes.<sup>959</sup> Goodman and Jinks also acknowledge that the fact “individual behavior and cognition reflect substantial social influence” is but “[o]ne of the central insights of social psychology”.<sup>960</sup> Further, Goodman and Jinks have acknowledged the need for more “refinement” of the ideas they have introduced, including the need for “more

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<sup>957</sup> Goodman & Jinks, *supra* note 898 at 27.

<sup>958</sup> *Ibid* at 6.

<sup>959</sup> *Ibid* at 26.

<sup>960</sup> *Ibid*.

highly specified causal pathways that involve micro-level, mechanism-based accounts”.<sup>961</sup>

Therefore, in reading Goodman and Jinks’ work on Socialization and International Law, one can see both the utility of turning to theories of social-psychology, but one is also left to wonder what more social-psychology can offer to help understand human behaviour, including in the specific context of armed conflict. Goodman and Jinks’ Socialization and International Law theory, therefore, points to the disciplines, particularly social psychology, that are likely to have at least some of the answers necessary to understand combatant violence toward civilians and how law-abiding individuals transition into law-breaking combatants.

#### 6.4 Conclusion

Most existing legal theories do not develop a behavioural model for understanding legal deviance. This chapter has examined three existing legal theories that do develop behavioural models and provide behavioural insights to explain legal compliance or deviance: Law and Economics theory, Behavioural Law and Economics theory, and Socialization and International Law. This chapter demonstrated how each of these three theories fail to provide an adequate model for understanding the perpetration of violence toward civilians and the transition from law-abiding individual to law-breaking combatant that perpetrators often undergo. First, the behavioural model developed by Law and Economics theory is based on fundamentally flawed assumptions about human rationality, self-interest, the ability to measure preferences, and goals. Behavioural Law Economics theorists have turned to psychology to develop a behavioural model that addresses the fundamental flaws in Law and Economics theory to demonstrate that there are limits to the extent individuals are rational and self-interested. However, although Behavioural Law and Economics theory does not suffer from the severe flaws of Law and Economics theory, the Behavioural Law and Economics behavioural model nonetheless remains a model that is intended to be generally applicable across a wide array of peacetime contexts. Consequently, Behavioural Law and Economics fails to provide a behavioural model that can adequately explain the transition of individuals from law-abiding in peace to law-breaking in conflict.

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<sup>961</sup> Ryan Goodman & Derek Jinks, “Social Mechanisms to Promote International Human Rights: Complementary or Contradictory?” in Thomas Risse, Stephen C Ropp & Kathryn Sikkink, eds, *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge, UK: Cambridge University Press, 2013) 103 at 120–21.



Socialization and International Law draws more deeply on understandings of human behaviour derived from behavioural sciences, in particular social psychology, than Behavioural Law and Economics theory, which has limited its reliance on psychology to what is necessary to correct the flawed assumptions of Law and Economics. The most useful component of Socialization and International Law theory for beginning to understand the perpetration of violence toward civilians is the socio-psychological state of cognitive dissonance. Cognitive dissonance explains how individuals faced with contradictory values, beliefs, or ideas, such as possible contradictions between the mildness of peace and the violence of war, suffer cognitive dissonance that they will try to address by “either changing their behavior or finding ways to justify their past behavior.”<sup>962</sup> However, Socialization and International Law’s use of acculturation to explain how internal and social pressures to conform can lead to behavioural change provides a limited and incomplete model for understanding how law-abiding citizens come to be law-breaking combatants who perpetrate acts of violence toward civilians. Acculturation and the two microprocesses of mimicry and status maximization provide only one small component of a more elaborate and detailed body of socio-psychological theory explaining individual behaviour.

Despite this weakness, Goodman and Jinks’ Socialization and International Law theory provides an excellent introduction into the potential of employing social psychology theories to understand legal compliance or deviance. Goodman and Jinks’ work further serves to demonstrate the value to law and legal scholars both theoretically and in practice of borrowing from other disciplines to improve understandings of human behaviour in the interactions of people with legal rules and norms. This chapter has therefore demonstrated both the lack of an existing legal theory capable of explaining the perpetration of violence toward civilians by members of armed groups as well as the opportunity other academic disciplines supply to develop an adequate understanding of combatant behaviour.

The next chapter seizes the opportunity to learn from academic disciplines like social psychology. The chapter will discuss four theories of social psychology and criminology that have been repeatedly relied on to explain how ordinary people come to commit violent acts during conflict such as war crimes, crimes against humanity, and genocide. The four theories

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<sup>962</sup> Goodman & Jinks, *supra* note 898 at 641; Goodman & Jinks, *supra* note 898 at 27.

discussed have been developed to understand and explain the specific perpetration of violence toward civilians within the exceptional and unique context of conflict. The chapter will provide a nuanced understanding of human behaviour that, in addition to the social pressures to conform used by Goodman and Jinks, captures more specific processes to explain behavioural change and the transition from law-abiding citizen in peacetime to law-breaking individual in conflict.

## Chapter 7

### 7 How Ordinary People Come to Commit Extraordinary Acts of Violence

The previous chapters have demonstrated that IHL contains many rules for the protection of civilians during NIACs that apply to the conduct of members of armed groups; however, in practice, widespread IHL violations are often committed by members of armed groups against civilians. The preceding chapter argued that there is no adequate legal theory to explain or account for the reasons underlying these IHL violations. Therefore, this chapter turns to theories of social psychology and criminology to help understand the perpetration of violent acts toward civilians and how law-abiding civilians during peacetime come to be law-breaking combatants during armed conflict.

This chapter examines four theories that explain how ordinary people come to commit acts of violence against civilians during conflict: criminology's theory of techniques of neutralization and social psychology's theories of moral disengagement, deindividuation, and obedience to authority. First, the chapter discusses the reason for selecting these four theories to help understand combatant behaviour. Second, the chapter will discuss the concept of 'ordinary people' as perpetrators of war crimes, crimes against humanity, and genocide. Then the chapter examines each of the four theories in turn, beginning with techniques of neutralization and followed by moral disengagement, deindividuation, and obedience to authority. This chapter develops a nuanced understanding of how law-abiding citizens in peacetime come to be law-breaking combatants who commit violent acts toward civilians during conflict. This chapter identifies two key themes: (1) the use of dehumanization by perpetrators to facilitate the commission of violence toward civilians,<sup>963</sup> and (2) the displacement of a sense of responsibility

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<sup>963</sup> Sociologists, such as Sherene Razack, have explored the danger of "[race thinking,] a structure of thought that divides up the world between the deserving and the undeserving": Sherene Razack, "'Your Client has a Profile: Race and National Security in Canada after 9/11'" (2007) 40 *Studies in Law, Politics, and Society* 3 at 7 See also, e.g., ; Sherene Razack, *Casting Out: The Eviction of Muslims from Western Law and Politics* (Toronto: University of Toronto Press, 2008); Sherene Razack, *Dark Threats and White Knights: the Somalia Affair, Peacekeeping and the New Imperialism* (Toronto: University of Toronto Press, 2004); George L Mosse, *A History of European Racism* (Madison: University of Wisconsin Press, 1978); Sociologists have also explored the effects of language, specifically racist language, that is often the product of race thinking. Van Dijk has noted the tendency to focus on violence that is a product of racism and overlook or ignore the implicit, everyday conveyance of racism: Teun A van

for one's actions used by perpetrators to facilitate the commission of violence toward civilians. These two themes are important because they indicate that combatant behaviour that dehumanizes civilians and/or allows combatants to displace their sense of responsibility for their actions can contribute to violence toward civilians. Therefore, this chapter explains the theories, which are then employed in chapter 8 to identify specific combatant behaviours in need of IHL regulation in order to advance the humanitarian goal of civilian protection in IHL. Ultimately, using the theories outlined in this chapter, this thesis argues that dehumanizing behaviours and behaviours that displace responsibility must be inhibited - through the use of law - *before* they result in violence directed toward civilians.

### 7.1 Social Psychology and Criminology

In order to understand combatant violence toward civilians, this thesis has, like Goodman and Jinks' theory of Socialization and International Law discussed in the preceding chapter, turned to other academic disciplines that can provide a nuanced understanding of human behaviour during armed conflict: social psychology and criminology. Social psychology is "the systematic study of the nature and causes of human social behavior."<sup>964</sup> This includes the study of "individuals' activities in the presence of others and in particular situations, the processes of social interaction between two or more persons, and the relationships among individuals and the groups to which they belong."<sup>965</sup> The behaviour examined is not merely actions, but also emotions and

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Dijk, "Discourse and Racism" in David Theo Goldberg & John Solomos, eds, *A Companion to Racial and Ethnic Studies* (Oxford: Blackwell Publishing, 2002) 145 at 153 See also, e.g., John F Dovidio, "On the Nature of Contemporary Prejudice: The Third Wave" (2001) 57:4 *Journal of Social Issues* 829. The effects of everyday racism (i.e., racism in peacetime among non-military citizens) have been widely examined: see, e.g., Kaine Grigg & Lenore Manderson, "'Just a Joke': Young Australian understandings of racism" (2015) 47 *International Journal of Intercultural Relations* 195; Nazar Akrami, Bo Ekehammar & Tadesse Araya, "Classical and modern racial prejudice: A study of attitudes toward immigrants in Sweden" (2000) 30:4 *European Journal of Social Psychology* 521; John Solomos, *Race and Racism in Britain*, 2d ed (New York: St. Martin's, 1993); Philomena Essed, *Understanding Everyday Racism: An Interdisciplinary Theory* (Newbury Park, CA: Sage Publications Ltd, 1991); Additionally, racist statements, even where made casually and conversationally, are "pernicious": Bernard Guerin, "Combating Prejudice and Racism: New Interventions from a Functional Analysis of Racist Language" (2003) 13 *Journal of Community & Applied Social Psychology* 29 at 29; This includes racist humor employed casually and without any intent to promote racist ideology, actions, or hatred: see, e.g., Michael Billig, "Humour and hatred: the racist jokes of the Ku Klux Klan" (2001) 12 *Discourse and Society* 267; Brendon Barnes, Ingrid Palmay & Kevin Durrheim, "The denial of racism: The role of humor, personal experience, and self-censorship" (2001) 20:3 *Journal of Language and Social Psychology* 321; Christie Davies, "Language, identity and ethnic jokes about stupidit" (1987) 65 *International Journal of the Sociology of Language* 39.

<sup>964</sup> John D DeLamater, Daniel J Myers & Jessica L Collett, *Social Psychology*, 8th ed (Boulder, CO: Westview Press, 2015) at 3.

<sup>965</sup> *Ibid.*

thoughts.<sup>966</sup> Criminology is the “study of the nature, extent, cause, and control of lawbreaking behavior.”<sup>967</sup> One of its central components is the “analysis of crime causation.”<sup>968</sup> While not limited to the study of psychological mechanisms which affect people’s behaviour, both social psychology and criminology include theories which focus on this particular aspect of behaviour. There is overlap between social psychology and criminology and, in the case of two of the theories discussed in this chapter - techniques of neutralization and moral disengagement – strong direct parallels between theories.

Both social psychology and criminology are expansive fields with many theories of human behaviour. Consequently, it was essential to narrow the focus of this study to theories which attempt to explain, either in their original form or through the subsequent application by other scholars, the concept of how ordinary people come to commit acts of violence against civilians during conflict, including genocide, crimes against humanity, and war crimes.<sup>969</sup> This thesis focuses on the individual level of analysis, that is, on theories which explain the psychological mechanisms or cognitive processes within an individual that produce or allow for destructive behaviour (as opposed to those mechanism within a state, a society, or an organization that lead to such behaviour). However, there is consideration of situational influences on the individual, such as the social pressures discussed in Goodman and Jinks’ theory of Socialization and International Law. This focus on the individual is not intended to suggest or imply that factors beyond the individual are irrelevant to the commission of international crimes. On the contrary,

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<sup>966</sup> *Ibid.*

<sup>967</sup> Mark M Lanier & Stuart Henry, *Essential Criminology*, 3d ed (Boulder, CO: Westview Press, 2010) at 16.

<sup>968</sup> *Ibid.*

<sup>969</sup> In addition to the four dominant theories identified and discussed in this chapter, the following works were considered: Cohen, *supra* note 32; Baumeister, *supra* note 32; Marina Aksenova, “Introduction: Breaking the Cycle of Mass Atrocities: Criminological and Socio-Legal Approaches to International Criminal Law” in Marina Aksenova, Elies van Sliedregt & Stephen Parmentier, eds, *Breaking the Cycle of Mass Atrocities: Criminological and Socio-Legal Approaches in International Criminal Law* (Oxford: Hart, 2019); Grossman, *supra* note 32; Maier-Katkin, Mears & Bernard, *supra* note 32; Rothe & Mullins, *supra* note 32; Dawn L Rothe, *State criminality: The crime of all crimes* (Lanham, MD: Lexinton, 2009); Frank Neubacher, “How Can it Happen that Horrendous State Crimes are Perpetrated?: An Overview of Criminological Theories” (2006) 4:4 *Journal of International Criminal Justice* 787; Smeulers & Haveman, *supra* note 32; Smeulers, *supra* note 32; Smeulers, *supra* note 84; Mika Haritos-Fatouros, “The Official Torturer: A Learning Model for Obedience to the Authority of Violence” (1988) 18 *Journal of Applied Social Psychology* 1107; Harrendorf, *supra* note 84; Waller, *supra* note 22; Staub, *supra* note 90; Staub, *supra* note 32; Staub, *supra* note 32; Ervin Staub, *The Roots of Goodness and Resistance Evil Inclusive Caring, Moral Courage, Altruism Born of Suffering, Active Bystandership, and Heroism* (Oxford: Oxford University Press, 2015); Zimbardo, *supra* note 23.

these factors are often, if not always, highly influential.<sup>970</sup> However, these factors are normally beyond the scope of IHL. IHL governs how wars are conducted, including the means and methods,<sup>971</sup> and sometimes circumstances under which attacks may legally occur.<sup>972</sup> IHL establishes rules to govern the selection of legitimate targets.<sup>973</sup> IHL defines who is a civilian and who is a combatant.<sup>974</sup> IHL is, for the most part, temporally limited to the space between the commencement of hostilities and their end.<sup>975</sup> The reason for the hostilities - that is, why the parties have decided to go to war - is irrelevant under IHL.<sup>976</sup> IHL largely limits itself to consideration of conduct of parties to an armed conflict during an armed conflict. It addresses a state's armed forces and provides for state responsibility for violations of IHL; however, it does not seek to regulate cultural,<sup>977</sup> societal, or political aspects of the state beyond the scope of armed conflict. Therefore, issues of ideology, economic hardship, cultural norms, government

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<sup>970</sup> See, e.g., Waller, *supra* note 22; Rothe & Mullins, *supra* note 32; Staub, *supra* note 32; Staub, *supra* note 90; Staub, *supra* note 969; Staub, *supra* note 32.

<sup>971</sup> See, e.g., Mary Ellen O'Connell, "Historical Development and Legal Basis" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 3d ed (Oxford: Oxford University Press, 2013) at 101–102; Moir, *supra* note 46 at 117–18, 145; Robert Kolb & Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Portland, OR: Hart, 2008) at 15, 17–18; ICRC, *International Humanitarian Law: Answers to Your Questions* (Geneva: ICRC, 2002) at 4.

<sup>972</sup> For example, certain weapons may only be illegal under certain circumstances. For example, the use of cluster munitions, which are not universally banned, in situations of urban warfare: see, e.g., Virgil Wiebe, "Footprints of Death: Cluster Bombs as Indiscriminate Weapons under International Humanitarian Law" (2000) 22:1 Michigan Journal of International Law 85 at 104–119.

<sup>973</sup> *Additional Protocol I*, *supra* note 5 at Article 52(2); *CCW Protocol II*, *supra* note 516 at Article 2(6); Henckaerts & Doswald-Beck, *supra* note 5 at Rule 8; Sassoli, *supra* note 9.

<sup>974</sup> *Additional Protocol I*, *supra* note 5 at Article 43(2); *1907 Hague Convention IV*, *supra* note 465 at Article 3; Henckaerts & Doswald-Beck, *supra* note 5 at Rules 3 & 5; *The Prosecutor v Thiomir Blaskic, Trial Judgment*, IT-95-14-T, 3 March 2000 at para 180.

<sup>975</sup> A few exceptions or possible exceptions exist such as provisions providing for the dissemination of treaty texts (i.e., GC I-IV Articles ; AP I Article 83; AP II Article 19) which is more likely to occur during times of peace than of war, the promotion of amnesty for those who participate in the conflict (i.e., AP II Article 6(5)) that is largely a post-conflict matter, and the legal review of new weapons, methods and means of warfare (i.e., AP I Article 36) which is generally conducted during times of peace.

<sup>976</sup> The question of when a state can go to war or use force legally against another state is governed by a different body of international law known as *jus ad bellum*.

<sup>977</sup> "[Law] is not the only norm-shaping force in society" (Sampsell-Jones at 135). The culture (e.g., beliefs, behaviours, values) of a particular society also plays an important role in influencing norms and behaviour: See, e.g., Ted Sampsell-Jones, "Culture and Contempt: The Limitations of Expressive Criminal Law" (2003) 27 Seattle University Law Review 133; While law can help constrain and shape behaviour, culture can also influence the extent to which certain individuals conform or comply with certain laws. See, e.g., discussion of female circumcision, culture, and law by L Amede Obiora, "Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision" (1996) 47 Case Western Law Review 122 at lehmanlef; Janice Nadler, "Expressive Law, Social Norms, and Social Groups" (2017) 42:1 Law & Social Inquiry 60 at 67–68; Richard W Brislin, *Understanding Culture's Influence on Behavior*, 2d ed (Fort Worth, TX: Harcourt College Publishers, 2000); On the dynamic interplay between psychology and culture see, e.g., Darrin R Lehman & Chi-yue Chiu, "Psychology and Culture" (2004) 55 Annual Review of Psychology 689 at 703–704; Edmund W Gordon, "Cultural Identity and Behavioral Change" (1997) 47:2 Case Western Law Review 389.

policy, etc., which have been identified by some scholars as important components of the commission of international crimes, cannot be regulated through the application of IHL.<sup>978</sup> Similarly, actors who are not part of an armed group, such as civilian state officials, are also outside the scope of IHL. Furthermore, there are certain assumptions that must be accepted within the context of IHL, namely that wars will occur and armed groups will exist. Thus, the temporal scope that is the focus of this thesis is the period between the commencement of an armed conflict and the conclusion of that conflict.

Many of the theories of the perpetration of international crimes or violence to civilians focus on state-based crimes.<sup>979</sup> Due to the individual level focus of this thesis, these state-focused theories have been eliminated from consideration in this study. Where theories that predominantly focus on an organization or group have been included, it is because these theories include aspects applicable at the individual level of analysis, such as situational social pressures, or because they have analogous applications to non-state military organizations. An analysis of the social psychological and criminological literature reveals four theories that are the most frequently relied upon to examine individual psychological processes that contribute to or facilitate the commission of violence against civilians and international crimes: techniques of neutralization, moral disengagement, deindividuation, and obedience to authority.

Each of the four theories discussed in this chapter has been employed to explain the commission of international crimes. In some cases, the theory has been used to explain genocide, other times to explain crimes against humanity, and other times war crimes.<sup>980</sup> This thesis considers that it is both reasonable and logical to consider theories applied to the context of genocide or commission of crimes against humanity (which do not fall under IHL, as they may also take place during peacetime) to be transferable to the commission of war crimes (which are governed

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<sup>978</sup> See, e.g., Waller, *supra* note 22; Rothe & Mullins, *supra* note 32; Rothe, *supra* note 969; Staub, *supra* note 32; Staub, *supra* note 90; Staub, *supra* note 32; Staub, *supra* note 969; Neubacher, *supra* note 969.

<sup>979</sup> See, e.g., Neubacher, *supra* note 969; Rothe, *supra* note 969.

<sup>980</sup> For example, Alvarez applies techniques of neutralization to violence toward civilians which could be construed as genocide, crimes against humanity, and war crimes in World War II during the Holocaust, Bryant et al. similarly apply techniques of neutralization to the Rwandan genocide (acts which were also crimes against humanity and war crimes). Kelman and Hamilton discuss obedience to authority with regards to the My Lai massacre which included war crimes and crimes against humanity. Similarly, Zimbardo's discussion of deindividuation and moral disengagement in the abuse of detainees at Abu Ghraib prison could be considered war crimes. See Alvarez, *supra* note 23; Bryant et al, *supra* note 23; Kelman & Hamilton, *supra* note 23; Zimbardo, *supra* note 23.

by IHL). This is because, while each of these types of crime fall under different categories within international criminal law, the specific acts and the fact that violence is directed towards civilians is common to all three categories of international crimes. For example, the murder of a civilian could amount to a war crime, a crime against humanity, or an act of genocide during war, or a crime against humanity or act of genocide during peace. It is possible - and has occurred in practice - that the same act is charged as a war crime, a crime against humanity, and genocide under international criminal law.<sup>981</sup> There is little difference between most crimes against humanity committed during an armed conflict and war crimes as neither inherently include or require discriminatory intent. What renders crimes against humanity unique from war crimes is that they can occur during peacetime. If crimes against humanity could only be committed during armed conflict “[they] would have been largely redundant, since most or all of the conduct involved would already have been covered as war crimes.”<sup>982</sup> However, the crime of genocide, whereby perpetrators seek to “destroy, in whole or in part, a national, ethnical, racial or religious group”<sup>983</sup> inherently involves extensive dehumanization of victims,<sup>984</sup> as does the crime against humanity of persecution, which requires the perpetrator to target victims based on “political, racial, national, ethnic, cultural, religious, gender . . . , or other grounds that are universally recognized as impermissible under international law”.<sup>985</sup> It must be acknowledged that the fact that dehumanization is inherent to these crimes may affect the extent to which theories that have previously only been used to address genocide or persecution as a crime against humanity can accurately explain IHL violations sufficiently. The following section turns to a discussion of the four theories used in this thesis: techniques of neutralization, moral disengagement, deindividuation, and obedience to authority.

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<sup>981</sup> For example, the International Criminal Tribunal for Rwanda convicted Théoneste Bagasora for genocide, the crimes against humanity of extermination and murder, and the war crime of murder and violence to life all for the murder of Augustin Maharangari and other killings between 7-9 April 1994 at the Kigali area roadblocks: *ICTR Bagasora Trial Judgment*, *supra* note 580 at paras 2158, 2186, 2194, 2245.

<sup>982</sup> Darryl Robinson, “The Elements of Crimes Against Humanity” in Roy S Lee, ed, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley, NY: Transnational Publishers, Inc, 2001) 57 at 63.

<sup>983</sup> *Rome Statute*, *supra* note 52 at Article 6.

<sup>984</sup> See, e.g., Gregory H Stanton, “Could the Rwandan genocide have been prevented?” (2004) 6:2 *Journal of Genocide Research* 211 at 214; Gregory H Stanton, “The 10 Stages of Genocide”, (2013), online: *Genocide Watch* <<http://genocidewatch.org/genocide/tenstagesofgenocide.html>>; Carola Lingaas, “The Concept of Race in International Criminal Law”, (12 February 2018), online: *Völkerrechtsblog* <<https://voelkerrechtsblog.org/the-concept-of-race-in-international-criminal-law/>>.

<sup>985</sup> *Rome Statute*, *supra* note 52 at Article 7(1)(8).



## 7.2 Ordinary People, Monstrous Acts

It is widely accepted among social psychologists, psychiatrists, psychopathologists, and criminologists that “the perpetrators [of international crimes] are ordinary people rather than psychopaths, sadists, or mentally deranged people.”<sup>986</sup> Although “the insistence that perpetrators of mass evil are different from the rest of us still thrives, both in popular opinion and in legal ones”,<sup>987</sup> nearly all case studies and general studies on perpetrators of international crimes have found that “perpetrators are indeed ordinary people who are not mentally deranged or otherwise disturbed.”<sup>988</sup> Waller has remarked that

not only does the claim of widespread psychopathology among perpetrators contradict the available evidence, but it also contradicts all diagnostic and statistical logic.<sup>989</sup>

The number of acts perpetrated in these violent contexts “greatly exceeds the crime rates under ordinary circumstances.”<sup>990</sup> The number of perpetrators of violence toward civilians during NIACs far exceeds societal prevalence rates of sadism and psychopathy<sup>991</sup> - personality disorders that, during peace, are sometimes used to explain how individuals come to commit acts of extreme violence against individuals. Consequently, the perpetration of these violent acts cannot be dismissed as merely the result of individual defects unique to the perpetrators. The perpetrators of these crimes are indeed law-abiding citizens who, in the context of conflict, become law-breaking combatants, a process which Smeulers refers to as the “phenomenon of the ‘law-abiding criminal’”.<sup>992</sup> Having demonstrated that the cause of these violent acts cannot be attributed to psychological deficiencies in the perpetrators, there is a need to explore other causal explanations. The following section will address each of the four dominant theories found in

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<sup>986</sup> Smeulers, *supra* note 22 at 234.

<sup>987</sup> Saira Mohamed, “Of Monsters and Men: Perpetrator Trauma and Mass Atrocity” (2015) 115 *Columbia Law Review* 1157 at 1169; See, e.g., Martha C Nussbaum, *Hiding from humanity: disgust, shame, and the law* (Princeton: Princeton University Press, 2004) at 166–67 (on appeal of idea that these perpetrators are monsters); Houge, *supra* note 83 at 189, 191 (discussing the common depiction of perpetrators tried by the ICTY as either opportunists or sadists).

<sup>988</sup> Smeulers, *supra* note 22 at 234.

<sup>989</sup> Waller, *supra* note 22 at 69.

<sup>990</sup> Smeulers, *supra* note 22 at 234.

<sup>991</sup> The fifth edition of the Diagnostic and Statistical Manual of Mental Disorders records the 12-month prevalence rates of antisocial personality disorder, which includes psychopathy and sociopathy, at between 0.2% and 3.3%: American Psychiatric Association, *supra* note 20; Torgersen, Kringlen & Cramer, *supra* note 20 A 2001 study based on 2053 adults in Oslo, Norway found prevalence rates of sadism at 0.2% and antisocial personality disorder at 0.7%: .

<sup>992</sup> Smeulers, *supra* note 22 at 234.

social psychology and criminology literature: techniques of neutralization, moral disengagement, deindividuation, and obedience to authority.

### 7.3 The Dominant Theories of Ordinary Evil

This section discusses the four dominant theories in social psychology and criminology literature to explain how ordinary civilians come to commit acts of violence toward civilians during conflict. These four theories are: techniques of neutralization, moral disengagement, deindividuation, and obedience to authority. Each of these theories contains specific patterns of behaviour that can contribute to the perpetration of violence towards civilians and which have been identified in perpetrator testimonies from historic instances of genocide, crimes against humanity, or war crimes. These psychological processes all address how individuals overcome societal and/or moral objections to harming innocent people. Techniques of neutralization and moral disengagement are particularly interesting because, while they originate from different fields of study, there is significant similarity in the behaviours they identify as facilitating crime. Each of these theories will be discussed in turn to identify the common themes of dehumanization<sup>993</sup> and displacement of responsibility that will be used in chapter 8 to identify combatant behaviours that would benefit from new IHL regulation in order to better for the protection of civilians.

#### 7.3.1 Techniques of Neutralization

The theory of “techniques of neutralization” was introduced by Gresham Sykes and David Matza in 1957.<sup>994</sup> They sought to explain how delinquents, having been socialized into the norms and values of society, overcome this socialization to participate in deviant behaviour. Juvenile offenders, for the most part, exhibit conforming and law-abiding behaviours, which is suggestive

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<sup>993</sup> Dehumanization is not merely a common theme amongst the dominant theories employed in this thesis, it appears throughout the literature that seeks to explain how ordinary people commit violent acts against civilians. See, e.g., Smeulers, *supra* note 32; Zimbardo, *supra* note 23; Philip Zimbardo, “A situationist perspective on the psychology of evil: Understanding how good people are transformed into perpetrators” in AG Miller, ed, *The social psychology of good and evil* (New York: The Guilford Press, 2004) 21; Johanna Ray Vollhardt & Maggie Campbell-Obaid, “The Social Psychology of Genocide and Mass Atrocities” in AG Miller, ed, *The Social Psychology of Good and Evil*, 2d ed (New York: Guilford Press, 2016) 159; Nick Haslam & Steve Loughnan, “How Dehumanization Promotes Harms” in AG Miller, ed, *The Social Psychology of Good and Evil*, 2d ed (New York: Guilford Press, 2016) 140; Waller, *supra* note 22; Staub, *supra* note 32; Grossman, *supra* note 32; Christopher W Mullins & Dawn L Rothe, *Blood, Power, and Bedlam: Violations of International Criminal Law in Post-Colonial Africa* (New York: Peter Lang Publishing, Inc, 2008); Maier-Katkin, Mears & Bernard, *supra* note 32.

<sup>994</sup> Gresham M Sykes & David Matza, “Techniques of Neutralization: A Theory of Delinquency” (1957) 22:6 American Sociological Review 664.

of an acceptance of the conventional beliefs and values of the larger society. As Sykes and Matza note,

... the juvenile delinquent would appear to be at least partially committed to the dominant social order in that he frequently exhibits guilt or shame when he violates its proscriptions, accords approval to certain conforming figures, and distinguishes between appropriate and inappropriate targets for his deviance.<sup>995</sup>

The question is, then, how to explain deviant acts committed by delinquents in face of their at least partial commitment to the dominant social order. Sykes and Matza explain that this is accomplished through “*justifications for deviance that are seen as valid by the delinquent but not by the legal system or society at large.*”<sup>996</sup> Rationalizations are commonly used after a deviant act has been committed in order to lessen feelings of self-blame and shield the individual from the blame of others. However, the justifications Sykes and Matza identify are *neutralizations* which *precede* the deviant act thereby serving to “neutralize[], turn[] back, or deflect[] in advance”<sup>997</sup> both internal disapproval and external disapproval from others in society. This internal and external disapproval, feelings of self-blame, etc., represent the cognitive dissonance that underlies acculturation in Goodman and Jinks’ theory of Socialization and International Law discussed in the preceding chapter. The neutralizing justification blocks the social controls, which would otherwise function to prevent the exercise of deviant impulses, so that the delinquent is free to proceed with deviant acts “without serious damage to [their] self image.”<sup>998</sup> The delinquent, therefore, has not adopted deviant values, rather they have merely qualified existing societal values through the use of techniques of neutralization. It is the techniques of neutralization that provide the specific process employed to address cognitive dissonance. They have redefined these values in a way that suppresses their moral force in certain situations. Consequently, through the use of these techniques of neutralization, “the delinquent represents not a radical opposition to law-abiding society but something more like an apologetic failure, often more sinned against than sinning in [their] own eyes.”<sup>999</sup>

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<sup>995</sup> *Ibid* at 666.

<sup>996</sup> *Ibid* [emphasis in original].

<sup>997</sup> *Ibid* at 667.

<sup>998</sup> *Ibid*.

<sup>999</sup> *Ibid*.

As noted, juvenile delinquents often exhibit guilt and shame when facing censure for deviant acts. Consequently, techniques of neutralization “may not . . . fully shield the individual from the force of [their] own internalized values and the reactions of conforming others”.<sup>1000</sup> Nonetheless, they are sufficient to facilitate the commission of the delinquent act in the first place. Further, while Sykes and Matza’s introduction of the theory of techniques of neutralization originated in the study of juvenile delinquents, the theory has since been applied more widely, including to adult crimes.<sup>1001</sup>

Subsequent work on techniques of neutralization has called into question the temporal aspect of Sykes and Matza’s depiction of the theory. Whereas Sykes and Matza emphasized that these techniques were employed *before* the criminal activity, strong arguments have been put forward that techniques of neutralization have significant utility *after* the commission of deviant acts, though they remain useful prior to these acts as well. Travis Hirschi has argued that some early acts of delinquency will occur prior to the formation of any technique of neutralization.<sup>1002</sup> Instead, it is after these initial acts that the techniques will be formed as a result of these early acts and serve to facilitate subsequent delinquent acts.<sup>1003</sup> Stanley Cohen emphasizes that neutralizations play important roles both before and after criminal acts. He states that neutralizations “function[] after the act to protect the individual from both self-blame and blame by others, and before the act to weaken social control . . . and make delinquency possible”.<sup>1004</sup> This dual temporal utility is strongly supported by Shadd Maruna and Heith Copes’ thorough analysis of techniques of neutralization in 2005.<sup>1005</sup> They conclude that “neutralization theory, then, is best understood as an explanation of persistence or desistance rather than of onset of offending.”<sup>1006</sup> The use of techniques of neutralization prior to any deviant activity is, however,

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<sup>1000</sup> *Ibid* at 669.

<sup>1001</sup> See, e.g., James Ditton, “Alibis and Aliases: Some Notes on the ‘Motives’ of Fiddling Bread Salesmen” (1977) 11:2 *Sociology* 233 (on salesmen stealing from customers); Richard C Hollinger, “Neutralizing in the workplace: An empirical analysis of property theft and production deviance” (1991) 12:2 *Deviant Behavior* 169 (on employee property theft); Carl Klockars, *The Professional Fence* (New York: The Free Press, 1974) (on buying and selling stolen goods).

<sup>1002</sup> Travis Hirschi, *Causes of Delinquency* (Berkeley, CA: University of California Press, 1969) at 208.

<sup>1003</sup> *Ibid*.

<sup>1004</sup> Cohen, *supra* note 32 at 60.

<sup>1005</sup> Shadd Maruna & Heith Copes, “What Have We Learned from Five Decades of Neutralization Research?” (2005) 32 *Crime and Justice* 221.

<sup>1006</sup> *Ibid* at 271.

difficult to empirically assess. As a result, studies examining the use of these techniques rely on data collected after deviant acts have been committed. For this reason, it is likely that the conclusions of Hirschi, Cohen, Maruna and Copes are a more accurate depiction of the theory's temporal aspect than Sykes and Matza's earlier assertions.

Five types of techniques of neutralization were identified in the work of Sykes and Matza: (1) denial of responsibility; (2) denial of injury; (3) denial of the victim; (4) condemnation of the condemners; and, (5) appeal to higher loyalties. These five techniques remain at the heart of the theory; however, subsequent scholars have identified five further techniques of neutralization. In 1974, Carl Klockars established the technique of the metaphor of the ledger.<sup>1007</sup> The 1981 work of W. William Minor describes the technique of defense of necessity.<sup>1008</sup> Alexander Alvarez, in his 1997 analysis of the theory, identified the technique of denial of humanity.<sup>1009</sup> Finally, in their 2017 article, Emily Bryant, Emily Brooke Schimke, Hollie Nyseth Brehm, and Christopher Ugge describe two new techniques of neutralization: victimization and appeals to good character.<sup>1010</sup> These ten techniques of neutralization are now described in turn.

#### *7.3.1.i Denial of Responsibility*

The controlling and constraining power of a sense of responsibility can be undone or limited where a delinquent employs the technique of denial of responsibility. The weight of responsibility has an important social function: it acts as an inhibiting or constraining influence on the actions of individuals. In using this technique of neutralization, the delinquent absolves responsibility for acts that they deem either accidental or the products of forces beyond their control. It is in "learning to view [themselves] as more acted upon than acting, [that] the delinquent prepares the way for deviance from the dominant normative system without the necessity of a frontal assault on the norms themselves."<sup>1011</sup> The denial of responsibility technique captures the theme of responsibility across the dominant theories addressed in this chapter. Consequently, this idea of a psychological mechanism that allows individuals to divest

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<sup>1007</sup> Klockars, *supra* note 1001.

<sup>1008</sup> W William Minor, "Techniques of Neutralization: A Reconceptualization and Empirical Examination" (1981) 18:2 *Journal of Research in Crime and Delinquency* 295.

<sup>1009</sup> Alvarez, *supra* note 23.

<sup>1010</sup> Bryant et al, *supra* note 23.

<sup>1011</sup> Sykes & Matza, *supra* note 994 at 667.

themselves of a sense of responsibility for their actions will play an important role in the review of IHL protections for civilians in chapter 8.

#### *7.3.1.ii Denial of Injury*

The denial of injury technique is used by individuals to seek to minimize or negate the harm caused by a deviant act in order to eliminate the censure, both internal and external, associated with causing harm. This technique of neutralization occurs when individuals characterize acts such as vandalism as “mischief” and stolen cars as being “borrowed”.<sup>1012</sup> Individuals also justify damaging people’s property or shoplifting from stores by claiming that insurance or wealth excuse the actions.<sup>1013</sup> What is important is that the deviant believes that, “since no obvious harm has been done to anyone or anything, the behavior is acceptable.”<sup>1014</sup>

#### *7.3.1.iii Denial of Victim*

In the operation of the denial of the victim technique, delinquents may “accept[] the responsibility for [their] deviant actions and [be] willing to admit that [their] deviant actions involve an injury or hurt”.<sup>1015</sup> However, individuals using this technique of neutralization render the victims themselves responsible for their own victimization.<sup>1016</sup> The perpetrators justify their injurious acts as “rightful retaliation or punishment.”<sup>1017</sup> The use of the denial of the victim technique can be facilitated by circumstances surrounding the deviant act, such as where “the victim is physically absent, unknown, or a vague abstraction.”<sup>1018</sup> Ultimately, whatever the context, the consequence of employing the denial of the victim technique is that the delinquents recast themselves as justified in their actions and the victims are recast as deserving of the harms they have suffered.

#### *7.3.1.iv Condemnation of the Condemners*

Individuals resorting to the condemnation of the condemners technique shift the focus from the victim(s), as well as themselves, onto those members of society who would judge the actions of the delinquent. The perpetrators claim that the condemners are the problem, not themselves, for

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<sup>1012</sup> *Ibid.*

<sup>1013</sup> Lanier & Henry, *supra* note 967 at 179.

<sup>1014</sup> Alvarez, *supra* note 23 at 152.

<sup>1015</sup> Sykes & Matza, *supra* note 994 at 668.

<sup>1016</sup> Alvarez, *supra* note 23 at 152.

<sup>1017</sup> Sykes & Matza, *supra* note 994 at 668.

<sup>1018</sup> *Ibid.*

the condemners “are hypocrites, deviants in disguise, or impelled by personal spite.”<sup>1019</sup> The delinquents may assert that the condemners are corrupt or unfair, in order to deflect focus from their own actions. In doing so, “[t]he delinquent, in effect, has changed the subject of the conversation in the dialogue between [their] own deviant impulses and the reactions of others; and by attacking others, the wrongfulness of [their] own behavior is more easily repressed or lost to view.”<sup>1020</sup>

#### *7.3.1.v Appeal to Higher Loyalties*

In the appeal to higher loyalties technique, delinquents deny that they are motivated by self-interest; rather they claim that they are simply “sacrificing the demands of the larger society for the demands of the smaller social groups to which the delinquent belongs such as the sibling pair, the gang, or the friendship clique.”<sup>1021</sup> The delinquent does not reject the conventional values of dominant society, but instead prioritizes norms seen as “more pressing or involving a higher loyalty”.<sup>1022</sup>

#### *7.3.1.vi Metaphor of the Ledger*

The metaphor of the ledger technique harkens to the use of a ledger in business, in which income is tracked in a credit column and expenditures are tracked in a debit column.<sup>1023</sup> In the optimal business scenario, credits will exceed debits and the business will make money. Employed as a technique of neutralization, the credits are good deeds - “acts of charity and benevolence” - while delinquent acts constitute debits. Individuals employing this technique will justify criminal acts through the reasoning that they have done more good things than bad things in life.<sup>1024</sup> In the balance of things, they are a good person, not a criminal. The application of this technique of neutralization “allows [a person] to loosen the restraints of [their] moral order” and emerge with “a positive, moral, decent self-image.”<sup>1025</sup>

#### *7.3.1.vii Defense of Necessity*

The defense of necessity technique of neutralization involves the perpetrator focusing on the necessity of committing the delinquent act. This focus absolves the delinquent of any sense of

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<sup>1019</sup> *Ibid.*

<sup>1020</sup> *Ibid.*

<sup>1021</sup> *Ibid* at 669.

<sup>1022</sup> *Ibid.*

<sup>1023</sup> Klockars, *supra* note 1001 at 152.

<sup>1024</sup> *Ibid* at 151.

<sup>1025</sup> *Ibid* at 161.

guilt.<sup>1026</sup> The concentration on necessity allows the perpetrator to challenge “[the act’s] characterization as deviant.”<sup>1027</sup> This technique may manifest itself in assertions by the perpetrator that that deviant act is “standard practice” in the context, or that the act is the “only way” to achieve the desired end.<sup>1028</sup> While there may be similarities between the types of rationalizations advanced under the defense of necessity technique and the technique of denial of responsibility, the two techniques are “conceptually distinct” from each other.<sup>1029</sup>

### 7.3.1.viii Denial of Humanity

Under the denial of humanity technique, the perpetrator seeks to dehumanize the victim of the deviant act. This serves to “distance[] participants ... from their intended victims.”<sup>1030</sup> Victims may be described as animals, demons, or objects.<sup>1031</sup> The act of depriving victims of their humanity means that “killing them no longer violates the religious and philosophical traditions whereby human life is pronounced sacred and special.”<sup>1032</sup> When there is no shared humanity between perpetrator and victim, the bonds of society’s norms of morality are broken.<sup>1033</sup> The portrayal of victims as inferior beings or objects serves to create the “psychological distance” common to all techniques of neutralization.<sup>1034</sup> Alvarez notes that this technique of neutralization was an essential component for participation in the Holocaust; however, it is unclear as to whether he considers the denial of humanity technique as essential to the employment of techniques of neutralization in order to participate in all acts of violence.<sup>1035</sup>

This technique of neutralization represents the second theme across the dominant theories discussed in this chapter, the theme of dehumanization. In chapter 8, dehumanization will be examined in the Sierra Leone and DRC case studies with a view to developing new IHL rules to inhibit combatants’ use of this technique to facilitate violence toward civilians.

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<sup>1026</sup> Minor, *supra* note 1008 at 198.

<sup>1027</sup> Bryant et al, *supra* note 23 at 4.

<sup>1028</sup> Minor, *supra* note 1008 at 198.

<sup>1029</sup> *Ibid.*

<sup>1030</sup> Alvarez, *supra* note 23 at 167.

<sup>1031</sup> *Ibid* at 148–49, 154, 166–67; Nick Haslam, Steve Loughnan & Yoshihisa Kashima, “Attributing and denying humanness to others” (2008) 19:1 European Review of Social Psychology 55 at 56.

<sup>1032</sup> Alvarez, *supra* note 23 at 167.

