13 International Humanitarian Law

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I. Introduction

Domestic courts typically deal with questions of international humanitarian law (1) when located in a state which is involved in armed conflict or occupation (eg, Israel, but also states deploying troops in out-of-area operations such as the United States (US)), or in which armed conflict has recently taken place (eg, the newly independent republics of the former Yugoslavia); or (2) when located in a third ('bystander') state that is/was not involved in the armed conflict in question but that allows the exercise of universal jurisdiction over war crimes (eg, the Netherlands).

As far as court decisions in (post-)conflict states are concerned, the quantity and quality of such decisions depend heavily on the existence of a functioning and independent judiciary. In many (post-)conflict states, this is not a given. It is no surprise then that the sheer majority of cases (recently made available) come from one jurisdiction: Israel, a state which, while engaged in an armed conflict with the Palestinian side, nonetheless functions very much as a normal rule of law-based state. It boasts independent courts that are willing to censure the state and the military for transgressions of international humanitarian law.

That being said, there are a substantial number of cases available from other jurisdictions, and not only from Western states involved in out-of-area military operations (eg, the US, United Kingdom (UK)).

The individual criminal responsibility of alleged perpetrators of international humanitarian law violations, and the exercise of universal jurisdiction over such perpetrators, are not covered in this chapter, but in the chapters on international criminal law and jurisdiction respectively.

II. The Self-executing Character of International Humanitarian Law Treaties in Domestic Courts

One of the major obstacles to international humanitarian law litigation in domestic courts is the possible lack of a private right of action under international humanitarian law treaties considered as not self-executing. Lacking a private right of action, individuals who are allegedly victims of international humanitarian law violations cannot file suit against states for compensation on the basis of international humanitarian law conventions, such as the 1907 Hague Conventions and the 1949 Geneva Conventions. Notably, US and Japanese courts have refused to give direct effect to international humanitarian law conventions. Some of the leading cases are discussed in this section. In Israel, by contrast, it is accepted that individual plaintiffs can directly rely on applicable international humanitarian law to contest decisions taken by the Israeli Defense Forces and the government. Combined with the ongoing occupation of the Palestine Territories by Israel, there is unsurprisingly a wealth of Israeli case law available, a sizable portion of which is discussed later in this contribution.

United States, Linder et al v Calero Portocarrero et al, Judgment of 17 September 1990, 747 F.Supp. 1452 (S.D. Florida 1990) (not in ILDC)

The case of *Linder et al v Calero Portocarrero et al* concerns a US national (Benjamin Linder) who moved to Nicaragua to aid the Sandinista government. In 1987 he was tortured and killed by (p. 463) a patrol of the Nicaraguan democratic forces, who belonged to the so-called 'contras' who were supported by the US. The plaintiffs thereupon brought suit against three contra organizations and four individuals in a US court. Count IV of the plaintiffs' amended complaint presented a claim for damages resulting from the defendants'

alleged violation of common Article 3 of the First Geneva Convention, the Second Geneva Convention and the protocols thereto:

> A treaty will only provide a basis for the enforcement of *private rights* in domestic courts if it is self-executing—that is, if it prescribes rules by which private rights may be determined […] Whether an international agreement is self-executing is a matter of interpretation to be determined by the courts. […] "In determining whether a treaty is self-executing courts look to the intent of the signatory parties as manifested by the instrument, and, if the instrument is uncertain, recourse must be had to the circumstances surrounding its execution." […] Courts which have considered the issue have almost uniformly determined that the Geneva Conventions are not self-executing. […] The Geneva Conventions expressly call for implementing legislation, and therefore the First and Second Geneva Conventions are not self-executing […]. While Plaintiffs cite commentary to the Conventions as evidence that the creation of private rights was intended, they cite no language to this effect within the agreement itself. Furthermore, the Plaintiffs fail to cite us to any case law which has held the Geneva Conventions to be self-executing. We can see no reason to find contrary to unanimous precedent on this issue. *(747 F.Supp. 1463)*

Iraq and Afghanistan Detainees Litigation, Re, Mohammed Ali and ors v Colonel Pappas and ors, Trial court order, 479 F.Supp.2d 85 (D.D.C. 2007), ILDC 812 (US 2007), 27th March 2007, United States; District of Columbia; District Court for the District of Columbia [DDC]

That the Geneva Conventions were not self-executing, and thus provided no private cause of action, was reaffirmed by the District Court of Columbia in the 2007 *Iraq and Afghanistan Detainees Litigation*. In this litigation, nine plaintiffs alleged that they were innocent civilians who had been tortured and abused while detained by the US military at various locations in Iraq and Afghanistan. Each plaintiff ultimately was released from custody without ever being charged with a crime. The plaintiffs advanced six causes of action, which included breach of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV).[1] Citing long-standing US court practice and engaging in a textual analysis of the relevant provisions of Geneva Convention IV, the District Court held, not surprisingly, that it was not self-executing.

> **58** The Court is not convinced that Geneva Convention IV is self-executing and establishes individual rights that may be judicially enforced via private lawsuits in federal courts. "Absent authorizing legislation, an individual has access to courts for enforcement of a treaty's provisions only when the treaty is self-executing, that is, when it expressly or impliedly provides a private right of action." […] None of the provisions of Geneva Convention IV contain any such express or implied language indicating that persons have individual "rights" that may be enforced under the treaty. Instead, the provisions of Geneva Convention IV state general obligations with regard to the treatment of protected persons that are imposed on signatory States.

The idea that the Geneva Conventions are not self-executing was in fact already enunciated in *Johnson v Eisentrager* (1950), in which the US Supreme Court held in a footnote, in respect of a challenge by twenty-one German nationals to their 1945 convictions for war crimes by a (p. 464) military tribunal convened in Nanking, China and to their subsequent imprisonment in occupied Germany:

> ‘We are not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the Geneva Convention of July 27, 1929, 47 Stat. 2021, concluded with forty-six other countries, including the German Reich, an agreement upon the treatment to be accorded captives. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention’.[2]

Not only may US courts refuse to give direct effect to international humanitarian law treaties regulating the conduct of hostilities or protecting combatants and civilians, they have also held that conventions outlawing the use of certain weapons do not create private causes of action. *Stutts and ors* is illustrative in this respect.

Stutts and ors v De Dietrich Group and ors, Stutts and ors v Deutsche Bank AG and ors, District court decision, No 03-CV-4058 (EDNY 2006), ILDC 874 (US 2006), 30th June 2006, United States; New York; District Court for the Eastern District of New York [EDNY]

US military servicemen and civilian employees of contractors who were deployed in the Persian Gulf region during the 1991 Gulf War were allegedly exposed to toxic agents contained in chemical weapons developed or otherwise obtained by the Iraqi government and detonated by the United States and its allies during the Gulf War. The plaintiffs brought suit against foreign corporations that had allegedly sold chemical agents and manufacturing equipment to Iraq, that were used to develop the chemical weapons, and businesses that had issued letters of credit which has been relied upon for the sale of said goods. The servicemen and civilian employees sought compensatory and punitive damages against the bank defendants under, amongst other legal instruments, the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (Geneva Protocol).[3] As in *Linder*, discussed above, the question arose whether there was a private right of action for individuals under the Geneva Gas Protocol.

> **25** … courts hold that the Geneva Conventions are not self-executing treaties and routinely reject private claims brought under them. See, e.g., Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 442 (1989) (Geneva Convention on the High Seas, 13 U.S.T. 2312, does not create a private right of action, but sets forth substantive rules of conduct and states that compensation shall be paid for certain wrongs); United States v. Fort, 921 F. Supp. 523, 526 (N.D. Ill. 1996) (“The courts have consistently held that the Geneva Conventions … are not self-executing and, thus, provide no basis for the enforcement of private rights in domestic courts.”). Accordingly, since the Geneva Convention is not self-executing and Congress has not passed implementing legislation, plaintiffs have no private right of action under the Convention.

Similar cases have arisen in Japan, notably in the 1990s when a barrage of compensation claims was brought by private plaintiffs against the Japanese government relating to civilian suffering during the Second World War. Without exception, Japanese courts have held that such plaintiffs (p. 465) do not have the right to claim compensation under international

humanitarian law, and the Hague Convention in particular, for damages suffered during the Second World War.