<sup>1033</sup> *Ibid.*

<sup>1034</sup> *Ibid.*

<sup>1035</sup> *Ibid* at 166.



### 7.3.1.ix *Victimization*

The technique of victimization differs from the denial of victim technique. Under the victimization technique, rather than focus on denying that the victim is a victim, the perpetrators focus on portraying themselves as victims.<sup>1036</sup> There may also be a similarity with the technique of condemning the condemners in that the individual “shifts blame from themselves”; however, the technique of victimization “do[es] not include the necessary component of accusing condemners.”<sup>1037</sup> A person employing the technique of victimization will speak of their own suffering or persecution. They will emphasize their own losses whether that be the loss of family, friends, or property. They will speak of their own victimization or “that of their ethnic group” or a minority group to which they belong.<sup>1038</sup> This technique allows actors to take refuge in the status of victimhood in order to avoid feelings of guilt for their own actions.

### 7.3.1.x *Appeals to Good Character*

In the appeals to good character technique of neutralization, actors “assert their good deeds or admirable character attributes that they contend render them incapable of committing ... crimes.”<sup>1039</sup> These good acts may include the protection of others from violence, attempts to “stop violence, and calling for peace.”<sup>1040</sup> In addition to such claims, people will “highlight other positive character traits” by “denying any personal ... animus” against victims or “by expressing remorse for the violence.”<sup>1041</sup> While there are similarities between the technique of appeals to good character and the metaphor of the ledger technique, actors employing the technique of appeals to good character refrain from “admitting guilt when cataloging their virtuous acts” and emphasize not only good deeds but also good character.<sup>1042</sup>

### 7.3.1.xi *Application of Techniques of Neutralization to International Crimes*

The preceding subsections have discussed each of the ten techniques of neutralization. The theory of techniques of neutralization was originally conceived and applied to domestic crimes during peacetime; however, techniques of neutralization have subsequently been applied to explain the commission of international crimes such as genocide, crimes against humanity, and

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<sup>1036</sup> Bryant et al, *supra* note 23 at 10.

<sup>1037</sup> *Ibid.*

<sup>1038</sup> *Ibid.*

<sup>1039</sup> *Ibid.*

<sup>1040</sup> *Ibid.*

<sup>1041</sup> *Ibid* at 10–11.

<sup>1042</sup> *Ibid* at 11.

war crimes.<sup>1043</sup> This section will discuss the manner in which techniques of neutralization has been applied to explain acts of violence against civilians during conflict, in particular during the Holocaust and during the Rwandan genocide.

Of particular interest to this thesis is the application of techniques of neutralization to the context of genocide, both by Alexander Alvarez and Bryant et al.<sup>1044</sup> As noted above in section 7.1, while genocide is a different crime than war crimes or crimes against humanity, specific underlying acts of genocide, such as the murder of civilians, are common to both crimes against humanity and war crimes. The focus of Alvarez and Bryant et al. is on how the violence of the acts committed are facilitated by techniques of neutralization, rather than genocide per se. They do not seek to explain genocide generally. Rather, their works examine individual perpetrators of acts within the context of genocide.

Bryant et al. identify techniques of neutralization in the testimonies of defendants before the International Criminal Tribunal for Rwanda and Alvarez employs the theory to explain how ordinary men and women came to participate, to varying degrees, in the Holocaust. Bryant et al. focus on the frequency with which the various techniques are applied, noting “limited use of the appeals to higher loyalty, denial of injury, and denial of the victim techniques”, but “frequent reliance” on the techniques of denial of responsibility, condemnation of the condemners, victimization, and appeals to good character. While interesting, consideration must be given to whether and to what degree the techniques noted by Bryant et al. were actually employed by the defendants to neutralize their behaviours before and during the commission of the acts. The findings of Bryant et al. rely on testimonies given at trial and Bryant et al. acknowledge that the status of the speakers as a defendants in criminal trials likely affected the types of techniques of neutralization revealed in the testimonies considered in the study.<sup>1045</sup> As Bryant et al. note, “denying the genocidal violence or the humanity of Tutsis would be deleterious to both [the defendants’] cases and their public image”.<sup>1046</sup> Consequently, the failure to find the techniques of

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<sup>1043</sup> See, e.g., Alvarez, *supra* note 23; Bryant et al, *supra* note 23; Stefan Harrendorf, “How Can Criminology Contribute to an Explanation of International Crimes?” (2014) 12 *Journal of International Criminal Justice* 231; Cohen, *supra* note 32; Neubacher, *supra* note 969.

<sup>1044</sup> Alvarez, *supra* note 23; Bryant et al, *supra* note 23.

<sup>1045</sup> Bryant et al, *supra* note 23 at 12–13.

<sup>1046</sup> *Ibid* at 12.

denial of injury and denial of humanity in these testimonies does not inherently mean that these techniques were not employed by perpetrators. While defendant testimonies did not provide evidence of the use of the denial of humanity technique, other sources have recorded the widespread use of dehumanizing language during the Rwandan genocide by génocidaires, most notably the use of the word ‘inyenzi’ (cockroach) to refer to Tutsis.<sup>1047</sup> Since the denial of humanity technique will often be absent from perpetrator accounts of conflict, one must look beyond perpetrator accounts to other sources to determine whether this technique may have been employed in a specific context.

Alvarez relies on evidence gathered during the Holocaust and statements made by perpetrators after the Holocaust to identify the application of Sykes and Matza’s original five techniques of neutralization.<sup>1048</sup> The denial of responsibility technique can be identified in the statements of many perpetrators, such as SS Lieutenant-Colonel Adolf Eichmann and Treblinka concentration camp Commandant Franz Stangl, both of whom claimed that their participation in acts of genocide was “innocent of wrongdoing because they were only following orders”.<sup>1049</sup> The denial of responsibility technique was employed by both to reassure themselves “that they remained decent people forced to do a dirty job.”<sup>1050</sup> In order to employ the denial of injury technique, participants in the genocide employed euphemistic language to disguise the negative reality of their actions. Rather than speak of genocide, they spoke of a “final solution” and instead of speaking of killing, they used the terms “special treatment,” “treated appropriately,” or “cleansing.”<sup>1051</sup> The use of scientific and technical euphemisms allowed participants to psychologically distance themselves from the true nature of their actions.<sup>1052</sup>

The denial of victim technique is evident in the way Jews were constructed as the enemy of Germany and the German people; they were “scapegoats for the defeat Germany suffered in World War I, the country’s subsequent economic collapse, and many other real or imagined

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<sup>1047</sup> See, e.g., Susan Benesch, “Inciting Genocide, Pleading Free Speech” (2004) 21:2 World Policy Journal 62 at 63–64.

<sup>1048</sup> Alvarez, *supra* note 23 at 152–54, 158–66.

<sup>1049</sup> *Ibid* at 158.

<sup>1050</sup> *Ibid* at 159.

<sup>1051</sup> *Ibid* at 160.

<sup>1052</sup> *Ibid* at 161.

social woes.”<sup>1053</sup> This allowed participants in the genocide to perceive of themselves as the true victims, rather than the Jews. Consequently, they “could operate from a position of moral superiority and define their actions as just, moral, and necessary.”<sup>1054</sup> Participants’ resort to the appeal to higher loyalties technique was facilitated by the same propaganda which portrayed the Jews as the cause of Germany’s woes. In depicting the Jews as the enemy, it was possible for participants to appeal to their own sense of patriotism and their need to protect “their people and their country.”<sup>1055</sup> Finally, Alvarez cites the extensive use by Nazis of “virulent anti-Semitic propaganda” that “focused on depicting Jewish people as subhuman” as evidence of the technique of denial of humanity.<sup>1056</sup> Ultimately, Alvarez successfully demonstrates how techniques of neutralization were employed by participants in the Holocaust “to overcome normative hurdles”.<sup>1057</sup>

The theory of techniques of neutralization developed by Sykes and Matza, and later elaborated upon by Klockars, Minor, Alvarez, and Bryant et al., provides a framework for understanding how ordinarily law-abiding individuals overcome society’s conventional normative constraints in order to commit deviant acts. It is not that such individuals have abandoned the conventional beliefs and values of larger society; rather, they have employed one or some of the ten techniques of neutralization identified by these theorists in order to defeat, or minimize, the power of social controls which would normally inhibit deviance. These techniques explain how offenders recast their deviance in a positive light free from internal or external censure in order to preserve their self-image. Social scientists have widely applied techniques of neutralization to traditional forms of criminality, but Alvarez and Bryant et al. demonstrate that this theory can also be usefully and successfully applied to international crimes such as acts of genocide.<sup>1058</sup> The techniques of denial of responsibility and denial of humanity are particularly important for the remainder of this chapter and the thesis as a whole. The importance of these two techniques comes from the fact that they capture the two themes of dehumanization and displacement of responsibility for one’s actions identified across the theories discussed in this chapter. Further,

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<sup>1053</sup> *Ibid* at 162.

<sup>1054</sup> *Ibid* at 163.

<sup>1055</sup> *Ibid* at 165.

<sup>1056</sup> *Ibid* at 166.

<sup>1057</sup> *Ibid* at 169.

<sup>1058</sup> Alvarez, *supra* note 23; Bryant et al, *supra* note 23.

the themes of dehumanization and displacement of responsibility for one's actions form the basis for analyzing combatant behaviour and identifying the need for new rules of IHL to protect civilians in chapter 8.

### 7.3.2 Moral Disengagement

The theory of “moral disengagement” was developed by social psychologist Albert Bandura and has its origins in Bandura's 1986 *Social Foundations of Thought and Action: A Social Cognitive Theory*.<sup>1059</sup> It was subsequently developed by Bandura in works devoted to the study of moral behaviour.<sup>1060</sup> There are numerous parallels between the mechanisms of moral disengagement developed by Bandura in social psychology and the criminological theory of techniques of neutralization. Bandura himself applied his theory to describe how people commit harmful acts, or what Bandura referred to as “the perpetration of inhumanities”, in contravention of their moral standards while “retain[ing] their sense of moral integrity.”<sup>1061</sup> Moral standards are learned through a combination of teaching and observation.<sup>1062</sup> They are then used to regulate one's actions, guiding the commission of acts which meet these standards and deterring those which violate them. Humans seek to engage in activities which provide them with “satisfaction and a sense of self-worth” while abstaining from doing things that “will bring self-censure.”<sup>1063</sup> The “exercise of moral agency” is both inhibitive – preventing inhumane action – and proactive – providing the capability to act humanely.<sup>1064</sup> Consequently, individuals have the capacity to choose to refrain from inhumane behavior by exercising self-influence.<sup>1065</sup> Therefore, the perpetration of violence against civilians is not inevitable. This suggests that if some, or all, of these mechanisms of moral disengagement could be prevented, deterred or inhibited, it could result in fewer IHL violations of protections for civilians.

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<sup>1059</sup> Albert Bandura, *Social Foundations of Thought and Action A Social Cognitive Theory* (Englewood Cliffs, NJ: Prentice-Hall Inc, 1986).

<sup>1060</sup> Albert Bandura, “Mechanisms of moral disengagement” in Walter Reich, ed, *Origins of Terrorism Psychologies, ideologies, theologies, states of mind* (New York: Cambridge University Press, 1990); Albert Bandura, “Selective activation and disengagement of moral control” (1990) 46:1 *Journal of Social Issues* 27; Albert Bandura et al, “Mechanisms of Moral Disengagement in the Exercise of Moral Agency” (1996) 71:2 *Journal of Personality and Social Psychology* 364; Bandura, *supra* note 23; Bandura, *supra* note 23.

<sup>1061</sup> Bandura, *supra* note 23. See also, Bandura, *supra* note 23.

<sup>1062</sup> Bandura et al, *supra* note 1060 at 364.

<sup>1063</sup> *Ibid.*

<sup>1064</sup> Bandura, *supra* note 23 at 194.

<sup>1065</sup> *Ibid.*

Bandura identifies social and psychological processes by which this ability to regulate one's own behaviour, through the exercise of internal control, "can be disengaged from inhumane conduct" thus facilitating the exercise of harmful behaviour without the consequence of self-censure.<sup>1066</sup>

Disengagement of self-censure can occur by

reconstructing conduct as serving moral purposes, by obscuring personal agency in detrimental activities, by disregarding or misrepresenting the injurious consequences of one's actions, or by blaming and dehumanizing the victims.<sup>1067</sup>

Disengagement of self-censure can be accomplished through one or more of the eight psychosocial mechanisms for moral disengagement: (1) moral, social, and economic justification; (2) euphemistic language or labeling; (3) advantageous comparison; (4) displacement of responsibility; (5) diffusion of responsibility; (6) disregard, distortion and denial of harmful effects; (7) dehumanization; and, (8) attribution of blame.<sup>1068</sup> Three of these mechanisms of moral disengagement - displacement of responsibility, diffusion of responsibility, and dehumanization – expressly capture the themes of dehumanization and responsibility, which are addressed by all of the dominant theories discussed in this chapter. However, the remaining five mechanisms of moral disengagement also contribute to dehumanization, particularly the use of euphemistic language, and the abdication of accountability for one's acts.

The effect of the application or employment of mechanisms of moral disengagement by individuals is not instantaneous; it "will not instantly transform considerate persons into cruel ones."<sup>1069</sup> Self-censure is gradually disengaged. People begin by "perform[ing] milder aggressive acts they can tolerate with some discomfort" and then, when "their self-reproof has been diminished..., the level of ruthlessness increases, until eventually acts originally regarded as abhorrent can be performed with little personal anguish or self-censure."<sup>1070</sup> It must be noted, however, that the identification and operation of these processes of moral disengagement in the behaviour of those who participate in inhumane acts in no way excuses the commission of such acts. As Bandura clearly states, "[t]here is a marked difference between scientific explanations of

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<sup>1066</sup> *Ibid.*

<sup>1067</sup> Bandura, *supra* note 1060 at 161.

<sup>1068</sup> See, e.g., Bandura, *supra* note 23 at 48–91; Bandura, *supra* note 23.

<sup>1069</sup> Bandura, *supra* note 23 at 203.

<sup>1070</sup> *Ibid.*

how moral self-sanctions are disengaged from inhumane conduct and evaluative judgments of that conduct.”<sup>1071</sup> When considering violence against civilians during armed conflict, while IHL provides the evaluative judgments of what conduct is legal and illegal, moral disengagement and the other theories discussed in this chapter provide the scientific explanations for how combatants come to commit acts of violence. These scientific explanations are a tool that can be employed “to prevent and counteract the suspension of morality in the perpetration of inhumanities.”<sup>1072</sup>

The technique of moral disengagement, like techniques of neutralization, explains specific thought processes individuals use to overcome cognitive dissonance in the commission of crimes. These mechanisms provide the specific content that Goodman and Jinks’ discussion of cognitive dissonance in the context of acculturation lacked.<sup>1073</sup> Further, as shown by Alvarez’s application of techniques of neutralization to the Holocaust and Bryant et al.’s application to the Rwandan genocide, evidence of these techniques can often be found in the testimonies of perpetrators. The next sections briefly examine each of Bandura’s mechanisms of moral disengagement in turn.

### *7.3.2.i Moral, Social, and Economic Justification*

The first psychosocial mechanism for moral disengagement is moral, social, and economic<sup>1074</sup> justification. Individuals use this mechanism to reconstrue their behaviour as morally acceptable. The act in question “is made personally and socially acceptable by portraying it as serving socially worthy or moral purposes.”<sup>1075</sup> These justifications serve to imbue the deleterious behaviour with a meritorious purpose: “[r]ighteous and worthy ends are used to justify harmful means.”<sup>1076</sup>

Military conduct represents a clear example of the psychosocial process of moral and social justification. The transformation of ordinary individuals into soldiers “is achieved not by altering

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<sup>1071</sup> Bandura, *supra* note 23 at 48.

<sup>1072</sup> *Ibid.*

<sup>1073</sup> See chapter 6 at section 6.3.3.

<sup>1074</sup> Economic justifications will be omitted from the discussion as they are limited to corporate actors and thus not relevant in the discussion of non-state armed groups. There is a potential that they would apply to private military companies, such as Academi (originally Blackwater), but these too remain outside the scope of this thesis.

<sup>1075</sup> Bandura, *supra* note 23 at 194.

<sup>1076</sup> Bandura, *supra* note 23 at 49.

their personality structures, aggressive drives, or moral standards,” but by “redefining the morality of killing so that it can be done free from self-censure.”<sup>1077</sup> Moral and social justifications operate to construe armed combat as a fight against oppression, to preserve a way of life, or to save humanity: “killing becomes an act of heroism.”<sup>1078</sup> Upon discharge, the soldier reverts to a civilian and “moral standards are reengaged” to once more deter deleterious behavior.<sup>1079</sup>

A further example of social and moral justification can be identified in some civil rights movements. Members of the movement identify the eradication of human rights violations as the righteous end that justifies sometimes militant means. In such contexts, members “appeal[] to what they regard as a higher level of morality derived from communal concerns.”<sup>1080</sup> While not acknowledged by Bandura, there is a parallel here to the appeal to higher loyalties technique of neutralization identified by Sykes and Matza.

### *7.3.2.ii Euphemistic Language and Labelling*

The use of euphemistic language or labeling by individuals is another psychosocial mechanism that operates to disengage moral reasoning from moral conduct. This mechanism recognizes the important role and effect language plays in how actions are perceived. The language used by individuals to describe an activity can have a significant effect on the “personal and social acceptability of [the activity]”.<sup>1081</sup> Euphemistic language and labeling can be, and is, employed by individuals to mask the true nature of destructive behaviour and acts, such that they are rendered “benign and people who engage in [them] are relieved of a sense of personal agency.”<sup>1082</sup> The work of Richard Gambino identifies three types of euphemisms: (1) “sanitizing and convoluted language”; (2) “the agentless passive form”; and, (3) “the borrowing of specialized jargon from a respectable enterprise.”<sup>1083</sup> Bandura returns to the context of the armed forces to provide examples of these forms of euphemistic language. The sanitizing language of “waste” and the acronym “KIA” (“killed in action”) are used to mask the soldier’s act of killing a

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<sup>1077</sup> Bandura, *supra* note 23 at 195.

<sup>1078</sup> Bandura, *supra* note 23 at 49.

<sup>1079</sup> *Ibid.*

<sup>1080</sup> *Ibid* at 52.

<sup>1081</sup> *Ibid* at 53.

<sup>1082</sup> Bandura, *supra* note 1060 at 170.

<sup>1083</sup> Bandura, *supra* note 23 at 53; Richard Gambino, “Watergate lingo: A language of non-responsibility” (1973) 22 *Freedom at Issue* 7.



person and neutralize the act's repugnancy.<sup>1084</sup> The agentless passive form is employed to "creat[e] the appearance that harmful acts are the work of nameless forces rather than of individuals."<sup>1085</sup> For example, the borrowed jargon of "clean, surgical strikes" describes bombing attacks in a manner that evokes the image of healing and medicine.<sup>1086</sup> The use of euphemistic language thereby distances the act from the reality of its harmful nature and distances the actors from responsibility for their acts. Again, there is a parallel between Bandura's euphemistic language mechanism of moral disengagement and Sykes and Matza's denial of injury technique of neutralization. Alvarez identifies the use of euphemisms such as "Final Solution" for genocide and "special treatment" for killing that neutralize the horrific nature of the acts themselves.<sup>1087</sup> Euphemistic language and labelling can also be linked to the mechanisms of dehumanization used in the Rwandan genocide, when génocidaires were instructed to "go to work [because] there was a lot of dirt that needed to be cleaned up."<sup>1088</sup> The euphemism 'to clean up' was used to instruct people to kill, and Tutsis were dehumanized by being referred to as "dirt".

### 7.3.3.iii Advantageous Comparison

The mechanism of advantageous comparison operates by comparing an act to another act that is considered even more morally reprehensible, thereby casting the first act in a more favourable light. The starker the contrast between the two activities, "the more likely it is that one's own destructive conduct will appear benevolent and righteous."<sup>1089</sup> For example, the United States Cold War policy of containment - stopping the threat of "communist enslavement" - was employed to detract from the horrors committed by American armed forces during the Vietnam War.<sup>1090</sup> Actors may also use historical comparisons to justify their destructive acts. For instance, the oppressive acts of a current regime may be contrasted with the crimes of a previous regime.<sup>1091</sup> Advantageous comparison, along with moral and social justifications and euphemistic language, represent, according to Bandura, "the most powerful set of psychological

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<sup>1084</sup> Bandura, *supra* note 23 at 53.

<sup>1085</sup> *Ibid* at 55; Dwight Bolinger, *Language: The loaded weapon; The use and abuse of language today* (London, UK: Longman, 1980).

<sup>1086</sup> Bandura, *supra* note 23 at 53.

<sup>1087</sup> Alvarez, *supra* note 23 at 160.

<sup>1088</sup> *The Prosecutor v Georges Anderson Nderubumwe Rutaganda, Trial Judgment*, ICTR-96-3-T, 6 December 1999 at para 385.

<sup>1089</sup> Bandura, *supra* note 23 at 56.

<sup>1090</sup> Bandura, *supra* note 23 at 196.

<sup>1091</sup> *Ibid*.

mechanisms for promoting detrimental activities.”<sup>1092</sup> The use of these mechanisms to “invest[] injurious means with high social or moral purpose not only eliminates self-deterrents but also engages self-approval in the service of harmful exploits.”<sup>1093</sup>

#### *7.3.2.iv Displacement of Responsibility and Diffusion of Responsibility*

As already noted, one of the strong themes running through the theories discussed in this chapter is the idea of responsibility and the process by which individuals divest themselves of a sense of responsibility in order to perpetrate, or deal with having perpetrated, a crime. The following two mechanisms of moral disengagement – displacement of responsibility and diffusion of responsibility – serve to “obscure[] or distort[]” the link between the actor, their actions, and the consequences of those actions.<sup>1094</sup> The mechanism of displacement of responsibility is identified in the works of Herbert Kelman and V. Lee Hamilton, and Stanley Milgram, discussed below. They demonstrated that, when an authority figure accepts responsibility for the consequences of a subordinate’s actions, the subordinate is willing to commit acts they would otherwise consider inhumane.<sup>1095</sup> The subordinate sees their act as flowing from the orders of the authority figure and, therefore, the act and its consequences are not a product of the subordinate’s actions. The subordinate has exempted themselves from any sense of culpability. The application of the displacement of responsibility mechanism is apparent in the testimonies of many Nazi commandants after the Holocaust. For example, the Commandant of Treblinka concentration camp, Franz Stangl, stated that “[t]he motive to murder did not originate with him. He 'only' carried out the order he had received in the best possible way.”<sup>1096</sup> Yitzhak Arad observes that, “[l]ooking at the situation in this way relieved his conscience and enabled him to oversee the death factory in which hundreds of thousands of people were murdered.”<sup>1097</sup> A defence of superior orders was refuted at the Nuremberg Trials.<sup>1098</sup> Nonetheless, the employment of the displacement of responsibility mechanism can be observed in subsequent instances of mass

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<sup>1092</sup> Bandura, *supra* note 23 at 58.

<sup>1093</sup> Bandura et al, *supra* note 1060 at 365.

<sup>1094</sup> *Ibid.*

<sup>1095</sup> Kelman & Hamilton, *supra* note 23; Milgram, *supra* note 23.

<sup>1096</sup> Yitzhak Arad, *Belzec, Sobibor, Treblinka: The Operation Reinhard Death Camps* (Bloomington, IN: Indiana University Press, 1987) at 186.

<sup>1097</sup> *Ibid* at 186–87.

<sup>1098</sup> United Nations, *Formulation of the Nürnberg Principles*, UN Doc A/CN.4/Ser. A/1950/Add.1, in ILC Yearbook 1950, vol 2, 181 at 191–93, para 43.

atrocities perpetrated by armed forces, such as the My Lai massacre in Vietnam.<sup>1099</sup> A clear parallel exists between the mechanism of displacement of responsibility and the technique of neutralization, denial of responsibility.

A sense of culpability is weakened when responsibility for destructive acts is diffused amongst numerous individuals.<sup>1100</sup> Self-sanctions lose their power as the direct link between action and consequence is obscured. This mechanism, known as diffusion of responsibility, can take three forms: (1) group decision-making; (2) division of labour; and, (3) collective action.<sup>1101</sup> Group decision-making serves to obscure individual responsibility since the decision, act, and its consequences can be attributed to the group and not one particular person: “[w]hen everyone is responsible, no one really feels responsible.”<sup>1102</sup> By dividing an action into its constituent parts and assigning each part to a different individual, individual responsibility for the ultimate product of the combined parts is dispersed and diminished. For example, the functions of death row executions in the United States are divided amongst numerous officers: each straps down only one part of the body, one inserts syringes, another attaches the heart monitor, and so on.<sup>1103</sup> Finally, collective action also allows individuals to easily “attribute [harm] largely to the behavior of others.”<sup>1104</sup> One example is a firing squad where all shooters must fire simultaneously and only one gun contains live ammunition. Further, collective action can serve to create a “sense of anonymity” among group members.<sup>1105</sup> The work of Bandura, Underwood, and Fromson and Zimbardo demonstrates that “[p]eople behave more cruelly under group responsibility than when they hold themselves personally accountable for their actions.”<sup>1106</sup> Much like the closely related displacement of responsibility, the mechanism of diffusion of responsibility parallels the technique of neutralization, denial of responsibility.

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<sup>1099</sup> Kelman & Hamilton, *supra* note 23.

<sup>1100</sup> Bandura et al, *supra* note 1060 at 176.

<sup>1101</sup> Bandura, *supra* note 23 at 62–63.

<sup>1102</sup> *Ibid* at 62.

<sup>1103</sup> *Ibid* at 63.

<sup>1104</sup> Bandura, Underwood & Fromson, *supra* note 167.

<sup>1105</sup> Bandura, *supra* note 23 at 63. See also Zimbardo, *supra* note 23.

<sup>1106</sup> Bandura et al, *supra* note 1060 at 365. See also, Bandura, Underwood & Fromson, *supra* note 167; Zimbardo, *supra* note 23.

### 7.3.2.v Disregard, Distortion and Denial of Harmful Effects

The mechanism of disregard, distortion and denial of harmful effects allows individuals to disengage moral control by minimizing, discrediting, misrepresenting, or denying the consequences of their actions. When people are insulated from the consequences of their actions and the suffering of their victims, it is easier for them to complete their tasks.<sup>1107</sup> Hierarchical chains of command can serve to distance decision-making superiors from the consequences of their orders executed by lower level functionaries.<sup>1108</sup> However, even the commands of authority figures are less likely to be obeyed when a person can “see and hear the suffering they cause”.<sup>1109</sup> There is a parallel here between the moral disengagement mechanism of disregard, distortion and denial of harmful effects and Sykes and Matza’s technique of neutralization denial of injury. Both serve to distance the actor from the reality of the harms suffered as a result of their actions.

### 7.3.2.vi Dehumanization

The mechanism of dehumanization allows people to divest victims of the qualities which make them human, resulting in the minimization or prevention of feelings of empathy and compassion in the perpetrator.<sup>1110</sup> There is a shared sense of common humanity when one sees others as sentient beings like themselves, which renders it “difficult to inflict suffering on humanized persons without experiencing distress and self-condemnation.”<sup>1111</sup> Yet, when these same persons are portrayed in subhuman terms, “it is easy to [inflict suffering] without guilt”.<sup>1112</sup> Dehumanization of victims can be achieved by depicting them as “mindless ‘savages,’ ‘degenerates’ and other despicable wretches.”<sup>1113</sup> Perpetrators may use degrading labels and ethnic slurs, for example American servicemen using the term “gook” during the Vietnam War to describe the Vietnamese people or the terms “hajjis” and “towel heads” to describe Iraqis during the second Gulf War (2003-2011).<sup>1114</sup> In an effort to further dehumanize victims, perpetrators may resort to “attributing demonic or bestial qualities to [victims].”<sup>1115</sup> This was

<sup>1107</sup> Bandura, *supra* note 23 at 199.

<sup>1108</sup> Bandura, *supra* note 1060 at 177.

<sup>1109</sup> Bandura, *supra* note 23 at 64. See also, Albert Bandura, “Social cognitive theory of social referencing” in S Feinman, ed, *Social referencing and the social construction of reality in infancy* (New York: Plenum, 1992) 175; Milgram, *supra* note 23.

<sup>1110</sup> Bandura, *supra* note 23 at 84–89.

<sup>1111</sup> *Ibid* at 84. See also Bandura, *supra* note 1109.

<sup>1112</sup> Bandura, *supra* note 23 at 84.

<sup>1113</sup> *Ibid*.

<sup>1114</sup> Zimbardo, *supra* note 23 at 307.

<sup>1115</sup> Bandura, *supra* note 23 at 84.

done, for example, by the Nazis who referred to the Jewish people as “parasitic vermin” and by Rwandan génocidaires who called their Tutsi victims “inyenzi” (cockroaches).

Laboratory studies have demonstrated that “when otherwise considerate people are given punitive power, they treat dehumanized individuals more harshly than those who are personalized or invested with human qualities.”<sup>1116</sup> The mechanisms of dehumanization and diffused responsibility, when combined, significantly increase the degree of punitiveness demonstrated by perpetrators, whereas when responsibility is personalized and victims humanized, there is a strong and positive effect on the exercise of self-restraint.<sup>1117</sup> This means that the combination of dehumanization and responsibility have the potential to be even more problematic than either in isolation. Depersonalization allows actors to treat others with “emotional detachment and little regard for them as persons.”<sup>1118</sup> Depersonalization can be facilitated through common phenomenon such as “[b]ureaucratization, automation, urbanisation, and high mobility” that “lead people to relate to each other in anonymous, impersonal ways.”<sup>1119</sup> The common conditions of war, where the enemy and its civilian population are strangers to opposing armed forces, also facilitate depersonalization since “[s]trangers can be more easily depersonalized than can acquaintances.”<sup>1120</sup> The devaluation and detachment produced by depersonalization render it a conducive stepping stone on the way to activating the disengaging power of dehumanization. The moral disengagement mechanism of dehumanization directly mirrors the technique of neutralization, denial of humanity, articulated by Alvarez. This mechanism reinforces the importance of the theme of dehumanization identified across the theories discussed in this chapter in the context of explaining combatant violence toward civilians.

### 7.3.2.vii Attribution of Blame

Attribution of blame is the final mechanism of moral disengagement in which perpetrators casts themselves as victims provoked into violence by the target of their violence.<sup>1121</sup> Perpetrators

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<sup>1116</sup> *Ibid* at 85. See also Bandura, Underwood & Fromson, *supra* note 167.

<sup>1117</sup> Bandura, *supra* note 23 at 201.

<sup>1118</sup> Bandura, *supra* note 23 at 89.

<sup>1119</sup> *Ibid*. See also, e.g., V Bernard, P Ottenberg & F Redl, “Dehumanization: A composite psychological defense in relation to modern war” in M Schwebel, ed, *Behavioral science and human survival* (Palo Alto, CA: Science and Behavior Books, 1965) 64.

<sup>1120</sup> Bandura, *supra* note 23 at 201.

<sup>1121</sup> *Ibid* at 203.

selectively portray the circumstances as being instigated by their victims, and thus characterize their own harmful acts as merely defensive. Furthermore, such a portrayal of events and circumstances means that “[v]ictims then get blamed for bringing suffering upon themselves.”<sup>1122</sup> The attribution of blame to others or on circumstances means that “not only are one’s own injurious actions excusable, but one can feel self-righteous in the process.”<sup>1123</sup> Attribution of blame was used extensively by Adolf Hitler and his Nazi party in their persecution of Jewish people during the Holocaust. They conveyed the message that “[t]he Jews are guilty of everything”, including the economic crisis in Germany and Germany’s defeat in the First World War.<sup>1124</sup> Another example is the manner in which Osama bin Laden “characterized his terrorist activities as ‘defensive jihad,’ compelled by ‘debauched infidels’ bent on enslaving the Muslim world.”<sup>1125</sup> Tactics such as these facilitated people’s participation in the commission of atrocities in the forms of genocide and terrorist attacks by deactivating self-censoring capacities through moral disengagement. Attribution of blame parallels the denial of victim technique of neutralization articulated by Sykes and Matza. Both operate to render victims responsible for their own victimization.

Albert Bandura’s theory of moral disengagement demonstrates mechanisms by which people are able to deactivate moral control to permit the commission or participation in atrocities. People have the capacity to selectively activate their internal control through the operation of self-regulation, self-censure, and self-sanctions. It is the failure to activate these processes of personal control that permits destructive and harmful behaviour. The moral standards of the individual have not been altered by the mechanism of moral disengagement nor have their personality structures or aggressive drives been changed. It is simply that self-restraint is no longer activated by the behaviour or act in question. The ability to activate and deactivate moral control selectively means that both acts of kindness and extreme cruelty can be observed in the same individual. Bandura actively makes the link between armed forces and the use of mechanisms of moral disengagement, as demonstrated by Nazis during the Holocaust and American armed

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<sup>1122</sup> *Ibid.*

<sup>1123</sup> *Ibid.*

<sup>1124</sup> Jeffrey Herf, *The Jewish Enemy Nazi Propaganda During World War II and the Holocaust* (Cambridge, MA: Harvard University Press, 2006) at 1–16, 209.

<sup>1125</sup> Bandura, *supra* note 23 at 90.

forces during the Vietnam War.<sup>1126</sup> While not acknowledged by Bandura, there are significant parallels between mechanisms of moral disengagement and the techniques of neutralization identified by Sykes and Matza, and subsequently further developed by Klockars, Minor, and Alvarez. Bandura has, however, provides greater detail on the specific psychological function of the mechanisms of moral disengagement than there is on the function of the techniques of neutralization. In particular, in addition to the mechanism of dehumanization, Bandura includes a separate mechanism addressing the use of euphemistic language. The historical examples provided above demonstrate that dehumanizing and euphemistic language are often used together by combatants. Further, Bandura identifies two separate mechanisms expressly addressing responsibility and how individuals can both displace or diffuse responsibility for their actions. Moreover, Bandura makes explicit the link between armed forces, as well as international crimes, and moral disengagement that was absent from the earliest articulations of techniques of neutralization.

### 7.3.3 Deindividuation

The theories of techniques of neutralization and moral disengagement focus largely on wholly internal processes – processes internal to the individual perpetrators – although diffusion and displacement of responsibility are often linked to the existence of a group or authority figure. However, the theory of deindividuation focuses primarily on the psychological effect membership within a group has on an individual. Deindividuation has its earliest roots in Gustave Le Bon’s 1895 book on crowd psychology.<sup>1127</sup> It was not until a 1952 article by social psychologists Leon Festinger, Albert Pepitone, and Theodore Newcomb that the term “deindividuation” was applied in the manner in which I will refer to it here: describing the behaviour exhibited by individuals when “submerged in a group.”<sup>1128</sup> Individuals are “submerged in the group” when they are no longer seen as, nor feel as, though they “stand out as individuals” - that is, when focus is placed on the group and not the individuals that make up the group.<sup>1129</sup> Under such conditions of deindividuation, Festinger et al. explained,

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<sup>1126</sup> Bandura, *supra* note 23 at 196, 200–202; Bandura, *supra* note 23 at 59.

<sup>1127</sup> Gustave Le Bon, *The Crowd: A Study of the Popular Mind* (London, UK: TF Urwin, 1908).

<sup>1128</sup> Leon Festinger, A Pepitone & T Newcomb, “Some consequences of de-individuation in a group” (1952) 47:2, *Supp The Journal of Abnormal and Social Psychology* 382 at 382.

<sup>1129</sup> *Ibid.*

there is likely to occur for the [group] member a reduction of inner restraints against doing various things. In other words, many of the behaviors which the individual wants to perform but which are otherwise impossible to do because of the existence, within [themselves], of restraints, become possible under conditions of deindividuation in a group.<sup>1130</sup>

Consequently, deindividuation can lead to behaviour normally frowned upon by society (i.e., anti-normative behaviour) because it weakens an individual's internal restraints. This includes both negative behaviour, such as acts of violence, as well as positive behaviour, such as public displays of extreme joy or sadness.<sup>1131</sup> The influence of the group on the individual in deindividuation theory has direct parallels to the influence of the groups discussed in the context of acculturation by Goodman and Jinks. However, deindividuation theory provides a more nuanced account of the function of social pressures on the individual than that provided in Goodman and Jinks' Socialization and International Law theory.

The theory of deindividuation was revisited in 1965 by Jerome E. Singer, Claudia A. Brush, and Shirley C. Lublin.<sup>1132</sup> They elaborated on the work of Festinger et al. and focused on the internal characteristics of deindividuation. Deindividuation was defined by Singer et al. as a "subjective state in which people lose their self-consciousness."<sup>1133</sup> A reduced sense of individuality and loss of self-consciousness are essential components of deindividuation. It is now understood that this can be more accurately described as a state of "reduced self-awareness" which "induce[s] a state of psychological disinhibition".<sup>1134</sup> It operates on both public and private self-awareness.<sup>1135</sup> Public self-awareness has an external focus that "involves attention to oneself as a social object" and includes "[c]oncerns about one's appearance and the impression made in social

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<sup>1130</sup> *Ibid.*

<sup>1131</sup> Ed Diener, "Deindividuation: The Absence of Self-Awareness and Self-Regulation in Group Members" in Paul B Paulus, ed, *Psychology of Group Influence* (Hillsdale, NJ: Lawrence Erlbaum Associates, Inc, 1980) 209 at 231.

<sup>1132</sup> JE Singer, CA Brush & SC Lublin, "Some aspects of deindividuation: Identification and conformity" (1965) 1:4 *Journal of Experimental Social Psychology* 356 at 356.

<sup>1133</sup> *Ibid.*

<sup>1134</sup> Richard Wortley, *Psychological Criminology: An Integrative Approach* (New York: Routledge, 2011) at 193. See also Diener, *supra* note 1131; Philip G Zimbardo, "The Human Choice: Individuation, Reason, and Order versus Deindividuation, Impulse, and Chaos" in *Nebraska Symposium on Motivation 1969* (Lincoln, NE: University of Nebraska Press, 1970) 237.

<sup>1135</sup> Steven Prentice-Dunn & Ronald W Rogers, "Effects of public and private self-awareness on deindividuation and aggression" (1982) 43:3 *Journal of Personality and Social Psychology* 503.



situations”.<sup>1136</sup> When public self-awareness is reduced, “people may be aware of what they are doing but have a reduced expectation of suffering any negative consequences.”<sup>1137</sup> By contrast, private self-awareness has an internal focus on things such as personal “perceptions, thoughts, and feelings.”<sup>1138</sup> Prentice-Dunn and Rogers have argued that it is the reduction of private self-awareness in particular that activates the process of deindividuation.<sup>1139</sup> This is because the submergence of one’s identity in a group “decrease[s one’s] ability to self-monitor their behaviour” and, consequently, “their capacity for self-regulation is fundamentally impaired.”<sup>1140</sup>

Psychologist Ed Diener has identified three fundamental premises of deindividuation. First, the prevention of self-awareness as an individual is submerged in a group and that group becomes an operating unit unto itself and the focus of all attention.<sup>1141</sup> Second, the individual no longer pays attention to their own behaviour and no longer sees themselves as an entity distinct from the group.<sup>1142</sup> Third, deindividuation triggers a “lack of self-regulation”.<sup>1143</sup> Additionally, self-regulation is absent in states of deindividuation because “[individuals] have relinquished decision-making to the group.”<sup>1144</sup> The external or outward focus of such individuals inhibits their ability to access their internal standards of behaviour from long-term memory.<sup>1145</sup> Deindividuation, as demonstrated by Diener’s three premises, is therefore the result of an interplay of “situational, internal and behavioral factors.”<sup>1146</sup>

Transgressive behaviour as a result of deindividuation is not reliant on the presence of deviant norms within the group. While the presence of such norms in the group can lead to transgressive behaviour, their absence does not inherently produce behaviour obedient to societal norms. This is because “lowered self-awareness leads to lowered adherence to societal norms even in the

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<sup>1136</sup> *Ibid* at 504.

<sup>1137</sup> Wortley, *supra* note 1134 at 194.

<sup>1138</sup> Prentice-Dunn & Rogers, *supra* note 1135 at 504.

<sup>1139</sup> *Ibid.*

<sup>1140</sup> Wortley, *supra* note 1134 at 194.

<sup>1141</sup> Diener, *supra* note 1131 at 211.

<sup>1142</sup> *Ibid.*

<sup>1143</sup> *Ibid.*

<sup>1144</sup> *Ibid* at 229.

<sup>1145</sup> *Ibid.*

<sup>1146</sup> *Ibid* at 211.

absence of deviant group standards.”<sup>1147</sup> There are several forces that have been identified by scholars as contributing to the creation of a deindividuated state: (1) pressure to conform; (2) a sense of anonymity; (3) and, a sense of responsibility.

#### 7.3.3.i Pressure to Conform

Conformity is defined as “the tendency to behave in accordance with group norms or unspoken rules about what one should or should not do.”<sup>1148</sup> Individuals join and conform to groups to fulfill their information needs.<sup>1149</sup> Group members are a source of other “ideas, views, perspectives, and knowledge that helps us to better navigate our world”.<sup>1150</sup> Second, a desire to belong to a group and be accepted by others fuels an individual’s normative needs: “other people are more likely to accept us when we agree with them than when we disagree, so we yield to their view of the world”.<sup>1151</sup> As group conformity increases and group members become progressively similar in behaviour, the ability to differentiate between members of the group becomes difficult, thereby leading to the inhibition of individual self-awareness.<sup>1152</sup> The pressure to conform was the primary source of social pressures discussed by Goodman and Jinks in their work on Socialization and International Law theory.

#### 7.3.3.ii Sense of Anonymity

A sense of anonymity may contribute powerfully to a state of antisocial deindividuation.<sup>1153</sup> Zimbardo argues that “anything that makes a person feel anonymous, as if no one knows who he or she is, creates the potential for that person to act in evil ways – if the situation gives permission for violence.”<sup>1154</sup> Submergence in a group can create this sense of anonymity, but groups may enhance anonymity and thus reduce a sense of personal accountability, through the use of “uniforms, costumes, and masks, all disguises of one’s usual appearance”.<sup>1155</sup> Many studies support the finding that anonymity and deindividuation increase the likelihood of antisocial behaviour. For example, Zimbardo demonstrated in a 1970 study that deindividuated

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<sup>1147</sup> *Ibid* at 212.

<sup>1148</sup> Elaine Cassel & Douglas A Bernstein, *Criminal Behavior*, 2d ed (Mahwah, NJ: Lawrence Erlbaum Associates, Inc, 2007) at 10.

<sup>1149</sup> Zimbardo, *supra* note 23 at 264.

<sup>1150</sup> *Ibid*.

<sup>1151</sup> *Ibid*.

<sup>1152</sup> Diener, *supra* note 1131 at 230.

<sup>1153</sup> Zimbardo, *supra* note 1134 at 255; Zimbardo, *supra* note 993 at 29–31; Zimbardo, *supra* note 23 at 219.

<sup>1154</sup> Zimbardo, *supra* note 993 at 29.

<sup>1155</sup> Zimbardo, *supra* note 23 at 219.

and anonymous women were more inclined to inflict pain on victims than individuated women.<sup>1156</sup> Diener, however, stresses that anonymity and deindividuation are not interchangeable terms because “an anonymous person (e.g., a bank robber in a ski mask) may be highly individuated and self-conscious, and a deindividuated crowd member may not be anonymous to a particular onlooker such as a policeman.”<sup>1157</sup> For example, some studies have suggested that anonymity in a group setting can actually lead to more reserved or controlled behaviour.<sup>1158</sup> In considering both studies that support a finding that anonymity increases disinhibited behaviour and those which suggest it decreases such behaviour, Diener concludes that “[a]nonymity will tend to disinhibit behavior if threats of punishment are a major source of inhibition”; “[t]he symbolic function of anonymity-inducing costumes will create a pressure on the individual to conform to the implicit message conveyed by the outfit”; and, that “[w]hen people are anonymous by virtue of appearing outwardly similar, besides the anonymity effect per se there will be group compliance pressures and a feeling of unity created by similar appearance.”<sup>1159</sup> By contrast, anonymity may serve to increase or decrease inhibition depending on whether the “form of anonymity serves to heighten or lessen the individual’s self-awareness.”<sup>1160</sup> Anonymity from other members of the group, such as an individual in a group of strangers participating in a protest, will reduce the pressure on individuals to conform to the group and thus is likely to decrease the level of disinhibited behaviour.<sup>1161</sup> Anonymity from people who are not members of the group, such as a group of individuals in disguise holding a public protest, however, may facilitate an individual’s dispersal or diffusion of responsibility from themselves onto other members of the group.

### 7.3.3.iii Sense of Responsibility

Deindividuation can affect an individual’s sense of responsibility for actions committed as a member of the group. The pressures to conform with a group and a sense of anonymity within that group contribute to a deindividuated individual’s ability to displace or diffuse responsibility onto the group and/or other members of the group. Zimbardo notes that the sense of

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<sup>1156</sup> Zimbardo, *supra* note 1134 at 263–69.

<sup>1157</sup> Diener, *supra* note 1131 at 220.

<sup>1158</sup> *Ibid* at 221; E Diener, J Dineen & K Westford, *Correlates of deindividuation in college campus crowds* (Unpublished Manuscript, 1974).

<sup>1159</sup> Diener, *supra* note 1131 at 222.

<sup>1160</sup> *Ibid.*

<sup>1161</sup> *Ibid.*

responsibility “may be made insignificant by situations in which [responsibility] is shared by others, by conditions which obscure the relationship between an action and its effects, or by a leader’s willingness to assume all of it.”<sup>1162</sup> Denial of responsibility as well as diffusion and displacement of responsibility indicate that an individual may shift responsibility for their actions onto a leader regardless of whether that leader is willing or not to assume responsibility for the actions of the group, as suggested in the preceding quote from Zimbardo. Zimbardo’s article in which these comments on responsibility were made predates Bandura’s articulation of the moral disengagement mechanisms of diffusion and displacement of responsibility. There are definite parallels between Zimbardo’s discussion of responsibility and Bandura’s discussion of displacement and diffusion of responsibility as well as between Zimbardo’s work and the earlier techniques of neutralization work done by Sykes and Matza. Zimbardo’s later work directly draws on Bandura’s theory of moral disengagement to explain torture and cruel, inhuman and degrading treatment of civilian detainees by members of the United States Armed Forces in Abu Ghraib prison, Iraq, in 2003.<sup>1163</sup>

#### *7.3.3.iv Criticism of Deindividuation*

Reicher, Spears, and Postmes have been extremely critical of deindividuation theory.<sup>1164</sup> Postmes and Spears conducted a meta-analysis of deindividuation literature and studies. According to their findings, “group immersion, group size, anonymity, lack of self-awareness” - characteristic factors of deindividuation - were “not associated with an increase in anti-normative behaviour.”<sup>1165</sup> Instead, they argue, the literature and studies suggest that these factors actually “are associated with an increase in normative behaviour.”<sup>1166</sup> In their view, in reality, any anti-normative behaviour found in the studies was evidence of greater conformity with group norms.<sup>1167</sup> Based on these findings and the results of their own studies, they advanced a new theory of social identity deindividuation effects (SIDE). This theory argues that anonymity and submergence in a group “can give rise to, not a loss of identity, but, rather, a change of identity,

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<sup>1162</sup> Zimbardo, *supra* note 1134 at 256.

<sup>1163</sup> Zimbardo, *supra* note 23 at 310; Zimbardo, *supra* note 993 at 31.

<sup>1164</sup> SD Reicher, R Spears & T Postmes, “A Social Identity Model of Deindividuation Phenomena” (1995) 6:1 *European Review of Social Psychology* 161; R Spears & T Postmes, “Deindividuation and antinormative behavior: A meta-analysis” (1998) 123:3 *Psychological Bulletin* 238.

<sup>1165</sup> Reicher, Spears & Postmes, *supra* note 1164 at 173.

<sup>1166</sup> *Ibid.*

<sup>1167</sup> *Ibid* at 183.

with a particular emphasis on the group identities that may become salient in such situations.”<sup>1168</sup> An individual transitions from “a *personal* to a *social* identity”.<sup>1169</sup> Despite this strong criticism of deindividuation, textbooks tend to not even reference the work of Postmes, Spears, and Reicher; rather they define and describe deindividuation in line with the works of Diener, Zimbardo, and Prentice-Dunn and Rogers.<sup>1170</sup>

The theory of deindividuation demonstrates a process by which membership in a group can facilitate individual participation in anti-normative behaviour. This behaviour may be positive or transgressive in nature. Through the process of deindividuation, individuals lose the ability to see themselves as individuals and, instead, focus is increasingly placed on the group as a whole. The effect is to inhibit individual self-awareness and thus the ability of individuals to self-regulate their own behaviour according to personal standards and societal norms. Similar to techniques of neutralization and moral disengagement, deindividuation operates on the individual. However, deindividuation differs from these two theories in that it is a process that requires the presence of a group in which the individual is submerged. The process does not operate if no group exists. Factors which contribute to the process of deindividuation - pressure to conform, a sense of responsibility, and a sense of anonymity – exist in many group contexts and have been expressly linked to the military context in the works of Zimbardo.<sup>1171</sup> Militaries and armed groups must be cohesive units in order to carry out operations effectively and efficiently. Additionally, a uniform has long been a requirement for parties to an international armed conflict.<sup>1172</sup> Ideally, uniforms should also be worn by parties to NIAC to facilitate combatants’ task of distinguishing between non-targetable civilians and legally targetable combatants even though a uniform is not a

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<sup>1168</sup> Paul Dickerson, *Social Psychology Traditional and Critical Perspectives* (Harlow, UK: Pearson, 2010) at 435.

<sup>1169</sup> *Ibid* at 334.

<sup>1170</sup> For example, Frank W Schneider, Jamie A Gruman & Larry M Coutis, *Applied Social Psychology Understanding and Addressing Social and Practical Problems*, 3d ed (Thousand Oaks, CA: Sage Publications Ltd, 2017) at 290; DeLamater, Myers & Collett, *supra* note 964 at 582; Lizabeth A Crawford & Katherine B Novak, *Individual and Society: Sociological Social Psychology* (New York: Routledge, 2014) at 452–53; Richard J Crisp & Rhiannon N Turner, *Essential Social Psychology*, 3d ed (Thousand Oaks, CA: Sage Publications Ltd, 2014) at 306. 308–10, 318; Elliot Aronson & Joshua Aronson, *The Social Animal*, 11th ed (New York: Worth Publishers, 2012) at 274–75.

<sup>1171</sup> Zimbardo, *supra* note 1134; Zimbardo, *supra* note 993; Zimbardo, *supra* note 23.

<sup>1172</sup> See, e.g., 1907 Hague Convention IV, *supra* note 465 at Article 1(2); Geneva Convention III, *supra* note 5 at Article 4(A)(2)(b).

requirement for an armed group to be considered a party to a NIAC.<sup>1173</sup> The possibility for deindividuation would therefore seem to be inherent within armed forces and armed groups.

#### 7.3.4 Obedience to Authority

Whereas deindividuation focuses on the effect of being submerged in a group, obedience to authority in the work of Stanley Milgram, Kelman and Hamilton focus on the effect of authority figures on an individual. The effect of authority on obedience, even in situations where an individual is harming another human being, originates in Milgram's laboratory experiments in the 1960s. His work has been widely cited and is relied upon by many of the scholars.<sup>1174</sup> His experiments demonstrated that ordinary people will obediently inflict pain on an innocent human being when ordered to do so by an authority figure.<sup>1175</sup> The results of Milgram's obedience to authority experiments play a significant role in the related theory of crimes of obedience from social psychologists Kelman and Hamilton.<sup>1176</sup> While Milgram drew parallels between his findings and the participation of so many German citizens in the Holocaust, Kelman and Hamilton examine their theory in the context of the My Lai massacre during the Vietnam War. Together, the work of Milgram, as well as that of Kelman and Hamilton, has been used in a great number of theories which endeavour to explain how ordinary people commit international crimes.<sup>1177</sup>

##### 7.3.4.i Milgram's Obedience Experiments

In Milgram's original, and most widely cited, laboratory experiment, two volunteers were placed in separate rooms. One volunteer, the "teacher," was in a room with the authority figure (the

<sup>1173</sup> See, e.g., Toni Pfanner, "Military uniforms and the law of war" (2004) 86:853 *International Review of the Red Cross* 93 at 122; M Cherif Bassiouni, "The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors" (2008) 98:3 *Journal of Criminal Law and Criminology* 711 at 741–42; Kleffner, *supra* note 71 at 320–21.

<sup>1174</sup> For example, Bandura, *supra* note 23 at 58–60, 64–65, 91, 134; Zimbardo, *supra* note 23 at 197, 234, 260, 267–76, 278–79, 281; Baumeister, *supra* note 32 at 190–91, 211, 256, 266–67, 285, 322; Kelman & Hamilton, *supra* note 23 at 148–66, 174, 207, 233, 266–67, 309–10; Cohen, *supra* note 32 at 89, 144, 311–12; Waller, *supra* note 22 at 107–15, 258; Smeulers, *supra* note 84 at 9–10; Harrendorf, *supra* note 1043 at 237–41; Alvarez, *supra* note 23 at 142, 146.

<sup>1175</sup> Milgram, *supra* note 23 at 6.

<sup>1176</sup> Kelman & Hamilton, *supra* note 23.

<sup>1177</sup> See, e.g., Cohen, *supra* note 32 at 89–91; Maier-Katkin, Mears & Bernard, *supra* note 32 at 239; Grossman, *supra* note 32 at 187, 191; Zimbardo, *supra* note 23 at 266–75; Zimbardo, *supra* note 993 at 26–29; Wortley, *supra* note 1134 at 192; Vollhardt & Campbell-Obaid, *supra* note 993 at 164, 166; Staub, *supra* note 32 at 29; Smeulers, *supra* note 32; Alette Smeulers, "Preventing International Crimes" in Willem de Lint, Marinella Marmo & Nerida Chazal, eds, *Criminal Justice in International Society* (London, UK: Routledge, 2014) 267 at 236, 238; Hugo Slim, "Why Protect Civilians? Innocence, Immunity and Enmity in War" (2003) 79:3 *International Affairs* 481 at 21, 280–81.

experimenter) and the other, the “learner,” was hooked up to an electrode in another room. The experimenter instructed the teacher to administer electric shocks each time the learner answered a question incorrectly, beginning at 15-volts and increasing in 15-volt increments, upon each wrong answer, up to a maximum of 450-volts.<sup>1178</sup> While physically separated from the learner, the teacher could hear the learner. The recipient of the shocks, unbeknownst to the teacher, was an actor and did not actually receive any shock. At 75-volts, the learner began expressing increasing discomfort and subsequently displayed increasing levels of distress, including asking to be released from the study and emitting an “agonized scream.”<sup>1179</sup> At 330-volts, the learner would go silent and unresponsive.<sup>1180</sup> If the volunteer administering shocks sought guidance from the experimenter or hesitated to administer a shock, they were instructed to continue by the experimenter.<sup>1181</sup> They were told that the absence of a response should be considered as an incorrect response and a shock should be administered.<sup>1182</sup> The majority of teachers continued to administer shocks up to the maximum level (450-volts), despite evidence that the learner had been in extreme pain and was now, perhaps, unconscious.<sup>1183</sup> Milgram concluded that “ordinary people, simply doing their jobs, and without any particular hostility on their part, can become agents in a terrible destructive process.”<sup>1184</sup>

From his studies, Milgram identified certain “adjustments in the [teacher’s] thinking ... that undermine [their] resolve to break with the authority.”<sup>1185</sup> First, individuals can become so focused on the “narrow consequences of the task that [they] lose[] sight of its broader consequences.”<sup>1186</sup> Second, the teacher absolves themselves of responsibility for the consequences of their actions and places the responsibility on “the experimenter, a legitimate authority.”<sup>1187</sup> The teacher’s moral priorities shift, from the morality of inflicting pain or harming an individual, to “a consideration of how well [they are] living up to the expectations that the

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<sup>1178</sup> Milgram, *supra* note 23 at 3.

<sup>1179</sup> *Ibid* at 4.

<sup>1180</sup> *Ibid* at 23.

<sup>1181</sup> *Ibid* at 4.

<sup>1182</sup> *Ibid* at 23.

<sup>1183</sup> *Ibid* at 33.

<sup>1184</sup> *Ibid* at 6.

<sup>1185</sup> *Ibid* at 7.

<sup>1186</sup> *Ibid*.

<sup>1187</sup> *Ibid* at 8.

authority has of him.”<sup>1188</sup> Finally, many of the teachers saw their acts as part of a larger “noble cause ... the pursuit of scientific truth.”<sup>1189</sup>

Milgram’s work on obedience to authority demonstrates that individuals are capable of committing extreme acts of violence when instructed to do so by an authority figure. As noted above, one of the key processes that contributes to this ability to commit acts of violence is the fact that the individual transfers responsibility for the consequences of his or her actions onto the authority figure. Responsibility is again the continuing theme in all of the theories discussed in this chapter.

#### *7.3.4.ii Crimes of Obedience*

Milgram’s findings play an important role in Kelman and Hamilton’s theory of crimes of obedience. In addition to supporting Milgram’s theory of destructive obedience, they pick up on the themes of responsibility and dehumanization seen in the theories of techniques of neutralization, moral disengagement, and deindividuation. Their theory aims to answer how “moral inhibitions against violence become weakened.”<sup>1190</sup> Again, this is very similar to the earlier theories presented in this chapter. All of these theories articulate explanations for individual participation in violent acts as a result of the deactivation or diminution of one’s ability to regulate their behaviour according to social norms. Kelman and Hamilton define a crime of obedience as “an illegal or immoral act committed in response to orders or directives from authority.”<sup>1191</sup> This authority, in the context of a crime of obedience, is “unrestrained” and “wrongful[ly] exercise[d]”.<sup>1192</sup> Kelman and Hamilton’s theory describes the social processes under which individuals may participate in sanctioned massacres, such as the Holocaust and the My Lai massacre during the Vietnam War: authorization, routinization, and dehumanization.<sup>1193</sup> These processes have been incorporated into criminologist Alette Smeulers’ work on the perpetration of human rights violations.<sup>1194</sup> These three processes also, in many ways, repackage

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<sup>1188</sup> *Ibid.*

<sup>1189</sup> *Ibid* at 9.

<sup>1190</sup> Kelman & Hamilton, *supra* note 23 at 16.

<sup>1191</sup> *Ibid* at 307.

<sup>1192</sup> *Ibid.*

<sup>1193</sup> *Ibid* at 16; Herbert C Kelman, “Violence without Moral Restraint: Reflections on the Dehumanization of Victims and Victimizers” (1973) 29:4 *Social Issues* 25 at 25.

<sup>1194</sup> Smeulers, *supra* note 32.



the elements of responsibility and dehumanization seen in techniques of neutralization, moral disengagement, and deindividuation. Each of these processes will be discussed in turn.

#### 7.3.4.iii Authorization

The first social process identified by Kelman and Hamilton, authorization, is an inherent component of sanctioned massacres.<sup>1195</sup> In identifying this, Kelman and Hamilton rely most heavily on the work of Milgram. A person is more likely “to commit or condone” violence when it is either directly or indirectly authorized by a legitimate authority, whether in the form of orders, encouragement, approval, or a generally permissive environment.<sup>1196</sup> Authorization eliminates the need to exercise individual judgment or make choices for oneself, effectively inhibiting the application of personal moral standards.<sup>1197</sup> A sense of obligation to obey orders will generally supplant personal standards even when those standards are inconsistent with the orders being given.<sup>1198</sup> Individuals may, however, be willing to disobey orders which they consider illegitimate, although there will be individual variance in the extent to which an individual will be willing to challenge authority.<sup>1199</sup> Usually, people will “obey without question”.<sup>1200</sup> Kelman and Hamilton note that, “[unquestioning] obedience is specifically fostered in the course of military training and reinforced by the structure of the military authority situation.”<sup>1201</sup> When a person is authorized, whether explicitly or implicitly, to commit an act, often they will “not see themselves as personally responsible for the consequences of their act[.]”<sup>1202</sup> Authorization, according to Kelman and Hamilton, includes the processes of diffusion of responsibility and deindividuation.<sup>1203</sup> Authorization, in the theory of crimes of obedience, allows people to detach from personal accountability in a similar manner to Sykes and Matza’s denial of responsibility, Bandura’s displacement of responsibility, or the attribution of responsibility to the group in deindividuation.

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<sup>1195</sup> Kelman & Hamilton, *supra* note 23 at 16.

<sup>1196</sup> *Ibid.*

<sup>1197</sup> *Ibid.*

<sup>1198</sup> *Ibid.*

<sup>1199</sup> *Ibid.*

<sup>1200</sup> *Ibid.*

<sup>1201</sup> *Ibid* at 17.

<sup>1202</sup> *Ibid* at 16.

<sup>1203</sup> *Ibid* at 334.

#### 7.3.4.iv *Routinization*

Kelman and Hamilton's second process of routinization focuses on the organization and repetitiveness of acts of violence. While authorization provides the means of initial participation in an action, continued participation is influenced by the regularization of the activity.<sup>1204</sup> The transformation of the activity "into routine, mechanical, highly programmed operations" serves to significantly diminish "the likelihood of moral resistance".<sup>1205</sup> Similar to the process of authorization, individual decisions become unnecessary when the action is routinized, and, as a consequence, the "occasions in which moral questions may arise" are limited.<sup>1206</sup> Routinization requires people "to focus[] on the details of the job rather than on its meaning", though this is more easily accomplished by individuals who have some physical distance between themselves, their actions, and their victims.<sup>1207</sup> Within an organization, each person will often only be responsible for one discrete component of the overall action. As a consequence, responsibility for the overall action is diffused among the various actors as in Sykes and Matza's denial of responsibility and Bandura's diffusion of responsibility.<sup>1208</sup> The routinization of activity in the context of sanctioned massacres "reinforce[s] [...] the view that what is going on must be perfectly normal, correct, and legitimate."<sup>1209</sup>

#### 7.3.4.v *Dehumanization*

While authorization and routinization operate to "override standard moral considerations" and "reduce the likelihood that such considerations will arise", Kelman and Hamilton feel that authorization and routinization are generally not sufficient in themselves to induce individual participation in sanctioned massacres.<sup>1210</sup> The process of dehumanization will usually need to be employed in addition to authorization and routinization in order to commit atrocities. Here, Kelman and Hamilton differ slightly from Bandura's moral disengagement mechanism of dehumanization and, possibly, Alvarez's denial of humanity technique of neutralization. In addition to dehumanization, Kelman and Hamilton note that the "neutralization of the victim"

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<sup>1204</sup> *Ibid* at 17.

<sup>1205</sup> *Ibid* at 18.

<sup>1206</sup> *Ibid*.

<sup>1207</sup> *Ibid*.

<sup>1208</sup> *Ibid*.

<sup>1209</sup> *Ibid*.

<sup>1210</sup> *Ibid* at 19.

can help to justify violence.<sup>1211</sup> Kelman and Hamilton find that dehumanization will “generally” have to be employed whereas in moral disengagement is merely a possible and not essential element of facilitating participation in acts of violence. The technique of neutralization, denial of humanity, on the other hand, was deemed an essential component of participation in the Holocaust by Alvarez, though it was unclear whether he believed it to be an essential component to the use of techniques of neutralization to facilitate participation in all forms of violence. Kelman and Hamilton do define dehumanization in the same way as in these other theories. They describe it as the process by which victims are “stripped of their human status”.<sup>1212</sup> They note that “[d]ehumanization of the enemy is a common phenomenon in any war situation” and that “a more extreme degree of dehumanization” is needed for sanctioned massacres because “the killing is not in direct response to the target’s threats or provocation.”<sup>1213</sup> The process of dehumanization is self-reinforcing because, in “observing [the] victimization” of victims, participants “are reinforced in their perception of the victims as less than human.”<sup>1214</sup> Thus, dehumanization can contribute to initial acts of violence as well as ongoing perpetuation of violence.

Authority can play a powerful role in the perpetration of international crimes. The works of Milgram, Kelman and Hamilton demonstrate that human beings, despite their own misgivings, will usually obey an order to inflict pain on an innocent person.<sup>1215</sup> People are reticent to disobey an order when they are unsure whether the order is or is not a legitimate order.<sup>1216</sup> In the face of an illegitimate order, some people may be willing to challenge authority, but, more frequently, people will blindly obey.<sup>1217</sup> Authorization from a legitimate authority allows individuals to place accountability for the consequences of their actions on the authority figure who gave the order. While the physical proximity of killing on the battlefield may provide encouragement to challenge an illegitimate order to kill a civilian, a soldier’s fear of the significant punishment attached to disobeying orders may counter the effects of physical proximity.<sup>1218</sup> The additional

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<sup>1211</sup> *Ibid* at 336.

<sup>1212</sup> *Ibid* at 19.

<sup>1213</sup> *Ibid*.

<sup>1214</sup> *Ibid*.

<sup>1215</sup> Milgram, *supra* note 23 at 6; Kelman & Hamilton, *supra* note 23 at 16.

<sup>1216</sup> Kelman & Hamilton, *supra* note 23 at 94, 138.

<sup>1217</sup> *Ibid* at 16.

<sup>1218</sup> Milgram, *supra* note 23 at Ch 4; Kelman & Hamilton, *supra* note 23 at 163.

factors of routinization and dehumanization operate in military contexts where international crimes have been committed under explicit or implicit authorization from a superior officer. The repetitive routinization of violence contributes to the diffusion of responsibility.<sup>1219</sup> Finally, dehumanization will usually be necessary in addition to authorization and routinization for an individual to participate in a massacre. Obedience to authority and crimes of obedience represent not only a powerful factor contributing to international crimes, but also reinforces the concepts of diffusion of responsibility and dehumanization found in the techniques of neutralization and moral disengagement.

#### 7.4 Conclusion

A study of social psychology and criminology literature on how ordinary people come to commit acts of violence against civilians reveals the prominence of the use of the theories of techniques of neutralization, moral disengagement, deindividuation, and obedience to authority in this body of literature. The theories all seek to explain how individuals reconcile the commission of violent acts that conflict with social, moral and legal norms while preserving their positive sense of self. Two specific themes dominate within these four theories: dehumanization and responsibility. Within techniques of neutralization, 10 forms of neutralizing criminal behaviour and avoiding self-censure are identified. Denial of responsibility and denial of humanity speak directly to the themes of dehumanization and responsibility. There are eight mechanisms of moral disengagement, which similarly explain how people to disengage moral self-sanctions and overcome moral standards in order to participate in international crimes. Diffusion or displacement of responsibility along with dehumanization and the use of euphemistic language and labelling focus on the themes of responsibility and dehumanization. The submergence of an individual in a group can result in deindividuation, wherein one's ability to self-monitor their behaviour is inhibited. Factors such as conformity to the group and anonymity within the group can lead to diffusion of responsibility. Obedience to authority demonstrates that individuals will often obey orders to harm another human being, even if it contradicts their own morals. An instruction or order from an authority figure allows an individual to displace responsibility for acts of violence onto the person who issued the instruction or order.

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<sup>1219</sup> Kelman & Hamilton, *supra* note 23 at 18.

This thesis advances the claim that there is a gap between the regulation of behaviour for the protection of individuals in peace and the regulations needed to protect civilians during war from combatant violence. Social psychology and criminology theories help to fill this gap because they explain how combatant deviance is adversely affected by psychological processes that reframe combatants' conceptions of right and wrong and, in doing so, fundamentally alter the way in which combatants view the IHL rules intended to protect civilians. This chapter has identified four theories from the disciplines of social psychology and criminology that address the psychology of violence toward civilians during conflict. All of these four theories present psychological processes which can prevent people from feeling responsible or accountable for the consequences of their actions. Further, across the four theories discussed in this chapter, dehumanization is shown to be another powerful contributing factor to violence against civilians. These processes allow an individual to reframe their understanding of right and wrong.

As noted earlier in this chapter, “[t]here is a marked difference between scientific explanations of how moral self-sanctions are disengaged from inhumane conduct and evaluative judgments of that conduct.”<sup>1220</sup> During armed conflict, IHL provides the evaluative judgments of what conduct is legal and what conduct is illegal. This chapter has provided the scientific explanations for how law-abiding citizens can become law-breaking combatants who commit acts of violence toward civilians. These scientific explanations are a tool that can be employed to “prevent and counteract the suspension of morality in the perpetration of inhumanities.”<sup>1221</sup> The perpetration of violence against civilians is not inevitable.<sup>1222</sup> Consequently, if some, or all, of these mechanisms of moral disengagement could be prevented, deterred or inhibited, it could result in fewer IHL violations of protections for civilians.

The earlier chapters in the thesis demonstrated that existing IHL protections for civilians during conflict are largely the same as protections afforded to individuals in peacetime. The next chapter uses the scientific explanations for combatant violence toward civilians identified in the current chapter, namely the processes of dehumanization and the displacement of responsibility,

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<sup>1220</sup> Bandura, *supra* note 23 at 48.

<sup>1221</sup> *Ibid.*

<sup>1222</sup> See, e.g., Bandura, *supra* note 23 at 194.

to examine combatant behaviour in Sierra Leone and the DRC. The next chapter will argue that there are common behaviours used by combatants to dehumanize civilians and to abdicate their sense of responsibility for their actions that are currently unregulated by IHL. In order to adequately protect civilians, new rules are needed to regulate these behaviours during armed conflict.

## Chapter 8

### 8 The Use of Social Psychology and Criminology to Identify and Address Gaps in International Humanitarian Law

This thesis advances the claim that there is a gap between the regulation of behaviour for the protection of individuals in peace and the regulations needed to protect civilians from combatant violence during war. Social psychology and criminology theories can help to develop the necessary conflict-specific behavioural regulations because they explain how combatant deviance is adversely affected by psychological processes that reframe combatants' conceptions of right and wrong and, in so doing, fundamentally alter the way in which combatants view the IHL rules intended to protect civilians. Chapters 3, 4, and 5 of this thesis provided the theoretical foundations and practical realities of civilian protections under IHL. States made evaluative judgments about what conduct needed to be prohibited for the protection of civilians during armed conflicts and codified these judgments in the four Geneva Conventions of 1949 and two 1977 Additional Protocols to the Geneva Conventions. Civilian protections during armed conflict are premised on the protections afforded to individuals in peacetime, despite the dramatically different contexts of peace and war. In practice, NIACs, such as those in Sierra Leone and the DRC, often see law-abiding citizens become law-breaking combatants who commit acts of violence against civilians. These acts are unquestionably illegal under IHL; however, the fact that these IHL violations occur provides little insight into why they are occurring: why have law-abiding citizens become law-breaking combatants?

In order to identify an explanation for this shift from legal compliance to legal deviance, this thesis examined three legal theories which seek to explain human behaviour and legal compliance or deviance. Chapter 6 demonstrated that existing explanations of individual behaviour in Law and Economics, Behavioural Law and Economics, and Socialization and International Law theories, fail to provide a sufficiently nuanced understanding of human behaviour to explain the transition from law-abiding citizen to law-breaking combatant who perpetrates acts of violence against civilians.

Without an adequate explanation of combatant perpetration of violence toward civilians in legal theory, Chapter 7 looked outside of the discipline of law for an explanation. Chapter 7 demonstrated that a deeper and more focused turn to social psychology, than that employed in Socialization and International Law theory, as well as to criminology, can provide conflict specific explanations of combatant violations of IHL protections for civilians. An examination of the theories of techniques of neutralization, moral disengagement, deindividuation, and obedience to authority demonstrated that behaviours that allow combatants to dehumanize civilians or to abdicate responsibility for their own actions place civilians at a heightened risk for suffering violence at the hands of combatants. These scientific explanations for combatant violations of IHL protections for civilians allow for an assessment of whether there are behaviours related to dehumanization and the displacement of responsibility that warrant regulation in order to advance the humanitarian goals of IHL for the protection of civilians.

Through the use of research and field data gathered in Sierra Leone and the DRC, this chapter identifies two common behaviours among members of armed groups that contribute to violence toward civilians in violation of IHL during NIACs. First, the use of dehumanizing or degrading language toward civilians by combatants was common in both the Sierra Leone civil war and the conflicts in the DRC. Second, the widespread use of nicknames by combatants in Sierra Leone and the DRC that contributes to producing a sense of anonymity in the combatant, which permits the combatant displace their sense of responsibility for their actions.

This chapter will prove three key ideas proffered in this thesis. First, this chapter demonstrates that existing IHL protections for civilians do not adequately regulate the use of demeaning, degrading, and dehumanizing language directed at civilians and the use of anonymizing nicknames by combatants. Second, this chapter argues that, in order to advance the humanitarian goals of IHL discussed in chapter 4, new regulations should be introduced to inhibit the ability of combatants to employ these behaviours as a means of facilitating the commission of IHL violations against civilians. Third, this chapter demonstrates how scientific explanations of combatant perpetration of violence offered by techniques of neutralization, moral



disengagement, deindividuation, and obedience to authority can be used to develop substantive regulations to address these problematic behaviours.

This chapter is divided into three parts: (1) the underlying theory on the role of law; (2) the use of dehumanization by combatants; and, (3) and the displacement of responsibility by combatants. Section 8.1 of this chapter demonstrates that law is a common tool employed to regulate risky behaviour and that it has the capacity to contribute to positive changes in those behaviours. The chapter then turns to an examination of the two themes identified in the dominant theories of social psychology and criminology in chapter 7: dehumanization and displacement of responsibility.

Section 8.2 of the chapter focusses on the theme of dehumanization and is divided into 12 subsections. This discussion begins with a brief review of dehumanization and the manner in which it explains combatant violence toward civilians. The use of demeaning, degrading, or dehumanizing language to speak to, or refer to, civilians is a manifestation of the mechanism of dehumanization used by combatants in Sierra Leone and the DRC. The chapter examines whether existing protections for civilians currently address the use of demeaning, degrading, or dehumanizing language by combatants. It argues that, although it may appear possible for existing IHL protections to capture these types of language, currently IHL does not clearly protect against the use of such language nor is there evidence that existing IHL has ever been interpreted in a manner that would capture demeaning, degrading, or dehumanizing language. The focus of the chapter next shifts to an examination of international human rights law to determine whether the prohibition on hate speech, as an exception to protection of free speech and expression rights, would adequately capture demeaning, degrading, or dehumanizing language used by combatants when speaking to or referring to civilians. It contends that hate speech, while able to capture some instances in which demeaning, degrading, or dehumanizing language is used, does not capture the full scope of the problematic use of these forms of language. The final subsection of section 8.2 recommends a new substantive regulation to prevent and inhibit the deleterious effects of demeaning, degrading, or dehumanizing language that can contribute to violations of IHL protections for civilians.

Section 8.3 of this chapter focuses on deindividuation, depersonalization, and displacement of combatant responsibility for violence towards civilians and is divided into six subsections. This section examines the risky behaviour of combatant use of anonymizing nicknames. The first subsection examines how the use of nicknames is a manifestation of deindividuation, depersonalization, and displacement of responsibility and the consequent effect the use of nicknames can have on combatant psychology. The second subsection considers whether nicknames are currently regulated under IHL or international human rights law, concluding that neither area of law currently regulates the use of nicknames by combatants. The final subsection makes recommendations for the regulation under IHL of nickname use by combatants.

This chapter concludes by demonstrating how scientific explanations, provided by theories of social psychology and criminology, for combatant violence toward civilians can positively contribute to the humanitarian goals of IHL.

### 8.1 The Power of Law to Change Risky or Dangerous Behaviour

This chapter argues that IHL regulation is needed to prevent or inhibit two behaviours which jeopardize civilian safety by increasing combatant violence toward civilians. This section explains why law is the appropriate tool to address the threat to civilians posed by combatant use of demeaning, degrading or dehumanizing language and combatant use of nicknames. This section demonstrates that law has the power to affect behavioural change by shaping how societies view particular actions.<sup>1223</sup> This section further demonstrates that legal regulation is a common means employed in both domestic and international law to regulate risky or dangerous behaviours.

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<sup>1223</sup> The culture (e.g., beliefs, behaviours, values) of a particular society also plays an important role in influencing norms and behaviour: See, e.g., Sampsell-Jones, *supra* note 977; Nadler, *supra* note 977 at 67–68; Brislin, *supra* note 977; While law can help constrain and shape behaviour, culture can also influence the extent to which certain individuals conform or comply with certain laws. See, e.g., discussion of female circumcision, culture, and law by Obiora, *supra* note 977; On the dynamic interplay between psychology and culture see, e.g., Lehman & Chiu, *supra* note 977 at 703–704; Gordon, *supra* note 977.

Laws and regulations express messages about the conduct they govern.<sup>1224</sup> Law functions as a tool to coerce and/or deter certain behaviours, but this is not its sole function.<sup>1225</sup> A law can also be used to “reconstruct existing norms and to change the social meaning of action through a legal expression or statement about appropriate behaviour.”<sup>1226</sup> This is often a common aim or feature of regulatory law<sup>1227</sup> and, more specifically, the regulation of dangerous or risky behaviour.<sup>1228</sup> Laws can impact not only people’s choices but the reputational effects of legal compliance and deviance.<sup>1229</sup> The theories of techniques of neutralization and moral disengagement in chapter 7 explained how people desire to maintain a positive self-image and often change their thinking and/or behaviour to align with a conception of positive identity.<sup>1230</sup> Law can contribute to this process by shaping what an individual sees as a positive behaviour by indicating social approval of certain behaviours and social disapproval of other behaviours.<sup>1231</sup> Law can also shape people’s “expectations about how others will behave” and how others will react to their own behaviour.<sup>1232</sup> In changing their behaviour to align with the social message conveyed by a law, people contribute to changing social norms.<sup>1233</sup> Behavioural change and/or reconstruction of social norms through regulation of dangerous or risky behaviour can be further aided through accompanying information and education about the risks of the behaviour or activity being regulated.<sup>1234</sup>

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<sup>1224</sup> See, e.g., Sunstein, *supra* note 871; Alex Geisinger, “Reconceiving the Internal and Social Enforcement Effects of Expressive Regulation” (2016) 58 William & Mary Law Review Online 1; Alex Geisinger, “A Belief Change Theory of Expressive Law” (2002) 88 Iowa Law Review 35; Maggie Wittlin, “Buckling under Pressure: An Empirical Test of the Expressive Effects of Law” (2011) 28 Yale Journal on Regulation 419; Lawrence Lessig, “Social Meaning and Social Norms” (1996) 144:5 University of Pennsylvania Law Review 2181; Kenworthy Bilz & Janice Nadler, “Law, Moral Attitudes, and Behavioral Change” in Eyal Zamir & Doron Teichman, eds, *The Oxford Handbook of Behavioral Economics and the Law* (Oxford: Oxford University Press, 2014) 241; Nadler, *supra* note 977.

<sup>1225</sup> See, e.g., Nadler, *supra* note 977 at 62–63; Wittlin, *supra* note 1224 at 419.

<sup>1226</sup> Sunstein, *supra* note 871 at 2031. ; See also Lessig, *supra* note 1224 at 2185.

<sup>1227</sup> Sunstein, *supra* note 871 at 2031.

<sup>1228</sup> See, e.g., *ibid* at 2032; Nadler, *supra* note 977 at 66–67.

<sup>1229</sup> See, e.g., Robert Cooter, “Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization” (2000) 79 Oregon Law Review 1 at 7–8; Sunstein, *supra* note 871 at 2031–32.

<sup>1230</sup> See chapter 7 at sections 7.2.1 and 7.2.2.

<sup>1231</sup> See, e.g., Nadler, *supra* note 977 at 63; Cooter, *supra* note 1229 at 7–8; Sunstein, *supra* note 871 at 2034–35.

<sup>1232</sup> Nadler, *supra* note 977 at 63.

<sup>1233</sup> See, e.g., Wittlin, *supra* note 1224 at 425; Cooter, *supra* note 870 at 586.

<sup>1234</sup> See, e.g., Sunstein, *supra* note 871 at 2034–35; Nadler, *supra* note 977 at 64.

States also attempt to address risks through international law. For example, the risks of nuclear weapons possession<sup>1235</sup> or of the disposal of hazardous wastes<sup>1236</sup> are both regulated through international treaties. IHL seeks to regulate the risks that war poses to civilians through rules governing the methods and means of warfare, including rules addressing combatant behaviour.<sup>1237</sup> For example, the principles of proportionality and precaution require military actors to take account of risks to civilians during conflict and take actions to minimize in as much as possible those risks.<sup>1238</sup> The regulation of risk is both a common function of law and an inherent characteristic of IHL.

Where clear laws exist to govern specific behaviours, ongoing violations may be the result of multiple causes. As discussed in chapter 1,<sup>1239</sup> IHL violations stem in part from compliance and enforcement issues. However, as argued in this thesis and demonstrated by the theories discussed in chapter 7, there are psychological factors that can contribute to IHL violations, some of which are either not currently regulated at all, or not sufficiently or clearly regulated, under existing IHL. This chapter posits that clear regulation of risky or dangerous behaviours, ideally accompanied by education about the risks associated with the behaviour, is particularly important where behaviours are considered innocuous or where the behaviours are socially accepted or socially tolerated. This chapter argues that the use of demeaning, degrading, or dehumanizing language towards civilians by combatants is, at the very least, socially tolerated and the use of nicknames by combatants is generally considered to be innocuous.

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<sup>1235</sup> *Treaty on the Non-Proliferation of Nuclear Weapons* [*Nuclear Non-Proliferation Treaty*].

<sup>1236</sup> *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* [*Basel Convention*].

<sup>1237</sup> For example, IHL prohibits the use of certain weapons (e.g., anti-personnel landmines), tactics (e.g., siege warfare, starvation), and acts (e.g., murder, rape, torture). See *Landmine Treaty*, *supra* note 8; Henckaerts & Doswald-Beck, *supra* note 5 at Rule 53 prohibition on starvation as method of warfare]; *Additional Protocol II*, *supra* note 5 at Article 14 (prohibition on starvation as method of warfare] as well as Article 4(2); *Geneva Convention IV*, *supra* note 5 at Common Article 3.

<sup>1238</sup> Henckaerts & Doswald-Beck, *supra* note 5 at Rules 14, 15, 22; *Additional Protocol I*, *supra* note 5 at Articles 55(1)(b), 57, 58(c); *Additional Protocol II*, *supra* note 5 at Article 13(1). See also, e.g., Quéguiner, *supra* note 479; Ken Watkin, "Assessing Proportionality: Moral Complexity and Legal Rules" (2005) 8 *Yearbook of International Humanitarian Law* 3.

<sup>1239</sup> See chapter 1 at section 1.2.

Socially tolerated practices can include behaviours that are illegal. For example, in North America, speed limits or drunk driving limits are often violated and may go unpunished,<sup>1240</sup> but this does not mean that speeding or drunk driving is legal. However, societal awareness of the risks sought to be minimized through the regulation of speeding and drunk driving (e.g., car accidents, death or injury to motorists or pedestrians) are widely known, if not even intuitive. However, there are times when criminal or regulatory measures are introduced to govern risky behaviour that has previously been legal and widely practiced. Drunk driving laws have not always been as restrictive as they are currently,<sup>1241</sup> and drunk driving was once more socially acceptable.<sup>1242</sup>

Another example of the power of law to effect social change can be seen in the introduction of seatbelt laws. Prior to 1963-1964, seatbelts were not a standard feature in automobiles<sup>1243</sup> and a legal requirement to wear a seatbelt was introduced in different countries in the 1970s.<sup>1244</sup> Indeed, many individuals in western societies vociferously opposed being required to wear a

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<sup>1240</sup> See, e.g., Scott M Stringer, “A Tale of Two Tickets: How Disparate Standards of Traffic Enforcement Compromise Safety on City Streets”, (20 March 2018), online: *Office of the New York City Comptroller Scott M Stringer* <<https://comptroller.nyc.gov/reports/a-tale-of-two-tickets-how-disparate-standards-of-traffic-enforcement-compromise-safety-on-city-streets/>>; Sean Carson, “23,000 foreign drivers escape UK speeding fines since January 2013”, (9 October 2014), online: *Motoring Research* <<https://www.motoringresearch.com/car-news/23000-foreign-drivers-escape-speeding-fines-since-jan-2013/>>; Walter Roberts & Mark T Fillmore, “Curbing the DUI offender’s self-efficacy to drink and drive: A laboratory study” (2017) 172 *Drug Alcohol Depend* 73; Michael Laurence, *The Development of California Drunk Driving Legislation* (California Department of Justice, 1988).

<sup>1241</sup> See, e.g., Laurence, *supra* note 1240.

<sup>1242</sup> See, e.g., James C Fell & Robert B Voas, “Mothers Against Drunk Driving (MADD): The First 25 Years” (2006) 7 *Traffic Injury Prevention* 195; Government of Canada, “Impaired driving in Canada, 2015”, (20 July 2016), online: *Statistics Canada* <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2016001/article/14679-eng.htm>>.