Japan, X et al v the State, Tokyo District Court, Judgment, 27 July 1995; H.T. 894 (197) (1995), 39 Japanese Annual of International Law 265-66 (1996) (not in ILDC)

The Japanese case of *X et al* concerned Korean nationals whose brothers and fathers were allegedly arrested, transported, and murdered by the Japanese military police on accusation of espionage right after the end of the Second World War in a Japanese-occupied territory which is now part of Russia. They filed a claim against the state of Japan for compensatory damages, the publication of an apology and the restoration of their honour. The claims are partly based on international law. See also the similar cases discussed below.

> [Article 3 of the Hague Convention] expressly lays down the responsibility of the belligerents to pay damages. This being so, the purpose of this provision can only be interpreted as to define the state's responsibility and cannot be interpreted to obligate the state to pay damages to each individual of the belligerent state.
>
> […] Regarding the existence of international customary law as alleged by the plaintiffs, neither the general practice nor the conviction (*opinio juris*) that the state has a duty to pay damages to each individual when that state infringes its obligations under international human rights law or international humanitarian law can be said to exist.

Japan, X et al v the State, Tokyo District Court, Judgment, 30 November 1998; H.T. (991) 262 (1999), 42 Japanese Annual of International Law 143-150 (1999) (not in ILDC)

X et al v the State concerned Dutch nationals who were interned in Japanese detention camps during the Japanese occupation of South East Asia in World War II, and who were allegedly subjected to forced labour, cruel treatment or sex slavery, filed a claim against the Japanese state for compensatory damages. The claim was based on Article 3 of the Hague Convention and on customary international law.

> Article 3 of the Hague Convention only stipulates international responsibility of a State for its violations of the Regulations annexed thereto toward the injured State. It must be stated that in the courts of Japan, individuals who suffered damages by those acts of armed forces members in violation of international humanitarian law cannot claim for compensation against the State to which the offenders belonged. True, according to the evidence, today it is to be admitted that views exist which recognize the possibility of individual claims. Those are all personal views, however, and cannot be upheld by the present Court.
>
> … since Article 3 of the Hague Convention cannot be a ground to support the claim, it is clear that a rule of international law of the same content, even if it existed, cannot serve as the basis for the claim. Moreover, even if the allegation by the plaintiffs pointed to the existence of international customary law recognizing direct individual claims for compensation against the offending State irrespective of Article 3 of the Hague Convention, there exist no such rules of international customary law to date.

The Tokyo District Court approached the question of whether private plaintiffs could derive individual rights to file suit against a state from Article 3 of the Hague Convention from the angle of the doctrine of direct effect of treaties coupled with an application of various methods of treaty interpretation. The court inquired whether, objectively speaking, the content of individual rights was sufficiently clearly defined in the Hague Convention, and whether state parties in fact intended to establish individual rights. Applying Articles 31

and 32 of the 1969 Vienna Convention on the Law of Treaties as customary law, it gave a negative answer to both questions. Historically, indeed, the treaties were only concerned with inter-state relations and did (p. 466) not confer rights on individuals. Only through the (discretionary) state-to-state mechanism of diplomatic protection could individuals have justice.

Varvarin Bridge Case, 36 citizens of Yugoslavia v Germany, Constitutional complaint, 2 BvR 2660/06, 2 BvR 487/07, ILDC 2238 (DE 2013), EuGRZ 2013, 563, DÖV 2013, 946, 13th August 2013, Germany; Constitutional Court [BVerfG]

A reasoning similar to the one made by US and Japanese courts was made in the *Varvarin Bridge* case,[4] brought by Serb victims of the NATO military operation in Serbia (1999), notably the bombardment of a bridge, in which Germany participated. The legal question was again whether the Hague and Geneva Conventions conferred rights on individuals to claim compensation from an allegedly responsible state (Germany in this case) for international humanitarian law violations of which those individuals were victims. The Constitutional Court answered in the negative.

> **H2** There was no rule of customary international law, as applicable in German courts pursuant Article 25 of the Basic Law, according to which victims of armed conflict had an individual right to compensation for violations of international humanitarian law against the alleged wrongdoing state.
>
> **H3** Neither Article 3 of the 1907 Hague Regulations nor Article 91 of Additional Protocol I could serve as a legal basis for individual claims. Firstly, these rules were not self-executing … Secondly, neither Article could be understood as providing a right to compensation to individual victims of armed conflict. … Claims for international wrongful acts still had to be taken up by the national state.

Association France-Palestine Solidarité (AFPS) and Palestine Liberation Organization (PLO) v Société Alstom transport SA and ors, Appeal judgment, No 11/05331, ILDC 2036 (FR 2013), 22nd March 2013, France; Île-de-France; Versailles; Administrative Court of Appeal

A French appeals decision demonstrates that, apart from individuals, also *non-governmental organizations* may not be entitled to invoke international humanitarian law conventions in domestic courts, let alone against *corporations*. Unlike states, the latter have no (or at least very limited) international legal personality. In the case, two French corporations had participated in a company which had signed a concession contract with Israel to construct a tramway. The tramway's trajectory included paths over the occupied territories, purportedly in violation of international humanitarian law.

> **H2** The international legal norms invoked by the [French-Palestine Solidarity Association] and the PLO did not include the right of individuals or non-state organizations to invoke them before the court. (paragraph 91)
>
> **H3** Veolia and Alstom had neither signed these conventions nor were recipients of the obligations contained therein. Therefore they could not be considered as subjects of international law. Since they were deprived of international personality, it was not possible to apply these conventions against them. (paragraph 109)

Japan, Ryuichi Shimoda et al v the State, District Court of Tokyo, 7 December 1963, 8 Japanese Annual of International Law 212 (1964). 32 ILR 626, 640-642 (not in ILDC)

If one does not accept that individuals enjoy private rights of action under the international humanitarian law conventions in the first place, the question of whether states are entitled to waive their rights to bring claims against other states on behalf of the former's aggrieved nationals on the basis of peace treaties becomes moot. A waiver does not violate the rights of individuals, as (p. 467) the state waives *its own* rights, not the rights of individuals. This is borne out by the District Court of Tokyo's decision in *Shimoda*,[5] in which victims of the atomic bombing of Hiroshima and Nagasaki by the US sought to engage the Japanese state's responsibility on the ground that it had waived claims of Japanese nationals against the Allied Powers.

> Article 19(a) of the Treaty of Peace with Japan, which was signed at San Francisco on September 8, 1951, and came into force on April 28, 1952, provides:
>
> > 'Japan waives all claims of Japan and its nationals against the Allied Powers and their nationals arising out of the war or out of actions taken because of the existence of a state of war, and waives all claims arising from the presence, operations or actions of forces or authorities of any of the Allied Powers in Japanese territory prior to the coming into force of the present Treaty.'
>
> […] it must be pointed out that a State has the power to waive the claims of its nationals under municipal law. A State has, as a function of its sovereignty, the power to create, modify and extinguish rights and duties of its nationals in accordance with the due process of its municipal law; it is therefore possible in theory for a State to undertake, as against another State, to waive the rights of its nationals which have such character in relation to the State, setting aside the question of the propriety of such an undertaking.
>
> […] Such being the case, the plaintiffs had no rights to lose, and therefore there is no reason for regarding the defendant State as legally responsible to the plaintiffs for an unlawful act.