<sup>1243</sup> See, e.g., Wittlin, *supra* note 1224 at 429–30; Center for Disease Control and Prevention, “Primary Enforcement of Seat Belt Laws | Motor Vehicle Safety | CDC Injury Center”, (7 February 2019), online: *Center for Disease Control and Prevention* <<https://www.cdc.gov/motorvehiclesafety/calculator/factsheet/seatbelt.html>>; Sean O’Grady, “The man who saved a million lives: Nils Bohlin - inventor of the seatbelt | The Independent”, (19 August 2009), online: *The Independent UK* <<https://www.independent.co.uk/life-style/motoring/features/the-man-who-saved-a-million-lives-nils-bohlin-inventor-of-the-seatbelt-1773844.html>>.

<sup>1244</sup> For example, Victoria, Australia in 1970, Ontario, Canada in 1976, Hungary in 1976, and the Netherlands in 1975. See FT McDermott & DE Hough, “Reduction in road fatalities and injuries after legislation for compulsory wearing of seat belts: experience in Victoria and the rest of Australia” (1979) 66:7 *British Journal of Surgery* 518; Ontario Ministry of Transportation, “Seatbelts Saving Lives In Ontario For 35 Years”, (29 December 2010), online: *news.ontario.ca* <<https://news.ontario.ca/mto/en/2010/12/seatbelts-saving-lives-in-ontario-for-35-years.html>>; Center for Disease Control and Prevention, “Driver Safety-Belt Use -- Budapest, Hungary, 1993”, (10 December 1993), online: <<https://www.cdc.gov/mmwr/preview/mmwrhtml/00022331.htm>>; SWOV Institute for Road Safety Research, *SWOV Fact sheet Seat belts, airbags and child protection devices* (SWOV Institute for Road Safety Research, 2012).

seatbelt on the grounds that such laws interfered with “individual freedom” and civil liberties.<sup>1245</sup> Four decades after the first mandatory seatbelt laws, societal perceptions of seat belts and their required use has dramatically changed, due in large part - or entirely - to the legal regulation of their use. Whereas the use of seatbelts prior to legal regulation was quite rare, their use has dramatically increased since the advent of seatbelt laws. In the province of Victoria, Australia, only 15 per cent of people wore seatbelts the year prior to the introduction of mandatory seatbelt laws in 1970; that number rose to 65 per cent in 1973 and 90 per cent by 1977.<sup>1246</sup> In Canada, mandatory seat belt laws have had similar success. In the province of Ontario, only 17.2 per cent of people wore seat belts prior to the introduction of mandatory seat belt laws in 1976; by 2011 that number had risen to 92.8 per cent.<sup>1247</sup> According to Wittlin, seatbelt laws in and of themselves positively affected the use of seatbelts distinct from the added effects of enforcement of seatbelt laws in the states she studied.<sup>1248</sup>

Legal regulation of risky behaviours is a common practice, both generally and in IHL specifically, and has been demonstrated to have the capacity to effect positive change in the prevalence of the risky behaviours being regulated. This suggests that, at a minimum, where a risky behaviour is identified in armed conflict, it is worth considering whether it may be possible to legally regulate the risky behaviour in question for the protection of civilians. As noted in chapter 1,<sup>1249</sup> there is an internal tension in the proposition that new laws are the solution to combatant non-compliance with existing IHL protections for civilians. However, once employed the psychological processes focused on in this chapter – dehumanization and deindividuation – serve to alter combatant psyches and reframe how they view civilians and the current laws intended to protect civilians. The laws recommended in this chapter represent an upstream intervention that prevents the use of these psychological process and, in doing so, disrupts the progression from ordinary individual to law-breaking combatant.

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<sup>1245</sup> See, e.g., Kenneth E Warner, “Bags, Buckles, and Belts: The Debate over Mandatory Passive Restraints in Automobiles” (1983) 8:1 *Journal of Health Politics, Policy and Law* 44; Howard Leichter, “Lives, Liberty, and Seat Belts in Britain: Lessons for the United States” (1986) 16:2 *International Journal of Health Services* 213; Linda Geller Dubinsky, “The Minnesota Mandatory Seat Belt Law: No Right to be Reckless” (1987) 10:1 *Hamline Law Review* 229.

<sup>1246</sup> McDermott & Hough, *supra* note 1244.

<sup>1247</sup> Ontario Ministry of Transportation, *supra* note 1244.

<sup>1248</sup> Wittlin, *supra* note 1224.

<sup>1249</sup> See pages 18-19 in Chapter 1.

The next section will examine the first risky behaviour focused on in this chapter: the use of demeaning, degrading, or dehumanizing language toward civilians. It will also consider whether this risky behaviour is currently regulated under IHL and will assess the potential of creating explicit regulation to combat the ability of such problematic language to contribute to violations of IHL protections for civilians during armed conflict.

## 8.2 Dehumanization

This section examines the failure of IHL to clearly address the use of demeaning, degrading, or dehumanizing language to refer to, or address, civilians. It draws together the theories of social psychology and criminology discussed in chapter 7, providing a brief review of the effects and risks of dehumanizing civilians, using evidence of dehumanization collected through research and field interviews in Sierra Leone and the DRC. It considers whether demeaning, degrading, or dehumanizing language could be sufficiently captured by existing IHL rules on non-discrimination, humane treatment, and the prohibitions of violence to mental health, torture or cruel treatment, and outrages upon personal dignity, in particular humiliating and degrading treatment. It then discusses whether existing international human rights law addressing the regulation of hate speech as a permissible restriction on free speech and freedom of expression could adequately address the concerns raised by the use of demeaning, degrading, or dehumanizing language in the theories of techniques of neutralization, moral disengagement, deindividuation, and obedience to authority. Finally, it proposes a new IHL regulation that prohibits the use of demeaning, degrading, or dehumanizing language to refer to or address civilians.

### 8.2.1 The Effect of Demeaning, Degrading, or Dehumanizing Language in Armed Conflict

Dehumanization and/or the use of euphemistic language plays a significant role in violence directed toward civilians during armed conflict.<sup>1250</sup> While the use of dehumanizing language toward civilians does not guarantee that an individual will perpetrate crimes against them,

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<sup>1250</sup> Sociology literature has also examined the relationship between dehumanization and language in the context of racism in peacetime: see, e.g., Razack, *supra* note 963; Akrami, Ekehammar & Araya, *supra* note 963; Razack, *supra* note 963; Razack, *supra* note 963; Grigg & Manderson, *supra* note 963; Mosse, *supra* note 963; Essed, *supra* note 963; Solomos, *supra* note 963; van Dijk, *supra* note 963; This literature also demonstrates that such forms of language can influence the spread of racist ideas, attitudes, and ideologies, even when comments are made in a casual conversation as opposed to a hostile verbal attack on the target of the racism: see, e.g., Guerin, *supra* note 963; Davies, *supra* note 963; Billig, *supra* note 963; Barnes, Palmary & Durrheim, *supra* note 963.

historical examples such as the Holocaust,<sup>1251</sup> the Rwandan genocide,<sup>1252</sup> the My Lai Massacre,<sup>1253</sup> and the abuse of detainees at Abu Ghraib,<sup>1254</sup> support the link between the existence of dehumanizing language and the perpetration of crimes against civilians.

Dehumanization is at its most extreme when combatants depict civilians and enemy combatants as animals, demons or objects. Dehumanization is the portrayal of other humans as inferior beings or objects. Dehumanization can also be achieved through the depiction of others as “mindless ‘savages,’ ‘degenerates’ and other despicable wretches.”<sup>1255</sup> The use of degrading labels and ethnic slurs, such as American servicemen using the term “gook” during the Vietnam War to describe the Vietnamese people or the terms “hajjis” and “towel heads” to describe Iraqis during the second Gulf War (2003-2011),<sup>1256</sup> can also be a means of dehumanizing victims. In the DRC, combatants are recorded as explicitly telling civilians: “You are not human beings”.<sup>1257</sup> Euphemistic language can also be used to dehumanize civilians in the eyes of combatants. For example, killing civilians or enemy combatants may be described as ‘cleaning’,<sup>1258</sup> ‘taking out the trash’,<sup>1259</sup> or ‘pulling up weeds’.<sup>1260</sup> In Sierra Leone, the RUF also used the euphemism “washing” to refer to killing<sup>1261</sup> and one witness before the Special Court for Sierra Leone testified that a Kamajor had referred to killing Temne as “weed[ing]”.<sup>1262</sup> Dehumanization can be

<sup>1251</sup> See, e.g., Alvarez, *supra* note 23 at 160, 166–69; Herf, *supra* note 1124 at 1–16, 209.

<sup>1252</sup> See, e.g., Benesch, *supra* note 1047 at 63–64; Dina Temple-Raston, *Justice on the Grass: Three Rwandan Journalists, Their Trial for War Crimes and a Nation’s Quest for Redemption* (New York: Simon & Shuster, 2008) at 29; Philip Gourevitch, *We Wish to Inform You that Tomorrow We Will Be Killed with Our Families: Stories from Rwanda* (New York: Picador, 1998) at 64, 140–41.

<sup>1253</sup> See, e.g., Zimbardo, *supra* note 23 at 307; Grossman, *supra* note 32 at 187, 191; Kelman, *supra* note 1193 at 50.

<sup>1254</sup> See, e.g., Zimbardo, *supra* note 23 at 307; Stephen Graham, “Remember Fallujah: Demonising Place, Constructing Atrocity” (2005) 23:1 *Environment and Planning D: Society and Space* 1 at 5; Stephanie Decker & John Paul, “The Real Terrorist was Me: An Analysis of Narratives Told by Iraq Veterans Against the War in an Effort to Rehumanize Iraqi Civilians and Soldiers” (2013) 8:3 *Societies Without Borders* 317 at 327; Phillip W d Mordin, “Why So Many Iraqis Hate Us? Try ‘Towel Head’ On for Size”, (50:57 400AD), online: *HuffPost* <[https://www.huffpost.com/entry/why-so-many-iraqis-hate-u\\_b\\_96330](https://www.huffpost.com/entry/why-so-many-iraqis-hate-u_b_96330)>.

<sup>1255</sup> Bandura, *supra* note 23 at 84.

<sup>1256</sup> Zimbardo, *supra* note 23 at 307.

<sup>1257</sup> *Ntaganda Confirmation of Charges ICC-01/04-02/06-T-8-Red-ENG WT 11-02-2014 42/53 SZ PT*, *supra* note 102 at 41.

<sup>1258</sup> See, e.g., Paul Rusesabagina & Tom Zoellner, *An Ordinary Man: An Autobiography* (New York: Viking, 2006) at 82.

<sup>1259</sup> See, e.g., Adam Lankford, *Human Killing Machines: Systematic Indoctrination in Iran, Nazi Germany, Al Qaeda, and Abu Ghraib* (Lanham, MD: Lexington Books, 2009) at 21.

<sup>1260</sup> See, e.g., Alex Alvarez, *Genocidal Crimes* (Abingdon, UK: Routledge, 2010) at 116.

<sup>1261</sup> Denov, *supra* note 102 at 127.

<sup>1262</sup> *The Prosecutor v Sam Hinga Norman, Moinina Fofana and Allieu Kondewa, Trial Transcript*, *supra* note 102 at 11.



common in conditions of war by virtue of the fact that the enemy and its civilian population are often strangers to opposing armed forces. This facilitates depersonalization of victims since “[s]trangers can be more easily depersonalized than can acquaintances.”<sup>1263</sup> Kelman and Hamilton have suggested that “a more extreme degree of dehumanization” is needed for sanctioned massacres in war because “the killing is not in direct response to the target’s threats or provocation.”<sup>1264</sup> This is not, however, necessarily borne out in laboratory experiments examining the effects of dehumanization. Laboratory experiments have demonstrated that the level of violence exhibited by a perpetrator is increased where the perpetrator’s sense of personal responsibility is depersonalized and victims are depersonalized and dehumanized.<sup>1265</sup> This will be addressed further in the following sub-section.

Dehumanization serves to create a psychological distance between perpetrator and victim.<sup>1266</sup> It minimizes the empathy felt for people who are not part of the perpetrator’s group by severing the perceived common bonds of humanity.<sup>1267</sup> Dehumanization facilitates the exercise of harmful behaviour without the consequence of self-censure. Dehumanization is also self-reinforcing: the victimization of victims reinforces the perception of them as less than human, thereby facilitating further violence towards them.<sup>1268</sup> This is why it is important to capture dehumanization upstream. Once direct acts of violence are occurring, dehumanization has long since altered combatants’ psyches.

#### 8.2.2 The Use of Demeaning, Degrading, or Dehumanizing Language toward Civilians in Sierra Leone and the Democratic Republic of Congo

The previous section discussed the general effects of dehumanization on combatant psyches. This section will provide more detailed examples of the use of demeaning, degrading, or dehumanizing language by combatants in Sierra Leone and the DRC. Fieldwork interviews with former combatants and data collection on combatants in Sierra Leone and the Democratic Republic of Congo (DRC) did not reveal the use of demeaning, degrading, or dehumanizing

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<sup>1263</sup> Bandura, *supra* note 23 at 201.

<sup>1264</sup> Kelman & Hamilton, *supra* note 23 at 19.

<sup>1265</sup> Bandura, *supra* note 23 at 85; Bandura, *supra* note 23 at 201; Bandura, Underwood & Fromson, *supra* note 167.

<sup>1266</sup> See, e.g., Alvarez, *supra* note 23 at 167.

<sup>1267</sup> See, e.g., *ibid.*

<sup>1268</sup> Kelman & Hamilton, *supra* note 23 at 19.

language. This is unsurprising. As noted in chapter 7, the work of Bryant et al. demonstrated that, in the context of the Rwandan genocide, the testimonies of defendants at the International Criminal Tribunal for Rwanda did not contain examples of the technique of neutralization denial of humanity.<sup>1269</sup> They noted that “denying the genocidal violence or the humanity of Tutsis would be deleterious to both [the defendants’] cases and their public image”.<sup>1270</sup> Despite the lack of evidence of such language in the testimonies, there is ample evidence of the use of these forms of language by génocidaires.<sup>1271</sup> The absence of dangerous language and forms of speech in testimonies from former combatants does not indicate an absence of such language in the conflict. Rather, alternative sources must be considered to determine whether such language was used by combatants.

In Sierra Leone, RUF combatants were portrayed by civilians as “beasts, animals, bush devils and inhuman agents of terror” and the RUF referred to Sierra Leonean elites as an “‘indigenous clique of unpatriotic exploiters and leeches’, [who] must be violently cleansed or destroyed along with their ‘rotten system’”.<sup>1272</sup> The RUF also used the euphemism “washing” to refer to killing.<sup>1273</sup> One victim testified before the Special Court for Sierra Leone that a CDF combatant told her that “they would weed all the Temne from xxx xxx” as they killed a Temne man.<sup>1274</sup> Some combatants in Sierra Leone are recorded as having referred to civilians as being “like insects”.<sup>1275</sup> Military songs were often sung by combatants in the DRC, such as combatants from the predominantly Hema UPC, who sang “songs disparaging or threatening the Lendu”<sup>1276</sup> and their Lendu opponents who “s[ang] anti-Hema songs”.<sup>1277</sup> In one case, demeaning, degrading, or dehumanizing songs were recorded being sung “a few months before the actual beginning of the

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<sup>1269</sup> Bryant et al, *supra* note 23.

<sup>1270</sup> *Ibid* at 12.

<sup>1271</sup> See, e.g., *The Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze, Trial Judgment*, ICTR-99-52-T, 2 December 2003 at paras 348, 390; Kennedy Ndahiro, “Dehumanisation: How Tutsis were reduced to cockroaches, snakes to be killed”, (13 March 2014), online: *The New Times* <<https://www.newtimes.co.rw/section/read/73836>>.

<sup>1272</sup> note 102.

<sup>1273</sup> Denov, *supra* note 102 at 127.

<sup>1274</sup> *The Prosecutor v Sam Hinga Norman, Moinina Fofana and Allieu Kondewa, Trial Transcript*, *supra* note 102 at para 11.

<sup>1275</sup> Keen, *supra* note 102 at 76.

<sup>1276</sup> *Lubanga Trial Transcript ICC-01/04-01/06-T-30-EN 53/195 SZ PT*, *supra* note 102 at 33.

<sup>1277</sup> BBC News, “Congo’s war within a war”, (18 February 2000), online: *BBC News* <<http://news.bbc.co.uk/2/hi/africa/648044.stm>>.

massacres.”<sup>1278</sup> Other songs sung by combatants in the DRC dehumanized girls by comparing them “to food for the leaders and communal cooking pots for the party”.<sup>1279</sup> In Sierra Leone, the degrading term “iron titty” was used by some combatants to refer to young girls they “took ... away to Liberia as their wives.”<sup>1280</sup> Similarly, combatants in Sierra Leone used the term ‘wife’ to “enslave[e] and psychologically manipulate[e] the women and with the purpose of treating them like possessions.”<sup>1281</sup> A witness at Bosco Ntaganda’s Confirmation of Charges Hearing at the ICC testified that “UPC soldiers shouted at the Lendu that they were not human but animals from the forest and that they were going to kill them.”<sup>1282</sup> Another combatant told this witness, “You are not human beings”.<sup>1283</sup> A former combatant testified that civilian homes were designated as “houses belonging to our enemies” and that combatants “were to destroy them.”<sup>1284</sup> A direct attack on civilian homes is a violation of existing IHL under the principle of distinction; however, reference to civilians as the “enemy” is not currently illegal.

The examples from Sierra Leone and the DRC show that the use of dehumanizing language is a problem that is present alongside IHL violations targeting civilians and is not unique to contexts in which genocide, ethnic cleansing, or persecution as a crime against humanity is occurring, although some examples targeted civilians based on ethnicity.<sup>1285</sup> As noted in chapter 7, in the context of armed conflict and with the exception of persecution as a crime against humanity, there is often very little distinction between crimes against humanity and war crimes. These examples demonstrate an ongoing problem, i.e. the dehumanization of civilians, that IHL must address in order to provide adequate protection to civilians during armed conflict.

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<sup>1278</sup> *Ibid.*

<sup>1279</sup> *Ntaganda Trial Transcript ICC-01/04-02/06-T-23-ENG ET WT 02-09-2015 61/67 SZ T, supra* note 102 at 61.

<sup>1280</sup> Lucian, Civilian, in Higbie & Moigula, *supra* note 102 at 103.

<sup>1281</sup> *SCSL RUF Trial Judgment, supra* note 579 at para 1466.

<sup>1282</sup> *Ntaganda Confirmation of Charges ICC-01/04-02/06-T-8-Red-ENG WT 11-02-2014 42/53 SZ PT, supra* note 102 at 41.

<sup>1283</sup> *Ibid.*

<sup>1284</sup> *Ntaganda Trial Hearing, P-0888 ICC-01/04-02/06-T-105-Red-ENG WT 20-06-2016 51/96 SZ T, supra* note 102 at 58.

<sup>1285</sup> This was sometimes the case in the conflict between the Hema and Lendu in the DRC and between Temne and Mende in Sierra Leone: see, e.g., *Ntaganda Confirmation of Charges ICC-01/04-02/06-T-8-Red-ENG WT 11-02-2014 42/53 SZ PT, supra* note 102 at 41; *The Prosecutor v Sam Hinga Norman, Moinina Fofana and Allieu Kondewa, Trial Transcript, supra* note 102 at 11.

### 8.2.3 International Humanitarian Law and the Use of Demeaning, Degrading or Dehumanizing Language

The identification of the problematic use of demeaning, degrading or dehumanizing language requires consideration of whether existing IHL addresses these forms of language when used to address or refer to civilians. The link between dehumanization and the perpetration of war crimes, crimes against humanity, and genocide is firmly established, yet it is not explicitly addressed in IHL.<sup>1286</sup>

Civilians have special protected status during armed conflict.<sup>1287</sup> This status flows from the fact that “[t]he protection of civilians in times of armed conflict, whether international or internal, is the bedrock of modern humanitarian law.”<sup>1288</sup> However, as noted in chapter 4, people are equally protected from murder, rape, and torture, among other crimes, in peacetime.<sup>1289</sup> What renders civilian protection particularly critical during armed conflict is that behaviour which is illegal during peace (e.g., murder, assault) is, subject to IHL rules, permitted during armed conflict. In particular, during armed conflict it is legal, and expected, that combatants directly target, injure, and kill enemy combatants.<sup>1290</sup> Due to this reality of armed conflict, there is a need to protect civilians from (1) being treated as enemy combatants towards whom combatants can legally be violent during conflict, and (2) being debased through the use of demeaning, degrading, or dehumanizing language that will facilitate direct violence towards civilians in contravention of existing IHL protections.

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<sup>1286</sup> See, e.g., Zimbardo, *supra* note 23; Bernard, Ottenberg & Redl, *supra* note 1119; Grossman, *supra* note 32; Staub, *supra* note 32; Cohen, *supra* note 32; Waller, *supra* note 22; Maier-Katkin, Mears & Bernard, *supra* note 32; Baumeister, *supra* note 32; Smeulers, *supra* note 32; Haritos-Fatouros, *supra* note 969.

<sup>1287</sup> See, e.g., *Geneva Convention IV*, *supra* note 5 at Common Article 3; Henckaerts & Doswald-Beck, *supra* note 5 at Rules 1, 2, 3, 87-103; Sivakumaran, *supra* note 46 at 255–73, 337–42; Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge, UK: Cambridge University Press, 2016) at 248–49; Hans-Peter Gasser & Knut Dormann, “Protection of the Civilian Population” in Dieter Fleck, ed, *The Handbook of International Humanitarian Law* (Oxford: Oxford University Press, 2013) at 231–57.

<sup>1288</sup> *ICTY Kupreskic Trial Judgment*, *supra* note 125 at para 521.

<sup>1289</sup> See chapter 4 section 4.3.

<sup>1290</sup> See, e.g., Dapo Akande, “Clearing the Fog of War? The ICRC’s Interpretive Guidance on Direct Participation in Hostilities” (2010) 59:1 *International and Comparative Law Quarterly* 180 at 192; William Fenrick, “ICRC Guidance on Direct Participation in Hostilities” (2009) *Yearbook of International Humanitarian Law* 287 at 299; Michael N Schmitt, “The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis” (2010) 1 *Harvard National Security Journal* 5 at 248–49, 269–74.

IHL protects civilians from being directly targeted by parties to an armed conflict and prohibits many forms of violence towards them;<sup>1291</sup> however, it does not explicitly regulate or prohibit the use of demeaning, degrading, or dehumanizing language toward civilians. That said, it may be possible to argue that such use of language is at least partially covered by one or more of four existing IHL rules: the requirement of humane treatment, the prohibition on violence to mental well-being, the prohibition on torture or cruel treatment, the prohibition on outrages upon personal dignity including humiliating and degrading treatment.

### 8.2.3.i Humane Treatment

IHL requires that civilians be treated humanely. As noted in chapter 4, the term “humane treatment” is largely left open to interpretation; however, its scope is given definition through the guidance provided by the types of acts designated as being inhumane in Common Article 3 and Additional Protocol II 4(2).<sup>1292</sup> The ICRC Customary IHL Study provides many examples of state practice in the application of the rule of humane treatment.<sup>1293</sup> Yet, the many state military manuals referencing this rule provide little additional guidance on the interpretation of the rule. For the most part, these manuals only repeat the language of “humane treatment”, “treated humanely”, or “humanity” without defining the terms.<sup>1294</sup>

One exception to the standard approach to “humane treatment” in military manuals is the Canadian 2001 Law of Armed Conflict Manual, which specifies that protected persons “must be humanely treated and protected against all acts or threats of violence, and against insults and public curiosity.”<sup>1295</sup> Certainly, this would include dehumanizing or derogatory language

<sup>1291</sup> See, e.g., *Geneva Convention IV*, *supra* note 5 at Common Article 3; *Additional Protocol II*, *supra* note 5 at Article 4(2); Henckaerts & Doswald-Beck, *supra* note 5; Cameron et al, *supra* note 226 at 192–241; Sivakumaran, *supra* note 46 at 255–73, 336–57; Dinstein, *supra* note 46 at 132–45; Pejic, *supra* note 71; Igor Primoratz, “Civilian Immunity in War” (2005) 36:1 *Philosophical Forum* 41; Slim, *supra* note 1177 at 485–86.

<sup>1292</sup> See, e.g., Cameron et al, *supra* note 226 at 193; Sivakumaran, *supra* note 46 at 255–73; Henckaerts & Doswald-Beck, *supra* note 5 at Rule 87; Jean Pictet, ed, *Commentary Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva: ICRC, 1952) at 53.

<sup>1293</sup> Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law: Volume 2: Practice* (Cambridge, UK: Cambridge University Press, 2005) at Rule 87.

<sup>1294</sup> *Ibid* citing the military manuals of Argentina, Australia, Belgium, Benin, Burkina Faso, Burundi, Cameroon, Canada, Central African Republic, Chad, Colombia, Congo, Côte d’Ivoire, Croatia, Djibouti, Dominican Republic, France, Germany, Greece, Guinea, India, Israel, Italy, Kenya, Madagascar, Mali, Mexico, Morocco, Netherlands, New Zealand, Nicaragua, Peru, Philippines, Romania, Russian Federation, Senegal, Sierra Leone, Spain, Sweden, Switzerland, Togo, United Kingdom of Great Britain and Northern Ireland, United States of America, and Zimbabwe.

<sup>1295</sup> Office of the Judge Advocate General, *supra* note 448 at 10–4, 11–5, 12–5.

directed at a protected person; however, this manual is not binding.<sup>1296</sup> Thus, barring an IHL rule prohibiting dehumanizing or derogatory speech, there would be no binding requirement on the Canadian Armed Forces to punish the use of such language directed at protected persons.

However, a senior member of the Canadian Armed Forces interviewed for this thesis stated that, while they would punish such language directed at civilians by a member of their unit, there was no requirement across the Forces to do so.<sup>1297</sup> Therefore, there is no consistent policy or practice regarding the use of demeaning, degrading, or dehumanizing language toward a civilian.

Since the enumerated examples of inhumane treatment in Common Article 3 and Article 4(2) of Additional Protocol II are not exhaustive, it is possible that the use of demeaning, degrading or dehumanizing language directed at a protected person is prohibited under the requirement of humane treatment. However, the lack of available evidence to support the existence or enforcement of such a rule would seem to suggest this is not the case. Three specifically prohibited types of inhumane treatment may capture the prohibition of such language: (1) the prohibition on violence to the mental well-being of persons; (2) the prohibition on torture and cruel treatment; and, (3) the prohibition on outrages upon personal dignity, in particular humiliating and degrading treatment.

#### 8.2.3.i.a Violence to Mental Well-Being

Violence to the mental well-being of persons is generally considered to include “the use of threats” to commit any of the prohibited acts under Additional Protocol II Article 4(2).<sup>1298</sup> Sivakumaran has indicated that where such threats are “not aimed at, or issued to, a particular individual” they are “unlikely [to] amount to such violence.”<sup>1299</sup> By contrast, techniques of neutralization, moral disengagement, and obedience to authority demonstrate that it is the adverse effect of the use of such language on combatants that contributes to violence toward civilians regardless of statements are issued.<sup>1300</sup> This suggests that it is also important to protect combatants from the psychological harms that stem from the use of these forms of language and, in protecting combatants from the deleterious psychological effects of this language to their own

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<sup>1296</sup> *Ibid* at i.

<sup>1297</sup> OTT411, Interview, Ottawa, 4 November 2016.

<sup>1298</sup> Sandoz, Swinarski, & Zimmermann, *supra* note 202 at para 4543.

<sup>1299</sup> Sandesh Sivakumaran, “Exclusion Zones in the Law of Armed Conflict at Sea: Evolution in Law and Practice” (2016) 92 *International Law Studies* 153 at 190.

<sup>1300</sup> See, e.g., Kelman, *supra* note 1193 at 49–50.

psyche, it will be possible to also better protect civilians. The prohibition on violence to mental well-being has been linked to the use of “mental torture”.<sup>1301</sup> However, since it is listed separately from the prohibition on torture, acts that fall short of the very high threshold for torture or the somewhat lower threshold for cruel treatment could still constitute violence to the mental well-being of persons.

#### 8.2.3.i.b Torture, Cruel and Inhuman Treatment

The second category of inhumane acts is torture, cruel and inhuman treatment. The prohibition on torture requires that an act be intentionally committed to inflict “severe pain or suffering, whether physical or mental”.<sup>1302</sup> Further, the act must be committed for a specific purpose, such as

obtaining from [the victim] or a third person information or a confession, punishing [the victim] for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing [the victim] or a third person, or for any reason based on discrimination of any kind.<sup>1303</sup>

It is under this final purpose – discrimination - that the use of demeaning, degrading, or dehumanizing language might be captured if it caused severe mental pain or suffering. Where the threshold of severity is not met, the use of these forms of language could not be considered to amount to torture. In order to constitute cruel or inhuman treatment, a threshold of serious mental pain of suffering, which is lower than the severity threshold for torture but still a high threshold, must be met. Mental pain and suffering are most frequently identified in conjunction with physical acts of torture or cruel or inhuman treatment.<sup>1304</sup> There are, however, purely psychological forms of torture that may target an individual’s phobias, such as solitary

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<sup>1301</sup> Sandoz, Swinarski, & Zimmermann, *supra* note 202 at para 4532.

<sup>1302</sup> *Torture Convention*, *supra* note 73 at Article 1 While this is a human rights convention, the ICTY in *Furundzija* relied on this definition to define the elements of torture for the prohibition under IHL.; *ICTY Furundzija Trial Judgment*, *supra* note 586 at para 162.

<sup>1303</sup> *Torture Convention*, *supra* note 74 at Article 1.

<sup>1304</sup> Office of the United Nations High Commissioner for Human Rights, *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Professional Training Series No 8/ Rev1 (Geneva: Office of the United Nations High Commissioner for Human Rights, 2004); *ICTY Kunarac Trial Judgment*, *supra* note 589 at paras 669, 611; *ICTR, Akayesu Trial Judgment*, *supra* note 310 at para 682; Metin Basoglu et al, “Psychological Effects of Torture: A Comparison of Tortured with Nontortured Political Activists in Turkey” (1994) 151:1 *American Journal of Psychiatry* 71; Frederico Allodi et al, “Physical and psychiatric effects of torture” in Eric Stover & Elena Nightingale, eds, *The Breaking of Bodies and Minds: Torture, Psychiatric Abuse, and the Health Professions* (New York: Freeman & Co, 1985) 58.

confinement and sleep deprivation, or the sexual taboos of a particular culture.<sup>1305</sup> International case law also indicates that credible threats to an individual's life can also cause sufficient mental pain or suffering.<sup>1306</sup> Psychological torture may include “constant taunting; verbal abuse; intimidations; [and] insulting the honour of a family member”.<sup>1307</sup> While there is limited literature on purely psychological forms of torture, it appears that, absent accompanying physical abuse or threats to commit illegal acts of physical abuse, this form of torture does not breach IHL protections against torture or cruel and inhuman treatment.<sup>1308</sup> Consequently, it would seem unlikely that demeaning, degrading, or dehumanizing language directed at civilians would be captured by the prohibitions on torture or cruel or inhuman treatment absent accompanying physical abuse or specific verbal threats.

#### 8.2.3.i.c Outrages upon Personal Dignity, Humiliating and Degrading Treatment

The third form of inhumanity - the prohibition on outrages upon personal dignity, in particular humiliating and degrading treatment - may be able to capture the use of demeaning, degrading, or dehumanizing language directed at protected persons. There is no firmly established threshold for the severity of humiliation or degradation under the prohibition of outrages upon personal dignity in IHL. The only indication of the appropriate threshold for violating the prohibition on outrages upon personal dignity comes from international criminal law, where the war crime of outrages upon personal dignity requires that an act be likely to cause “serious humiliation, degradation or otherwise would be a serious attack on human dignity.”<sup>1309</sup> Sivakumaran has suggested that this “serious” threshold only applies to the prohibition under international criminal law and that, while a threshold must still be met under IHL, it is likely to be lower than

<sup>1305</sup> Hernan Reyes, “The worst scars are in the mind: psychological torture” (2007) 89:867 *International Review of the Red Cross* 591 at 604–11.

<sup>1306</sup> *The Prosecutor v Mladen Naletilic, aka “Tuta”, Vinko Martinovic, a.k.a “Stela”, Trial Judgment*, IT-98-34-T, 31 March 2003 at para 367; *ICTR, Akayesu Trial Judgment*, *supra* note 310 at para 682. International case law also states that rape and being forced to watch a relative be raped can violate the prohibition on inflicting mental suffering in and of themselves; *Prosecutor v Laurent Semanza, Trial Judgment*, ICTR-97-20-T, 15 May 2003 at para 149; See also, e.g., Cordula Droege, “In truth the leitmotiv: the prohibition of torture and other forms of ill-treatment in international humanitarian” (2007) 89:867 *International Review of the Red Cross* 515.

<sup>1307</sup> Reyes, *supra* note 1305 at 612.

<sup>1308</sup> *Ibid*; Pau Pérez-Sales, *Psychological Torture: Definition, Evaluation, Measurement* (Abingdon, UK: Routledge, 2017) at 326.

<sup>1309</sup> *ICTY Kunarac Trial Judgment*, *supra* note 589 at para 514; *ICTY Kunarac Appeal Judgment*, *supra* note 613 at paras 161, 163; See also *ICTY Haradinaj Trial Judgment*, *supra* note 613 at para 132; *ICTR Bagosora Trial Judgment*, *supra* note 580 at para 2250; *ICTR Renzaho Trial Judgment*, *supra* note 613 at para 809; *ICTR, Nyiramasuhuko Trial Judgment*, *supra* note 103 at para 6178; *SCSL Charles Taylor Trial Judgment*, *supra* note 569 at para 431; *SCSL RUF Trial Judgment*, *supra* note 579 at para 175; *SCSL AFRC Trial Judgment*, *supra* note 581 at para 716.



that found in international criminal law.<sup>1310</sup> However, no alternative threshold for IHL has been stipulated. Examples of outrages upon personal dignity in international criminal law include “[I]nappropriate conditions of confinement,” “perform[ing] subservient acts,” being “forced to relieve bodily functions in their clothing,” and “endur[ing] the constant fear of being subjected to physical, mental, or sexual violence” in detention.<sup>1311</sup> The plain and ordinary meaning of ‘humiliating’ and ‘degrading’ is “to make someone feel ashamed or lose respect for himself or herself”<sup>1312</sup> and “causing people to feel that they have no value”.<sup>1313</sup> Certainly, based on these two definitions, the use of dehumanizing or degrading language directed at civilians would likely be captured. However, since the threshold for the IHL violation is unclear, it difficult to gauge whether, for example, calling someone a “gook” or a “towel head” would constitute a violation of the IHL protection. If the threshold under IHL is “serious humiliation, degradation or otherwise ... a serious attack on human dignity”, like in international criminal law, then it is unlikely that the use of terms such as “gook” or “towel head” would be captured by the IHL prohibition on outrages upon personal dignity because words alone of this nature are unlikely to cause “humiliation ... so intense that any reasonable person would be outraged.”

It is possible, even without an explicit prohibition on the use of demeaning, degrading, or dehumanizing language, that such language could be captured by the IHL requirement to treat civilians humanely. However, as noted, the absence of publicly available information on the use of such language toward civilians being punished suggests that states either do not, or chose not, to consider existing IHL protections for civilians to capture such language absent concurrent perpetration of illegal physical acts of violence. Further, although dehumanization was noted by the authors of the ICRC study *Roots of Behaviour*,<sup>1314</sup> there was no mention or suggestion that the use of language to dehumanize civilians is currently governed by IHL. Where the International Committee of the Red Cross, the “guardian of international humanitarian law”<sup>1315</sup>

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<sup>1310</sup> Sivakumaran, *supra* note 46 at 264.

<sup>1311</sup> *ICTY Kvocka Trial Judgment*, *supra* note 592 at para 173.

<sup>1312</sup> Cambridge English Dictionary, “Humiliate - meaning in the Cambridge English Dictionary”, online: *Cambridge English Dictionary* <<https://dictionary.cambridge.org/dictionary/english/humiliate>>.

<sup>1313</sup> Cambridge English Dictionary, “Degrading - meaning in the Cambridge English Dictionary”, online: *Cambridge English Dictionary* <<https://dictionary.cambridge.org/dictionary/english/degrading>>.

<sup>1314</sup> Muñoz-Rojas & Frésard, *supra* note 12.

<sup>1315</sup> ICRC, *supra* note 971 at 32.

and the “main driving force behind the development of international humanitarian law”,<sup>1316</sup> is silent on the existence of a particular protection for civilians during armed conflict, this is highly suggestive that no such legal protection exists. A prohibition or regulation of the use of demeaning, degrading, or dehumanizing language toward civilians could develop into an act captured by existing IHL. However, the power of law to shape behaviour and, in some cases, change social norms, relies on actors being aware of the law that seeks to change the perception of certain behaviours. This need to for clarity and awareness of a specific rule in order to alter behaviour supports the creation of new, clear regulation of the use of demeaning, degrading, or dehumanizing language directed toward civilians, accompanied by education of the risks of these types of language and enforcement. Furthermore, new, explicit regulation of demeaning, degrading, or dehumanizing language targeted at civilians would be consistent with the underlying IHL goal of protecting civilians who do not take part in hostilities.<sup>1317</sup>

#### 8.2.4 The Use of Demeaning, Degrading, or Dehumanizing Language in International Human Rights Law

This section will examine the question of whether international human rights law prohibits the use of demeaning, degrading, or dehumanizing language in armed conflict. The preceding discussion indicates that, while it is possible that a prohibition on demeaning, degrading or dehumanizing language to address or reference protected persons could be captured by certain existing IHL prohibitions, it appears unlikely that they actually do, or are considered to, capture such behaviour. Although existing IHL likely does not address this issue, it is relevant to consider whether international human rights law applicable during armed conflict already captures these forms of language. If the problem is already addressed by international human rights law, then a new rule of IHL would be unnecessary.

Within international human rights law, the right which is most relevant to possible regulation of demeaning, degrading, or dehumanizing language is the right to free speech or freedom of expression. The right to free speech is codified in many international and regional human rights

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<sup>1316</sup> Francois Bugnion, “The International Committee of the Red Cross and the Development of International Humanitarian Law” (2004) 5:1 *Chicago Journal of International Law* 191 at 191.

<sup>1317</sup> See chapter 4 at section 4.1.

treaties.<sup>1318</sup> It is also widely protected under national laws.<sup>1319</sup> Under the International Covenant on Civil and Political Rights (ICCPR),<sup>1320</sup> the right to freedom of expression is defined as including the “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”<sup>1321</sup> Free speech is an important protection for “the quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged”.<sup>1322</sup> Free speech is integral to “historical research, the dissemination of news and information, the public accountability of government authorities”.<sup>1323</sup> Protection of freedom of expression is therefore a very important task in a democratic society.

On its face, the right of free speech would appear to protect rather than prohibit the use of demeaning, degrading, or dehumanizing language; however, despite the fundamental nature of the right of freedom of expression, some restrictions of this right are, if not required, certainly permitted under international law.<sup>1324</sup> Under international human rights law, the right to freedom

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<sup>1318</sup> For example, this right is protected under Article 19 of the Universal Declaration of Human Rights, Article 19 of the International Covenant on Civil and Political Rights, Article 4 of Convention Against All Forms of Racial Discrimination, Article 10 of the European Convention on Human Rights, Article 13 of the American Convention on Human Rights, and Article 9 of the African Convention on Human and People’s Rights: *Universal Declaration of Human Rights* [UDHR] at Article 19; *ICCPR*, *supra* note 394 at Article 19; *International Convention on the Elimination of All Forms of Racial Discrimination* [Convention on the Elimination of All Forms of Racial Discrimination] at Article 4; *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, Council of Europe [European Convention on Human Rights] at Article 10; *American Convention on Human Rights*, Organization of American States [American Convention on Human Rights] at Article 13; *AU Kampala Convention*, *supra* note 408 at Article 9.

<sup>1319</sup> For example, in Canada, France, Ireland, New Zealand, the United Kingdom, and South Africa: *Canadian Charter of Rights and Freedoms* [Canadian Charter of Rights and Freedoms] at Section 2(b); *Declaration of the Right of Man and the Citizen*, France, 26 August 1789 [France, Declaration of the Right of Man and the Citizen] at Article 11; *Prohibition of Incitement To Hatred Act, 1989*, Ireland [Ireland, Prohibition of Incitement To Hatred Act, 1989] at Article 40; *New Zealand Bill of Rights Act 1990*, New Zealand [New Zealand Bill of Rights Act 1990] at Article 14; *Human Rights Act 1998*, United Kingdom [UK Human Rights Act] at Section 12; *Constitution of the Republic of South Africa*, South Africa [Constitution of the Republic of South Africa] at Article 16.

<sup>1320</sup> *ICCPR*, *supra* note 394.

<sup>1321</sup> *Ibid* at Article 19.

<sup>1322</sup> *R v Keegstra*, [1990] 3 SCR 697 (Supreme Court of Canada); Similar pronouncements have been made by the U.S. Supreme Court (e.g., *New York Times Co v Sullivan*, United States Supreme Court; ) and the European Court of Human Rights (e.g., *Police Dept of City of Chicago v Mosley*, United States Supreme Court; *Incal v Turkey*, judgment of 9 June 19, European Court of Human Rights; *Lindon, Otchakovsky-Laurens and July v France* [GC], nos 21279/02 and 36448/02, § 45, ECHR 2007-XI).

<sup>1323</sup> *ICTR, Nahimana Trial Judgment*, *supra* note 1271 at para 1001.

<sup>1324</sup> See, e.g., Navanethem Pillay, “Freedom of Speech and Incitement to Criminal Activity: A Delicate Balance” (2008) 14 *New England Journal of International & Comparative Law* 203 at 203; Mariana Mello, “Hagan v. Australia: A Sign of the Emerging Notion of Hate Speech in Customary International Law” (2006) 28 *Loyola of Los*

of expression can be subjected to certain restrictions. Under the ICCPR, states may legally restrict freedom of expression if a restriction is necessary “[f]or respect of the rights or reputations of others” and/or “[f]or the protection of national security or of public order (ordre public), or of public health or morals.”<sup>1325</sup> The right to freedom of expression can also be derogated from during public emergencies, such as armed conflicts.<sup>1326</sup>

The right to freedom of expression is qualified by a prohibition in the ICCPR on “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”, which “shall be prohibited by law”.<sup>1327</sup> The UN Human Rights Council has considered this particular prohibition to be non-derogable, even though the ICCPR does not list Article 20 as non-derogable.<sup>1328</sup> Where explicit prohibitions like the prohibition on advocacy of national, racial or religious hatred in the ICCPR are not included, freedom of expression provisions have often been interpreted to include a prohibition on advocacy of national, racial, or religious hatred, which is commonly referred to as ‘hate speech’.<sup>1329</sup> However, international human rights law merely creates an obligation for states to prohibit hate speech and does not in itself create a criminal offence. International human rights law relies on states to implement legislation to address hate speech. However, not all states regulate hate speech. Notably, for the purposes of this thesis, neither Sierra Leone nor the Democratic Republic of Congo have laws regulating hate speech.<sup>1330</sup> Therefore, there are countries where there would be no possible

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Angeles International & Comparative Law Review 365 at 366; John C Knechtle, “When to Regulate Hate Speech” (2006) 110 Pennsylvania State Law Review 539 at 542; Stephanie Farrior, “Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech” (1996) 14 Berkeley Journal of International Law 1 at 62–63; Sionaidh Douglas-Scott, “The Hatefulness of Protected Speech: A Comparison of the American and European Approaches” (1999) 7 William & Mary Bill of Rights Journal 305 at 27–31; Scott J Catlin, “A Proposal for Regulating Hate Speech in the United States: Balancing Rights Under the International Covenant on Civil and Political Rights” (1994) 69 Notre Dame Law Review 771 at 793–99.

<sup>1325</sup> ICCPR, *supra* note 394 at Article 19 Restrictions on freedom of expression are also codified in Article 13(5) ACHR and Article 10(2) ECHR; ; *American Convention on Human Rights*, *supra* note 1318; *European Convention on Human Rights*, *supra* note 1318.

<sup>1326</sup> ICCPR, *supra* note 394 at Article 4(1); *European Convention on Human Rights*, *supra* note 1318 at Article 15(1).

<sup>1327</sup> ICCPR, *supra* note 394 at Article 20(2). Similar prohibitions are also found in Article 7 UDHR prohibiting incitement to discrimination, and Article 13(5) ACHR prohibiting hate speech including “propaganda for war” and “advocacy of ... hatred... that constitute incitements to lawless violence”.

<sup>1328</sup> UN Human Rights Council, *supra* note 398 at para 13(e).

<sup>1329</sup> See, e.g., *Erbakan v Turkey*, European Court of Human Rights.

<sup>1330</sup> US Department of State, “Sierra Leone - 2016 Country Report on Human Rights Practices”, (3 March 2017), online: *United States Department of State* <<https://www.state.gov/reports/2016-country-reports-on-human-rights-practices/sierra-leone/>>; Abdul Brima, “Preventing religious conflict in Sierra Leone: a careful balancing act”, (27

regulation of hate speech during armed conflict, unless the speech satisfied the elements of the international crimes of incitement to genocide or persecution as a crime against humanity.<sup>1331</sup> A further general issue with relying on hate speech under international human rights law to address demeaning, degrading, or dehumanizing speech toward civilians during armed conflict is that international human rights law creates obligations only for some, but not all, armed groups.<sup>1332</sup> This means that many armed groups will have no obligation under international human rights law to address hate speech among their combatants during armed conflict.

Hate speech or incitement of hatred under IHRL has been criminalized in many domestic jurisdictions.<sup>1333</sup> These offences must, rightly so, balance individuals' fundamental free speech rights with the desire to prohibit forms of speech that incite hatred or violence against a particular group on discriminatory grounds. As will be discussed below, there is a legal distinction in many countries between the free speech rights of civilians and those of members of armed forces. The protection of free speech has often necessitated national or regional courts to review laws that regulate hate speech.<sup>1334</sup> Extreme forms of hate speech have also been criminalized under international criminal law as the crimes of incitement to genocide<sup>1335</sup> and

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November 2017), online: *Peace Insight* <<https://www.peaceinsight.org/blog/2017/11/preventing-religious-conflict-sierra-leone-careful-balancing-act/>>; US Department of State, "2017 Country Reports on Human Rights Practices: Democratic Republic of the Congo", (20 April 2018), online: *United States Department of State* <<https://www.state.gov/reports/2017-country-reports-on-human-rights-practices/democratic-republic-of-the-congo/>>. The DRC does provide the High Council for Broadcasting and Communication the capacity to temporarily suspend media outlets for publishing or broadcasting hate speech.; Freedom House, "Congo, Democratic Republic of (Kinshasa) - Freedom of the Press 2016", (10 March 2016), online: *Freedom House* <<https://freedomhouse.org/report/freedom-press/2016/congo-democratic-republic-kinshasa>>.

<sup>1331</sup> See, e.g., Rome Statute Article 25(3)(e) (incitement to genocide) and 7(1)(h) (persecution as a crime against humanity): *Rome Statute*, *supra* note 52.

<sup>1332</sup> See chapter 3 at section 3.4.

<sup>1333</sup> For example, it has been criminalized in Australia, Canada, France, Ireland, New Zealand, South Africa, and the United Kingdom: *Criminal Code 1913 (WA)*, Australia [*Australian Criminal Code*] at sections 77-80; *Criminal Code*, Canada [*Canadian Criminal Code*] at section 319; *Décret n° 2005-284 du 25 mars 2005 relatif aux contraventions de diffamation, d'injure et de provocation non publiques à caractère discriminatoire et à la compétence du tribunal de police et de la juridiction de proximité*, France [*France, Décret n 2005-284 dur 25 mars 2005*] at 5752; *Ireland, Prohibition of Incitement To Hatred Act, 1989*, *supra* note 1319; *Human Rights Act 1993*, New Zealand [*New Zealand Human Rights Act 1993*] at sections 61, 131; *Promotion of Equality and Prevention of Unfair Discrimination Act, 2000*, South Africa [*South Africa, Promotion of Equality and Prevention of Unfair Discrimination Act, 2000*] at section 10(1); *Public Order Act 1989*, United Kingdom [*UK, Public Order Act*] at section 18.

<sup>1334</sup> See, e.g., *R v Keegstra*, *supra* note 1322; *Perinçek v Switzerland*, European Court of Human Rights; *Brandenburg v Ohio*, United States Supreme Court.

<sup>1335</sup> See, e.g., *ICTR, Nahimana Appeal Judgment*, *supra* note 103; *Callixte Kalimanzira v The Prosecutor, Appeal Judgment*, ICTR-05-88-A, 20 October 2010; *ICTR, Nyiramasuhuko Appeal Judgment*, *supra* note 103; See also e.g., Gregory S Gordon, "A War of Media, Words, Newspapers, and Radio Stations: The ICTR Media Trial Verdict and

persecution as a crime against humanity.<sup>1336</sup> However, hate speech is not *prima facie* criminalized under international criminal law.<sup>1337</sup> The International Criminal Tribunal for Rwanda Appeals Chamber clearly distinguished between “hate speech in general (or inciting discrimination or violence) and direct and public incitement to commit genocide.”<sup>1338</sup> Similarly, the court stated that “not every act of discrimination will constitute the crime of persecution”.<sup>1339</sup> The International Criminal Tribunal for Rwanda Appeals Chamber in *Nahimana* chose not to rule on whether hate speech that is not accompanied by calls for violence could attain the requisite threshold of gravity for persecution as a crime against humanity.<sup>1340</sup>

In domestic, regional, and international case law, four important considerations in assessing speech have emerged: (1) context; (2) identity of the speaker and their audience; (3) intent; and (4) causation. The first two, context and identity, do not inhibit the use of hate speech laws to regulate demeaning, degrading, or dehumanizing speech toward civilians during armed conflict. In actuality, context and identity can help to explain why combatant speech merits its own unique regulation during armed conflict. However, the intent and causation elements of hate speech laws, while appropriately balancing free speech rights and society’s desire to denounce the promotion of hatred and violence against identifiable groups, would inhibit the ability to fully capture the forms of speech that pose a risk to combatants’ psyches and civilians’ safety during armed conflict. The following sub-sections examine these issues.

#### *8.2.4.i The Context of Statements and the Identity of Speaker and Audience*

Consideration of context and the identity of speaker and audience do not inherently impede the ability of domestic hate speech laws to address demeaning, degrading, or dehumanizing speech toward civilians during armed conflict. Words may take on a different meaning or have a different impact depending on the context and the identity of speaker and audience. For example,

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a New Chapter in the International Law of Hate Speech” (2004) 45 Virginia Journal of International Law 139 at 168–77; Richard Ashby Wilson, *Incitement on Trial: Prosecuting International Speech Crimes* (Cambridge, UK: Cambridge University Press, 2017) at 34–44.

<sup>1336</sup> See, e.g., MICT, 04/11/2018, *MICT, Seselj Appeal Judgment*, *supra* note 103; *ICTR, Nyiramasuhuko Appeal Judgment*, *supra* note 103; *ICTR, Nahimana Appeal Judgment*, *supra* note 103; See also, e.g., Gregory S Gordon, “Hate Speech and Persecution: A Contextual Approach” (2013) 46:2 Vanderbilt Journal of Transnational Law 303.

<sup>1337</sup> *ICTR, Nahimana Appeal Judgment*, *supra* note 103 at paras 692, 986-87.

<sup>1338</sup> *Ibid* at para 692.

<sup>1339</sup> *Ibid* at para 985.

<sup>1340</sup> *Ibid* at para 987.

the UN Human Rights Council accepted the restriction of hate speech disseminated by a teacher of young children.<sup>1341</sup> However, comments made by a journalist in the context of a program devoted to exposing societal racism, were not legitimate hate speech.<sup>1342</sup> Hate speech may take on a particularly egregious nature where committed in a context of community violence motivated by discrimination,<sup>1343</sup> but be permissible where the connection between comment and conflict is geographically remote.<sup>1344</sup> In the context of the crime of incitement to genocide, the International Criminal Tribunal for Rwanda stressed the importance of evaluating alleged genocidal speech “in its proper context” because “a particular message may appear ambiguous on its face or to a given audience, or not contain an explicit appeal to commit genocide, and still... amount to direct incitement.”<sup>1345</sup> Context here is extremely important because it means that perpetrators cannot hide behind euphemistic language or other forms of coded messages.<sup>1346</sup> This thesis agrees that context is highly important to evaluating speech among combatants; however, it argues that the specific context of armed conflict necessitates regulation of forms of demeaning, degrading, or dehumanizing speech toward civilians that, during peace, would warrant protection due to free speech rights.

The “standing or influence” of the statement maker can also increase the level of influence their statements have on their audience.<sup>1347</sup> In particular, statements made by public officials, politicians, or “persons with particular status in the society”<sup>1348</sup> can have a high degree of influence on others and may give the impression, correct or not, that the state itself condones or promotes the discrimination and hatred.<sup>1349</sup> International criminal case law on incitement to genocide and persecution as a crime against humanity has considered the power dynamic

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<sup>1341</sup> *Malcolm Ross v Canada*, CCPR/C/70/D/736/1997, 26 October 2000 at para 11.6.

<sup>1342</sup> *Jersild v Denmark*, 36/1993/431/510, 22 August 1994 at para 9.

<sup>1343</sup> *Zana v Turkey*, Application No 18954/91, 25 November 1997 at paras 9-12, 58-60.

<sup>1344</sup> *Incal v Turkey*, judgment of 9 June 19, *supra* note 1322 at paras 9, 58.

<sup>1345</sup> *Edouard Karemera & Matthieu Ngirumpatse v The Prosecutor, Appeal Judgment*, ICTR-98-44-A, 29 September 2014 at para 483; See also, *ICTR, Nahimana Appeal Judgment*, *supra* note 103 at paras 700, 701, 703.

<sup>1346</sup> For example, in the Nyiramasuhuko case, ICTR found directives to “sweep the dirt outside” to be incitement to genocide because the audience at the time would have “understood the words ... ‘sweeping dirt’, to mean they needed to kill Tutsis.” *ICTR, Nyiramasuhuko Trial Judgment*, *supra* note 103 at paras 6026-27.

<sup>1347</sup> Article 19, *Prohibiting incitement to discrimination, hostility or violence*, Policy Brief (London, UK: Article 19, 2012) at 30.

<sup>1348</sup> *Ibid* at 31.

<sup>1349</sup> Toby Mendel, *Study on International Standards Relating to Incitement to Genocide or Racial Hatred For the UN Special Advisor on the Prevention of Genocide*, GT-DH-DEV A(2006)004 (2006) at 65.

between speaker and audience in the context of superior responsibility, with the International Criminal Tribunal for Rwanda extending the application of the traditionally military concept to civilians.<sup>1350</sup> The identity of the statement maker must also be considered in relation to the identity of the audience. In some cases, the audience may be “characterized by excessive respect for authority” which causes them to be more easily influenced by statements made by authority figures.<sup>1351</sup>

The chain of command in armed groups and effects of authority mean that the use of such forms of speech before subordinates could have a powerful and negative impact on the behaviour of subordinates toward civilians.<sup>1352</sup> The legitimacy of a commander’s authority over their subordinates renders subordinates particularly susceptible to the influence of their commanding officers.<sup>1353</sup> Not only can the demeaning, degrading, or dehumanizing language contribute to debasing the civilians in the eyes of the subordinate, but the impact of the position of authority of the statement-maker can have the effect of suggesting that similar behaviour from subordinates is condoned or even encouraged.<sup>1354</sup> Even where there is no superior-subordinate relationship between speaker and audience, there is potential for demeaning, degrading, or dehumanizing language about civilians to adversely affect how listeners view and treat civilians. Combatants usually develop a “powerful sense of accountability to [their] comrades on the battlefield” which is “the primary factor that motivates a soldier to ... kill[] and [die]”.<sup>1355</sup> Fidelity to one’s comrades can be so strong that a combatant is willing to kill or die for them and a desire to conform and fit in with the group gives combatants power over one another even where they are equal in rank.<sup>1356</sup> Therefore, the use of demeaning, degrading, or dehumanizing language toward a civilian can have a more powerful affect among members of an armed group than among other people who do not have similar power and influence dynamics. Consequently, armed conflict represents a context in which demeaning, degrading, or dehumanizing language has a greater

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<sup>1350</sup> *Alfred Musema v The Prosecutor, Appeal Judgment*, ICTR-96-13-A, 16 November 2001 at paras 9, 371, 880-81, 936, 951, 967.

<sup>1351</sup> Susan Benesch, *Dangerous Speech: A Proposal to Tackle Violence* (New York: World Policy Institute, 2012) at 4.

<sup>1352</sup> See, e.g., Kelman & Hamilton, *supra* note 23.

<sup>1353</sup> See, e.g., Hugo Slim, *Killing Civilians: Method, Madness, and Morality in War* (New York: Columbia University Press, 2008) at 219–22; Kelman & Hamilton, *supra* note 23 at 16–17; Grossman, *supra* note 32.

<sup>1354</sup> See, e.g., Kelman & Hamilton, *supra* note 23.

<sup>1355</sup> Grossman, *supra* note 32 at 149.

<sup>1356</sup> Zimbardo, *supra* note 23 at 264.



power to influence how civilians are viewed than in a peacetime context and outside of the power dynamics of armed groups.

#### 8.2.4.ii Intent and Causation

Hate speech laws require that the speaker intends to incite hatred and/or violence toward a specific group.<sup>1357</sup> It has been advocated that that intent should be the decisive element when evaluating these statements: the statement-maker must “intend[] not only to share his/her opinions with others but also to compel others to commit certain actions based on those beliefs, opinions or positions.”<sup>1358</sup> Courts and other human rights bodies have repeatedly held that, in order to legally restrict free speech, governments must link “liability to the intent of the author”.<sup>1359</sup> The crimes of incitement to genocide and persecution as a crime against humanity carry the very high *mens rea* thresholds of “genocidal intent”<sup>1360</sup> and “discriminatory intent”<sup>1361</sup> respectively. The gravity of these two crimes necessitates a high threshold of *mens rea* due to of the extreme level of moral and social stigma associated with these offences.<sup>1362</sup>

In addition to an intent to incite hatred and/or violence, hate speech laws require that the speech in question actually does result in hatred or violence toward a specific group.<sup>1363</sup> Based on the

<sup>1357</sup> Article 19, *supra* note 1347 at 5.

<sup>1358</sup> *Ibid* at 22.

<sup>1359</sup> *Robert Faurisson v France*, Communication No. 550/1993, UN Doc CCPR/C/58/D/550/1993 (1996), 19 July 1995 at concurring opinion Evatt, Kretzmer, and Klein, para 9 See also ; UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, *Joint Statement on Racism and the Media* (London, UK: OSCE, 2001) at 2; *ECHR, Jersild v Denmark*, *supra* note 1335 at para 30; *R v Keegstra*, *supra* note 1315; *United States v Priest*, (1972) 45 CMR 338 at 347.

<sup>1360</sup> *Callixte Nzabonimana v The Prosecutor, Appeal Judgment*, ICTR-98-44D-A, 29 September 2014 at para 121 See also; *ICTR, Kalimanzira Appeal Judgment*, *supra* note 1335 at para 155; *Simon Bikindi v The Prosecutor, Appeal Judgment*, ICTR-01-72-A, 18 March 2010 at para 135; *ICTR, Nahimana Appeal Judgment*, *supra* note 103 at para 677.

<sup>1361</sup> See, e.g., *Prosecutor v Vujadin Popovic, Ljubisa Beara, Drago Nikolic, Ljubomir Borovcanin, Radivoje Miletic, Vinko Pandurevic, Trial Judgment*, IT-05-88-T, 10 June 2010 at paras 968-69; *ICTY Kupreskic Trial Judgment*, *supra* note 125 at para 621.

<sup>1362</sup> See, e.g., Schabas, *supra* note 61 at 138–39; Wald, *supra* note 61 at 627, 629; *ICTY, Krstic Appeal*, *supra* note 61 at para 36; Gregory S Gordon, *Atrocity Speech Law: Foundation, Fragmentation, Fruition* (Oxford: Oxford University Press, 2017) at 361; Stuart Ford, “Is the Failure to Respond Appropriately to a Natural Disaster a Crime against Humanity? The Responsibility to Protect and Individual Criminal Responsibility in the Aftermath of Cyclone Nargis” (2010) 38 *Denver Journal of International Law & Policy* 227 at 275.

<sup>1363</sup> UN Human Rights Committee (HRC), *Incitement to racial and religious hatred and the promotion of tolerance: Report of the High Commissioner for Human Right*, 20 September 2006, A/HRC/2/6 at para 41; *ICCPR*, *supra* note 394 at Article 20(2) See also, ACHR Art 13(5), which proscribes statements that “constitute incitements to lawless violence or to any other similar action” and CERD Art 4(a), which proscribes “incitement to racial discrimination, as well as all acts of violence or incitement to such acts ... [and] the provision of any assistance to racist activities,

work of the United Nations Human Rights Commission and the Committee on the Elimination of Racial Discrimination, ‘hatred’ “is a state of mind rather than a specific act.”<sup>1364</sup> While “hatred, as such, is simply an opinion and is thus absolutely protected under international law”, most states accept this standard “because hatred will inevitably find some form of tangible manifestation, and groups should not have to wait until concrete acts are perpetrated on them before being able to claim some protection.”<sup>1365</sup> Even if a definition of ‘hate’ can be agreed upon, “it is almost impossible to prove whether hatred per se is or is not likely to result from the dissemination of certain statements.”<sup>1366</sup>

The International Criminal Tribunal for Rwanda Appeals Chamber clearly distinguished between “hate speech in general (or inciting discrimination or violence) and direct and public incitement to genocide.”<sup>1367</sup> Similarly, the court stated that “not every act of discrimination will constitute the crime of persecution”.<sup>1368</sup> The International Criminal Tribunal for Rwanda Appeals Chamber in *Nahimana* chose not to rule on whether hate speech that is not accompanied by calls for violence could attain the requisite threshold of gravity for persecution as a crime against humanity.<sup>1369</sup> It would appear, therefore, that under international criminal law, only the most extreme forms of hate speech which meet the stringent threshold requirements for incitement to genocide (e.g., direct and public; intent to destroy) or persecution as a crime against humanity

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including the financing thereof”; *American Convention on Human Rights*, *supra* note 1318; *Convention on the Elimination of All Forms of Racial Discrimination*, *supra* note 1318.

<sup>1364</sup> Toby Mendel, *Hate Speech Rules Under International Law* (Halifax, NS: Centre for Law and Democracy, 2010) at 9.

<sup>1365</sup> *Ibid*; There are some states, however, who strongly object to banning incitement of hatred, such as the United States. Even in the context of preventing genocide, the U.S. has taken the position that “Under Anglo-American rules of law the right of free speech is not to be interfered with unless there is a clear and present danger that the utterance might interfere with a right of others” (see UN Economic and Social Council, *Prevention and Punishment of Genocide: Comments by Governments on the Draft Convention Prepared by the Secretariat*, UN Doc. E/623 (1948)); U.S. courts have repeatedly overturned laws attempting to prohibit certain forms of expression including homophobic speech (*Snyder v Phelps*, (2011) 131 S Ct 1207 at 1220); burning crosses (*RAV v City of St Paul*, (1992) 505 US 377); and advocacy of racial hatred (*USSC, Brandenburg v Ohio*, *supra* note 1327 at 448–49); The position of the U.S. Supreme Court is that statements must be more than offensive to be prohibited (*Snyder v Phelps*, *supra* note at 1220; *Simon & Schuster, Inc v Members of the New York State Crime Victims Bd*, (1991) 502 US 105 at 118; *Texas v Johnson*, (1989) 491 US 397 at 414); However, the U.S. Supreme Court has also stated that “When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right” (*Schenck v United States*, (1919) 249 US 47 at 52).

<sup>1366</sup> Mendel, *supra* note 1349 at 39.

<sup>1367</sup> ICTR, *Nahimana Appeal Judgment*, *supra* note 103 at para 692.

<sup>1368</sup> *Ibid* at para 985.

<sup>1369</sup> *Ibid* at para 987.

(e.g., discriminatory intent to harm, interference with fundamental right, gravity threshold) are criminalized.

The elements of existing domestic hate speech laws and the international crimes of incitement to genocide and persecution as a crime against humanity fail to fully capture what is truly problematic about the use of demeaning, degrading, or dehumanizing language by combatants. Social psychology and criminology theories of combatant perpetration of civilian abuses showed that dehumanization can facilitate IHL violations regardless of whether there is a specific intent to incite IHL violations.<sup>1370</sup> The effects of demeaning, degrading, or dehumanizing speech on both the combatant and their audience can contribute to IHL violations regardless of whether or not the combatant intends to incite the emotion of hatred or to incite IHL violations. The problem with demeaning, degrading, or dehumanizing language used by combatants is the language itself and the depiction of civilians as inferior beings, rather than on any specific emotion motivating the language. The problem with the use of demeaning, degrading, or dehumanizing language by civilians is the insidious effect that such language has psychologically on both speaker and audience that can contribute to explicit violations of IHL protections, not whether the speaker intends to incite hatred or violence against civilians. There is no evidence that reference to civilians as ‘gooks’ in Vietnam or ‘sand niggers’ in Iraq were intended to incite the IHL violations towards civilians that followed in My Lai in the case of Vietnam and Abu Ghraib in the case of Iraq. Yet, these terms have been linked to IHL violations in both cases.<sup>1371</sup> Therefore, the specific intent to incite hatred or violence required under hate speech regulation would not capture all forms of problematic demeaning, degrading, or dehumanizing speech against civilians identified by criminologists and social psychologists who have studied the link between dehumanization and violence against dehumanized individuals. However, although the intent requirement in hate speech offences may not capture all the forms of speech that can contribute to violence against civilians, intent cannot be eliminated entirely from a new offence. Thus, the new law proposed in section 8.2.5 will include an intent element, but one that differs from the intent requirement in hate speech offences.

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<sup>1370</sup> See chapter 7 at sections 7.2.1.viii; 7.2.2.ii; 7.2.2.vi; 7.2.4.i; 7.2.4.v.

<sup>1371</sup> *Zimbardo, supra* note 1134 at 307.

If required as a necessary element of an IHL prohibition on the use of demeaning, degrading, or dehumanizing speech, the requirement that actual hatred and/or violence against a group be incited or caused would limit, in some circumstances, the extent to which IHL might prevent harm to civilians. Part of the harm of demeaning, degrading, or dehumanizing language is that it can build and escalate over time. The opportunity to deter and prevent violence against civilians will be lost if IHL regulation of demeaning, degrading, or dehumanizing speech requires that actual incitement of hatred result from a single utterance of demeaning, degrading, or dehumanizing speech.

Courts have relied upon social science evidence to demonstrate a link between speech and harm and, consequently, justify restrictions to free speech.<sup>1372</sup> For example, the Supreme Court of Canada has repeatedly held social science evidence of a link between a form of speech and harm, even where not fully conclusive, can be relied upon to support restriction of speech.<sup>1373</sup> Bandura, Underwood, and Fromson have demonstrated a link between the use of demeaning, degrading, or dehumanizing language and an increased likelihood that individuals will harm other individuals that have been dehumanized. Consequently, regulation is supported by this link between the use of demeaning, degrading, or dehumanizing language and harm.

The preceding discussion has examined how, under international human rights law, the right to freedom of expression can and, in some cases, must be restricted to protect the rights of others from violence, hostility, and discrimination.<sup>1374</sup> In international human rights law and in the implementation of human rights law, a balance is sought between fundamental rights of freedom of expression and other rights such as equality and human dignity.<sup>1375</sup> The discussion of hate speech laws has illustrated that international human rights law is an inadequate vehicle for regulating demeaning, degrading or dehumanizing speech toward civilians during armed conflict for three key reasons. First, regulation of hate speech relies on national legislation and there are states where no such legislation exists. Second, many armed groups do not reach the threshold to

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<sup>1372</sup> See, e.g., *R v Sharpe*, [2001] 1 SCR 45 at para 89; *Ross v New Brunswick School District No 15*, [1996] 1 SCR 825 at para 101; *R v Butler*, [1992] 1 SCR 452; *R v Keegstra*, *supra* note 1322 at Section D.

<sup>1373</sup> See, e.g., *R. v Sharpe*, *supra* note 1372 at para 89; *Ross v New Brunswick School District No 15*, *supra* note 1372 at para 101; *R v Butler*, *supra* note 1372; *R v Keegstra*, *supra* note 1322 at Section D.

<sup>1374</sup> See, e.g., Pillay, *supra* note 1324 at 203; Mello, *supra* note 1324 at 366; Knechtle, *supra* note 1324 at 542; Farrior, *supra* note 1324 at 62–63; Douglas-Scott, *supra* note 1324 at 327–31; Catlin, *supra* note 1324 at 793–99.

<sup>1375</sup> Pillay, *supra* note 1324 at 203.

have legal obligations under international human rights law, thereby leaving a significant number of armed groups unregulated if international human rights law is relied on as the sole means of dealing with problematic forms of speech during conflict. Finally, the requirements of intent and causation of hatred and violence mean that there are dangerous forms of demeaning, degrading, or dehumanizing speech that would not be captured under hate speech laws.

The use of demeaning, degrading, or dehumanizing language by combatants is not fully captured by existing hate speech laws. However, this does not mean that new regulation of the use of demeaning, degrading, or dehumanizing language by combatants is possible. Free speech remains a fundamental right that cannot be arbitrarily infringed. This thesis argues that the specific context of armed conflict and the identity of the speakers as combatants justifies regulation of demeaning, degrading, or dehumanizing speech toward civilians that would otherwise be an illegal restriction of free speech for civilians and during peace. The following section will advance this argument through a discussion of the existing practice and case law in Canada, Europe, and the United States that has distinguished the free speech protections afforded to members of armed forces from that afforded to civilians.

#### *8.2.4.iii Restriction of Free Speech in Military Contexts*

The protection of free speech differs between peacetime and wartime contexts. For example, the right to freedom of expression can be derogated from in public emergencies, such as armed conflict.<sup>1376</sup> This section demonstrates that combatants' free speech is already regulated differently from that of civilians in many jurisdictions. This section examines the differentiation between civilian and combatant free speech and the legal grounds identified in national and regional case law as justifying greater regulation of free speech among combatants. This different treatment of civilian and combatant free speech provides the legal grounds to restrict combatants' use of demeaning, degrading, or dehumanizing speech toward civilians during armed conflict. While the focus of the thesis is on non-state armed groups, this section relies on case law addressing domestic regulation of state armed forces. It cannot be definitively said that armed groups with obligations under international human rights law would be able to exercise and limit rights in the same manner that states exercise and limit rights. The binding quality of

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<sup>1376</sup> See, e.g., *ICCPR*, *supra* note 394 at Articles 4 and 19(3).

international human rights law on armed groups is, in many ways a theoretical or abstract concept. Apart from academic analysis, pronouncements from bodies, such as the UN Security Council, are usually phrased in general terms, for example, “[d]emand[ing] that parties to armed conflicts comply strictly with the obligations applicable to them under ... human rights law”.<sup>1377</sup> Some academics have, however, suggested that armed groups should only be bound by international human rights law to the extent that they have the capacity to protect and respect a particular right.<sup>1378</sup> In the absence of clear direction on the issue and given that IHL rules apply in the same manner to both state armed forces and non-state armed groups, I consider it appropriate to rely on the parameters attributed to states’ abilities to restrict the rights of members of their national armed forces as a guide for the manner in which non-state armed groups may be able to regulate the rights of their own combatants.

Free speech case law from Canada, the European Union, and United States notes that there is a difference between the protection of free speech for ordinary civilians and the protection of free speech for certain other members of society, in particular members of the armed forces.<sup>1379</sup> Unquestionably, combatants are entitled to, and retain, free speech rights while in uniform;<sup>1380</sup> however, those rights will not be identical to those of a civilian. For example, in the United States, civilians may criticize or insult the President, but members of the armed forces can be court martialed for the same behaviour<sup>1381</sup> or receive a reprimand, be subjected to a fine, and/or

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<sup>1377</sup> UN Security Council, *supra* note 433.

<sup>1378</sup> See, e.g., Moir, *supra* note 46 at 194; Sassoli & Olson, *supra* note 429 at 622–23; Murray, *supra* note 73 at 172–202.

<sup>1379</sup> See, e.g., *Parker v Levy*, (1974) 417 US 733 at 758; *United States v Howe*, (1967) 17 CMA 165, 37 CMR 429; *United States v Brown*, 45 MJ 389, 391 (CAAF 1996) at 397; *Grigoriades v Greece*, (1997) 27 EHRR 464 at para 45; See also *Kazakov v Russia*, Application no. 1758/02, 05/06/2009 at para 27; *Joksas v Lithuania*, Application no. 25330/07, 12/02/2014 at para 70; *Konstantin Markin v Russia*, Application no. 30078/06, 22 March 2012 at para 135; *Kalaç v Turkey*, *Judgment, Merits*, App No 20704/92, Case No 61/1996/680/870, ECHR 1997-IV, [1997] ECHR 37, (1999) 27 EHRR 552, IHRL 2998 (ECHR 1997), 1st July 1997 at para 28; *R v Booth BR (Private)*, Court Martial (Canada); *R. v Sharpe*, *supra* note 1372 at para 22 (recognizing the need to sometimes restrict free speech for the protection of vulnerable persons); *Ross v New Brunswick School District No 15*, *supra* note 1372 (determining that an individual’s position in society, e.g., a teacher, may allow for greater restriction of speech than for other persons).

<sup>1380</sup> *Grigoriades v Greece*, *supra* note 1379 at para 45; *Kazakov v Russia*, *supra* note 1379 at para 27; *Joksas v Lithuania*, *supra* note 1379 at para 70; *United States v Wilson*, (ACMR 1991) 33 MJ 797 at 799; *Parker v Levy*, *supra* note 1379 at 758.

<sup>1381</sup> *United States v Howe*, *supra* note 1379.

be forced into early retirement.<sup>1382</sup> Canadian and European courts have allowed for more regulation of speech even among civilians because both the Canadian Charter of Rights and Freedoms and the European Convention on Human Rights allow for the restriction of rights where the maintenance of a democratic society necessitates a particular restriction.<sup>1383</sup>

Deviation from the civilian standards of protection for free speech is based primarily on reasons of national security,<sup>1384</sup> maintenance of military discipline,<sup>1385</sup> unit cohesion,<sup>1386</sup> and troop morale.<sup>1387</sup> An assessment of whether a regulation violates the freedom of expression rights of a member of the armed forces requires decision-makers “to take into account the special conditions attaching to military life and the specific ‘duties’ and ‘responsibilities’ incumbent on military personnel”.<sup>1388</sup> Further, “in choosing to pursue a military career, members of the armed forces have accepted of their own accord a system of military discipline and the limitations of rights and freedoms implied by it”.<sup>1389</sup> For example, military codes of justice often

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<sup>1382</sup> Steven Lee Myers, “Military Warns Soldiers of Failure to Hail Chief”, *The New York Times* (21 October 1998); John Loran Kiel, Jr. “When Soldiers Speak Out: A Survey of Provisions Limiting Freedom of Speech in the Military” (2007) 37 *Parameters* 69.

<sup>1383</sup> *Canadian Charter of Rights and Freedoms*, *supra* note 1319 at Section 1; *European Convention on Human Rights*, *supra* note 1318 at Article 10 (2).

<sup>1384</sup> This is the dominant standard employed by the European Court of Human Rights see, e.g., *Grigoriades v Greece*, *supra* note 1379 at para 39; See also Peter Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge, UK: Cambridge University Press, 2005) at 58–59.

<sup>1385</sup> See, e.g., *Goldman v Weinberger*, (1986) 106 S Ct 1310 at 507; *Chappell v Wallace*, (1983) 462 US 296 at 300; *Parker v Levy*, *supra* note 1379 at 744; *Grigoriades v Greece*, *supra* note 1379 at para 45; *Kazakov v Russia*, *supra* note 1379 at para 27; *Joksas v Lithuania*, *supra* note 1379 at para 70; *R v Mader GG (Corporal)*, 2015 CM 3003 at para 2; *R v Rainville JCB (Master Warrant Officer)*, 2013 CM 3017 at para 23; *R v Alcime OJ (Bombardier)*, 2012 CM 3021 at para 3; *R v Menard JP (Ex-Corporal)*, 2012 CM 3016 at para 3-4; *R v Moriarity*, [2015] 3 SCR 485; See also James M Hirschhorn, “The Separate Community: Military Uniqueness and Servicemen’s Constitutional Rights” (1984) 62 *North Carolina Law Review* 177 at 246; David E Fitzkee, “Religious Speech in the Military: Freedoms and Limitations” (2011) 41:3 *Parameters* 59 at 61.

<sup>1386</sup> See, e.g., *Goldman v Weinberger*, *supra* note 1385 at 507; *Chappell v Wallace*, *supra* note 1385 at 300; *Parker v Levy*, *supra* note 1379 at 744; *Grigoriades v Greece*, *supra* note 1379 at para 45; *Kazakov v Russia*, *supra* note 1379 at para 27; *Joksas v Lithuania*, *supra* note 1379 at para 70; *R v Mader GG (Corporal)*, *supra* note 1385 at para 2; *R v Rainville JCB (Master Warrant Officer)*, *supra* note 1385 at para 23; *R v Alcime OJ (Bombardier)*, *supra* note 1385 at para 3; *R v Menard JP (Ex-Corporal)*, *supra* note 1385 at paras 3-4; *R v Moriarity*, *supra* note 1385; See also Hirschhorn, *supra* note 1385 at 246; Fitzkee, *supra* note 1385 at 61.

<sup>1387</sup> See, e.g., *Goldman v Weinberger*, *supra* note 1378 at 507; *Chappell v Wallace*, *supra* note 1378 at 300; *Parker v Levy*, *supra* note 1372 at 744; *Grigoriades v Greece*, *supra* note 1372 at para 45; *Kazakov v Russia*, *supra* note 1372 at para 27; *Joksas v Lithuania*, *supra* note 1372 at para 70; *R v Mader GG (Corporal)*, *supra* note 1378 at para 2; *R v Rainville JCB (Master Warrant Officer)*, *supra* note 1378 at para 23; *R v Alcime OJ (Bombardier)*, *supra* note 1378 at para 3-4; *R v Menard JP (Ex-Corporal)*, *supra* note 1378 at para 3-4; *R v Moriarity*, *supra* note 1378; See also Hirschhorn, *supra* note 1378 at 264; Fitzkee, *supra* note 1378 at 61.

<sup>1388</sup> *Konstantin Markin v Russia*, *supra* note 1379 at para 135.

<sup>1389</sup> *Ibid.*

place limitations on combatants' freedom of expression through the requirement of a uniform, regulating hair styles and facial hair,<sup>1390</sup> and even prohibiting soldiers in uniform from holding hands in public.<sup>1391</sup> These restrictions apply equally during peace and war.

Courts have required that certain standards must be met in order for a restriction on the free speech of a military member to be legal. There must be a rational connection between the purpose (e.g., "maintenance of discipline, efficiency and morale") and the effects of rules restricting free speech of members of the armed forces.<sup>1392</sup> Canadian case law has found that the "behaviour of members of the military relates to discipline, efficiency and morale even when they are not on duty, in uniform, or on a military base."<sup>1393</sup> Actual harm to the military mission or military environment is not always a required component of the offence.<sup>1394</sup> Laws restricting the free speech of military members must also "be formulated with sufficient precision to enable the persons concerned – if need be with appropriate legal advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."<sup>1395</sup> However, a law may still be "couched in very broad terms" and meet these standards.<sup>1396</sup>

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<sup>1390</sup> Canada, *Canadian Forces Dress Instructions*, A-DH-265-000/AG-001, 2017-02-01 at Chapter 2 "Policy and Appearance" and Chapter 3 "Religious and Spiritual Accommodation"; United Kingdom, *The Queen's Regulations for the Army 1975 (Amendment No 26)* at Chapter 5, Part 9, Section 5.366; United States Navy, *United States Navy Uniform Regulations*, NAVPERS 15665I at Chapter 2 "Grooming Standards".

<sup>1391</sup> Canada, *supra* note 1390 at Chapter 2 "Policy and Appearance".

<sup>1392</sup> *R v Moriarity*, *supra* note 1385. In another Canadian case, a Court Martial Court determined that racist conduct by a member of the armed forces could legally be subject to disciplinary action: *R v Booth BR (Private)*, *supra* note 1379; American case law has demanded "a reasonably direct and palpable connection between the [restricted] speech and the military mission or military environment": *United States v Wilcox*, (2008) 66 MJ 442.

<sup>1393</sup> *R v Moriarity*, *supra* note 1385.

<sup>1394</sup> *United States v Priest*, *supra* note 1359 at 344; *United States v Johnson*, 39 MJ 1033 at 1037–38.

<sup>1395</sup> *Grigoriades v Greece*, *supra* note 1379 at para 37; See also *Kononov v Latvia [GC]*, no 36376/04, § 185, ECHR 2010 at para 185; *Del Río Prada v Spain [GC]*, no 42750/09, § 79, ECHR 20 at para 79; *Rohlina v the Czech Republic [GC]*, no 59552/08, § 50, ECHR 2015 at para 50; *Chauvy and Others v France*, 29 June 2004, Application no. 64915/01 at para 44; *Altug Taner Akcam v Turkey*, Application no. 27520/07, 25 October 2011 at para 87; *Aydin v Germany*, Application no. 16637/07, 27 January 2011 at para 41; Similar requirements of avoiding ambiguity or vagueness exist in American and Canadian case law as well: see, e.g., *R v Moriarity*, *supra* note 1385 (addressing question of overbreadth of military regulation); *Parker v Levy*, *supra* note 1379 (addressing the vagueness of certain military regulations).

<sup>1396</sup> *Grigoriades v Greece*, *supra* note 1379 at para 38.



Broadly worded regulations are common to military codes of discipline.<sup>1397</sup> They have repeatedly been deemed to satisfy requisite precision or clarity standards in American, Canadian, and European case law.<sup>1398</sup> For example, codes usually contain regulations prohibiting “conduct to the prejudice of good order and discipline”.<sup>1399</sup> While broadly worded offences still usually require a level of intent, courts have considered the language used and surrounding circumstances to be demonstrative of an individual’s intent.<sup>1400</sup> For example, where language was deemed “disrespectful and abusive” under the circumstances of an offence of insubordination, the court found this “prov[ed the accused’s] intention to be insubordinate.”<sup>1401</sup> Intent may also be irrelevant to the determination of innocence or guilt, such as in the case of conduct that may discredit the armed forces.<sup>1402</sup> However, case law indicates that intent will still be relevant to sentencing or determining the appropriate punishment for an offence regardless of the degree to which intent factors into determinations of guilt.<sup>1403</sup>

Dehumanization has a demonstrated a link to violence towards civilians, even without any specific level of hatred in either the statement-maker or the audience.<sup>1404</sup> In peacetime, the importance of free speech under international and domestic laws requires that government ability to restrict speech be limited and that any legal restriction on the speech of ordinary citizens be subject to high thresholds of intention.<sup>1405</sup> The severity and extreme stigmatization

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<sup>1397</sup> For example, “conduct unbecoming an officer and a gentleman” in *US Armed Forces Uniform Code of Military Justice* [*US Armed Forces Uniform Code of Military Justice*] at Article 133.

<sup>1398</sup> See, e.g., *Grigoriades v Greece*, *supra* note 1379 at para 38; *Parker v Levy*, *supra* note 1379; *R v Lunn*, (1993) 19 CRR (2d) 291 (CMAC) at 297–98.

<sup>1399</sup> See, e.g., *Canada National Defence Act*, *supra* note 543 at s. 129; *US Armed Forces Uniform Code of Military Justice*, *supra* note 1397 at Article 134; *UK Armed Forces Act 2006*, *supra* note 543 at s. 19.

<sup>1400</sup> See, e.g., *R v Rainville JCB (Master Warrant Officer)*, *supra* note 1385 at para 26; *United States v Priest*, *supra* note 1359 at para 343.

<sup>1401</sup> See, e.g., *R v Rainville JCB (Master Warrant Officer)*, *supra* note 1385 at para 26.

<sup>1402</sup> See, e.g., *Parker v Levy*, *supra* note 1379.

<sup>1403</sup> See, e.g., *R v Mader GG (Corporal)*, *supra* note 1385; *R v Rainville JCB (Master Warrant Officer)*, *supra* note 1385.

<sup>1404</sup> See, e.g., Nick Haslam & Steve Loughnan, “Dehumanization and Infrahumanization” (2014) 65 *Annual Review of Psychology* 399 at 401, 418; Allison Abrams, “The Psychology Behind Racism”, (6 September 2017), online: *Psychology Today* <<https://www.psychologytoday.com/blog/nurturing-self-compassion/201709/the-psychology-behind-racism>>.