All foregoing judgments, which did not accept the argument that international humanitarian law conventions provided a private cause of action, are based on a conservative reading of the convention. Israeli case law, however, shows that some domestic courts may be willing to allow private plaintiffs to directly invoke provisions of international humanitarian law treaties. Moreover, the international community has recently pushed for more rights for victims of gross violations of human rights and international humanitarian law. In particular, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by the General Assembly in 2005 (the German Constitutional Court refers to an earlier version of this document in the judgment cited above), provides that '[a] victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law'.[6] The preamble to this document refers to Article 3 of the Hague Convention. While this may not render that provision directly applicable in the domestic legal order, a tendency is clearly discernible to the effect of granting victims of international humanitarian law violations standing in courts and other grievance mechanisms to obtain reparation. This could be done through a domestic statute that confers private rights of action on individuals in respect of violations of international humanitarian law (eg, *habeas corpus* petitions in case of detention),[7] or that refers back to international humanitarian law or international human (p. 468) rights law. Examples of statutes creating causes of action in respect of international humanitarian law are the US Alien Tort Statute[8] and the US Uniform Code of Military Justice (UCMJ).[9] In *Salim Ahmed Hamdan v Donald H Rumsfeld, Secretary of Defense*, the US Supreme Court held in respect

of the UCMJ, Article 21 of which provides that '[t]he provisions of this code conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or *by the law of war* may be tried by such military commissions, provost courts, or other military tribunals'[10] (emphasis added):

> For, regardless of the nature of the rights conferred on Hamdan, cf. *United States* v. *Rauscher,* 119 U. S. 407 (1886), they are, as the Government does not dispute, part of the law of war. See *Hamdi,* 542 U. S., at 520.521 (plurality opinion). And compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted (slip op. pp. 64-65)

In view of the *renvoi* of a *domestic statute* to the law of war, the court held that the *Eisentrager* footnote, quoted above, was not controlling, thereby overruling the Court of Appeals. Thus, on the basis of the UCMJ, the Geneva Conventions, being part of 'the law of war', *could* create enforceable rights for individuals such as Hamdan, an Al-Qaeda member arrested by US forces in Afghanistan, in the US legal order. Such *renvoi* could, however, easily be withdrawn by the US Congress, as indeed happened when Congress adopted the Military Commissions Act 2006, 120 Stat 2600, section 948b(g) of which provides that '[n]o alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights'.

III. Qualification of Conflict

By its very nature, international humanitarian law only applies in times of armed conflict. The exact qualification of a conflict is therefore crucial, also in light of the fact that different international humanitarian law rules apply to international and non-international conflicts. A number of domestic courts have been asked to qualify certain conflicts for the purpose of applying international humanitarian law—the law of international or non-international armed conflict as the case may be. Two cases, one from the Russian Federation (facing a conflict in Chechnya) and one from the US (fighting a global war on terror against Al-Qaeda), are discussed in this section.

In this judgment,[11] the Russian Constitutional Court tested the constitutionality of a number of Presidential Decrees relating to the conflict in Chechnya in light of the Constitution, including its Article 15, paragraph 4 of which provides that both general and conventional international law shall be part of the Russian legal system. On the basis of this Article, the court reviewed the Decrees in light of Additional Protocol II to the Geneva Conventions.[12](p. 469)

Russian Federation, Constitutional Court of the Russian Federation, 31 July 1995, Sobranie zakonodatelstva Rossiyskoy Federatsii, 1995, No. 33, Art. 3424. An unofficial English translation of this judgment has been published by the European Commission for Democracy through Law of the Council of Europe, CDL-INF (96) 1 (see also ICRC website, not in ILDC)

> **5.** … The Supreme Soviet of the USSR having ratified Protocol Additional to Geneva Conventions of 12 August 1949 relating to the protection of victims of non-international armed conflicts (Protocol II), have charged the Counsel of Ministers of the USSR to prepare and to submit to the Supreme Soviet of the USSR proposals on appropriate modifications of national law. However the said commission has not been executed. Nevertheless the provisions of the Protocol relative to human treatment of all persons who are not taking part or who are no longer taking part in the hostilities, of wounded and sick, to protection of civilian population, works and

> installations containing dangerous forces, protection of cultural objects and places of worship shall be applicable by both parties to the armed conflict.
>
> At the same time an unduly national implementation of these provisions was one of the reasons of the failure to respect the rules of the said Additional Protocol which stipulate that the use of force shall be commensurable with the aims and all efforts shall be taken to avoid injuring the interests of civilians and their property.
>
> **6.** The Federal Counsel of the Russian Federation shall regularize the legislation on the use of the armed forces of the Russian Federation, as well as the regulation of other matters which can arise in extraordinary situations or during conflicts, including those resulting from the Protocol Additional to Geneva Conventions of 12 August 1949 relating to the protection of the victims of non-international armed conflicts (Protocol II).

Paola Gaeta has observed in respect of this judgment of the Russian Constitutional Court that 'this could well be the first time a national court has been called upon to scrutinize compliance by a state's armed forces with international rules concerning the protection of civilians and the conduct of hostilities during an armed conflict'.[13] Unfortunately, the court did not further justify why precisely Additional Protocol II would be applicable to the conflict in Chechnya. Before applying the rules of Additional Protocol II, the court should have *qualified* the conflict as a non-international armed conflict. It could have held that the conflict rose to the level of an armed conflict of a certain duration and intensity which pitted rebel fighters against government troops, ie, a non-international armed conflict to which Additional Protocol II applies. It could also have held that Chechnyan rebels fought a war of national liberation, to which, pursuant to Article 1(4) of Additional Protocol I,[14] the rules of *international* armed conflicts apply. However, the decision is extremely relevant, not only for the clarification of the law of non-international armed conflict but also in terms of the effect of international law in the Russian legal order.[15]

Hamdan v Rumsfeld and ors, Appeal judgment, 548 US 557, 126 S Ct 2749, 165 L Ed 2d 723 (2006), ILDC 745 (US 2006), 29th June 2006, United States; Supreme Court [US]

In 2001, Salim Ahmed Hamdan, an Al-Qaeda operative, was captured during hostilities between the United States and the Taliban and turned over to the US military. He was (p. 470) held in custody at the infamous US prison in Guantanamo Bay, Cuba. In 2003, the US President deemed him eligible for trial by military commission for then-unspecified crimes. Before the US Supreme Court the case question arose as to whether Common Article 3 of the Geneva Conventions, which set out some minimal procedural guarantees, applied to the case of Hamdan. The US government and the Court of Appeals believed not, but the Supreme Court thought otherwise:

> The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being … international in scope … does not qualify as a … conflict not of an international character … 415 F. 3d, at 41. That reasoning is erroneous. The term 'conflict not of an international character' is used here in contradistinction to a conflict between nations. So much is demonstrated by the 'fundamental logic [of] the Convention's provisions on its application'. *Id.*, at 44 (Williams, J., concurring). Common Article 2 provides that 'the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties'. 6 U. S. T., at 3318 (Art. 2, ¶1). High Contracting Parties (signatories) also must abide by all terms of the Conventions vis-à-vis one another even if one party to the conflict is a nonsignatory Power, and must so abide vis-à-vis the nonsignatory if 'the latter accepts and applies. those terms.' *Ibid.* (Art. 2, ¶3). Common Article 3, by

> contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory Power, who are involved in a conflict in the territory of a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase 'not of an international character' bears its literal meaning … Commentary on the Additional Protocols to the Geneva Conventions of 12 August 1949, p. 1351 (1987) ('[A] noninternational armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other'). (slip op. pp. 67-68)

By characterising the armed conflict between the US and Al-Qaeda as a conflict governed by Common Article 3 of the Geneva Conventions, the US Supreme Court pointed out that US government action in the war on terror was subject to international legal constraints. The Supreme Court read Common Article 3 expansively, and arguably correctly, by holding that the provision applies to *all* armed conflicts, including conflicts pitting a state (the US) against a non-state actor (Al-Qaeda) outside the former's territory. As a result of the applicability of Common Article 3, the Supreme Court could subsequently review the US military commission set up to try Hamdan in light of international humanitarian law (see below 'detention').

IV. Protected Persons

International humanitarian law is a body of law that has as one of its primary aims the protection of persons who do not take part in hostilities, in particular the sick, wounded and shipwrecked, prisoners of war and other detained persons and civilians. With respect to international armed conflicts, Article 4 of the Geneva Convention IV provides that '[p]ersons protected by the Convention are 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'.[16]

(p. 471) Pursuant to this provision, as traditionally understood, *only* persons who are *not* nationals of a party to a conflict or an occupying power are protected by the Geneva Conventions. The cases discussed in this section concern (1) the question of whether this classic understanding should be maintained, given the changed reality of armed conflicts, and (2) the extent to which protected persons could avail themselves of legal protection of international humanitarian law in case of abuse of protected status or in case considerations of military necessity militate against a broad construction of protection.

Nango and 31 others v Israel and ors, Original Petition to the High Court of Justice, Case No HCJ 7918/05, 59(2) PD 856, ILDC 156 (IL 2005), 22nd August 2005, Israel; Supreme Court; Supreme Court as High Court of Justice

Nango and ors v Israel and ors deals with the 'Disengagement Plan' adopted on 6 June 2004, according to which Israel was to withdraw from the Gaza Strip. The plan included the eviction of all Israelis from the Gaza Strip and from four settlements in the West Bank. Jewish settlers from Gaza claimed that they constituted 'protected persons' under Article 4 of the Geneva Convention IV and, accordingly, that Israel could not permanently evict them from their homes.