<sup>1405</sup> See, e.g., *R v Keegstra*, *supra* note 1322; Similar pronouncements have been made by the U.S. Supreme Court (e.g., *New York Times Co v Sullivan*, *supra* note 1322; *Police Dept of City of Chicago v Mosley*, *supra* note 1322); and the European Court of Human Rights (e.g., *Incal v Turkey*, *judgment of 9 June 19*, *supra* note 1322; *Lindon*,

associated with international crimes of incitement to genocide and persecution as a crime against humanity similarly justify exacting thresholds of *mens rea*. However, in the context of armed conflict, the international community has demonstrated a desire to protect civilians under IHL as much as possible without excessively inhibiting militarily necessary methods and means of warfare.<sup>1406</sup> The failure under IHL and international human rights law to address forms of speech less extreme than hate speech, incitement to genocide, or persecution as a crime against humanity creates a clear gap. This gap permits the use of demeaning, degrading, or dehumanizing speech by combatants during armed conflict, which can facilitate the commission of IHL violations against civilians – the very type of violations that the international community clearly seeks to prevent.

The specific context of armed conflict is recognized under international law as a situation in which state obligations to protect the right to free speech may be derogated from for all citizens.<sup>1407</sup> This means that speech that would be protected during peacetime may legally be restricted during armed conflict.<sup>1408</sup> Courts in Canada, the European Union, and United States have recognized that, in both peace and war contexts, militaries are entitled to restrict the free speech rights of their combatants to a greater degree than a state may restrict the speech of civilians.<sup>1409</sup> Further, the ability to legally restrict the free speech rights of combatants is generally believed to be even greater during an active conflict than during peace.<sup>1410</sup> The need for discipline, cohesion, morale, and security among combatants is heightened during an armed conflict. In addition to posing a threat to civilians, the use of racist language has the potential to “corrode the morale and internal cohesion of a [military] unit.”<sup>1411</sup> Strong internal discipline

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*Otchakovsky-Laurens and July v France [GC]*, *supra* note 1322; as well as the ICTR [*ICTR, Nahimana Trial Judgment*, *supra* note 1271 at para 1001].

<sup>1406</sup> See chapter 4 at section 4.1.

<sup>1407</sup> See, e.g., *ICCPR*, *supra* note 394 at Articles 4 and 19.

<sup>1408</sup> See, e.g., UN Human Rights Council, *supra* note 398.

<sup>1409</sup> See, e.g., *Parker v Levy*, *supra* note 1379; *United States v Brown*, *supra* note 1379 at 397; *United States v Howe*, *supra* note 1379; *Grigoriades v Greece*, *supra* note 1379 at para 45; *Kazakov v Russia*, *supra* note 1379 at para 27; *Joksas v Lithuania*, *supra* note 1379 at para 70; *Konstantin Markin v Russia*, *supra* note 1379 at para 135; *Kalaç v Turkey*, *Judgment, Merits*, *supra* note 1379 at para 28; *R v Booth BR (Private)*, *supra* note 1379; *R v Rainville JCB (Master Warrant Officer)*, *supra* note 1385; *R v Mader GG (Corporal)*, *supra* note 1385; *R v Moriarity*, *supra* note 1385.

<sup>1410</sup> See, e.g., *Rowe*, *supra* note 1384 at 59; *Carlson v R Schlesinger*, 511 F. 2d 1327.

<sup>1411</sup> *R v Dryngiewicz ZA (Corporal)*, 2012 CM 1016 at para 7.

systems, as discussed in chapter 3,<sup>1412</sup> are the primary indicator that an armed group possesses a sufficient degree of organization to fulfill obligations under IHL and to be an official party to an armed conflict. Internal disciplinary systems are therefore an important source of IHL implementation within armed groups.<sup>1413</sup> The erosion of fidelity to the laws of war through the use of demeaning, degrading, or dehumanizing language toward civilians during armed conflict is both inimical to the aims of IHL to protect and manage risk to civilians during conflict as well as to the discipline essential for the functioning of armed forces and armed groups. This not only establishes the need to regulate these forms of speech by combatants during armed conflict, it also provides legal justification for these limitations.

Legal regulation has the power to shift and change existing norms among combatants that currently contribute to the dehumanization and denigration of civilians during armed conflict. However, this regulation must be clear and must be known to the members of the community in which behaviours are sought to be changed. Existing IHL does not provide this clarity. However, IHL could become a force for positive norm creation through the adoption of a rule prohibiting the use of demeaning, degrading, or dehumanizing language to describe, refer to, or address protected persons.

#### 8.2.5 A New International Humanitarian Law Rule to Regulate the Use of Demeaning, Degrading, or Dehumanizing Language

Given that neither IHL nor international human rights law currently address all the forms of demeaning, degrading, or dehumanizing language that contribute to violence toward civilians there is a need for a new IHL rule regulating these forms of speech. A new IHL rule regulating the use of demeaning, degrading, or dehumanizing language by combatants toward civilians should include and/or address five key components: (1) an inclusive definition of ‘demeaning, degrading, or dehumanizing language’; (2) the use of euphemistic language; (3) the use of the

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<sup>1412</sup> See chapter 3 at section 3.1.

<sup>1413</sup> Anne-Marie La Rosa & Carolin Wuerzner, “Armed groups, sanctions and the implementation of international humanitarian law” (2008) 90:870 *International Review of the Red Cross* 327 at 330, 333; Sassoli, *supra* note 25 at 31–32.

term ‘enemy’ to refer to civilians; (4) a level of intent; and, (5) no requirement for a specific result or outcome. This section will discuss each of these components in turn.

The first necessary component for a new IHL rule regulating the use of demeaning, degrading, or dehumanizing language is an inclusive definition of ‘demeaning, degrading, or dehumanizing language’. An inclusive definition will allow for possible broader interpretation and application of the rule by parties to a conflict while not allowing for an interpretation of the rule that is narrower than the specific elements included in the definition. This will protect the elements of demeaning, degrading, or dehumanizing language, the prohibition of which is currently necessary for civilian protection, but leave room for substantive development of the rule in the future. The term ‘demeaning, degrading, or dehumanizing language’ should capture many forms of dangerous speech, including all the examples provided in subsections 8.2.1 and 8.2.2 above, such as discriminatory or racist speech, the use of negative stereotypes, and other language that serves to cast civilians as a threat, as inferior, or as not worthy of respect or protection.

In addition to language provided in the preceding paragraph, a second component that should be included in a new IHL rule regulating the use of demeaning, degrading, or dehumanizing language is the inclusion of euphemistic language when it has the effect of demeaning, degrading, or dehumanizing civilians. The use of euphemistic language can have an equally powerful effect on people as explicit language demeaning, degrading, or dehumanizing civilians.<sup>1414</sup> Although phrases such as “taking out the trash”<sup>1415</sup> or “pulling up weeds”<sup>1416</sup> may have innocuous meanings in certain contexts, where used to refer euphemistically to civilians, phrases such as these must be captured by an IHL rule regulating the use of demeaning, degrading, or dehumanizing language in order to prevent or inhibit the use of dehumanization of civilians by combatants to reframe their conceptions of right and wrong and the contribution to violence toward civilians that stems from this reframing.

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<sup>1414</sup> See, e.g., *ICTR, Karemera Appeal Judgment*, *supra* note 1345 at para 483; *ICTR, Nahimana Appeal Judgment*, *supra* note 103 at paras 700, 701, 703; *ICTR, Nyiramasuhuko Trial Judgment*, *supra* note 103 at paras 6026-27.

<sup>1415</sup> See, e.g., Lankford, *supra* note 1252 at 21.

<sup>1416</sup> See, e.g., Alvarez, *supra* note 1260 at 116.

The third necessary component of a new IHL rule regulating demeaning, degrading, or dehumanizing language is the inclusion of a prohibition on using the term ‘enemy’ to refer to a civilian or the civilian population. This is important because combatants are trained to kill the enemy and IHL permits combatants to kill enemy combatants. Reference to civilians as the ‘enemy’ debases the protected status of civilian life and physical integrity by placing the civilian in the category of permissible target of violence permitted under IHL. The new rule should, however, include a defence of honest and reasonable mistake as to the identity or status of a specific civilian. In a NIAC, combatants are not always easily distinguished from civilians and a combatant should not be disciplined where there is no intent to place a protected civilian in the category of permissible target. An ‘honest mistake’ is a commonly accepted defence to regulatory offences and some criminal offences in certain countries.<sup>1417</sup> It is a well-accepted principle of criminal law that a person should not be punished without some amount of moral blameworthiness.<sup>1418</sup> Further, there is no necessity for the use of the label ‘enemy’ with regards to protected persons in armed conflict: violence is meant to be kept between parties to the conflict and civilians, provided they are not actively or directly participating in hostilities, may never legally be directly targeted.<sup>1419</sup> Consequently, there is no legitimate reason to allow such behaviour among combatants.

The fourth necessary component of an IHL rule regulating the use of demeaning, degrading, or dehumanizing language by combatants should address the level of intent for the offence. The IHL offence should require an intent to demean, degrade, or dehumanize a protected civilian or the civilian population on the part of the combatant accused of violating the prohibition. This level of intent differs from domestic hate speech laws which require that the speaker intend to promote, advocate, or incite hatred. This must be done in order to capture the forms of speech that can manipulate the psyche of combatants and debase civilians in a manner that facilitates

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<sup>1417</sup> See, e.g., Laurie L Levenson, “Good Faith Defenses: Reshaping Strict Liability Crimes” (1992) 78 Cornell Law Review 401 at 435–51 (discussing good faith defences in Australia, Canada, New Zealand, the UK).

<sup>1418</sup> See, e.g., Richard Card, *Card, Cross, and Jones Criminal Law* (Oxford: Oxford University Press, 1998) at 32; Itzhak Kugler, *Direct and oblique intention in the criminal law : an inquiry into degrees of blameworthiness* (Aldershot, UK: Ashgate, 2002) at 24; Hamish Stewart, “Legality and Morality in H.L.A. Hart’s Theory of Criminal Law” (1999) 52 SMU Law Review 201 at 205; HLA Hart, *Punishment and Responsibility* (New York: Oxford University Press, 1968) at 21; John G Malcolm, “Morally Innocent, Legally Guilty: The Case for Mens Rea Reform” (2017) 18 The Federalist Society Review 40 at 46.

<sup>1419</sup> This is the principle of distinction. See discussion in chapter 4 at section 4.2.1.

acts of violence towards them. An intent to demean, degrade, or dehumanize a civilian or the civilian population directly links the level of intent to the harm the regulation seeks to prevent. The specific harm that needs to be prevented in armed conflict is the debasement of civilians in the minds of combatants that facilitates violence toward civilians. In armed conflict it is the demeaning, degrading, or dehumanizing language itself that that contributes to harm against civilians, not the animating emotion behind the speech.<sup>1420</sup> Racism, discrimination, and otherization of groups that leads to the use of demeaning, degrading, or dehumanizing language can be motivated by many different things including fear, the need to belong, projection of one's own negative feelings onto others, and emotional incompetence, that is, a failure to "understand[] the origins of the negative emotions which, like all of [one's] emotions, deserve respect and care as they are important to [one's] sense of self."<sup>1421</sup> An intent requirement which rests on an intention to provoke a single specific emotion, i.e. hatred, such as in domestic hate speech laws, is inadequate to capture many instances of dangerous speech during armed conflict. The unique context of armed conflict and combatants has been recognized as one in which greater restriction of speech rights is legally permitted and accepted.<sup>1422</sup> However, combatants nonetheless retain free speech rights.<sup>1423</sup> Consequently, intent must remain a component of the IHL offence in order to balance the protection of civilians with the protection of combatants' speech rights. The standard of intent to demean, degrade, or dehumanize a protected civilian or the civilian population is consistent with other existing military offences that restrict speech, such as insubordination where it must be established that the combatant "inten[ded] to be insubordinate."<sup>1424</sup> Since racist language could and has been punished in national armed forces as conduct to the "prejudice of good order and discipline",<sup>1425</sup> which is often, if not

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<sup>1420</sup> See, e.g., Haslam & Loughnan, *supra* note 1404 at 401, 418; Abrams, *supra* note 1404.

<sup>1421</sup> Abrams, *supra* note 1404.

<sup>1422</sup> See, e.g., *Parker v Levy*, *supra* note 1379 at 758; *United States v Howe*, *supra* note 1379; *United States v Brown*, *supra* note 1379 at 397; *Grigoriades v Greece*, *supra* note 1379 at para 45; *Kazakov v Russia*, *supra* note 1379 at para 27; *Jokas v Lithuania*, *supra* note 1379 at para 70; *Konstantin Markin v Russia*, *supra* note 1379 at para 135; *Kalaç v Turkey*, *Judgment, Merits*, *supra* note 1379 at para 28; *R v Booth BR (Private)*, *supra* note 1379.

<sup>1423</sup> *Grigoriades v Greece*, *supra* note 1379 at para 45; *Kazakov v Russia*, *supra* note 1379 at para 27; *Jokas v Lithuania*, *supra* note 1379 at para 70; *United States v Wilson*, *supra* note 1380 at 799; *Parker v Levy*, *supra* note 1379 at 758.

<sup>1424</sup> *R v Rainville JCB (Master Warrant Officer)*, *supra* note 1385 at para 26.

<sup>1425</sup> See, e.g., *R c Camiré JJN (Caporal-chef)*, 2019 CM 4003 (racist comment charged as conduct to the prejudice of good order and discipline); *R v Rainville JCB (Master Warrant Officer)*, *supra* note 1378; *R v Dryngiewicz ZA (Corporal)*, *supra* note 1404 (racist comment charged as conduct to the prejudice of good order and discipline); *R v Booth BR (Private)*, *supra* note 1372 denial of application arguing that racist conduct could not be charged as a service offence].

always, a strict liability offence,<sup>1426</sup> requiring an intent to demean, degrade, or dehumanize a civilian during an armed conflict would, in practice, provide a higher level of intent requirement for the regulation proposed in this thesis.

The fifth component necessary for an IHL rule regulating the use of demeaning, degrading, or dehumanizing language by combatants is that the offence should require that the demeaning, degrading, or dehumanizing language used by a combatant have the effect of debasing a civilian or the civilian population in the eyes of the audience. This is another important difference between the necessary components of the IHL offence and the common requirements of domestic hate speech laws. Domestic hate speech laws seek to prevent discriminatory violence and, therefore, in order to contravene hate speech laws, the speech must result in hatred or violence toward the target of the hate speech. By contrast, the harm sought to be prevented with an IHL rule regulating the use of demeaning, degrading, or dehumanizing speech by combatants is the debasement of civilians in the minds of combatants. The debasement of civilians can produce increasing levels of dehumanization in the minds of combatants over time,<sup>1427</sup> making it difficult to alter patterns of violence that begin downstream. This is why it is the debasement of civilians that is the harm which must be prevented and why it must be prevented early on. The assessment of whether speech has the effect of debasing a civilian or the civilian population in the eyes of the audience should be based on a reasonable person standard: would a reasonable person consider the speech to demean, degrade, or dehumanize a civilian or the civilian population. One reason a reasonable person standard should be used is due to the difficulty of determining whether debasement has occurred in the mind of a specific audience member prior to the escalation of the effects of such language which results in physical violence toward a civilian. The use of a reasonableness standard to evaluate the conduct of combatants is common accepted practice among many national armed forces.<sup>1428</sup>

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<sup>1426</sup> See, e.g., Ministry of Defence, *Manual of Service Law: JSP 830 Volume 1* (Government of the United Kingdom, 2017) at Chapter 7 "Non-criminal conduct (disciplinary) offences" 1-7-59 & 1-7-60.

<sup>1427</sup> On gradual effects see, e.g., Kelman & Hamilton, *supra* note 23 at 19; Bandura, *supra* note 23 at 203; Diener, *supra* note 1131 at 234–35; Zimbardo, *supra* note 1134 at 296–99; Zimbardo, *supra* note 23 at 222–25, 307–10.

<sup>1428</sup> For example, this is the case in Canada, the United Kingdom, and the United States: see, e.g., *Canada National Defence Act*, *supra* note 543 at section 129; *US Armed Forces Uniform Code of Military Justice*, *supra* note 1397 at Article 134; *UK Armed Forces Act 2006*, *supra* note 543 at section 19.

Armed conflict is meant to be between parties to the conflict and while civilians and other protected persons may indirectly suffer from the conflict, there is no legitimate reason to allow for the use of demeaning, degrading, or dehumanizing language to describe, refer to, or address such persons. This section has proposed a new IHL rule to regulate the use of demeaning, degrading, or dehumanizing speech by combatants. In order to effectively inhibit the effects of dehumanization on combatants which contribute to violence toward civilians, this new IHL rule must include five components. First, the definition of ‘demeaning, degrading, or dehumanizing language’ should be inclusive, but not exhaustive. Second, the rule should include a prohibition on the use of euphemistic language where it has the effect of demeaning, degrading, or dehumanizing a civilian or the civilian population. Third, the rule should include a prohibition on referring to a civilian or the civilian population as the ‘enemy’; however, this component should include a defense of reasonable mistake. Fourth, the offence should require an intent on the part of the speaker to demean, degrade, or dehumanize a civilian or the civilian population. Finally, the rule should require, based on a reasonableness standard, that the speech have the effect of debasing a civilian or the civilian population in the mind of the audience. Together, these five components will provide an IHL rule that balances the protection of civilians with the speech rights of combatants, while still having the capacity to inhibit the ability of dehumanization to contribute to violence toward civilians during armed conflict.

### 8.3 Deindividuation, Depersonalization, and Displacement of Responsibility

This section will examine the need for a new IHL rule regulating the use of nicknames by combatants. It will provide a brief review of the effects and risks of deindividuation, depersonalization, and the displacement of responsibility. It will provide evidence of the use of nicknames by combatants in Sierra Leone and the DRC, which can serve to create a sense of anonymity among combatants as well as be a means of creating a separate identity that assumes responsibility for acts of violence committed by combatants. This section will examine whether the use of nicknames is already addressed by existing rules of IHL. It will also discuss whether existing international human rights law, specifically the right to free speech already discussed in the context of demeaning, degrading, or dehumanizing speech, may actually protect the use of nicknames in armed conflict, thereby preventing its regulation. Finally, this section will propose a new IHL rule regulating the use of nicknames by combatants in armed conflict.



### 8.3.1 The Effect of Nicknames in Armed Conflict

The theory of deindividuation demonstrates that the submergence of an individual in a group can decrease private self-awareness leading to an impairment of that individual's ability to self-regulate their behaviour.<sup>1429</sup> In a state of deindividuation, "people may be aware of what they are doing but have a reduced expectation of suffering any negative consequences."<sup>1430</sup> This is accompanied by a reduced ability to consider long-term consequences and an increased susceptibility to the influences of immediate stimuli, emotions, and motivations.<sup>1431</sup> The desire to conform to and be accepted by a group also influence an individual submerged in a group.<sup>1432</sup> Anonymity can contribute to diffusion of responsibility.<sup>1433</sup> Zimbardo has stated that "anything that makes a person feel anonymous ... creates the potential for that person to act in evil ways – if the situation gives permission for violence."<sup>1434</sup> A link between anonymity and antisocial behaviour has been found in social psychology experiments.<sup>1435</sup> Contexts in which "threats of punishment are a major source of inhibition" for individuals, contexts in which individuals sport a costume that conveys an implicit message, and contexts in which group members are similar in appearance can all enhance an individual's sense of anonymity and tend to increase disinhibited behaviour.<sup>1436</sup> All three of these contexts exist within an armed group. First, internal disciplinary systems seek to enforce compliance through coercion and punishment. Second, the uniform of a combatant or soldier implicitly conveys power and violence.<sup>1437</sup> Third, a group in which combatant or soldier wears the same uniform contributes to an outwardly similar appearance. Thus, all three contexts that can increase disinhibited behaviour are often present among armed groups.

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<sup>1429</sup> Wortley, *supra* note 1134 at 194; Prentice-Dunn & Rogers, *supra* note 1135 at 504.

<sup>1430</sup> Wortley, *supra* note 1134 at 194.

<sup>1431</sup> Diener, *supra* note 1131 at 211.

<sup>1432</sup> See, e.g., Zimbardo, *supra* note 1134 at 255; Zimbardo, *supra* note 993 at 29–31; Zimbardo, *supra* note 23 at 219, 264; Diener, *supra* note 1131 at 220–22; Cassel & Bernstein, *supra* note 1148 at 222.

<sup>1433</sup> See, e.g., Bandura, *supra* note 23 at 63; Zimbardo, *supra* note 23 at 301–305.

<sup>1434</sup> Zimbardo, *supra* note 993 at 29.

<sup>1435</sup> See, e.g., Zimbardo, *supra* note 23 at 299–305; Zimbardo, *supra* note 1134 at 263–69; Diener, *supra* note 1131 at 222.

<sup>1436</sup> Diener, *supra* note 1131 at 222.

<sup>1437</sup> Note some armed groups do not have uniforms or chose not to sport uniforms. However, even where combatants do not always have access to or chose to wear uniforms they will often seek to adopt some form of similar attribute during battle to avoid killing members of their own group. For example, Ishmael Beah, a former child soldier in Sierra Leone has spoken of how group members would wear helmets and green head ties into battle where the combatants' instructions were to kill anyone who did not wear a helmet or green head tie: Ishmael Beah, "The Making, and Unmaking, of a Child Soldier", *The New York Times* (14 January 2007); Ishmael Beah, *A Long Way Gone: Memoirs of a Boy Soldier* (New York: Farrar Straus and Giroux, 2007).

In addition to the effects of a state of deindividuation, the core theories of techniques of neutralization, moral disengagement, and obedience to authority demonstrate that factors which serve to decrease an individual's sense of responsibility, or that allow an individual to attribute responsibility for their own actions to another actor, will facilitate their ability to participate in crimes.<sup>1438</sup> Indeed, these theorists have shown that “[p]eople behave more cruelly under group responsibility than when they hold themselves personally accountable for their actions.”<sup>1439</sup> Further, where a diffused sense of responsibility is combined with the use of dehumanization, this has been shown to significantly increase the degree of punitiveness expressed by individuals.<sup>1440</sup> Thus, factors which contribute to individuals' ability to distance themselves from feeling personally responsible for their actions, including acts that cause another person to suffer, can facilitate their participation in atrocity crimes.

There are two factors inherent in the organization and function of armed groups that contribute to deindividuation and an individual's ability to separate themselves from a sense of responsibility. First and foremost, an armed group is a group, therefore the potential for deindividuation is inherent in the existence of an armed group. Since the existence of these groups is an accepted reality of non-international armed conflict, a certain amount of deindividuation is both likely and unavoidable. Second, armed groups will often, where possible, wear uniforms or some sort of other identifying feature.<sup>1441</sup> They may do this for reasons similar to those as regular armed forces: “[i]dentification, obedience, comradeship and a display of strength” or as a means to “gain respectability”.<sup>1442</sup> Even where members of an armed group do not have the resources to afford or acquire uniforms, they will often attempt to have a common identifying feature among the group.<sup>1443</sup> For example, a witness in the Bosco Ntaganda case at the International Criminal Court (ICC) stated,

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<sup>1438</sup> See, e.g., Sykes & Matza, *supra* note 994 at 667; Bandura et al, *supra* note 1060 at 365; Bandura, *supra* note 23 at 62–63; Kelman & Hamilton, *supra* note 23 at 18; Zimbardo, *supra* note 1134 at 256; Zimbardo, *supra* note 23; Milgram, *supra* note 23 at 8.

<sup>1439</sup> Bandura et al, *supra* note 1060 at 365; Bandura, Underwood & Fromson, *supra* note 167; Zimbardo, *supra* note 23.

<sup>1440</sup> Bandura, *supra* note 23 at 201.

<sup>1441</sup> See, e.g., Pfanner, *supra* note 1173; Beah, *supra* note 1437; Beah, *supra* note 1437.

<sup>1442</sup> Pfanner, *supra* note 1173 at 102.

<sup>1443</sup> See, e.g., Beah, *supra* note 1437; *Ntaganda Trial Hearing, P-0888 ICC-01/04-02/06-T-105-Red-ENG WT 20-06-2016 51/96 SZ T*, *supra* note 102; Kleffner, *supra* note 71 at 334–35.

They did wear something to identify them. Some put on leaves around their arms, others around their necks. It was a something, a sign to identify them so people would know that they were defending the village in the case of war, to help. So they did wear something to identify themselves. They had leaves around their arm or their necks, or sometimes they had fabric of a -- of a particular colour. They did have ways of identifying themselves.<sup>1444</sup>

Similarly, in Sierra Leone, a former RUF combatant recalled

Our group was called Born Naked because of our hardness, and when we fought we took off our shirts and tied them around our waists or wore them inside out. We also did this to recognize each other because at that time both rebels and soldiers could be wearing combat uniforms.<sup>1445</sup>

Sometimes armed groups will choose not to wear uniforms, trying to disguise themselves as civilians, or wear the stolen uniforms of enemy combatants, trying to have their violent acts attributed to the enemy.<sup>1446</sup> A uniform has long been the primary means for parties to an international armed conflict to fulfill the IHL requirement to wear a “fixed, distinctive sign visible at a distance”.<sup>1447</sup> From a civilian protection perspective, uniforms or another form of “fixed, distinctive sign visible at a distance” should also be worn by parties to NIACs to facilitate combatants’ task of distinguishing between non-targetable civilians and legally targetable combatants.<sup>1448</sup> This is so even though a uniform is not a requirement for an armed group to be considered a party to a NIAC.<sup>1449</sup> The use of uniforms or other common identifying mark serves two very important functions during armed conflict. First, as a matter of military utility, uniforms allow combatants to distinguish between members of their own armed group and enemy

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<sup>1444</sup> *Ntaganda Trial Hearing, P-0888 ICC-01/04-02/06-T-105-Red-ENG WT 20-06-2016 51/96 SZ T*, *supra* note 102 at 43.

<sup>1445</sup> Jasper, RUF Voluntary Recruit, in Higbie & Moigula, *supra* note 102 at 129.

<sup>1446</sup> See, e.g., Zubairu Wai, *Epistemologies of African Conflicts, Violence, Evolution, and the War in Sierra Leone* (New York: Palgrave Macmillan, 2012) at 102–103; Laurie R Blank & Gregory P Noone, *International Law and Armed Conflict: Fundamental Principles and Contemporary Challenges in the Law of War*, (New York: Wolters Kluwer, 2019) at 408; Sierra Leone Truth and Reconciliation Commission, *supra* note 102 at Ch 4, para 430.

<sup>1447</sup> See, e.g., *1907 Hague Convention IV*, *supra* note 465 at Article 1(2); *Geneva Convention III*, *supra* note 5 at Article 4(A)(2)(b).

<sup>1448</sup> See, e.g., Pfanner, *supra* note 1173 at 94, 123; Emily Crawford, “The Principle of Distinction and Remote Warfare” in Jens David Ohlin, ed, *Research Handbook on Remote Warfare* (Cheltenham, UK: Edward Elgar, 2017) at 52, 62.

<sup>1449</sup> See, e.g., Pfanner, *supra* note 1173 at 122; Bassiouni, *supra* note 1173 at 741–42; Kleffner, *supra* note 71 at 320–21.

combatants, thereby fulfilling a tactical or strategic function.<sup>1450</sup> Second, uniforms are extremely important for reducing accidental civilian casualties, as a uniform can serve to distinguish combatants from civilians.<sup>1451</sup> Although uniforms are not explicitly required under the law of NIACs, some distinguishing feature, such as a uniform, is an implicit legal requirement in NIACs by virtue of the principle of distinction that, as a rule of customary IHL, binds all parties to an armed conflict.<sup>1452</sup> Consequently, even though they may contribute to deindividuation, uniforms are an essential feature of civilian protection during armed conflict. Unless an alternative means of fulfilling the legal requirement of distinction can be found, a prohibition or restriction on the use of uniforms would be counter to the aim of civilian protection during conflict.

The use of nicknames can contribute to deindividuation, in particular through the creation of a sense of anonymity, depersonalization, and distancing the individual from a sense of responsibility for their actions. This is because the use of the nickname can allow individuals to separate their identity, facilitating depersonalization and disassociation from their actions committed under the second identity. This is best described through the concept of doubling.<sup>1453</sup> This is a form of disassociation by which an individual develops a “second self”.<sup>1454</sup> The individual and their second self “operate autonomously, allowing the participant to function in the two irreconcilable worlds of the ‘normal’ and the genocidal.”<sup>1455</sup> Doubling has been used to explain apartheid era violence in South Africa.<sup>1456</sup> Smeulers has referenced doubling more generally to explain the type of process perpetrators use to “try to cope with their own roles [in violence]”.<sup>1457</sup> Preston has made a connection between doubling and the experiences of some

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<sup>1450</sup> See, e.g., Pfanner, *supra* note 1173 at 100; Beah, *supra* note 1437.

<sup>1451</sup> See, e.g., Michael W Lewis & Emily Crawford, “Drones and Distinction: How IHL Encouraged the Rise of Drones” (2013) 44 *Georgetown Journal of International Law* 1127 at 1136.

<sup>1452</sup> See, e.g., APV Rogers, *Law on the Battlefield*, 2d ed (Huntington, NY: Juris Pub, 2004) at 38–41; Lewis & Crawford, *supra* note 1451 at 1136.

<sup>1453</sup> Lifton, *supra* note 22; RJ Lifton & E Markusen, *The Genocidal Mentality: Nazi Holocaust and Nuclear Threat* (New York: Basic Books, 1990).

<sup>1454</sup> Alvarez, *supra* note 23 at 147.

<sup>1455</sup> *Ibid.*

<sup>1456</sup> Robert N Kraft, *Violent Accounts: Understanding the Psychology of Perpetrators through South Africa’s Truth and Reconciliation Commission* (New York: New York University Press, 2014) at 89–91.

<sup>1457</sup> Smeulers, *supra* note 22 at 239–40.

Ugandan child soldiers trying to reconcile their civilian and their rebel identities.<sup>1458</sup> Doubling was first used to explain how Nazi doctors participated in the killing of patients:

Doubling involved the formation of an Auschwitz self, by which one internalized many of the patterns and assumptions of the Auschwitz environment: the reversals of healing and killing, the operative Nazi biomedical vision, the extreme numbing that rendered killing no longer killing, struggles with omnipotence (deciding who would live or die) and impotence (being a cog in a powerful machine), maintaining a medical identity while killing, and somehow finding meaning in the environment.<sup>1459</sup>

The use of nicknames by combatants can fulfill a similar function. This makes the choice of nicknames particularly meaningful, as often combatant nicknames represent an idealized vision of the self as a hero or allude to particularly violent identities or characters. A heroic identity could give a combatant a sense of righteous purpose that justifies all of their acts, while a violent identity can help propel a combatant to acts of violence. Zimbardo notes that CIA officers operating at Abu Ghraib prison, which became notorious when reports revealed egregious violations of IHL toward detainees,<sup>1460</sup> only used aliases and never their true names.<sup>1461</sup> Therefore, it is not merely physical appearances changes, such as the use of a uniform or war paint,<sup>1462</sup> that contribute to a separate ‘combatant identity’, but also the use of nicknames.

### 8.3.2 Examples of the Use of Nicknames by Combatants in Sierra Leone and the DRC

The previous section discussed the general effects of deindividuation, depersonalization, and displacement of diffusion of responsibility on combatant psyches and how nicknames in particular can affect the psychology of combatants. This section will provide more detailed examples of the use of nicknames by combatants in Sierra Leone and the DRC.

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<sup>1458</sup> Justin M Preston, “‘If They Abduct You, You Don’t Come Back’: Understanding Ugandan Former Child Soldiers in the Context of Their Life” (2015) 21:3 *Peace and Conflict: Journal of Peace Psychology* 432 at 438, 441.

<sup>1459</sup> Lifton & Markusen, *supra* note 1453 at 106. See also; Lifton, *supra* note 22.

<sup>1460</sup> Seymour M Hersh, “Torture at Abu Ghraib”, (30 April 2004), online: *The New Yorker* <<https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib>>. See also; David P Forsythe, “The United States and International Humanitarian Law” (2008) 7:1 *Journal of Human Rights* 25 at 30–32; CNN, “Iraq Prison Abuse Scandal Fast Facts - CNN”, (4 March 2019), online: *CNN* <<https://www.cnn.com/2013/10/30/world/meast/iraq-prison-abuse-scandal-fast-facts/index.html>>.

<sup>1461</sup> Zimbardo, *supra* note 23 at 394.

<sup>1462</sup> See, e.g., *ibid* at 303–305; RJ Watson, “Investigation into Deindividuation Using a Cross-Cultural Survey Technique” (1973) 25 *Journal of Personality and Social Psychology* 342.

One element that appeared repeatedly in the research and fieldwork interviews and data collection conducted for this thesis: the use of nicknames by combatants in both the Sierra Leone and DRC case studies. Many of the victim, witness, and perpetrator statements collected from the archives of the Sierra Leone Truth and Reconciliation Commission contained reference to nicknames.<sup>1463</sup> However, in-person interviewees in Sierra Leone and the DRC did not reference nicknames during our conversations, with one exception. One interviewee in the DRC revealed his nickname had been ‘Jack Bauer’, after the lead character on the television series ‘24’, when he showed me his demobilization card that had been issued under the name ‘Jack Bauer’ rather than his actual name.<sup>1464</sup> Indeed, ‘Jack Bauer’ was an extremely common nickname among combatants in Eastern Congo.<sup>1465</sup> The use of nicknames in both Sierra Leone and Eastern Congo has been documented in case law,<sup>1466</sup> the Sierra Leone Truth and Reconciliation Commission Report,<sup>1467</sup> UN Reports,<sup>1468</sup> and academic literature.<sup>1469</sup>

As noted in the preceding section, the use of nicknames by combatants can be particularly problematic where they evoke heroic or violent separate identities. The widespread use of the nickname ‘Jack Bauer’ in the DRC created an identity that was able to righteously protect the country.<sup>1470</sup> Violent nicknames in the DRC and Sierra Leone have included ‘First Blood’,<sup>1471</sup>

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<sup>1463</sup> SA, TRC Statement, *supra* note 102; MD, RUF Victim, Sierra Leone Truth and Reconciliation Commission Statement [MD, TRC Statement]; SW, SLA child victim, Sierra Leone Truth and Reconciliation Commission Statement [SW, TRC Statement]; AA, RUF child recruit, Sierra Leone Truth and Reconciliation Commission Statement [AA, TRC Statement]; SM, RUF child recruit, Sierra Leone Truth and Reconciliation Commission Statement [SM, TRC Statement]; TR, RUF forced recruit, Sierra Leone Truth and Reconciliation Commission Statement [TR, TRC Statement]; MD, AFRC & RUF victim, Sierra Leone Truth and Reconciliation Commission Statement [MD, TRC Statement]; TK, RUF child soldier, Sierra Leone Truth and Reconciliation Commission Statement [TK, TRC Statement].

<sup>1464</sup> Tung Yin, “Jack Bauer Syndrome: Hollywood’s Depiction of National Security Law” (2007) 17 Southern California Interdisciplinary Law Journal 279 at 279-24’ was an American television show airing on the Fox television network 2001-2010 starring Kiefer Sutherland as the lead character Jack Bauer, a director of field operations in a counter terrorist unit. Jack Bauer “routinely violates laws against torture, murder, aggravated assault, armed robbery” in order to “save [his] country from terrorists bent on using nuclear, biological, or chemical weapons on U.S. soil.”

<sup>1465</sup> Strohlic, *supra* note 102.

<sup>1466</sup> See, e.g., SCSL AFRC Trial Judgment, *supra* note 580 at paras 11, 312.

<sup>1467</sup> Sierra Leone Truth and Reconciliation Commission, *supra* note 101 at Ch 3, para 473 and Ch 4, paras 52, 239 fn 124.

<sup>1468</sup> See, e.g., UN Security Council, *supra* note 102 at para 26; UN Security Council, *Midterm report of the Group of Experts on the Democratic Republic of Congo, 16 October 2015*, A/2015/797 at para 14.

<sup>1469</sup> See, e.g., Vermeij, *supra* note 102 at 74; Pype, *supra* note 102 at 264.

<sup>1470</sup> Strohlic, *supra* note 102.

<sup>1471</sup> Sierra Leone Truth and Reconciliation Commission, *supra* note 102 at Ch 3, para 473.

‘Kill man no blood’,<sup>1472</sup> ‘Rambo’,<sup>1473</sup> and ‘Terminator’.<sup>1474</sup> One Sierra Leonean woman is recorded as saying

When we were with the rebels we saw them capture and kill a lot of people. We also saw women raped in front of us. I saw everything. I don’t know the real names of any of the rebels, only their nicknames. One was called The Killer and another was Cobra.<sup>1475</sup>

This quote demonstrates not only the prevalent use of nicknames in conjunction with IHL violations, but also the extent to which these nicknames could allow combatants to be anonymous: to the point where possibly no one knows their real name.

Other examples of heroic or aspirational nicknames include the common use of “Superman” in Sierra Leone or names of sports heroes such as “Gullit” used by senior AFRC commander Alex Tamba Brima, subsequently convicted of war crimes and crimes against humanity by the Special Court for Sierra Leone.<sup>1476</sup> Other extremely violent nicknames include “Hitler”,<sup>1477</sup> “‘Blood Never Dry,’ ‘Laughing and Killing,’ [and] ‘The Castrator’”.<sup>1478</sup> Another common nickname in the DRC has been “Bruce Lee”, a name which, like other names drawn by combatants from American wrestling programs or action films, evoke images and identities of people who are “virile men, who are self-confident, in control of everything, energetic and dynamic. They control their health and are able to confront any physical danger; in a word, they are invincible.”<sup>1479</sup> Vermeij has noted that “nicknames dissociate[] [people] from the violence they carry out and makes it possible for them to function as killing machines without remorse”.<sup>1480</sup> One Jack Bauer in Eastern Congo stated, “‘When this ideology of Jack Bauer comes to me it’s

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<sup>1472</sup> *Ibid* at Ch 4, para 52.

<sup>1473</sup> *SA, TRC Statement, supra* note 102.

<sup>1474</sup> *Ntaganda Trial Hearing, P-0888 ICC-01/04-02/06-T-105-Red-ENG WT 20-06-2016 51/96 SZ T, supra* note 102 at 36.

<sup>1475</sup> Baby Seiya, Civilian, in Higbie & Moigula, *supra* note 102 at 185.

<sup>1476</sup> Ruud Gullit was a famous Dutch football player in the 1980s and 1990s and captained the Dutch national team in their European Championship win in 1988. See, e.g., *Prosecution Memorandum to Accompany Indictment [Alex Tamba Brima]*, SCSL [*SCSL Prosecution Memo [Alex Tamba Brima]*] at para 1; *SA, TRC Statement, supra* note 102.

<sup>1477</sup> UN Security Council, *supra* note 102 at para 26.

<sup>1478</sup> Vermeij, *supra* note 102 at 74.

<sup>1479</sup> Pype, *supra* note 102 at 264.

<sup>1480</sup> Vermeij, *supra* note 102 at 74. See also; Peter Singer, *Children at War* (Berkeley, CA: University of California Press, 2006) at 73.

like taking drugs...I have no fear.”<sup>1481</sup> Thus, the use of nicknames allows combatants to create a separate identity under which they can participate in acts of violence without jeopardizing, or at least minimizing negative effects on, their sense of self.

### 8.3.3 The Use of Nicknames under Existing International Humanitarian Law

Existing IHL does not explicitly address the use of nicknames by combatants nor is it addressed implicitly under existing rules. In fact, the use of nicknames is a widespread, common historical and contemporary practice among armed groups and national armed forces in various areas of the world.<sup>1482</sup> There are two likely explanations for why nicknames are not addressed by IHL. First, IHL prohibitions in NIACs are generally aimed at the protection of persons outside the armed group, that is, civilians, other protected persons, and, to a more limited extent, enemy combatants. Thus, as discussed in the preceding section, IHL is more likely to regulate language directed at civilians and other protected persons rather than focus on how combatants within an armed group treat each other. Second, the use of nicknames is likely not addressed in IHL because nicknames generally appear innocuous, unless they are deemed to constitute verbal abuse or bullying.<sup>1483</sup> Finally, as a form of speech, any regulation or restriction of the use of nicknames must be evaluated in light of the protections for free speech discussed earlier in this chapter. Existing IHL is aimed at addressing acts against civilians that are likely to cause physical or mental pain or suffering.<sup>1484</sup> Most IHL prohibitions and regulations for civilian protection address acts that have a close proximal relationship to the pain or suffering of a civilian, such as direct acts of torture and cruel treatment or the physical conditions in which detainees are kept.<sup>1485</sup> However, there are IHL provisions that seek to protect civilians indirectly.

<sup>1481</sup> Strohlic, *supra* note 102.

<sup>1482</sup> See, e.g., Julie Knox, “The Weird World Of Military Nicknames”, (5 October 2015), online: *Forces Network* <<https://www.forces.net/news/tri-service/weird-world-military-nicknames>>; David Mastey, “Child Soldier Narratives and Their War Names” (2018) 99:2 *English Studies* 166; John Rentoul, “The Top 10: Nicknames for Generals”, (14 January 2017), online: *The Independent UK* <<https://www.independent.co.uk/voices/the-top-10-nicknames-for-generals-a7524171.html>>; Strohlic, *supra* note 102.

<sup>1483</sup> See, e.g., Pernille Due et al, “Bullying and symptoms among school-aged children: international comparative cross sectional study in 28 countries” (2005) 15:2 *European Journal of Public Health* 128 at 128; W Ray Crozier & Patricia S Dimmock, “Name-calling and nicknames in a sample of primary school children” (1999) 69:4 *British Journal of Educational Psychology* 505; Evelyn M Field, *Bully Blocking at Work: A Self-Help Guide for Employees, Managers, and Mentors* (Bowen Hill, AUS: Australian Academic Press, 2010) at 17.

<sup>1484</sup> See, e.g., the prohibition on violence to life, physical integrity, and mental well-being, the prohibition on torture, cruel and inhuman treatment, the prohibition on outrages upon personal dignity including humiliating and degrading treatment, the prohibition on rape and other forms of sexual violence, all found in *Geneva Convention IV*, *supra* note 5 at Common Article 3; *Additional Protocol II*, *supra* note 5 at Article 4(2).