> […] by virtue thereof should be dismissed (858 F-G) 3. […] the petitioners, who are Israeli citizens living in the evicted areas, do not fall under the definition of the term "protected persons" under the 1949 Geneva Convention for the Protection of Civilians in Times of War, and under the principles of the laws of occupation.

Applying Article 4 of the Geneva Convention IV, the Israeli court refused to consider Jewish settlers in Gaza as protected persons, since they were nationals of Israel (Israel being the Occupying Power of the Palestinian Territories). This traditional nationality requirement has however been relaxed by the ICTY Appeals Chamber in the *Tadic* decision 1999, when the ICTY put forward the criterion of ethnic allegiance to determine the status of the protected person under Article 4 of the Geneva Convention IV.[17] The concept of allegiance espoused by the ICTY in *Tadic* has been cited approvingly in various domestic cases that relate to the ethnic conflict in the former Yugoslavia. Below, the German *Sokolovic* case and the Kosovar *Kolasinac* case are discussed in this respect.

Kosovo, Andjelko Kolasinac case, Case No. AP-KZ 230/2003, Supreme Court of Kosovo, Decision of 9 January 2004 overturning the verdict of 31 January 2003 by the District Court of Prizren, P. No. 226/2001, and remanding the case for retrial, partly reprinted in *Yearbook of International Humanitarian Law* 569 (2004) (not in ILDC)

An allegiance requirement may more accurately capture the reality of ethnic conflict in the former Yugoslavia, where a party to an 'internationalised' armed conflict may well target persons who are formally their own nationals but who, for ethnic reasons, pay allegiance to an adverse party. In *Kolasinac*, a case before the Kosovo Supreme Court, the question arose whether the requirement of allegiance of protected persons also applied to the conflict in Kosovo.

> […] save Common Article 3 the Fourth Geneva Convention does not cover explicitly the category of protected persons afforded protection in the case before the trial court, i.e. Kosovo Albanians who were Yugoslav nationals and resided on the territory (p. 472) controlled by Yugoslav government. […] the District Court appears to derive from [the ICTY's] statement that injured parties in their relation with FRY Government had protected status from Geneva Convention IV and both Additional Protocols, despite having been nationals of FRY. The Supreme Court finds that in the light of evidence adduced in the main trial such conclusion was neither factually supported nor sufficiently legally explained. (p. 25)
>
> In the instant case, the Supreme Court finds that the trial court was not right to take the above-quoted ICTY's statement out of its context and use it as basis to automatically import the whole of Geneva Convention's protection of non-combatants to the facts of this case. (p. 25)
>
> […] Rather, the court would need to establish whether between the victims and the party who had control over that group the allegiance based on nationality did not effectively exist, and that, instead, there was an effective allegiance to an adverse party to the international conflict, ethnicity being a possible decisive for the issue of allegiance. Alternatively, it might be considered whether a lack of an effective bond with the party of whom the victims were formally nationals could result in such a situation that the victims who found themselves in the midst of an international conflict were *in substance* treated as stateless persons and therefore, for the purpose of protected status, should be regarded as such. (p. 26)

It is noted that the court did *not* give short shrift to the allegiance concept as set forth by the ICTY regarding the conflict in Bosnia Herzegovina, and thus it is not on a collision course with the ICTY. It only cautioned that the facts of the conflict in Kosovo should be carefully scrutinized: was there really no allegiance whatsoever of the Kosovo Albanian population to the Yugoslav government? In the cases regarding Kosovo, the ICTY did not answer this question, as it qualified the conflict between the KLA and Yugoslav army as a non-international armed conflict.[18] The concept of allegiance in respect of protected persons indeed has its particular relevance only in *international(-ized)* armed conflict to

which the Geneva Conventions are applicable in their entirety (and not only Common Article 3).

Physicians for Human Rights v Israeli Defence Force Commander in the West Bank, Original Petition to the High Court of Justice, HCJ 2936/02, ILDC 354 (IL 2002), 8th April 2002, Israel; Supreme Court; Supreme Court as High Court of Justice

Domestic courts, Israeli courts in particular, have tackled many complicated questions as to whether, in specific cases, the military had taken sufficient protective measures with respect to protected persons and (civilian) objects.

A first thorny issue is how the military should react to military personnel and armed groups —who may be protected by the Geneva Conventions—abusing their position. In cases involving shootings by Israeli Defence Forces (IDF) at Red Cross and Red Crescent medical teams working out of ambulances and in hospitals, Israeli courts, while urging caution, have not declared such attacks illegal under international humanitarian law, nor have they affirmed an absolute obligation under international humanitarian law to evacuate the wounded.[19]

(p. 473) In *Physicians for Human Rights v The Commander of the Israeli Defence Forces in the West Bank*, petitions of an aid organization challenged the legality under international humanitarian law of a number of specific events during a 2002 operation in the Palestinian Territories, namely shootings by IDF at Red Cross and Red Crescent medical teams working out of ambulances and in hospitals, prevention of the evacuation of the wounded and sick to hospitals to receive medical care, and prevention of the evacuation and burial of bodies. The court held as follows:

> **3** Though we are unable to express a position regarding the specific events mentioned in the petition, which are, on the face of things, severe, we see fit to emphasize that our combat forces are required to abide by the rules of humanitarian law regarding the care of the wounded, the ill, and bodies of the deceased. The fact that medical personnel have abused their position in hospitals and in ambulances has made it necessary for the IDF to act in order to prevent such activities but does not, in and of itself, justify sweeping breaches of humanitarian rules. Indeed, this is also the position of the State. This stance is required, not only under the rules of international law on which the petitioners have based their arguments here, but also in light of the values of the State of Israel as a Jewish and democratic state.
>
> **4** The IDF shall once again instruct the combat forces, down to the level of the lone soldier in the field, of this commitment by our forces based on law and morality—and, according to the State, even on utilitarian considerations—through concrete instructions which will prevent, to the extent possible, and even in severe situations, incidents which are inconsistent with the rules of humanitarian law.

Physicians for Human Rights v Israeli Defence Force Commander in the West Bank, Original petition to the High Court of Justice, HCJ 2117/02, ILDC 366 (IL 2002), 28th April 2002, Israel; Supreme Court; Supreme Court as High Court of Justice

This case concerned similar operations where IDF soldiers had fired on ambulances of the Red Crescent and had wounded medical teams travelling in them. As in *HCJ 2936/02*, the High Court reminded the military of its obligation under international humanitarian law to protect medical units and personnel against attacks, while leaving open the option of attack in case of abuse by the enemy.

> **6** […] the "Medical Service" has the right to full protection only when it is *exclusively* engaged in the search, collection, transport and treatment of the wounded or sick. Note the provisions of Articles 24 of the First Geneva Convention as well as the provisions of article 26, which expands this protection to include the Red Cross and similar voluntary aid societies.

This last decision demonstrates the pragmatic streak of Israeli courts: while IDF Forces should uphold international humanitarian law rules in respect of the treatment of the sick and wounded, and medical personnel, one cannot tolerate that terrorists take advantage of those rules to abuse medical facilities to perpetrate attacks. After all, international humanitarian law is all about striking a precarious balance between military necessity and protection of persons not taking active part in hostilities, a balance which is unhinged when fighters camouflage as medical teams.

Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v Israel and ors, Original Petition to the High Court of Justice, HCJ 769/02, ILDC 597 (IL 2006), 13th December 2006, Israel; Supreme Court; Supreme Court as High Court of Justice

As the previously discussed 'medical' cases show, it is sometimes difficult to strike a balance between the imperatives of protecting medical facilities and preventing abuse of such protection. It is equally difficult to give a clear-cut answer to the question of whether the policy of 'targeted killings' employed by states (notably Israel) against members of terrorist organizations (p. 474) is necessarily illegal under international humanitarian law, as this requires striking a difficult balance between the fight against terrorism and the protection of civilians.

In 2006, an Israeli court rendered a nuanced decision in a case brought by two human rights organizations, which challenged the policy of preventive strikes employed by Israel in the Gaza Strip and the West Bank, by which it aimed to kill members of terrorist organizations involved in the planning, launching, or execution of terrorist attacks against Israeli civilians and soldiers. The Israeli court notably clarified the concept of 'direct participation in hostilities'.[20]

> **39.** As regarding the scope of the wording "takes a direct part" in hostilities, so too regarding the scope of the wording "and for such time" there is no consensus in the international literature. Indeed, both these concepts are close to each other. However, they are not identical. With no consensus regarding the interpretation of the wording "for such time", there is no choice but to proceed from case to case. Again, it is helpful to examine the extreme cases. On the one hand, a civilian taking a direct part in hostilities one single time, or sporadically, who later detaches himself from that activity, is a civilian who, starting from the time he detached himself from that activity, is entitled to protection from attack. He is not to be attacked for the hostilities which he committed in the past. On the other hand, a civilian who has joined a terrorist organization which has become his "home", and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack "for such time" as he is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility …
>
> **40.** These examples point out the dilemma which the "for such time" requirement presents before us. On the one hand, a civilian who took a direct part in hostilities once, or sporadically, but detached himself from them (entirely, or for a long period) is not to be harmed. On the other hand, the "revolving door" phenomenon, by which each terrorist has "horns of the alter" (1 Kings 1:50) to grasp or a "city of refuge" (Numbers 35:11) to flee to, to which he turns in order to rest and prepare

> while they grant him immunity from attack, is to be avoided … In the wide area between those two possibilities, one finds the "gray" cases, about which customary international law has not yet crystallized. There is thus no escaping examination of each and every case. In that context, the following four things should be said: first, well based information is needed before categorizing a civilian as falling into one of the discussed categories. Innocent civilians are not to be harmed (*see* Cassese, at p. 421). Information which has been most thoroughly verified is needed regarding the identity and activity of the civilian who is allegedly taking part in the hostilities […]

Under international humanitarian law, civilians cannot be attacked 'unless and for such time as they take a direct part in hostilities'.[21] The concept of 'direct participation in hostilities' has been (p. 475) further clarified by the ICRC,[22] but both this judgment and the ICRC document do not come up with bright-line rules as regards who is a civilian directly participating in hostilities and thus a legitimate military target. In the final analysis, this determination is to be made on a case-by-case basis. That being said, the Israeli High Court is to be credited with at least advancing a number of criteria that should guide the determination, in particular with respect to the 'for such time' requirement of Article 51(3) of Additional Protocol I.[23] Application of these criteria may offer the Israeli army, and any army for that matter, some leeway to target and kill terrorists who are *planning* terrorist attacks, even though they might not actually be executing them. Such terrorists cannot pass through a 'revolving door' after they have perpetrated an attack and claim that they are no longer directly participating in hostilities. When precisely (alleged) terrorists lose their immunity from targeting is left open by the court.

al–Basyuni Ahmad and ors v Prime Minister and Minister of Defence, Original Petition, Case No HCJ 9132/07, ILDC 883 (IL 2008), 30th January 2008, Israel; Supreme Court; Supreme Court as High Court of Justice

Domestic courts may censure the government and military commanders for having taken actions detrimental to the interests of protected persons. In that sense, the government and the commanders incur negative obligations. At the same time, domestic courts may sometimes also compel commanders to take affirmative protective steps, eg providing humanitarian assistance to civilians and preparing for casualties. In that sense, the state and commanders may incur *positive* obligations under international humanitarian law when conducting military operations or occupying an area. A belligerent's positive obligations vis-à-vis the civilian population are not unlimited, however. This is shown by an Israeli court judgment regarding the legality under international humanitarian law of Israel's decision to restrict the supply of fuel and electricity to the Gaza Strip. At the time, Gaza was no longer effectively controlled by Israel, and Israel feared that fuel and electricity could be used by terrorists targeting Israel. Petitioners claimed that limiting the supply of fuel and electricity would cause certain, severe, and irreversible harm to essential humanitarian systems in the Gaza Strip: to the hospitals, to the water and sewage systems, and to the entire civilian population.

> **22.** [W]e reiterate that the Gaza Strip is controlled by a murderous terrorist organization, which acts tirelessly to strike at the State of Israel and its inhabitants, violating every possible rule of international law in its violent acts, which are directed indiscriminately toward civilians—men, women and children. However, as mentioned above, the State of Israel is committed to acting against the terrorist organizations within the framework of the law and in accordance with the provisions of international law, and to refrain from intentional harm to the civilian population in the Gaza Strip. In light of the entirety of information presented before us regarding provision of electricity to the Gaza Strip, we are of the opinion that the amount of industrial diesel that the State announced it will supply, as well as the

> electricity supplied regularly via power lines originating in Israel, fulfill the basic humanitarian needs of the Gaza Strip at the present time.

This decision again captures well the conflict between the interests of protected persons—in this case the supply of diesel and electricity from Israel to the civilian population in Gaza—and the security needs of the state, which may fear that such a supply is not only used to (p. 476) fulfil the basic humanitarian needs of the civilian population but is diverted by terrorists. Conspicuous is the almost emotional outburst of the court where it says that Israel is 'a democratic state fighting for its life in the framework of the means that the law puts at its disposal' while 'terrorist organizations […] rise up against it'.[24] It is hardly surprising then that the court refuses to second-guess decisions of the government—it cites that it only reviews their 'legality'—and that it eventually sides with the government without ascertaining whether the fuel supply is actually abused by terrorists.[25]

V. Detention

In times of armed conflict and occupation, parties to the conflict or occupying powers regularly detain individuals who are seen as posing a security risk. In particular, Israeli and US courts have reviewed the legality of such detentions, which are often of an administrative nature, in light of international humanitarian law. In the course of this review, in some cases questions as to the status of captured fighters have also been raised. Are these fighters, notably irregular fighters involved in 'terrorist activities' entitled to prisoners of war (POW) status pursuant to Article 4A of the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III),[26] or can they be characterized as 'unlawful/enemy' combatants who do not fall within the ambit of international humanitarian law?

Israeli courts have heard many detention cases in relation to the Israeli-Palestinian conflict. Without exception, they have accepted the authority of the Military Commander to detain any person in occupied territory posing a security risk. However, relying on the Geneva Conventions, they have emphasized the importance of judicial review of executive detention decisions.

Marab and ors v Israeli Defence Force Commander in the West Bank and Judea and Samaria Brigade Headquarters, Final Decision, HCJ 3239/02, ILDC 15 (IL 2003), 5th February 2003, Israel; Supreme Court; Supreme Court as High Court of Justice

The *Marab* case concerned orders of the IDF Commander in the West Bank to allow mass administrative detention of wanted persons for investigative reasons. According to these orders, amongst other things, a detainee could be held in detention for eighteen days without an opportunity to be heard by a judge. In a long but well-reasoned decision that balanced security concerns and individual rights, the High Court ruled that the orders violated international law standards on detention:

(p. 477)

> **21.** [on the approach of international law concerning occupation in times of war] On the one hand, the liberty of each resident of occupied territory is, of course, recognized. On the other hand, international law also recognizes the duty and power of the occupying state, acting through the military commander, to preserve public peace and safety; *see* Article 43 of the Annex to the Hague Convention Regulations Respecting The Laws and Customs of War on Land-1907 [hereinafter Hague Regulations]. In this framework, the military commander has the authority to promulgate security legislation intended to allow the occupying state to fulfill its function of preserving the peace, protecting the security of the occupying state, and the security of its soldiers. *See* Article 64 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War-1949 [hereinafter the Fourth Geneva

> Convention]. Consequently, the military commander has the authority to detain any person suspect of committing criminal offences, and any person he considers harmful to the security of the area …
>
> **34.** […] we are of the opinion that detention periods of 18 days, under Order 1500, and 12 days, under Orders 1505, 1512 and 1518, exceed appropriate limits. This detention period was intended to allow for initial investigation. However, that is not its proper function. According to the normative framework, soon after the authorized officer carries out the initial detention, the case should be transferred to the track of judicial intervention. The case should not wait for the completion of the initial or other investigation before it is brought before a judge. The need to complete the initial investigation will be presented before the judge himself, and he will decide whether there exists reasonable suspicion of the detainee's involvement to justify the continuation of his detention. Thus, Order 1500, as well as Orders 1505, 1512, and 1518, unlawfully infringes upon the judge's authority, thus infringing upon the detainee's liberty, which the international and Israeli legal frameworks are intended to protect.