<sup>1485</sup> For example, see the decision of the ICTY Trial Chamber in Limaj that found “the deplorable conditions of detention in both the storage room and the cowshed at the Llapushnik/Lapusnik prison camp, were such as to cause



For example, rules requiring particular care to be taken with installations, such as dams or nuclear electrical facilities,<sup>1486</sup> and prohibiting attacks on “objects indispensable to the survival of the civilian population” are rules for the protection for civilians that prohibit acts that do not have the same physical proximity to civilian harm as acts such as torture.<sup>1487</sup> The effects of nicknames on combatants that contribute to IHL violations against civilians, such as the production of a sense of anonymity<sup>1488</sup> and doubling,<sup>1489</sup> are less obvious because they are psychological as opposed to physical. Without an understanding of the possible psychological effects of nicknames on combatants, the common use of nicknames can seem innocuous.

Decision makers may focus on the more immediately apparent positive effects of the use of nicknames. The use of nicknames may not only be viewed as innocuous but can be considered to sometimes be a positive tool for “social cohesion”,<sup>1490</sup> or for “solidarity, friendship and affection”,<sup>1491</sup> or may be viewed as merely being humorous.<sup>1492</sup> Nicknames may facilitate or enhance camaraderie and team esprit de corps within military units.<sup>1493</sup> Group cohesiveness is extremely important in armed groups and contributes to fostering the feeling of accountability

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serious mental and physical suffering to the detainees, and constituted a serious attack upon the dignity of the detainees.” (at para 289) These conditions and the mental and physical suffering caused by them to detainees rose to the level of cruel treatment (at para 294): *ICTY, Limaj et al Trial Judgment, supra* note 188.

<sup>1486</sup> Henckaerts & Doswald-Beck, *supra* note 5 at Rule 42.

<sup>1487</sup> *Ibid* at Rule 54.

<sup>1488</sup> The adverse consequences of anonymity produced by nicknames has been discussed often in the context of online activities such as aggression online generally, cyberbullying, and cyber terrorism: see, e.g., Michail Tsikerdekis, “The choice of complete anonymity versus pseudonymity for aggression online” (2012) 2:8 eMinds: International Journal on Human-Computer Interaction 35; Wei Pang Wu & Chung-Cheng Lien, “Cyberbullying: An Empirical Analysis of Factors Related to Anonymity and Reduced Social Cue” (2013) 311 Applied Mechanics and Materials 533; Marc Rogers, “The Psychology of Cyber-Terrorism” in Andrew Silke, ed, *Terrorists, Victims and Society: Psychological Perspectives on Terrorism and its Consequences* (Chichester, UK: John Wiley & Sons Ltd, 2003) at 85.

<sup>1489</sup> See, e.g., Preston, *supra* note 1458 at 438, 441; Smeulders, *supra* note 22 at 259.

<sup>1490</sup> Crozier & Dimmock, *supra* note 1483 at 506; US Military Academy, “Building a Cohesive Team”, *Army Magazine* (April 2013) at 68.

<sup>1491</sup> Crozier & Dimmock, *supra* note 1483 at 506; V de Klerk & B Bosch, “Nicknames as sex-role stereotypes” (1996) 35 Sex Roles 525 at 527; Frederick J Manning, “Morale and Cohesion in Military Psychiatry” in Franklin D Jones et al, eds, *Military Psychiatry: Preparing in Peace for War* (Falls Church, VA: Office of the Surgeon General, US Dept of the Army; Washington, DC & Armed Forces Institute of Pathology, 1994) at 4; James K Skipper, “Nicknames, Coal Miners and Group Solidarity” (1986) 34:2 Names 134 at 137.

<sup>1492</sup> See, e.g., Crozier & Dimmock, *supra* note 1483 at 506; de Klerk & Bosch, *supra* note 1491; D Boxer & F Cortés-Conde, “From bonding to biting: Conversational joking and identity display” (1997) 27 Journal of Pragmatics 275; US Military Academy, *supra* note 1490 at 68.

<sup>1493</sup> See, e.g., Manning, *supra* note 1491 at 4, 12; US Military Academy, *supra* note 1490; Harvey Meyer, “Military Monikers”, (28 October 2011), online: *The American Legion* <<https://www.legion.org/magazine/90376/military-monikers>>; Oliver Brett, “What’s in a nickname?”, *BBC News* (15 January 2009), online: <<http://news.bbc.co.uk/2/hi/7829013.stm>> (on nicknames facilitating camaraderie generally).

among fellow combatants.<sup>1494</sup> Group cohesiveness and morale can have a positive effect on a unit's operational effectiveness.<sup>1495</sup> However, while group cohesiveness is important for the successful execution of military operations, there is nothing to suggest that the use of nicknames to aid in fostering this cohesiveness is necessary to produce group cohesion.<sup>1496</sup> Further, there are many effective alternatives for building team cohesion such as team sports.<sup>1497</sup>

#### 8.3.4 The Use of Nicknames under International Human Rights Law

The preceding discussion demonstrates that the use of nicknames by combatants is not captured by existing IHL rules and prohibitions. In actuality, the use of nicknames is generally seen by members of armed forces as playing a positive role in fostering camaraderie and cohesiveness within military units.<sup>1498</sup> However, social psychology and criminology theories indicate that underneath this seemingly innocuous and useful façade, the use of nicknames can contribute to an individual's commission of violent acts towards civilians.<sup>1499</sup> IHL seeks to minimize the adverse effects of war on civilians,<sup>1500</sup> therefore, regulation of behaviour that contributes to violence against civilians would be consistent with this objective. Although existing IHL does not address the subject of nickname use by combatants, it is relevant to consider whether international human rights law applicable during armed conflict already captures the use of

<sup>1494</sup> See, e.g., Grossman, *supra* note 32 at 149; US Military Academy, *supra* note 1490 at 68.

<sup>1495</sup> See, e.g., US Military Academy, *supra* note 1490 at 67; John Baynes, *Morale: a study of men and courage; the Second Scottish Rifles at the Battle of Neuve Chapelle, 1915* (London, UK: Cassell, 1967); Peter J Murphy & Kelly MJ Farley, "Morale, Cohesion, and Confidence in Leadership: Unit Climate Dimensions for Canadian Soldiers on Operations" in Carol McCann & Ross Pigeau, eds, *The Human in Command: Exploring the Modern Military Experience* (New York: Springer Science+Business Media New York, 2000) 311.

<sup>1496</sup> King does however suggest that the use of nicknames for objectives, such as naming a particular hill "South Kidney" due to its shape, has an important function to "distinguish and individualize anonymous features" and conceal objectives from the enemy (at 501-502). This form of nickname is distinct from the personal use of nicknames by combatants discussed in this thesis. Anthony King, "The Word of Command Communication and Cohesion in the Military" (2006) 32:4 *Armed Forces & Society* 493 at 501-502.

<sup>1497</sup> See, e.g., Eva Talent, "Military Team Building Activities", (21 August 2018), online: <<https://bizfluent.com/13583776/military-team-building-activities>>.

<sup>1498</sup> See, e.g., Meyer, *supra* note 1493; US Military Academy, *supra* note 1490 at 68; Eyal Ben-Ari, *Mastering Soldiers: Conflict, Emotions, and the Enemy in an Israeli Military Unit* (New York: Berghahn Books, 1998) at 29.

<sup>1499</sup> Smeulers, *supra* note 22 at 259 (linking nicknames to doubling and the perpetration of harm to civilians); Preston, *supra* note 1450 at 438, 441 (linking nicknames to doubling and the perpetration of harm); Kraft, *supra* note 1448 at 89-91 (linking doubling to the perpetration of harm generally); Lifton, *supra* note 22 (linking doubling to perpetration of harm generally); Bandura et al, *supra* note 1056 at 365 (linking anonymity to the perpetration of harm generally); Zimbardo, *supra* note 989 at 29 (linking anonymity to perpetration of harm generally).

<sup>1500</sup> See, e.g., Williamson, *supra* note 95 at 161; Samuel Estreicher, "Privileging Asymmetric Warfare (Part III)": The Intentional Killing of Civilians under International Humanitarian Law" (2012) 12:2 *Chicago Journal of International Law* 589 at 593; Amnesty International, "Armed Conflict", online: <<https://www.amnesty.org/en/what-we-do/armed-conflict/>>; Yael Ronen, "Avoid or Compensate - Liability for Incidental Injury to Civilians Inflections during Armed Conflict" (2009) 42:1 *Vanderbilt Journal of Transnational Law* 181 at 184.

nicknames or whether it prohibits restriction on the use of nicknames. If the issue is already covered by international human rights law, then a new rule of IHL would likely be unnecessary. If a restriction on the use of nicknames is prohibited under international human rights law this may affect how a new IHL rule is structured. This section will examine whether international human rights law regulates or protects the use of nicknames during armed conflict.

The use of nicknames is not explicitly addressed under international human rights law. If anything, rather than restrict their use, international human rights law may protect their use under the right to freedom of expression. As discussed earlier in this chapter, freedom of expression is intended to protect an individual's right to "seek, receive and impart information and ideas of all kinds...either orally, in writing or in print, in the form of art, or through any other media of a person's choice".<sup>1501</sup> Freedom of expression has been deemed to include less obvious forms of expression such as one's manner of dress.<sup>1502</sup> A nickname can be used to communicate something about the person who goes by that nickname. For example, a combatant nicknamed "Cobra" may be someone who is stealthy and lethal like a snake.<sup>1503</sup> However, not all behaviour is protected by freedom of expression: free speech rights are not absolute and may be lawfully regulated by governments in particular during armed conflict,<sup>1504</sup> and militaries may place greater restrictions on the free speech rights of members of the armed forces than they would otherwise legally be able to place on the free speech rights of civilians.<sup>1505</sup>

The use of a nickname may be punished where it breaches other laws, for example, nicknames dealing with hate speech, defamation, discrimination in the United Kingdom<sup>1506</sup> or nicknames or alias used to commit a crime in Canadian criminal law.<sup>1507</sup> This means that, even if nicknames

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<sup>1501</sup> *ICCPR*, *supra* note 394 at Article 19(2).

<sup>1502</sup> See, e.g., UN Human Rights Committee (HRC), *General Comment No 34, Article 19, Freedoms of opinion and expression*, UN Doc CCPR/C/GC/34 at para 12.

<sup>1503</sup> The nickname "Cobra" was reported to be used by at least one rebel in Sierra Leone: Baby Seiya, Civilian, in Higbie & Moigula, *supra* note 102 at 185.

<sup>1504</sup> See discussion in section 8.2.4 of this chapter.

<sup>1505</sup> See discussion in sub-section 8.2.4.iii of this chapter.

<sup>1506</sup> See, e.g., *Nolan v CD Bramall Dealership Ltd t/a Evans Halshaw Motorhouse Worksop*, [2012] UKET/2601000/12; *Ruda v Tei*, 2 June 2011, Case No1807582/10 [2011] EqLR 1108; *Dove v Brown & Newirth Ltd*, [2016] UKET/3301905/2015.

<sup>1507</sup> The use of a nickname or alias to commit a crime will usually be captured by offences dealing with fraud or false pretenses. One common example of crime committed under a false name is identity theft. See, e.g., in Canada,

are protected, their use may still be legally restricted for other necessary purposes such as the protection of others from discriminatory hatred and violence or to impede crimes of fraud. Many states also regulate names by restricting the names parents may give their child, or the names to which adults may voluntarily change. For example, parents in Denmark may choose their child's name from a list of 7,000 names or apply for special permission to use a name not listed.<sup>1508</sup> The Danish law also requires that the “name must show the gender of the child and not be unusual.”<sup>1509</sup> Meanwhile adults in the United States may not legally change their name to one that is considered obscene, a racial slur, or which contains symbols or numerals.<sup>1510</sup> Informal name changes such as going by a nickname, as opposed to official legal changes, are less strictly regulated. In many common law jurisdictions, individuals may easily choose to informally be known by a different name. In these jurisdictions “people have a right under common law to be officially recognized by whatever name they ordinarily use”;<sup>1511</sup> it is simply a matter of choosing a name and using it.<sup>1512</sup> Name changes in this manner are often a common occurrence. For example, someone legally named Edward may go by Ed, Eddie, Ted, or Ned.

Nicknames are therefore neither fully protected nor truly prohibited under international human rights law and many domestic legal systems. Certainly, it is clear that they may legally be subject to restrictions and regulations. Existing restrictions focus on the protection of other rights and the promotion of other social goods, such as the protection of best interest of the child, the prevention of hate speech or racial discrimination, and to avoid their use to escape accountability for the commission of crimes. However, no existing rules would appear to address their common colloquial usage among colleagues in the armed forces or in armed groups. Consequently, the

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*Canadian Criminal Code*, *supra* note 1333 at Section 362 (false pretense), Section 380 (fraud), Section 402.2 (identity theft).

<sup>1508</sup> “The Strict Name Laws of Denmark - WorldAtlas.com”, (20 November 2017), online: *World Atlas* <<https://www.worldatlas.com/articles/the-strict-name-laws-of-denmark.html>>.

<sup>1509</sup> *Ibid.*

<sup>1510</sup> “Are There Legal Name Change Restrictions?”, online: <<http://www.lawprofessor.com/are-there-legal-name-change-restrictions/>>.

<sup>1511</sup> Eric Andrew-Gee, “Why and how Ontarians change their names in the 21st century”, (12 November 2017), online: *The Globe and Mail* <<https://www.theglobeandmail.com/news/national/why-and-how-ontarians-change-their-names-in-the-21stcentury/article31799805/>>.

<sup>1512</sup> *Ibid.*; “Change of Name”, online: *Women and the Law in Alberta* <<https://www.lawforalbertawomen.ca/women-and-marital-status/change-of-name/>>; “Common-Law Name Change”, (2010), online: <<http://myfamilylaw.com/library/common-law-name-change/?more=yes>>; *Israel Merolevitz & others, petitioners, ; Lindon v First National Bank, ; Christianson v King County, .*

application of international human rights law in armed conflicts does not currently address the problem of the use of nicknames contributing to deindividuation, depersonalization, and the displacement of responsibility, which in turn can facilitate the commission of and participation in crimes against civilians. International human rights law does, however, protect free speech and expression, which includes the use of nicknames. The next section will advocate for a new regulation on the use of nicknames within armed groups that could limit these deleterious outcomes and will consider whether the restriction proposed would be a legal limit on free speech.

### 8.3.5 Regulation of Nicknames in a Military Context

A new IHL rule regulating the use of nicknames by combatants during armed conflict is needed to prevent the psychological effects of nickname use that can contribute to the perpetration of violence toward civilians. Section 8.1 demonstrated the power of law to change behaviour by shaping what an individual sees as a positive behaviour by indicating social approval of certain behaviours and social disapproval of other behaviours.<sup>1513</sup> Further, law is commonly used to regulate risky or dangerous behaviours.<sup>1514</sup> Behaviours that are socially acceptable, such as not wearing a seatbelt, have been dramatically changed through the use of legal regulation.<sup>1515</sup> The regulation of risk regulation is inherent to IHL, which seeks to limit the risks to civilians during armed conflict.<sup>1516</sup> Consequently, the regulation of the risk posed to civilians through combatant use of nicknames is logical and consistent with IHL efforts to limit risks to civilians during conflict. Further, a law is needed to clearly express disapproval of the adverse effects of nickname use in conflict in an effort to alter combatant behaviour by inhibiting the reframing of combatant decision-making.

Section 8.3.1 demonstrated the effects deindividuation, including anonymity, depersonalization, diffusion of responsibility, and doubling can have on combatants which contribute to combatant violence toward civilians. The effects of these psychological processes have been linked to

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<sup>1513</sup> See, e.g., Sunstein, *supra* note 871 at 2034–35; Nadler, *supra* note 977 at 63; Cooter, *supra* note 1229 at 7–8.

<sup>1514</sup> See, e.g., Nadler, *supra* note 977 at 67–68; Geisinger, *supra* note 1224 at 41, 63; Sunstein, *supra* note 871 at 2024, 2052.

<sup>1515</sup> See, e.g., McDermott & Hough, *supra* note 1244; Ontario Ministry of Transportation, *supra* note 1244.

<sup>1516</sup> See, e.g., *ICTY Kupreskic Trial Judgment*, *supra* note 125 at para 521.

increased aggression generally<sup>1517</sup> as well as specifically to the perpetration of violence toward civilians during conflict.<sup>1518</sup> The effects of deindividuation and the use of diffusion of responsibility and doubling result in a reframing of the manner in which combatants evaluate right and wrong and make decisions about courses of action.<sup>1519</sup> When a combatant is operating under the effects of these psychological processes, they no longer view their behaviour in the same manner they did in peacetime when they followed the law.<sup>1520</sup> The effects of these processes must be inhibited in order to prevent their contribution to the perpetration of violence against civilians. The inhibition of these processes will also render the work of organizations which engage with armed groups, such as the ICRC, easier because, assuming compliance with the new law, they will not have to undo this harmful reframing before being able to effectively engage armed actors.

The enhanced risk produced by the use of nicknames, in particular heroic or violent nicknames, is captured by the earlier quote from one Congolese combatant: ““When this ideology of Jack Bauer comes to me it’s like taking drugs...I have no fear.””<sup>1521</sup> An absence of fear or remorse, as well as a sense of invincibility,<sup>1522</sup> eliminates considerations of responsibility for one’s actions during conflict and renders the combatant a threat to civilians and a threat to the internal discipline of the armed group or armed forces due to the potential for illegal violence toward civilians. When the power of nicknames to contribute to violence against civilians is understood, it becomes unsurprising that all new members of the terrorist organization Al-Qaeda, known for targeting civilians, assume a new name upon joining the organization.<sup>1523</sup> This thesis recommends that a new IHL rule be adopted and implemented to regulate the use of anonymizing nicknames that help combatants eliminate feelings of fear and remorse and produce a feeling of invincibility among combatants in armed conflict. This new rule would decrease the

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<sup>1517</sup> See, e.g., Zimbardo, *supra* note 989 at 29; Zimbardo, *supra* note 23 at 301–305; Bandura, *supra* note 23 at 63; Zimbardo, *supra* note 1130 at 263–69; Diener, *supra* note 1127 at 222; Kraft, *supra* note 1448 at 89–91; Lifton, *supra* note 22; Lifton & Markusen, *supra* note 1445.

<sup>1518</sup> See, e.g., Smeulers, *supra* note 22 at 259; Preston, *supra* note 1458 at 438, 441.

<sup>1519</sup> See, e.g., Alvarez, *supra* note 23 at 147; Kraft, *supra* note 1456 at 89–91; Lifton & Markusen, *supra* note 1453 at 106; Lifton, *supra* note 22; Smeulers, *supra* note 22 at 259; Preston, *supra* note 1458 at 438, 441.

<sup>1520</sup> For example, doubling allowed Nazi doctors to “maintain[] a medical identity while killing [patients]”: Lifton & Markusen, *supra* note 1453 at 106.

<sup>1521</sup> Strohlic, *supra* note 102.

<sup>1522</sup> See, e.g., Pype, *supra* note 102 at 264; Vermeij, *supra* note 102 at 74.

<sup>1523</sup> Matthew Guidere, “Al-Qaeda’s Noms de Guerre” (2006) 1:3 Defense Concepts 6 at 7.

risk of crimes against civilians during armed conflict by inhibiting a source of deindividuation, doubling, and displacement of responsibility that contribute to increased violence. This is because it would impede a combatant's ability to create a separate or alternative identity under which they could commit these crimes anonymously without facing the same self-sanction they would otherwise be likely to feel. In addition, much like the effects of dehumanization, the effects of deindividuation, disassociation, and doubling can intensify over time,<sup>1524</sup> which makes it important to capture and prevent the use of nicknames at the earliest point possible. The capture of nicknames upstream is important to prevent the reframing of combatant psyches before this leads to direct violence against civilians.

In addition to decreasing the risk of violence toward civilians, the reasonable restriction of behaviour contributing to violence towards civilians can protect combatants from the significant post-conflict psychological costs associated with harm to civilians and/or prisoners during armed conflict.<sup>1525</sup> This provides additional support for the regulation of the use of nicknames that provide a sense of invincibility and absence of responsibility for both the maintenance of discipline critical for military operations during an armed conflict and for the protection of civilians that is integral to IHL.

Section 8.3.3 demonstrated that nicknames are not currently regulated by IHL. Furthermore, the use of nicknames does not serve an essential military purpose. While nicknames may contribute to the development of unit cohesion and morale,<sup>1526</sup> there are other ways of producing cohesion and morale, such as through team building exercises and team sports.<sup>1527</sup> Additionally, basic military training in itself is considered one of the primary tools for fostering cohesion and bonding among recruits.<sup>1528</sup> Unit cohesion may be an important source of operational

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<sup>1524</sup> On the intensification of the effects of these processes over time see, e.g., Kelman & Hamilton, *supra* note 23 at 19; Diener, *supra* note 1131 at 234–35; Zimbardo, *supra* note 23 at 222–25, 307–10; Zimbardo, *supra* note 1134 at 296–99; Bandura, *supra* note 23 at 203.

<sup>1525</sup> See, e.g., Bruce P Dohrenwend et al, “The Roles of Combat Exposure, Personal Vulnerability, and Involvement in Harm to Civilians or Prisoners in Vietnam-War-Related Posttraumatic Stress Disorder” (2013) 1:3 *Clinical Psychological Science* 223.

<sup>1526</sup> See, e.g., US Military Academy, *supra* note 1490 at 68; Skipper, *supra* note 1491 at 137; Manning, *supra* note 1491 at 4.

<sup>1527</sup> See, e.g., Talent, *supra* note 1497; US Military Academy, *supra* note 1490.

<sup>1528</sup> See, e.g., Robert A Pape & James K Feldman, *Cutting the Fuse: The Explosion of Global Suicide Terrorism and How to Stop It* (Chicago: University of Chicago Press, 2010) at 60; Richard Farnell, “How U.S. Army Basic

effectiveness,<sup>1529</sup> but nicknames are not a necessary component of the production of group cohesion.

Section 8.3.4 demonstrated that international human rights law does not regulate the use of nicknames during armed conflict. That section also demonstrated that the use of names and nicknames can and is legally regulated under different domestic legal systems.<sup>1530</sup> Therefore, although international human rights law does not provide helpful regulation of the use of nicknames during conflict, it also does not inhibit the regulation of nicknames based on the protection of human rights, such as freedom of expression.

In addition to providing protection for civilians under IHL, a new rule regulating the use of nicknames could help improve accountability both at the military justice or internal disciplinary level as well as under international and domestic criminal law and other accountability mechanisms, such as truth commissions. The regulation of nicknames could inherently do this by eliminating, in as much as possible, the likelihood that a combatant's true identity could be unknown to others in an armed group. Nicknames can pose practical difficulties for seeking accountability for IHL violations under various mechanisms.<sup>1531</sup> The use of nicknames can complicate or impede the ability of investigators and prosecutors to identify those responsible for violations and bring them to account for their actions. This is because a combatant's true identity - their legal name - may be well masked by the use of a nickname. This is demonstrated by a victim in the Sierra Leone Civil War, who stated, "I don't know the real names of any of the rebels, only their nicknames."<sup>1532</sup> Also, when many individuals use the same nickname, such as 'Jack Bauer', it may be difficult to link a specific Jack Bauer to the specific violations being

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Training Turns Diverse Groups into Teams", *Harvard Business Review* (18 July 2016), online: <<https://hbr.org/2016/07/how-u-s-army-basic-training-turns-diverse-groups-into-teams>>.

<sup>1529</sup> See, e.g., Grossman, *supra* note 32 at 149; US Military Academy, *supra* note 1490; Murphy & Farley, *supra* note 1495; Baynes, *supra* note 1495.

<sup>1530</sup> See, e.g., note 1508; Andrew-Gee, *supra* note 1511; note 1510; note 1512; *Israel Merolevitz & others, petitioners, supra* note 1512; *Christianson v King County, supra* note 1512; *Nolan v CD Bramall Dealership Ltd t/a Evans Halshaw Motorhouse Worksop, supra* note 1506; *Ruda v Tei, supra* note 1506; *Dove v Brown & Newirth Ltd, supra* note 1506.

<sup>1531</sup> Sierra Leone Truth and Reconciliation Commission, *supra* note 101 at Ch 4, para 239, fn 134; Similarly, the prosecution of combatants by the Special Court for Sierra Leone was complicated by the widespread use of nicknames, for example, the prosecution of AFRC senior officer Alex Tamba Brima who denied that he had ever gone by the nickname "Gullit": *SCSL AFRC Trial Judgment, supra* note 580 at paras 11, 312.

<sup>1532</sup> Baby Seiya, Civilian, Higbie & Moigula, *supra* note 102 at 185.



investigated. This difficulty can be addressed in some cases by issuing arrest warrants and indictments listing all known names and aliases of a suspect. This was frequently done at the Special Court for Sierra Leone.<sup>1533</sup> In spite of this, identity was an issue in some of these cases, such as that of Alex Tamba Brima, who denied having the nickname ‘Gullit’.<sup>1534</sup> It will often be possible to link nicknames to specific individuals when they are well-known, high-level perpetrators and officers; however, it is difficult to do so for lower ranking combatants. This was noted by the Sierra Leone Truth and Reconciliation Commission, which mentioned on more than one occasion the inability to identify an individual’s real name due to the use of nicknames.<sup>1535</sup> Thus, addressing the use of nicknames in IHL could have additional benefits for criminal law and other forms of accountability for perpetrators of crimes against civilians.

*8.3.5.i A New Rule of International Humanitarian Law to Address the Use of Nicknames by Combatants*

A new IHL rule regulating the use of nicknames by combatants needs three components: (1) a requirement that combatants be known by their first name or surname; (2) an exception for diminutive and derivative nicknames; and, (3) a recordkeeping requirement. This section will discuss each of these components in turn.

The first necessary component to the regulation of nicknames under IHL is that the rule should require combatants to be known by either their first name or surname. This would prevent combatants from using nicknames to create a sense of anonymity, doubling, or to diffuse their sense of responsibility for their actions. Consequently, this would prevent combatants from using these psychological mechanisms to reframe their decision-making during conflict.

The second necessary component of an IHL rule regulating the use of nicknames is the inclusion of an exception to the strict requirement of using only first and last names that would allow

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<sup>1533</sup> See, e.g., *Prosecution Memorandum to Accompany Indictment [Johnny Paul Koroma]*, SCSL [*Prosecution Memo [Johnny Paul Koroma]*] at para 1; *Prosecution Memorandum to Accompany Indictment [Sam Bockarie]*, SCSL [*SCSL Prosecution Memo [Sam Bockarie]*] at para 1; *SCSL Prosecution Memo [Alex Tamba Brima]*, *supra* note 102 at para 1; *Prosecution Memorandum to Accompany Indictment [Morris Kallon]*, SCSL [*Prosecution Memo [Morris Kallon]*] at para 1; *Prosecution Memorandum to Accompany Indictment [Santigie Borbor Kanu]*, SCSL [*Prosecution Memo [Santigie Borbor Kanu]*] at para 1.

<sup>1534</sup> *SCSL AFRC Trial Judgment*, *supra* note 581 at paras 11, 312.

<sup>1535</sup> See, e.g., Sierra Leone Truth and Reconciliation Commission, *supra* note 102 at Ch 4, para 239, fn 134; *ibid* at Ch 3, para 73.

combatants to be known by a derivative or diminutive form of either their first name or surname. A rule regulating the use of nicknames must be balanced against the free speech rights of combatants outlined in Section 8.2.4.iii above. Therefore, if a rule were to be developed to regulate the use of nicknames by combatants, it must not be a blanket prohibition and any such rule would need to allow for certain legitimate uses of nicknames. For example, a combatant named Edward Jones could go by Ed, Ted, Eddie, or Jonesy. The preservation of the use of derivative and diminutive nicknames among combatants would maintain a contribution to group cohesion and the fostering of camaraderie. While there is nothing to suggest that a derivative or diminutive nickname does not carry the risk of permitting a combatant to form a separate identity under which they commit violent acts against civilians, the chances of doubling and diffusion of responsibility is lessened due to the link between the combatant's real identity and nickname. In order to balance free speech protections with the IHL's goal of protecting civilians,<sup>1536</sup> only nicknames that can anonymize the combatant or provide for a separate identity unrelated to their real self should be regulated during armed conflict. Non-derivative or non-diminutive nicknames fall into this category, in particular aspirational nicknames that portray the individual as a hero, and violent nicknames that allow a combatant to create a particularly violent separate identity. This was evident in the nicknames used by combatants carrying out severe IHL and IHRL violations in the wars in Sierra Leone and the DRC, as outlined above.

The third component necessary for an IHL rule regulating the use of nicknames by combatants is the requirement that records be kept of all combatants by both first and last name and, if necessary, other identifiers. This would diminish the capacity of combatants to create a separate identity for themselves as well as diminish the likelihood that a combatant's true identity could be unknown to others in an armed group. Ideally this requirement would be fulfilled through the maintenance of a full roster of combatants, but the rule should allow this requirement to be fulfilled through the use of full names in reports recording the activities of the unit.<sup>1537</sup> This

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<sup>1536</sup> See, e.g., *ICTY Kupreskic Trial Judgment*, *supra* note 125 at para 521.

<sup>1537</sup> The maintenance of these kinds of records has long been common practice among Western militaries: see, e.g., The National Archives (United Kingdom), "Unit war diaries", online: *First World War portal* <<http://www.nationalarchives.gov.uk/first-world-war/centenary-unit-war-diaries/>>; US Army Center of Military History, "Master Index of Army Records", online: *US Army Center of Military History* <<https://history.army.mil/reference/records.htm>>; Library and Archives Canada, "War Diaries, Ship Logs and Operations Record Books", (12 September 2014), online: *Library and Archives Canada* <<http://www.bac-lac.gc.ca/eng/discover/military-heritage/Pages/war-diaries-ship-logs-operations-records.aspx>>.

requirement to record the first and last names of combatants would not include a requirement to be able to produce such records in any and all circumstances. Not all armed groups have the resources to record and store this information in a manner that would protect them from damage or destruction during armed conflict.<sup>1538</sup> Nonetheless, the requirement to record the first and last names of combatants would assist military commanders as well as other individuals such as investigators, prosecutors, and truth commissioners, to conduct necessary work to ensure accountability for IHL violations during armed conflicts.<sup>1539</sup>

In sum, this section has identified three key components that a new IHL rule regulating anonymizing combatant nickname use should possess: (1) the requirement that combatants be known by either their first or last name; (2) an exception to the rule that allows for the use of derivative or diminutive forms of first or last names; and (3) the requirement to record the first and last names of combatants. A new regulation on the use of non-derivative and non-diminutive nicknames would balance free speech with the risk of harm posed to civilians by combatants who use such nicknames to free themselves of the moral constraints that normally inhibit their capacity to commit violent acts toward civilians.

#### 8.4 Conclusion

This chapter has drawn on the insights gleaned from theories of techniques of neutralization, moral disengagement, deindividuation, and obedience to authority, in particular it has focused on dehumanization, euphemistic language, deindividuation, anonymity, doubling, and the diffusion of responsibility. These psychological processes have the power to debase civilians in the eyes of combatants<sup>1540</sup> and to alleviate combatants of a sense of responsibility for their violent actions toward civilians.<sup>1541</sup> As a result, processes such as dehumanization and diffusion of responsibility

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<sup>1538</sup> This is the case not only for poorly resourced armed groups in developing countries such as the DRC but also Western Armed Forces. For example, many British war records were lost during German air raids of World War II: see, e.g., National Archives (United Kingdom), “First World War - Service records”, online: *National Archives* <[http://www.nationalarchives.gov.uk/pathways/firstworldwar/service\\_records/sr\\_soldiers.htm](http://www.nationalarchives.gov.uk/pathways/firstworldwar/service_records/sr_soldiers.htm)>.

<sup>1539</sup> For example, extensive records kept by the Nazis during World War II proved to be of immense utility during the Nuremberg Trials: see, e.g., Nuremberg Trials Project, “Nuremberg - Documents”, online: *Nuremberg Trials Project* <<http://nuremberg.law.harvard.edu/documents>>; National Political Radio, “The Last Nuremberg Prosecutor Has 3 Words Of Advice: ‘Law Not War’”, (18 October 2016), online: *NPR.org* <<https://www.npr.org/sections/parallels/2016/10/18/497938049/the-last-nuremberg-prosecutor-has-3-words-of-advice-law-not-war>>.

<sup>1540</sup> See chapter 7 at sections 7.2.1.viii, 7.2.1.xi, 7.2.2.ii, 7.2.2.iv, and 7.2.4.v. See also chapter 8 at section 8.2.1.

<sup>1541</sup> See chapter 7 at sections 7.2.1.i, 7.2.1.xi, 7.2.2.iv, and 7.2.3. See also chapter 8 at section 8.3.1.

have been linked to violence committed against civilians in World War II,<sup>1542</sup> the Vietnam war,<sup>1543</sup> the Rwandan genocide,<sup>1544</sup> and the Iraq war in 2003.<sup>1545</sup> This chapter further identified dehumanization and displacement of responsibility in the contexts of the Sierra Leone civil war and series of conflicts in the DRC. This chapter has discussed the manifestation of dehumanization and displacement of responsibility – as demonstrated in Sierra Leone and the DRC - through two forms of speech commonly used by combatants: (1) demeaning, degrading, or dehumanizing language toward civilians, and (2) non-derivative or non-diminutive nicknames used by combatants. The use of these forms of speech by combatants during armed conflict drives the neutralization of, and disengagement from, social norms that would otherwise inhibit violence toward civilians.<sup>1546</sup> The effects of these forms of speech are particularly insidious and dangerous to civilians and combatants during armed conflict because their effects generally build over time until they result in extreme forms of violence that constitute IHL violations during armed conflict.<sup>1547</sup> The cumulative effect of these acts are extreme violations of IHL protections for civilians such as assault, murder, torture, and outrages upon personal dignity.<sup>1548</sup> This chapter argues that there is a need to address demeaning, degrading, or dehumanizing language toward civilians and non-derivative or non-diminutive nicknames, in particular heroic or violent nicknames, used by combatants before they result in the reframing of combatant conceptions of right and wrong and violent acts toward civilians. In addition to the established link between dehumanization and diffusion of responsibility with respect to violence toward civilians,<sup>1549</sup> this chapter has grounded its argument in (1) the power of law to change behaviours; (2) civilian

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<sup>1542</sup> See, e.g., Alvarez, *supra* note 23 at 160, 166–69; Herf, *supra* note 1124 at 1–16, 209.

<sup>1543</sup> See, e.g., Zimbardo, *supra* note 23 at 307; Grossman, *supra* note 32 at 187, 191; Kelman, *supra* note 1193 at 50.

<sup>1544</sup> See, e.g., Benesch, *supra* note 1047 at 63–64; Temple-Raston, *supra* note 1252 at 29; Gourevitch, *supra* note 1252 at 64, 140–41.

<sup>1545</sup> See, e.g., Zimbardo, *supra* note 23 at 307; Graham, *supra* note 1254 at 5; Decker & Paul, *supra* note 1254 at 327; Mordin, *supra* note 1254.

<sup>1546</sup> See chapter 7 at sections 7.2.1 and 7.2.2.

<sup>1547</sup> On the gradual effects of these behaviours, particularly through moral disengagement, deindividuation, see, e.g., Minor, *supra* note 1008 at 301; Albert Bandura, “Selective Moral Disengagement in the Exercise of Moral Agency” (2002) 31:2 *Journal of Moral Education* 101 at 111; Bandura, *supra* note 23 at 203; Zimbardo, *supra* note 23 at 223, 258, 309; Smeulders, *supra* note 32 at 243, 247; A real life example, the development of state torturers in Greece, is examined in detail in the work of Haritos-Fatouros: Haritos-Fatouros, *supra* note 969.

<sup>1548</sup> As, previously noted, these IHL violations and others have been linked to dehumanization and displacement of responsibility in World War II, the Vietnam War, the Rwandan Genocide, and the 2003 Iraq War: see, e.g., Alvarez, *supra* note 23 at 160, 166–69; Grossman, *supra* note 32 at 187, 191; Gourevitch, *supra* note 1252 at 64, 140–41; Graham, *supra* note 1254 at 5.

<sup>1549</sup> See, e.g., C Haney, W Banks & P Zimbardo, “A study of prisoners and guards in a simulated prison” (1973) 30 *Naval Research Review* 4; Bandura, Underwood & Fromson, *supra* note 167; Bandura et al, *supra* note 1060 at 365; Zimbardo, *supra* note 23.

protection as the foundational concept of IHL; (3) the common use of law to regulate risk, including the centrality of risk regulation for the protection of civilians in existing IHL; and (4) the difference between free speech protection in peace and for civilians as compared to free speech protection in war and for combatants.

Law plays an important role in altering human behaviour.<sup>1550</sup> Behaviours that were once seen as socially acceptable, such as the non-use of seatbelts,<sup>1551</sup> can be drastically changed over time through legal regulation. Education about the reasons for new regulation of previously accepted behaviours or activities can enhance the effectiveness of behavioural change through law.<sup>1552</sup> While some militaries regulate the use of offensive or racist speech,<sup>1553</sup> it remains prevalent in other militaries.<sup>1554</sup> Furthermore, regulation of armed forces under domestic military law not only varies between countries but also its application does not extend to armed groups or any entity outside the national armed forces.<sup>1555</sup> The use of nicknames, on the other hand, is not currently subject to regulation and their harmful effects during armed conflict do not appear to be common knowledge. Clear legal regulation of demeaning, degrading, or dehumanizing language toward civilians during armed conflict as well as nicknames could have a positive effect on preventing or reducing the use of these practices to commit violent acts toward civilians during conflict. Both the use of demeaning, degrading, or dehumanizing language and the use of nicknames must be captured upstream in order to ultimately prevent these behaviours from allowing combatants to alter their psyches in a way that leads to direct violence toward civilians. The prevention of direct violence toward civilians requires that behaviours which make a critical

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<sup>1550</sup> See section 8.1 in this chapter.

<sup>1551</sup> See, e.g., McDermott & Hough, *supra* note 1244; Ontario Ministry of Transportation, *supra* note 1244; Wittlin, *supra* note 1224.

<sup>1552</sup> See, e.g., Sunstein, *supra* note 871 at 2034–35; Nadler, *supra* note 977 at 64.

<sup>1553</sup> See, e.g., *R c Camiré JJN (Caporal-chef)*, *supra* note 1425; *R v Rainville JCB (Master Warrant Officer)*, *supra* note 1385; *R v Dryngiewicz ZA (Corporal)*, *supra* note 1411; *R v Booth BR (Private)*, *supra* note 1379.

<sup>1554</sup> See, e.g., Shannon E French & Anthony I Jack, “Dehumanizing the Enemy: The Intersection of Neuroethics and Military Ethic” in David Whetham & Bradley J Strawser, eds, *Responsibilities to Protect Perspectives in Theory and Practice* (Leiden, NLD: Brill Nijhoff, 2015) at 188–90; Sebastian Junger, “We’re all guilty of dehumanizing the enemy”, (13 January 2012), online: *The Washington Post* <[https://www.washingtonpost.com/opinions/were-all-guilty-of-dehumanizing-the-enemy/2012/01/13/gIQAtRduwP\\_story.html?noredirect=on&utm\\_term=.6699dad88171](https://www.washingtonpost.com/opinions/were-all-guilty-of-dehumanizing-the-enemy/2012/01/13/gIQAtRduwP_story.html?noredirect=on&utm_term=.6699dad88171)>; Lt Col Peter Fromm, Lt Col Douglas Pryer & Ly Col Kevin Cutright, “The Myths We Soldiers Tell Ourselves (and the Harm These Myths Do)” (2013) *Military Review* 57.

<sup>1555</sup> See, e.g., Georg Nolte & Heike Krieger, “Comparison of European Military Law Systems” in Georg Nolte, ed, *European Military Law Systems* (Berlin: De Gruyter Recht, 2003) at 130–75; Eugene R Fidell, “A World-Wide Perspective on Change in Military Justice” (2000) 48 *Armed Forces Law Review* 195.

alteration to combatant decision-making are inhibited before they can begin to change combatants from ordinary individuals into law-breaking combatants.

As well, the argument for IHL regulation of demeaning, degrading, or dehumanizing language directed toward civilians and of non-derivative or non-diminutive nicknames used during conflict finds support in the foundational aims of IHL. Civilian protection during war is the “bedrock of modern humanitarian law.”<sup>1556</sup> Protection of civilians from harm and the adverse consequences and impacts of armed conflict not only undergirds existing IHL, it drives the ongoing development of this body of law.<sup>1557</sup> Consequently, civilian protection provides a strong impetus for further IHL regulations of behaviours that endanger civilians during armed conflict.

Admittedly, the forms of speech discussed in this chapter – demeaning, degrading, or dehumanizing language and nicknames – do not directly inflict physical harm on civilians. Rather, these forms of speech create an increased risk of violence directed toward civilians during an armed conflict. The regulation of risk through law is not uncommon; in fact, it is often an important function of governments, both in practice and in the public perception of the duty of governments to manage certain risks in society.<sup>1558</sup> While there is no global government, the international community of states creates law through treaties and through their practice and *opinio juris*.<sup>1559</sup> States also frequently use international law to regulate risk.<sup>1560</sup> The management of risk is a central component of IHL, which seeks to limit the risks of war to civilians, including military operations and combatant actions. Risk regulation is a common function of law

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<sup>1556</sup> *ICTY Kupreskic Trial Judgment*, *supra* note 125 at para 521.

<sup>1557</sup> For example, the successful campaigns for treaties to ban the use of anti-personnel landmines and cluster munitions have been driven by the desire to increase protection for civilians during armed conflict: see, e.g., Ramesh Thakur & William Maley, “The Ottawa Convention on Landmines: A Landmark Humanitarian Treaty in Arms Control?” (1999) 5:3 *Global Governance* 273 at 296–97; John Borrie & Maya Brehm, “Enhancing civilian protection from use of explosive weapons in populated areas: building a policy and research agenda” (2011) 93:883 *International Review of the Red Cross* 809; Pascal Bongard, “Engaging armed non-state actors on humanitarian norms: reflections on Geneva Call’s experience”, *Humanitarian Exchange Magazine* (2017).

<sup>1558</sup> See, e.g., David Garland, “The Rise of Risk” in Richard V Ericson & Aaron Doyle, eds, *Risk and Morality* (Toronto: Toronto University Press, 2003) 117 at 59–62; Violaine Roussel, “New Moralities of Risk and Political Responsibility” in Richard V Ericson & Aaron Doyle, eds, *Risk and Morality* (Toronto: University of Toronto Press, 2003) 117 at 118–19; Reza Lahidji, *Summary of Discussion on Risk and Regulation at the Meeting of the Group on Regulatory Policy, 1-2 December 2008* (OECD, 2008) at 7.