In the *Marab* case, the High Court gave concrete application to Articles 43 and 78 of the Geneva Convention IV. These provisions refer to judicial review of administrative detention decisions but do not specify set detention periods or occasions for judicial intervention with regard to detention. Decisions on such detention periods or occasions are indeed best left to the states and their commanders implementing the conventions, who may be confronted with specific security concerns which the drafters of the Geneva Conventions could impossibly have anticipated. It then falls to those states' domestic courts to review the pertinent decisions and to set workable standards as to the length of detention without judicial review. Of note is that the High Court in *Marab* not only relied on international humanitarian law but also on international human rights and Israeli law standards when determining that a period of eighteen days without judicial review violated the law.

A detention issue that in the context of the 'war on terror' has led to heated legal debate was how to categorize, under international humanitarian law, members of organizations proclaimed as 'terrorist', such as Al-Qaeda or Hezbollah, who did not satisfy the requirements of Article 4A of the Geneva Convention III for POW status, the so-called 'unlawful or enemy combatants'. In recent times, mainly Israeli and US courts have tackled this issue, although in the past courts in Singapore, Malaysia, and Nigeria had already given thought to the issue.

Israel v Srur (Muhammad) and ors, Decision on Jurisdiction, Case No 548/06, Case No 549/06, Case No 550/06, ILDC 845 (IL 2007), 4th December 2007, Israel; North District; Nazareth; District Court

The Israeli case of *Srur* concerned the detention of several Hezbollah combatants, captured during the 2006 armed conflict between Israel and Hezbollah (who operated from Lebanon). (p. 478) When indicted before an Israeli court for murder and attempted murder of IDF soldiers, and engagement in terror, the combatants claimed POW status under Geneva Convention III.

> **8** […] Hezbollah members are not to be deemed to be prisoners of war if only by reason of the fact that the organization operates in violation of the laws of war … even though the Hezbollah organization has taken part in various Lebanese governing entities, it still continues to exist as an independent framework and has followed a completely independent policy of its own, as a terrorist organization,

without informing even Lebanese governmental concerns of its intentions or its acts.

10 […] we must perforce understand that the Hezbollah organization does not form part of the armed forces of Lebanon, and that it is not connected with the Government of Lebanon, is not under that body's discipline, either as to receiving executive orders or as to obeying existing orders, either by way of economic ties or supply line ties, whether of combat equipment or other munitions. In fact, Hezbollah constitutes nothing more than an independent military organization, getting orders from its apparatuses, or from entities outside Lebanon (the Government of Teheran).

12 […] as stated, in view of the evidence now placed before us, we are persuaded that the Defendants ought not to be viewed as prisoners of war even in terms of the provision of Article 4 A (1) of the Convention.

In the *Srur* case, the criminal court engaged in quite a detailed analysis of whether Lebanese Hezbollah fighters fell within the POW definition of Article 4A of the Geneva Convention III, in particular whether they qualified as members of armed forces, militias, and volunteer corps. The case is rather closely argued from a legal point of view. It is notable, however, that at several junctures the court refers to the Iranian overlords of Hezbollah. This statement is probably well received in certain political quarters, but, if it is true that the organization receives orders from Tehran, this raises the question of whether Hezbollah could not qualify as an 'Iranian' militia or volunteer corps. The court believed it did not, as it was not 'united by the central regime'.[27]

The events of 9/11 and the ensuing reaction have also led to significant US jurisprudence on detention. In 2002, US President Bush instituted military commissions to try detainees, including irregular Al-Qaeda fighters captured in the 'war on terror'. Such commissions could possibly characterize irregular Al-Qaeda fighters captured in Afghanistan as unlawful combatants. Subsequently, a criminal court could bring them to justice for their unlawful participation in hostilities against the United States.

Hamdan v Rumsfeld and ors, Appeal judgment, 548 US 557, 126 S Ct 2749, 165 L Ed 2d 723 (2006), ILDC 745 (US 2006), 29th June 2006, United States; Supreme Court [US]

The creation of the special military commissions, and the limited due process guarantees which they offered, sparked a number of legal challenges, most of them based on constitutional grounds. In one of those cases, however, *Hamdan v Rumsfeld*, decided by the US Supreme Court, international humanitarian law played a more prominent role. Having determined that Common Article 3 of the Geneva Conventions was applicable to the armed conflict between the US and Al-Qaeda in Afghanistan, the Supreme Court ascertained whether the mode of establishment of military commissions and their guarantees comported with the Geneva Conventions:

(p. 479)

Common Article 3 [of the Geneva Conventions]… is applicable here and … requires that Hamdan be tried by a 'regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples'. 6 U. S. T., at 3320 (Art. 3, ¶1(d)).

[…] the procedures adopted to try Hamdan deviate from those governing courts-martial in ways not justified by any 'evident practical need', *post*, at 11, and for that reason, at least, fail to afford the requisite guarantees. See *post*, at 8, 11.17. We add only that … various provisions of Commission Order No. 1 dispense with the principles, articulated in Article 75 and indisputably part of the customary

> international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him. See §§6(B)(3), (D). That the Government has a compelling interest in denying Hamdan access to certain sensitive information is not doubted. Cf. *post*, at 47.48 (THOMAS, J., dissenting). But, at least absent express statutory provision to the contrary, information used to convict a person of a crime must be disclosed to him. (slip op. 69-72)

Of note is that the US Supreme Court considered Article 75 of Additional Protocol I to be customary international law (the US not being a party to Additional Protocol I), in keeping with the ICRC's study on customary international law, and to be applicable in *any* armed conflict, not only international armed conflicts. In spite of the court's rather detailed examination of applicable international humanitarian law in *Hamdan*, it is observed, however, that a far larger part of the court's opinion is devoted to an analysis of the compatibility of the establishment and functioning of military commissions with US (constitutional) law.

Following the Supreme Court's ruling, US Congress responded by passing legislation, the Military Commissions Act (MCA).[28] This act did not particularly strengthen the protections offered to detainees: it subjected all alien unlawful enemy combatants to trial by military commission,[29] it deprived federal courts of their jurisdiction to hear *habeas corpus* and other petitions filed by alien enemy combatants,[30] and it excluded the application of a number of due process guarantees under the Uniform Code of Military Justice.[31]

Congress decided for itself in Section 948b(f) that 'a military commission established under this chapter is a regularly constituted court, affording all the necessary "judicial guarantees which are recognized as indispensable by civilized peoples" for purposes of common Article 3 of the Geneva Conventions', a determination which is unlikely to be contested by the courts on the basis of international law, since Section 948b(g) provides that the Geneva Conventions do not establish a source of rights: '[n]o alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights'. Inevitably, however, the MCA raised new legal issues, mostly on constitutional law grounds, including in the further proceedings against Hamdan.

In case of doubt about the exact legal status of a combatant (and accordingly his POW status), in accordance with Article 5 of the Geneva Convention III, such persons 'shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal'. Could military commissions qualify as status determination tribunals pursuant to Article 5 of the Geneva Convention III? Before a military commission established under the MCA, Hamdan claimed entitlement to POW status under Article 4A of the (p. 480) Geneva Convention III, and made a motion for a status determination under Article 5 of the Geneva Convention III.

> **16** The Commission notes the terms of MCA §948b(g), which provide "No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights." Because the accused has not yet been determined to be an alien unlawful enemy combatant by any tribunal, this section does not apply to defeat his right to rely on the Geneva Conventions for the purposes of determining his status.