<sup>1559</sup> See, e.g., Hugh Thirlway, “The Sources of International Law” in Malcolm Evans, ed, *International Law*, 3d ed (Oxford: Oxford University Press, 2010) 95.

<sup>1560</sup> For example, the risks of nuclear weapons possession or the risks of hazardous waste disposal: *Nuclear Non-Proliferation Treaty*, *supra* note 1235; *Basel Convention*, *supra* note 1236.

generally and an integral component of IHL. Thus, I argued that the use of IHL to regulate the increased risk of violence posed to civilians by combatant use of demeaning, degrading, or dehumanizing language and nicknames during armed conflict is not only consistent with the aims of IHL, but it is also consistent with the manner in which law is used to protect civilians through risk management.

There is a recognized difference between protections afforded to the free speech rights of civilians and during peace as compared to those of combatants and during war. This chapter demonstrated how both national and regional courts of countries with very strong protections for free speech recognize that free speech restrictions which exceed those legally permissible for civilians in peace are often legal within armed forces.<sup>1561</sup> Combatants retain some free speech rights, but they differ from those accorded to civilians.<sup>1562</sup> One of the primary legal justifications for limitations on the free speech of combatants is the need to maintain discipline within armed forces and armed groups.<sup>1563</sup> Internal discipline is one of the primary mechanisms for ensuring internal compliance with IHL. The erosion of fidelity to the laws of war through the use of demeaning, degrading, or dehumanizing language directed toward civilians and non-derivative or non-diminutive nicknames by combatants is both inimical to the aims of IHL to protect and manage risk to civilians during conflict as well as to the discipline essential for the functioning of armed forces and armed groups.

There is a need for new IHL rules to inhibit the use of dehumanization, euphemistic language, anonymity, doubling, and diffusion of responsibility by combatants that allows them to reframe

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<sup>1561</sup> See, e.g., *Parker v Levy*, *supra* note 1379 at 758; *United States v Howe*, *supra* note 1379; *United States v Brown*, *supra* note 1379 at 397; *Grigoriades v Greece*, *supra* note 1379 at para 45; *Kazakov v Russia*, *supra* note 1379 at para 27; *Jokas v Lithuania*, *supra* note 1379 at para 70; *Konstantin Markin v Russia*, *supra* note 1379 at para 135; *Kalaç v Turkey*, *Judgment, Merits*, *supra* note 1379 at para 28; *R v Booth BR (Private)*, *supra* note 1379; *R. v Sharpe*, *supra* note 1372 at para 22; *Ross v New Brunswick School District No 15*, *supra* note 1372.

<sup>1562</sup> See, e.g., *Grigoriades v Greece*, *supra* note 1379 at para 45; *Kazakov v Russia*, *supra* note 1379 at para 27; *Jokas v Lithuania*, *supra* note 1379 at para 70; *United States v Wilson*, *supra* note 1380 at 799; *Parker v Levy*, *supra* note 1379 at 758.

<sup>1563</sup> See, e.g., *Goldman v Weinberger*, *supra* note 1385 at 507; *Chappell v Wallace*, *supra* note 1385 at 300; *Parker v Levy*, *supra* note 1379 at 744; *Grigoriades v Greece*, *supra* note 1379 at para 45; *Kazakov v Russia*, *supra* note 1379 at para 27; *Jokas v Lithuania*, *supra* note 1379 at para 70; *R v Mader GG (Corporal)*, *supra* note 1385 at para 2; *R v Rainville JCB (Master Warrant Officer)*, *supra* note 1385 at para 23; *R v Alcime OJ (Bombardier)*, *supra* note 1385 at para 3; *R v Menard JP (Ex-Corporal)*, *supra* note 1385 at para 3-4; *R v Moriarity*, *supra* note 1385; See also *Hirschhorn*, *supra* note 1385 at 246; *Fitzkee*, *supra* note 1385 at 61.

their conceptions of right and wrong, which can lead to violence toward civilians during conflict. Section 8.2 of this chapter argued for a new rule to address the use of demeaning, degrading, or dehumanizing language by combatants. Dehumanizing and euphemistic language could be captured, in theory, by existing IHL rules prohibiting inhumane treatment, in particular the prohibition on humiliating and degrading treatment. However, the lack of evidence that these forms of speech toward civilians during armed conflict is considered prohibited,<sup>1564</sup> in particular from the International Committee of the Red Cross, is highly suggestive that no such legal protection currently exists under IHL. Existing national laws governing hate speech are insufficient in the specific context of armed conflict and with regard to the specific harm posed to civilians by the combatant use of dehumanizing and euphemistic language. Further, because the limitations on the restriction of free speech in peacetime do not apply in the same way during war or to combatants,<sup>1565</sup> speech regulation that is more restrictive than that permitted in the peacetime context of hate speech is possible during armed conflict.

A new IHL rule to regulate the use of demeaning degrading, or dehumanizing language by combatants requires five components. First, the rule should have an inclusive definition of ‘demeaning, degrading, or dehumanizing language’ that includes forms of speech that serve to debase civilians, such as language which casts civilians as a threat, as inferior, or as not worthy of respect or protection. Second, the rule should include the use of euphemistic language that has the effect of demeaning, degrading, or dehumanizing civilians. Third, the rule should extend to prohibit the use of the term ‘enemy’ to refer to a civilian or the civilian population. Fourth, the level of intent for the new offence of using demeaning, degrading, or dehumanizing language should be an intent to demean, degrade or dehumanize a civilian or the civilian population. Finally, the new rule should require that the demeaning, degrading, or dehumanizing language used by a combatant have the effect of debasing a civilian or the civilian population in the eyes of the audience based on a standard of reasonableness. Together, these five components provide a rule that will inhibit demeaning, degrading, and dehumanizing speech from serving to reframe

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<sup>1564</sup> Although the international crimes of incitement to genocide and persecution as a crime against humanity can capture the most extreme forms of hate speech during conflicts, there is no clear regulation under IHL instruments.

<sup>1565</sup> See, e.g., *Parker v Levy*, *supra* note 1379 at 758; *United States v Howe*, *supra* note 1379; *United States v Brown*, *supra* note 1379 at 397; *Grigoriades v Greece*, *supra* note 1379 at para 45; *Kazakov v Russia*, *supra* note 1379 at para 27; *Jokas v Lithuania*, *supra* note 1379 at para 70; *Konstantin Markin v Russia*, *supra* note 1379 at para 135; *Kalaç v Turkey*, *Judgment, Merits*, *supra* note 1379 at para 28; *R v Booth BR (Private)*, *supra* note 1379.



conceptions of right and wrong in the minds of both speaker and audience. This will inhibit the ability of dehumanization and euphemistic language to contribute to the perpetration of violence toward civilians.

Section 8.3 of the chapter argued that a new IHL rule regulating the use of nicknames by combatants is needed. A new rule regulating the use of nicknames is required in order to impede the ability of nicknames to produce a sense of anonymity, a separate combatant identity, and the diffusion of responsibility in a combatant that can contribute to the perpetration of violence toward civilians. In particular, heroic or violent nicknames have been linked to combatants' losing their fear, remorse, and a sense of accountability. Civilian protection warrants regulation of the risk of combatant violence posed by nicknames. Nicknames are not regulated under existing IHL, nor do they serve an essential military function. The human right to freedom of expression does not prevent the regulation of names and nicknames during peace and greater regulation of forms of expression is permitted during armed conflict and with regards to combatants. Therefore, international human rights law does not bar the regulation of nicknames. Further, regulation of risk is a key aspect of IHL and the power of law to change common or socially accepted behaviours, such as seatbelt use, militate in favour of the regulation of nickname use by combatants to alter current practices and minimize existing risks.

A new IHL rule regulating the use of nicknames requires three components. First, the rule should require combatants to be known by either their first or last name. Second, the rule should provide an exception for the use of derivative or diminutive nicknames based on a combatant's first or last name. This exception is intended to balance the risk of harm that stems from anonymity and/or the creation of a separate combatant identity with the free speech rights of combatants. The risk of anonymity or the creation of a separate combatant identity is less likely to occur when a combatant uses a derivative or diminutive form of their own name as compared to a non-derivative or non-diminutive nickname, particularly heroic or violent nicknames. Third, the rule should require a record to be kept of combatants' first and last names, such as recording this information in unit reports, in order to decrease likelihood of combatant anonymity and increase the likelihood of combatant accountability. Together, these components of a new rule regulating

the use of nicknames would inhibit the ability for nicknames to produce anonymity, doubling, and diffusion of responsibility that can contribute to the perpetration of violence toward civilians.

Together, the two recommendations in this chapter demonstrate how theories that examine factors that can contribute to violence toward civilians can be applied to NIACs in order to identify behaviours that pose a risk to civilians but are not regulated under existing IHL. These recommendations demonstrate how behaviours that may be harmless, relatively harmless, or subject to limited regulation in peacetime, may pose an increased risk of harm to civilians during armed conflict and, consequently, warrant IHL regulation. Law may be used to limit the risks to civilians posed by behaviours such as the use of demeaning, degrading, or dehumanizing language and the use of non-derivative and non-diminutive nicknames. These laws can serve to inhibit psychological processes contributing to violence toward civilians.

## Chapter 9

### 9 Conclusion

This thesis has discussed the protection of civilians during NIACs with an emphasis on violations of IHL by members of non-state armed groups directed against civilians. In the many NIACs over the last three decades, civilians have been subjected to widespread violence at the hands of combatants in direct contravention of IHL.<sup>1566</sup> Studies have demonstrated that the perpetration of this violence cannot be attributed to psychological deficiencies on the part of the perpetrators: “the perpetrators are ordinary people within extraordinary circumstances.”<sup>1567</sup>

I began my research wondering how law-abiding citizens during peace become law-breaking combatants during armed conflict. This question was only reinforced in my mind by conversations I had with many kind and friendly people I met in Sierra Leone and the DRC and who I came to learn had been members of armed groups that violently attacked civilians during conflicts in both of these countries. I, as well as this thesis, have been driven by the premise that in order to prevent crime it is necessary to understand crime. Through this thesis, I have begun the process of considering how combatant psychology can help to develop conflict-specific ways of improving civilian protection, rather than relying on the same regulation of specific behaviours for civilian protection in conflict as are used to protect individuals in peacetime.

This closing chapter restates the research problem and summarizes the approach, findings, and recommendations advanced in the thesis. It will also address some limitations of the work and propose areas for further research.

This thesis advanced the claim that there is gap between the regulation of behaviour for the protection of individuals in peace and the regulations needed to protect civilians from combatant

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<sup>1566</sup> Examples of NIACs in which civilians have been victims of widespread IHL abuses include the Democratic Republic of Congo (1996-ongoing), Rwanda (1990-1994), Sierra Leone (1991-2002), South Sudan (2013-ongoing), Sudan (2003-2013), Syria (2011-ongoing), Yemen (2015-ongoing), and the Former Yugoslavia (1991-1999).

<sup>1567</sup> Smeulers, *supra* note 22 at 234.

violence during war. Social psychology and criminology theories can help to develop the necessary conflict-specific behavioural regulations because they explain how combatant deviance is adversely affected by psychological processes that reframe combatants' conceptions of right and wrong and, in so doing, fundamentally alter the way in which combatants view the IHL rules intended to protect civilians.

War is an exceptional context with different legal demands than peace. In war, there is no blanket prohibition against killing and no blanket prohibition that protects individuals from being killed. Frequent incidences of violence toward civilians committed by members of armed groups exist. Efforts to improve civilian protection in NIACs requires addressing the IHL violations committed by these combatants. The binding obligations of IHL on armed groups and their members exist regardless of whether an armed group consents to be bound by these rules. Armed groups and their members are bound by current IHL by virtue of both the ability of states to assume legal obligations on behalf of their citizens and by the limited international legal personality bestowed on armed groups based on Common Article 3 and Additional Protocol II. Consequently, armed groups would likely be affected by the new IHL regulations proposed in this thesis. Although international human rights law applies during armed conflict, only a limited number of armed groups that act as *de facto* authorities on a territory will have legal international human rights obligations. IHL protections for civilians are very important tools for governing combatant behaviour, but the specific prohibited acts for civilian protection (e.g., murder, violence to physical integrity, torture and rape) are acts that are equally prohibited in most countries during peace. Similarly, while the existence of widespread IHL violations directed toward civilians in Sierra Leone and the DRC - the case studies employed in this thesis - indicates ongoing threats to civilian protection in spite of existing IHL protections, knowledge of these violations alone does not necessarily provide any insight into the combatant psychology leading to violence toward civilians.

There are three attempts in legal theory to draw on human behaviour to explain compliance or deviance: Law and Economics theory, Behavioural Law and Economics theory, and Socialization and International Law theory. These three theories fall short of providing the depth and nuance necessary to understand and explain combatant violence toward civilians during

armed conflict. I turned to theories of social psychology and criminology not because I believe legal theory to be an inferior discipline but because I believe it is unrealistic to expect one discipline to possess all of the answers to all of the problems in a complex and multi-dimensional world. Specific theories to explain how ordinary individuals come to commit violations of IHL exist in the disciplines of social psychology and criminology. Further, social psychologists and criminologists have scientifically demonstrated a link between specific behaviours, such as dehumanization or anonymity, and the expression of aggression and violence. Within this body of literature, I identified four dominant theories that were repeatedly relied on by different scholars: techniques of neutralization, moral disengagement, deindividuation, and obedience to authority. Within these four theories, I identified two dominant themes: (1) the dehumanization of civilians through the use of dehumanizing or euphemistic language and (2) the diffusion of responsibility through deindividuation, anonymity, and doubling. Dehumanization poses a risk to civilians because it debases civilians in the eyes of the speaker and their audience and the assumption that that the dehumanized civilian does not need to be accorded the same humane treatment as other humans. Diffusion responsibility produced through deindividuation, anonymity, and doubling poses a risk to civilians because it allows combatants to psychologically abdicate personal responsibility for their violent actions.

I have argued that, guided by criminological and social psychological insights, specifically the effects of dehumanization and diffusion or displacement of responsibility, there are behaviours which, although legal during peace, should be regulated during war due to the risk they pose to civilians. I argued that the use of demeaning, degrading, or dehumanizing speech, although necessarily protected for civilians and during peace due to the fundamental human right to free speech and expression, should be regulated during armed conflict when used by combatants toward a civilian or the civilian population. While existing IHL could potentially capture these forms of speech as inhumane treatment, the absence of evidence that demeaning, degrading, or dehumanizing speech directed toward civilians is currently considered illegal indicates that a clear regulation of these forms of speech may be necessary in order to change how these forms of speech are currently viewed and treated. I have argued that hate speech as criminalized in some national jurisdictions fails to fully capture the harms that stem from the demeaning, degrading, or dehumanizing language itself and an intent to demean, degrade, or dehumanize

rather than from a feeling of hatred and a desire to provoke violence. Consequently, I have proposed IHL regulation of demeaning, degrading, or dehumanizing speech by combatants directed toward civilians during armed conflicts where the speaker intended to demean, degrade, or dehumanize and where a reasonable person would view the speech as debasing a civilian or the civilian population. Such a regulation would inhibit the ability of dehumanization to contribute to violence toward civilians.

The second recommendation I have made is for the IHL regulation of the use of heroic or violent nicknames, as these nicknames provide combatants with a sense of anonymity and a separate identity on which to place responsibility for harms committed against civilians. While uniforms also contribute to deindividuation, they are necessary during armed conflict in order to facilitate the application of the principle of distinction, which protects civilians by requiring combatants to distinguish between enemy combatants and civilians. The use of nicknames is also a form of free speech or expression that receives significant protection under human rights law during peacetime in many national jurisdictions. However, I argued that the risk posed by the use of nicknames, particularly heroic or violent nicknames, during armed conflict warrants regulation for the protection of civilians. Ultimately, through the examples of demeaning, degrading, or dehumanizing language and heroic or violent nicknames as seen in both historic contexts of violence toward civilians (e.g., World War II, Vietnam, Rwanda and Iraq) and in the case study conflicts of Sierra Leone and the DRC, I have demonstrated that there are specific behaviours which, in an armed conflict situation, pose a risk to civilians and, consequently, require regulation under IHL.

Although there may seem to be a problematic internal tension in the advocacy of new IHL laws as a means of addressing non-compliance with existing laws, I have demonstrated that there is a critical difference between the way individuals think, act, and make decisions before the use of psychological processes, such as dehumanization or displacement of responsibility, and after. In order to prevent direct acts of violence against civilians downstream, new IHL rules addressing the psychological processes that contribute to these acts of violence must be enacted upstream as a preventative measure. Failure to intervene prior to the perpetration of direct acts of violence against civilians allows a psychological obstacle to compliance to develop in the psyches of

combatants. This is why it is important to capture both the use of demeaning, degrading, or dehumanizing language and the use of nicknames at the earliest point possible in order to prevent the alterations to combatant psyches that lead to direct violence. Enforcement will only be optimally effective when the right laws exist. I have argued that the right laws for civilian protection must address the psychology of combatant violence toward civilians and, in particular, the use of demeaning, degrading, or dehumanizing language and the use of nicknames. It is in removing these obstacles to compliance that meaningful progress may be made in the prevention of direct harm toward civilians in armed conflict.

Chapter 1 introduced key constructs and concepts central to the thesis as well as established the scope of the thesis. First, the primary focus of this thesis has been IHL, drawing where necessary or relevant from international criminal law, international human rights law, and domestic military justice systems. The chapter distinguished between IHL and international criminal law, bodies of law which, due to many areas of overlap, are often conflated. Within the field of IHL, the focus was identified as non-state armed groups in the context of NIACs. The research was situated within the existing literature which has largely focused on engagement with armed groups on issues of compliance and education based on existing IHL. This thesis contributes to existing IHL literature in four important ways: (1) by introducing an in-depth examination of combatant psychology into the IHL literature; (2) by identifying a gap within current IHL regulation and literature on the protection of civilians; (3) by demonstrating that there are ways that IHL protection for civilians can and should be substantively developed; and, (4) by developing and recommending new IHL regulations to address the use of demeaning, degrading, or dehumanizing language by combatants during conflict as well as the use of non-diminutive and non-derivative nicknames by combatants during war.

Other scholars have begun to apply social psychology and socio-legal approaches to international criminal law.<sup>1568</sup> For example, Smeulers has recently used social psychology, including cognitive dissonance and crimes of obedience, to discuss the defence of superior orders codified in Article 33(1) of the Statute of the International Criminal and the reasons why this defence, currently

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<sup>1568</sup> See, e.g., Smeulers, *supra* note 84; Aksenova, *supra* note 969; Harrendorf, *supra* note 1043; Harrendorf, *supra* note 84.

only available with regards to war crimes, should possibly be extended to crimes against humanity and genocide.<sup>1569</sup> Other scholars have applied socio-legal approaches and social psychology to examine international criminal law issues of individual responsibility,<sup>1570</sup> to discuss the role of the Malabo Protocol to make changes to the African Court of Justice and Human Rights,<sup>1571</sup> and to explore the differences in the application of international and national criminal law.<sup>1572</sup> These scholars are demonstrating the value of using social psychology and criminology to think about law, specifically international criminal law. This thesis is the first work to demonstrate how an approach based on social psychology and criminology can be used in the substantive development of IHL.

Chapter 2 set out the methodological approach of this thesis. This thesis uses primarily legal doctrinal methodology, which relies on the authoritative texts of international law – treaties, custom, general principles, case law, and scholarly literature – to develop normatively persuasive arguments that are grounded in the realities of the international legal system. This thesis has relied heavily on interpretation; however, in doing so it drew on research from the social sciences as supporting evidence. The thesis also used qualitative case study analysis based on conflicts in Sierra Leone and the DRC to demonstrate the current status quo of IHL in practice and to find evidence in practice of the behaviours identified within the social psychological and criminological theories and studies employed in the thesis. Chapter 2 provided details on the research and data collection conducted for both of these case studies. Though this thesis drew on work from the social sciences and included the use of case studies, it remained motivated by the “normative perspective of ‘the law’.”<sup>1573</sup>

Chapter 3 focused on identifying the legal actors whose behaviour was the subject of focus in the thesis: armed groups and their members. This chapter clarified the legal concept of ‘armed

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<sup>1569</sup> The defence of superior orders under the ICC statute is currently prevented in the case of crimes against humanity and genocide (Article 33[2]). Smeulers, *supra* note 83; *Rome Statute*, *supra* note 51.

<sup>1570</sup> Carlson, *supra* note 84; Houge, *supra* note 84; Harrendorf, *supra* note 84.

<sup>1571</sup> van Sliedregt, *supra* note 84.

<sup>1572</sup> Gawronski, *supra* note 84; Barbara Hola & Amani Chibashimba, “Punishment in Transition: Empirical Comparison of Post-Genocide Sentencing Practices in Rwandan Domestic Courts and the ICTR” in Marina Aksenova, Elies van Sliedregt & Stephen Parmentier, eds, *Breaking the Cycle of Mass Atrocities: Criminological and Socio-Legal Approaches in International Criminal Law* (Oxford: Hart, 2019) 137.

<sup>1573</sup> Kool, Emaus & van Uhm, *supra* note 134 at 79.



group' and demonstrated that both armed groups and their members are bound by existing IHL. It argued that the binding obligations of IHL on armed groups and their members exist regardless of whether an armed group consents to be bound by these rules and questions of compliance should not be conflated with questions of the binding quality of law. Armed groups and their members are bound by current IHL by virtue of both the ability of states to assume legal obligations on behalf of their citizens and by the limited international legal personality bestowed on armed groups based on Common Article 3 and Additional Protocol II. Consequently, armed groups would likely be affected by the new IHL regulations proposed in this thesis. However, although IHL applies to all armed groups, this chapter argued that international human rights law only creates binding obligations for a limited number of armed groups that act as *de facto* authorities on a territory will have legal international human rights obligations. The chapter concluded that, because armed groups are bound by IHL, and in some cases by international human rights law, this means that the application of new IHL regulations, such as those developed in chapter 8, would be likely to affect armed groups.

Chapter 4 discussed the rules and principles to which organized armed groups are subject in NIACs for the protection of civilians. First, it discussed the concept of humanity that is the driving force undergirding much of IHL, in particular its core treaties: the four Geneva Conventions of 1949 and their two Additional Protocols in 1977. It argued that the humanitarian goals of IHL warrant ongoing consideration of civilian protection and ways civilians might be better protected during armed conflict. It then turned to more specific rules of IHL for the protection of civilians, such as the principles of distinction proportionality, and precaution. Combatants are required to distinguish between combatants and civilians as well as military objectives and civilian objects and it is prohibited to directly target civilians or civilian objects. However, they may be indirectly injured or killed in an attack on a legitimate target if that attack's anticipated military advantage is proportional to the incidental civilian damage that will be caused by it. Further, IHL protects civilians from inhuman treatment in all circumstances. Inhuman treatment is not exhaustively defined in IHL, but examples of acts that are inhuman treatment as explicitly prohibited are provided: for example, violence to life, torture and cruel treatment, humiliating and degrading treatment, and pillage. However, this chapter observed that there is little to no difference between these specific prohibited acts for the protection of civilians

during armed conflict and peacetime legal protections for individuals. It suggested that the unique context of armed conflict in which some people may legally kill and be killed may demand regulation of behaviours that, in peace, would be legal but in war pose a threat to the safety of civilians.

Chapter 5 demonstrated the prevalence of IHL violations of civilian protections in practice through the case studies of Sierra Leone and the DRC. The chapter provided some brief background information on the case study conflicts: Sierra Leone's civil war and the many conflicts in the DRC since the mid 1990s. This chapter focused on the types of IHL violations committed against civilians in both Sierra Leone and the DRC. The existence of ongoing violations demonstrates the possible need for greater regulation of combatants during armed conflict. This chapter argued that, while the existence of widespread IHL violations toward civilians in Sierra Leone and the DRC demonstrate the persistence of threats to civilian protection in spite of existing IHL rules, knowledge of these violations alone does not necessarily provide any insight into the combatant psychology leading to violence toward civilians. Consequently, it is necessary to look beyond mere awareness of the existence of IHL violations to understand how law-abiding civilians become law-breaking combatants who commit acts of violence against civilians.

Chapter 6 examined whether behavioural models developed in the legal theories of Law and Economics, Behavioural Law and Economics, and Socialization and International Law provide an adequate understanding of human behaviour to explain the perpetration of violence by combatants during armed conflict. It argued that Law and Economics theory provides an inadequate behavioural model due to its flawed assumptions about human rationality, self-interest, preferences and goals. Behavioural Law and Economics theory has advanced a behavioural model that addresses many of Law and Economics' flawed assumptions; however, this chapter argued that Behavioural Law and Economics also falls short of providing an adequately nuanced model of human behaviour because as it aims for the broadest application possible it focuses solely on a limited number of aspects of human psychology in ordinary, day-to-day life. Consequently, it fails to appreciate that unique context of war and how this context affects combatant psychology. Finally, this chapter examined Socialization and International

Law theory, which draws upon some theories from the social and behavioural sciences to understand how law influences states. It argued that Socialization and International Law theory is inadequate for understanding combatant perpetration of violence for one important reason: the theory provides a very limited look at one psychological process affecting compliance, acculturation, and leaving open whether there are other theories of explanations that might be useful to explain individual behaviour.

Chapter 7 turned to theories of social psychology and criminology and highlighted the fact that the perpetration of violence toward civilians cannot be dismissed as psychological deficiencies. These perpetrators were law-abiding civilians in peacetime who become law-breaking combatants during armed conflict. The chapter identified four theories that have been repeatedly used by scholars to explain how ordinary individuals come to commit violent acts against civilians during conflict: (1) techniques of neutralization; (2) moral disengagement; (3) deindividuation; and, (4) obedience to authority. These theories demonstrate that individuals are not inherently disposed to commit violent acts against civilians. Rather, certain patterns of thought can inhibit self-regulation and allow individuals to neutralize or disengage their so-called moral compass, thereby facilitating their participation in IHL violations. These patterns of thought may take the form of justifications, denial or displacement of responsibility, or blaming the victim. The theory of deindividuation demonstrates that submergence in a group and anonymity can produce disinhibited behaviour, in part because it also provides a means of displacing individual responsibility onto the group. Finally, obedience to authority demonstrates that individuals are more inclined to commit violent acts under orders or authorization from a legitimate authority, even where the orders themselves may not be legitimate. Through discussion of these four theories, this chapter identified two dominant processes contributing to violence toward civilians: (1) dehumanization and (2) diffusion of responsibility.

Chapter 8 identified the use of the psychological processes of dehumanization and diffusion of responsibility in combatant behaviour in Sierra Leone and the DRC: the use of demeaning, degrading, or dehumanizing language and the use of nicknames. Both of these behaviours serve to alter the minds of combatants and create an obstacle to compliance with IHL rules prohibiting direct violence against civilians. Further, the effects of both of these behaviours which lead to

direct violence against civilians intensify over time. It is necessary to capture these behaviours upstream at the earliest point possible in order to prevent the creation of this obstacle to compliance. This chapter recommended two new IHL rules to regulate the use of these behaviours by combatants. The chapter began by positing that law has the power to change risky or dangerous behaviours, such as those examined in chapter 8, even where these behaviours were previously socially acceptable or tolerated. Furthermore, risk regulation is an inherent component of IHL, which seeks to regulate and limit risks to civilians during armed conflict. It argued that, at minimum, where a risky behaviour is identified during armed conflict, it is worth considering whether it may be possible to legally regulate that risky behaviour for the protection of civilians. Part two of the chapter argued the need for IHL regulation of the use of demeaning, degrading, or dehumanizing language by combatants. It reiterated the risks associated with the dehumanization of civilians, in particular, the reframing of combatant perceptions of right and wrong contributing to violence toward civilians. It provided examples from Sierra Leone and the DRC of combatant use of demeaning, degrading, or dehumanizing language. It argued that the use of demeaning, degrading, or dehumanizing speech, although necessarily protected for civilians and during peace due to the fundamental human right to free speech and expression, should be regulated during armed conflict when used by combatants toward a civilian or the civilian population. While existing IHL could potentially capture these forms of speech as inhumane treatment, the absence of evidence that demeaning, degrading, or dehumanizing speech toward civilians is currently considered illegal indicates that a clear regulation of these forms of speech may be necessary in order to change how these forms of speech are currently viewed and treated. Limitations placed on the ability of states to regulate free speech in peacetime do not apply in the same manner during war or to combatants. Consequently, international human rights law does not prevent the regulation of demeaning, degrading, or dehumanizing speech during conflict. It argued that a new IHL rule regulating the use of these forms of speech should include five components: (1) an inclusive definition of ‘demeaning, degrading, or dehumanizing language’; (2) a restriction on the use of euphemistic language that demeans, degrades, or dehumanizes; (3) a restriction on the use of the term ‘enemy’ to refer to a civilian or the civilian population; (4) a requirement of an intent to demean, degrade, or dehumanize on the part of the speaker; and, (5) a requirement that the speech have the effect,

based on a standard of reasonableness, of demeaning, degrading, or dehumanizing a civilian or the civilian population in the mind of the listener.

The third part of chapter 8 examined the deindividuation of combatants and the production of a sense of anonymity, doubling, and diffusion of responsibility among combatants. It argued that, while the use of uniforms can contribute to deindividuation, uniforms are an inherent necessity during armed conflict in order to facilitate the application of the principle of distinction which protects civilians by requiring combatants to distinguish between enemy combatants and civilians. The chapter focused on the widespread use of nicknames by combatants which can contribute to a sense of anonymity, facilitate the diffusion of responsibility and permit combatants to create a separate identity under which they commit violent acts. It argued that the use of nicknames is appropriate for regulation as their use is neither a military necessity nor an existing means of aiding in the protection of civilians. Further, due largely to the seemingly innocuous nature of nicknames, neither IHL nor international human rights law currently regulate the use of nicknames. The use of nicknames is, however, a form of free speech or expression that receives near absolute protection under human rights law in many national jurisdictions. The unique risk anonymizing heroic or violent nicknames pose to civilians during armed conflict warrants regulation of these forms of nicknames, since they provide combatants with a feeling of invincibility contributing to increased violence and aggression. Finally, this chapter recommended that a new rule regulating the use of nicknames by combatants should include three components: (1) the requirement that combatants be known by their first or last name; (2) an exception to this requirement for the use of derivative or diminutive nicknames based on a combatant's first or last name; and, (3) a requirement to record the full name of combatants.

Ultimately, through the examples of demeaning, degrading, or dehumanizing language and heroic or violent nicknames as seen in both historic contexts of violence toward civilians (e.g., World War II, Vietnam, Rwanda and Iraq) and in the case study conflicts of Sierra Leone and the DRC, this chapter demonstrated the potential to use combatant psychology in the ongoing development of IHL. Combatant psychology provides not only a means of identifying combatant behaviours that pose a particular risk to civilians during armed conflict, it also offers a guide for developing new substantive rules to inhibit behaviours contributing to violence toward civilians

during armed conflicts. The regulation of demeaning, degrading, or dehumanizing language toward civilians and the use of non-derivative or non-diminutive nicknames by combatants provides a means of contributing to IHL's aim of civilian protection. Further research and fieldwork may identify additional combatant behaviours that could be addressed to manage risks to civilians during armed conflict. Combatant psychology can help people to understand some of the causes of violence directed toward civilians during armed conflict and, through this understanding, it is possible to begin to imagine new ways to prevent harm to civilians during war.

As noted at the outset of this chapter, this thesis was driven by the premise that, in order to prevent crime, it is necessary to understand crime. I have argued that the theories of techniques of neutralization, moral disengagement, deindividuation, and obedience to authority can provide a significantly deepened understanding of the context of IHL abuses directed against civilians during armed conflict. In turn, the understanding of how dehumanization and displacement of responsibility contribute to violence against civilians has led me to identify the problematic usage of demeaning, degrading, or dehumanizing language as well as non-derivative or non-diminutive nicknames in the case studies of Sierra Leone and the DRC. I have used this knowledge to propose two new IHL regulations to prevent the ability of these behaviours to lead to IHL violations of civilian protections. The inhibition of the dehumanization of civilians through a prohibition on demeaning, degrading, or dehumanizing speech will reduce risks of violence directed toward civilians during conflict by inhibiting the reframing of combatant perceptions of right and wrong that contributes to this violence. The inhibition of deindividuation, doubling, and the abdication of personal accountability for one's actions through the regulation of non-derivative or non-diminutive nicknames will similarly reduce risks of violence directed toward civilians during conflict by inhibiting the reframing of combatant perceptions of right and wrong that contributes to this violence. Unfortunately, the inhibition of these behaviours will not eradicate the problem of IHL abuses of civilians entirely because the complex realities of armed conflict make it impossible to reduce all IHL violations to two psychological causes. However, I intend for the two regulations I have proposed to serve as a starting point from which combatant psychology can be used to develop further ways to diminish violence directed toward civilians during armed conflicts. Further, the inhibition of the

dehumanization of civilians and the production of anonymity and doubling will allow the work of organizations, such as the ICRC, which engage with armed groups to be more effective.

Looking forward, there is room to expand data collection within Sierra Leone and the DRC as well as extend data collection to other conflicts. While I identified the two themes of dehumanization and displacement of responsibility and addressed two manifestations of these themes in the context of Sierra Leone and the DRC, there were other behaviours identified in the criminological and social psychological theories used in this thesis that could be utilized to evaluate existing IHL protections for civilians.<sup>1574</sup> Further, there will likely be more ways that displacement of responsibility manifests itself in combatant behaviour and possibly other acts that serve to debase civilians in the eyes of combatants. Understanding combatant psychology can provide insights not just for those seeking to develop new regulations to improve civilian protection during conflict, it can also help commanders better understand and manage the behaviour of their subordinates in a way that promotes the high levels of discipline necessary for IHL compliance more broadly. The utility of combatant psychology is not limited to the regulation of armed groups. The proposed regulations in this thesis may also be of utility for state armed forces where my, albeit limited, anecdotal evidence suggests that dehumanization by combatants during armed conflict exists within Western militaries.<sup>1575</sup> The regulations I have proposed could help to prevent some of the types of civilian abuses committed, for example, by U.S. forces in Iraq.<sup>1576</sup>

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<sup>1574</sup> For example, the theories discussed in chapter 7 emphasize the power of authorization and routinization, which allow combatants to displace and diffuse responsibility for their own actions onto superior officers and/or their fellow combatants. Although the chain of command plays an important role in the functioning of armed groups as well as state militaries, it might be possible to develop ways of mediating the effects of the chain of command on the sense of responsibility combatants feel for their own actions. There may also be additional manners in which dehumanization, anonymization, or the abdication of personal responsibility is manifested in combatant behaviour during armed conflict that could be identified through further fieldwork and/or the extension of fieldwork to different case study conflicts.

<sup>1575</sup> For example, the torture and murder of a Somali teenager by Canadian soldiers in 1993. The official report explicitly records racism within the ranks and among the Canadian Armed Forces members responsible: Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair* (Ottawa: Minister of Public Works and Government Services Canada, 1997); See also, e.g., JL Granatstein & Dean F Oliver, “The Somalia Affair The Oxford Companion to Canadian Military History” (2013) 22:4 Canadian Military History 59; Richard Foot, “Somalia Affair”, (5 November 2018), online: *The Canadian Encyclopedia* <<https://www.thecanadianencyclopedia.ca/en/article/somalia-affair>>; Alexander John McKinnon, *Torture of the Other - Racism as an Element of Torture in Contemporary Military Operations* Carleton University, 2006) [unpublished].

<sup>1576</sup> The most well known example is the abuse of detainees at Abu Ghraib prison: see, e.g., Hersh, *supra* note 1460; However, Abu Ghraib is not the only recorded incident of IHL violations committed by US troops: see, e.g. Raffi

This thesis has sought to contribute to a better understanding of combatant psychology and to identify a way this understanding can be put to practical use within IHL. Dehumanization and displacement of responsibility provide paths to civilian suffering and I have argued that legal regulation can block combatants' path to IHL violations.

### 9.1 Limitations

This thesis establishes a strong case for the substantive development of IHL based on insights into combatant psychology. However, like all works it is not without limitations. First, as addressed in chapter 2, the case study fieldwork was limited by the size and scope of the fieldwork data collection as well as by practical, security and logistical limitations on interviews in the field. Another limitation of this thesis is that it provides limited discussion on the enforcement of IHL. Its primary focus is on developing a new approach to thinking about the development of IHL and the types of behaviours that are regulated by this body of law. Thus, it addressed the utility of a new approach that considers how combatant psychology contributes to IHL violations and identified theories that provide this information. It then applies the theory of combatant psychology to existing IHL based on the recent and ongoing armed conflicts in Sierra Leone and the DRC. It demonstrated the utility and applicability of a combatant psychology approach in the development of IHL and took this as a logical end point. Enforcement is a natural correlate of law-making and issues of compliance and deviance but approaches the problem of IHL violations from a different direction than that which was the focus in this thesis. Consequently, the thesis leaves for future research questions of enforcement. The premise of these thesis is that IHL must have new rules in place to prevent the psychological reframing of conceptions of right and wrong before any remaining issues regarding compliance and enforcement are examined.

### 9.2 Future Research

Over the next five years, I intend to focus on two projects stemming from the research and fieldwork conducted for this thesis. First, I will build on the links I began to develop between the military justice systems and the regulation of armed groups. This project would conduct a study of state military justice systems as well as a study of the internal disciplinary systems of armed

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Khatchadourian, "The Kill Company", (2 June 2009), online: *The New Yorker* <<https://www.newyorker.com/magazine/2009/07/06/the-kill-company>>.



groups. The aim of the project will be to identify practices within state military justice systems that might be adopted and adapted for the internal regulation of non-state armed groups. The goal would be to produce different models of disciplinary best practices targeting different sizes of armed groups with different levels of organization. These models would provide a useful tool for armed groups as well as for international organizations engaging with armed groups. The second research project will examine topics raised by field interviews, but which fell outside the scope of this thesis. In particular, the issue of disarmament, demobilization, and reintegration was very important to former combatants I spoke to in Eastern DRC. My discussion with these ex-combatants highlighted for me the effect disarmament, demobilization, and reintegration programs can have on both incentivizing current combatants to disarm and demobilize, but also, where programs leave ex-combatants dissatisfied or in precarious living conditions, this can contribute to re-enlistment and the disincentivization of participation in these programs to combatants. This problem arises in contexts like the DRC where disarmament, demobilization, and reintegration programs operate alongside ongoing conflict. Consequently, there is an interesting overlap between IHL and post-conflict regulation, sometimes referred to as *jus post bellum* (or law after war), that requires further study.

### 9.3 Conclusion

In sum, the protection of civilians during conflicts requires rules targeting the particular risks posed to civilians during war. The use of social psychology and criminology theories help to identify what these conflict-specific risks to civilians are by providing insight into the psychological processes that lead law-abiding citizens to become law-breaking combatants who perpetrate acts of violence against civilians. My hope is that this improved understanding of violence toward civilians can continue to be used to develop new ways to protect civilians during conflict and to advance IHL's humanitarian objectives.

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## Appendix A

Research Ethics

**Western University Health Science Research Ethics Board  
NMREB Full Board Initial Approval Notice**

**Principal Investigator:** Prof. Valerie Oosterveld  
**Department & Institution:** Law, Western University

**NMREB File Number:** 106790

**Study Title:** Bringing Non-State Actors into the Fold: Re-Framing International Humanitarian Law for the Realities of Modern Conflicts

**Sponsor:**

**NMREB Initial Approval Date:** August 27, 2015

**NMREB Expiry Date:** August 27, 2016

**Documents Approved and/or Received for Information:**

Document Name	Comments	Version Date
Recruitment Items	Email Script for recruitment (organizations and individuals)	2015/05/25
Other	Non-Disclosure & Confidentiality Agreement for translators and transcribers	2015/05/25
Revised Western University Protocol		2015/05/25
Other	Interview Guide Group 2	2015/05/25
Other	Interview Guide Group 1	2015/05/25
Revised Letter of Information & Consent	Group 2	2015/05/25
Revised Letter of Information & Consent	Group 1	2015/05/25

The Western University Non-Medical Research Ethics Board (NMREB) has reviewed and approved the above named study, as of the NMREB Initial Approval Date noted above.

NMREB approval for this study remains valid until the NMREB Expiry Date noted above, conditional to timely submission and acceptance of NMREB Continuing Ethics Review.

The Western University NMREB operates in compliance with the Tri-Council Policy Statement Ethical Conduct for Research Involving Humans (TCPS2), the Ontario Personal Health Information Protection Act (PHIPA, 2004), and the applicable laws and regulations of Ontario.

Members of the NMREB who are named as Investigators in research studies do not participate in discussions related to, nor vote on such studies when they are presented to the REB.

The NMREB is registered with the U.S. Department of Health & Human Services under the IRB registration number IRB 00000941.



son, NMREB Chair

Ethics Officer to Contact for Further Information

<input type="checkbox"/> Erika Basile ebasile@uwo.ca	<input type="checkbox"/> Grace Kelly grace.kelly@uwo.ca	<input type="checkbox"/> Mina Mekhail mmekhail@uwo.ca	<input type="checkbox"/> Vikki Tran vikki.tran@uwo.ca
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## Curriculum Vitae

**Name:** Kirsten Stefanik

**Post-secondary Education and Degrees:** University of Western Ontario  
London, Ontario, Canada  
2013-2019 Ph.D.

University of Western Ontario  
London, Ontario, Canada  
2012-2013 LLM

University of British Columbia  
Vancouver, British Columbia, Canada  
2009-2012 J.D.

University of British Columbia  
Vancouver, British Columbia, Canada  
2003-2009 B.A.

**Honours and Awards:** Social Science and Humanities Research Council (SSHRC)  
Doctoral Fellowship  
2014-2018

Canadian Council on International Law  
Ronald St. John MacDonal Award  
2014

Governor General's Academic Gold Medal  
2013

**Related Work Experience** Adjunct Professor (International Humanitarian Law)  
University of Windsor  
2019

Adjunct Professor (International Environmental Law)  
University of Western Ontario  
2018

### **Publications:**

Stefanik, Kirsten. Rise of the Corporation and Corporate Social Responsibility: The Case for Corporate Customary International Law (2017) *Canadian Yearbook of International Law* 276.

Stefanik, Kirsten. "The Environment and Armed Conflict: Employing General Principles to Protect the Environment" in Carsten Stahn, Jens Iverson & Jennifer Easterday, eds. *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles and Practices* (Oxford University Press, 2017) 93.

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