In this case, the US military commission hearing the case against *Hamdan* and exercising its *Kompetenz-Kompetenz* characterized itself as a competent status determination tribunal in the sense of Article 5 of the Geneva Convention III, although it is strictly speaking not a tribunal. Much ink has been spilled over the legality and appropriateness of status determination and punishment proceedings before military commissions.[32] Such commissions are however a step forward vis-à-vis the previous Combatant Status Review

Tribunals, which failed to conduct a proper Article 5 determination. This decision does obviously not rule out that Al-Qaeda fighters can be qualified as unlawful/enemy combatants and, on that basis, be tried for their unlawful participation in hostilities. A military commission later determined that Hamdan was indeed an 'enemy combatant'.[33] He was convicted in 2008.[34]

In a somewhat related case, *Boumediene and ors v Bush and ors*,[35] the US Supreme Court entertained the question of whether aliens detained as enemy combatants at Guantanamo Bay had the constitutional privilege of habeas corpus to challenge the legality of their detention. A Combatant Status Review Tribunal had determined that each of the aliens in the present suit was an enemy combatant, and, as noted above, the Military Commission Act excluded *habeas corpus* jurisdiction of any court, justice or judge over the Guantanamo detainees. Relying entirely on US constitutional law, and not on international law, the Supreme Court, having granted *certiorari* in light of a circuit split over *habeas corpus* protection, held that the constitutional guarantees of *habeas corpus* extended to the detainees at Guantanamo (as the US maintained *de facto* sovereignty over Cuba) and that the Military Commission Act was an unconstitutional suspension of the writ of *habeas corpus*.

South Africa, S v Petane, Cape Provincial Division, 3 November 1987, 1988 (3) South African Law Reports 51 (not in ILDC)

One final case to be mentioned in this connection is that of *S v Petane*, where a member of the military wing of the African National Congress (ANC) was indicted for terrorism and attempted (p. 481) murder in connection with an attempt to place a bomb in a South African shopping centre. The international law question in this case was whether the accused was entitled to POW status on the basis of Article 1(4) of Additional Protocol I, which extends the legal protection that the Geneva Conventions give in international armed conflicts to (non-international) 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination'. As South Africa was not a party to Additional Protocol I, the question arose whether its Article 1(4) was binding on South Africa as customary international law.

> On what I have heard in argument I disagree with his assessment that there is growing support for the view that the Protocols reflect a new rule of customary international law. No writer has been cited who supports this proposition. Here and there someone says that it may one day come about. I am not sure that the provisions relating to the field of application of Protocol I are capable of ever becoming a rule of customary international law, but I need not decide that point today. For the reasons which I have given I have concluded that the provisions of Protocol I have not been accepted in customary international law. They accordingly form no part of South African law.

Since this decision, Additional Protocol I has become more widely ratified. That being said, for Article 1(4) to attain customary international law status, it would appear that those states that are 'specially affected' by the rule should recognize it.[36] As the South African court aptly notes, very few countries face a situation of peoples 'fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination'. Of those countries that could potentially qualify, few have ratified Additional Protocol I (neither Israel nor Morocco have, but Russia has). The decision also illustrates that domestic courts may be willing to ascertain state practice and *opinio juris* with a view to identifying a rule of customary international law, but that they tend to err on the side of caution.

VI. Occupation

The law of (belligerent) occupation forms part and parcel of international humanitarian law and is governed by the Geneva Convention IV 1949, the Hague Regulations 1907,[37] and applicable customary international law. Domestic courts typically pronounce themselves on questions of occupation law during or in the immediate aftermath of armed conflict and occupation.

As Israel is one of the few (well-functioning) states that occupy another territory—the Occupied Palestinian Territories—most recent decisions on occupation law have been rendered by Israeli courts.[38] The decisions are often well reasoned and rely heavily on international law. (p. 482) In most cases, they attempt to strike a balance between the government's security needs and the needs of the local population. In striking this balance, it is conspicuous that Israeli courts are not subservient to the government: while they do not second-guess military decisions by the military commander in the occupied territory, they do not shy away from reviewing the government's application of the principle of proportionality—ie, the means to find the balance between security needs and the needs of the local population, and from occasionally finding against the government.

Beit Sourik Village Council v Israel and Israeli Defence Force Commander in the West Bank, Final Decision, HCJ 2056/04, ILDC 16 (IL 2004), 30th June 2004, Israel; Supreme Court; Supreme Court as High Court of Justice

The 2004 *Beit Sourik* decision provides a fine example of the balancing exercise carried out by Israeli courts. The legal question in this case was whether the erection of a separation or security fence between Israel and the Occupied Palestinian Territories, and the fence's route, met the requirements of the law of belligerent occupation. For the purpose of erecting a so-called 'security fence' on West Bank territory, the Israeli Defence Force (IDF) Commander of the West Bank issued eight orders allowing the IDF to seize lands, some of which were privately owned. The fence was erected to prevent the infiltration of terrorists from the West Bank into Israel. Beit Sourik Village Council, representing thousands of village inhabitants, petitioned the High Court of Justice, arguing that the fence, if built along the planned route, would have an excessive impact on many of the basic rights of the Beit Sourik villagers, including under international humanitarian law. As in many international humanitarian law cases heard by Israeli courts, the *Beit Sourik* court was called on to weigh Israel's legitimate security interests and the rights of individuals adversely affected by the construction of the security fence in occupied territory.

> **85.** The task of the military commander is not easy. He must delicately balance between security needs and the needs of the local inhabitants. We were impressed by the sincere desire of the military commander to find this balance, and his willingness to change the original plan in order to reach a more proportionate solution. We found no stubbornness on his part. Despite all this, we are of the opinion that the balance determined by the military commander is not proportionate. There is no escaping, therefore, a renewed examination of the route of the fence, according to the standards of proportionality that we have set out.

The *Beit Sourik* case stands out for its clear enunciation of the principle of proportionality as the operating principle of weighing the competing legitimate demands of security and individual rights in times of armed conflict. The principle was recognized as a principle of general international law, international humanitarian law, and Israeli administrative law.

Under international humanitarian law, military commanders in occupied territories do have the authority to seize private lands under Articles 23 and 52 of the Hague Regulations and Article 53 of the Geneva Convention IV, eg, so as to build a security fence, as long as this seizure could be justified by military/security purposes. At the same time international

humanitarian law also obliges military commanders to refrain from injuring the local population[39]—thereby emphasizing the local population's rights. The principle of proportionality enables the commanders, as supervised by courts, including domestic courts, to weigh these competing international humanitarian law norms. It is remarkable in this case that, after a lengthy analysis the court, while showing understanding for the military commander's difficult task of weighing the various interests involved, ruled that the balance achieved was not proportionate, and that the commander gave undue priority to the state's security needs. Ultimately, *Beit Sourik* shows how (p. 483) the principle of proportionality, as a principle of law, serves as the tool for domestic courts to review executive military decisions.

Ajuri and ors v Israeli Defence Force Commander in West Bank and ors, Original Petition to the High Court of Justice, Case No HCJ 7015/02, 56(6) PD 352, [2002] Isr L Rep 1, (2003) 97 AJIL 173, ILDC 14 (IL 2002), 3rd September 2002, Israel; Supreme Court; Supreme Court as High Court of Justice

The principle of proportionality has also determined the outcome of other occupation cases pertaining to the collision between security imperatives and individual rights. This outcome has not always been wholly favourable to the Israeli government, as is also exemplified by the *Ajuri* case, another case underlining the independence of Israeli courts vis-à-vis the political branches.

Ajuri[40] revolved around the issuance of orders of residence assignment by the Israeli Defence Force Commander in the West Bank regarding three residents of the West Bank, who were family members of 'suicide bombers'. The orders, which required them to move for two years from the West Bank to Gaza, were issued pursuant to Article 78 of the Geneva Convention IV. The first legal question that arose was whether the assignment of residence from the West Bank to Gaza was not a prohibited deportation, whereas the second was whether the assignment was reasonable in light of the danger represented by the residents.

> **29.** The discretion of the military commander to order assigned residence is broad. But it is not absolute discretion. The military commander must exercise his discretion within the framework of the conditions that we have established in this judgment and as prescribed in art. 78 of the Fourth Geneva Convention and the Amending Order. The military commander may not, for example, order assigned residence for an innocent person who is not involved in any activity that harms the security of the State and who does not present any danger, even if the military commander is of the opinion that this is essential for decisive reasons of security. He also may not do so for a person involved in activity that harms the security of the State, if that person no longer presents any danger that assigned residence is designed to prevent. Indeed, the military commander who wishes to make use of the provisions of art. 78 of the Fourth Geneva Convention must act within the framework of the parameters set out in that article. These parameters create a 'zone' of situations—a kind of 'zone of reasonableness'—within which the military commander may act. He may not deviate from them.

Eventually, the court approved the orders with respect to the first two residents, but set aside the orders with respect to the third resident, who was not sufficiently dangerous for purposes of application of Article 78 of the Geneva Convention IV. Conspicuously, in setting aside those orders, the court did not rely on the principle of proportionality as such but on the related requirement of 'reasonableness'. Proportionality could however possibly be seen as making reasonableness operational. After all, the court specifically inquired whether the persons against whom an assignment order was issued posed a real danger to the security of the Israeli state, and thus whether the measure restricting individual rights was proportionate to the security aim pursued. Of note is that the court considered lack of discretion and reasonableness to form an integral part of Article 78 of the Geneva

Convention IV, ie, the provision that allows military commanders to issue orders for assigned residence.(p. 484)

Bethlehem Municipality v Ministry of Defence of Israel and Israeli Defence Force Commander in the Judea and Samaria Area, Petition to the High Court of Justice, HCJ 1890/03, PD 59(4) 736, ILDC 368 (IL 2005), 3rd February 2005, Israel; Supreme Court; Supreme Court as High Court of Justice

Another fine example of an—again Israeli—domestic court limiting a military commander's discretion on the basis of a reasonableness/proportionality review of his decisions is offered by the following occupation case regarding the conformity with the law of belligerent occupation of the sequestration of land in the West Bank for paving a secure route to a Jewish holy site close to Bethlehem.[41]

> **21.** The Jewish worshippers have the basic right to freedom of worship at Rachel's Tomb, and respondent is responsible for securing the realization of this right, while protecting the security and lives of the worshippers. In examining the means for realization of this purpose, respondent must take into consideration the basic rights of petitioners, including property rights and freedom of movement, and balance properly between them. In this case, the solution adopted by respondent, after he reexamined his original plans and followed the instructions of the caselaw of this Court, indeed ensures the realization of the worshippers' freedom of worship without causing a substantial impingement upon petitioners' freedom of movement and property rights. We therefore have not found that the arrangement made at the end of the proceedings is characterized by unreasonableness which would justify our intervention.

The court also affirmed the commander's authority to take restrictive measures under international humanitarian law, in this case the sequestration of land, but subsequently conducted a reasonableness and proportionality review. In this case, the court used 'reasonableness' and 'proportionality' in the same sentence, without exactly distinguishing between the two.[42] An interesting aspect of the case is that the proportionality-informed balancing exercise pitted two human rights regimes against each other: the right to freedom of worship (freedom of religion) of Jewish worshippers—for whose benefit the sequestration measures were taken—and the freedom of movement and the right to property of the (Palestinian) residents whose position was adversely affected by the measures. Issue may of course be taken with the outcome of the proportionality test, which was clearly favourable to the military commander and indirectly to Jewish worshippers.

National Unity Party v TRNC Assembly of the Republic, First and last instance, D 3/2006, ILDC 499 (TCc 2006), 21st June 2006, Cyprus; Turkish Republic of Northern Cyprus (disputed); Supreme Court; Constitutional Court

While most relevant decisions on occupation are rendered by Israel courts, a limited number of other relevant domestic court cases on occupation are available. Some cases have been decided by Turkish Cypriot courts, which have recognized that Turkey acts as an occupying power in northern Cyprus and have applied the law of occupation to that territory. In one notable decision, a Turkish Cypriot court decided the following with respect to the appropriation of private immovable property by the Turkish Cypriot community after Turkey's 1974 military intervention in Cyprus:

> **H1** In international law, immovable private properties in a territory under military control cannot be appropriated by the invading belligerent. However, temporary use of (p. 485) private lands and buildings was permitted for the purposes required by the necessities of war. If it was necessary, private buildings could be converted into public buildings (such as hospitals) or fortifications. (paragraph 30) In such

> circumstances, applicable principles of international law did not allow the occupant to change the legal tie between absentees (displaced persons) and their properties (as can be seen from citations in this judgment from Oppenheim, Benvenisti, and the Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land (18 October 1907) 36 Stat 2277; 1 Bevans 631; 205 Consol TS 2773; Martens Nouveau Recueil (3d) 461, entered into force 26 January 1910 ('Hague Regulations'). Such persons must still be regarded as the legal owners of the land. (paragraph 32).

This case shows that also Turkish Cypriot courts are not subservient to the government. They are willing to recognize that the Turkish overlords of Turkish Cyprus act as occupying powers, and accordingly to apply the international law of occupation to northern Cyprus. In this case, international humanitarian law and legal literature were amply cited (and arguably correctly applied) to support the rule that immovable private property in occupied territories could not be appropriated, although it could be temporarily used.

VII. Weapons

Portions of international humanitarian law address the lawfulness of the use of certain weapons by belligerents. Some domestic courts have reviewed such use by their own government. A US and a Dutch court decision pertaining to the use of herbicides and chemical weapons respectively are discussed below.

Vietnam Association For Victims Of Agent Orange and ors v Dow Chemical Company and ors, Appeal judgment, 517 F 3d 104 (2d Cir 2008), ILDC 1040 (US 2008), 22nd February 2008, United States; Court of Appeals (2nd Circuit) [2d Cir]

In the United States, private plaintiffs brought a case under the Alien Tort Statute in relation to the US military's use of the defoliant herbicide Agent Orange during the Vietnam War, a herbicide which allegedly caused harm to human health and the environment in Vietnam.[43] The tort case was not brought against the US government but against the defendants who manufactured and supplied the herbicides to the US government. The question arose as to whether the use of Agent Orange constituted a violation of customary international law actionable under the Alien Tort Statute.

> **32** The sources of international law relied on by Plaintiffs do not support a universally-accepted norm prohibiting the wartime use of Agent Orange that is defined with the degree of specificity required by [the U.S. Supreme Court's decision in *Sosa*]. Although the herbicide campaign may have been controversial, the record before us supports the conclusion that Agent Orange was used as a defoliant and not as a poison designed for or targeting human populations. Inasmuch as Agent Orange was intended for defoliation and for destruction of crops only, its use did not violate the international norms relied upon here, since those norms would not necessarily prohibit the deployment of materials that are only secondarily, and not intentionally, harmful to humans. In this respect, it is significant that Plaintiffs nowhere allege that the government intended to harm human beings through its use of Agent Orange.(p. 486)
>
> **39** Plaintiffs' claims that the use of Agent Orange violated the norm of proportionality and caused unnecessary suffering rely upon international agreements requiring intentionality that Plaintiffs cannot establish. Article 23(e) prohibits the use of "arms, projectiles, or material calculated to cause unnecessary suffering." Article 6 of the Nuremberg Charter proscribes "wanton destruction of cities, towns or villages, or devastation not justified by military necessity." […] The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied. It is relatively simple to state that there

> must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects […]. It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values.
>
> **40** Plaintiffs have, at best, alleged a customary international norm proscribing the purposeful use of poison as a weapon against human beings that is inapplicable in this case.

The US court's decision in the *Agent Orange Litigation* is interesting in two respects. For one thing, it gives short shrift to (domestic) courts conducting a proportionality-informed review of military decisions. For another, it ruled that only the purposeful use of poison as a weapon against human beings is unlawful under international humanitarian law.

As far as proportionality is concerned, the court held that the principle is too vague and indefinite to satisfy the requirements laid down by the US Supreme Court in the *Sosa* case for a claim under the US Alien Tort Statute (ATS) to be actionable. These requirements do not follow from international law but from statutory interpretation of the ATS. The ATS provides in 28 US § 1350 that '[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States', but the US Supreme Court later required in *Sosa* that the international norm of which violation was claimed be sufficiently clear and unambiguous and defined with sufficient specificity to render it obligatory and universal.[44] In *Agent Orange*, the court ruled that the international humanitarian law principle of proportionality, which by its very nature is not a bright-line rule but instead requires balancing various interests, does not qualify as such a norm. Compare however the string of Israeli court decisions conducting a proportionality review of decisions of IDF military commanders and of the Israeli government, discussed above.

As far as the second point of interest is concerned, the court required that plaintiffs establish that the US government *intended* to harm human beings through their use of Agent Orange. According to the court, the use of poison that had only secondary harmful effects on human beings—such as the use of the *defoliant* Agent Orange in Vietnam—was not prohibited. As the plaintiffs could not establish the government's intention to harm humans, no international humanitarian law norms were violated. The (older) international humanitarian law treaty norms which prohibit the use of poison, if interpreted restrictively, may indeed only have contemplated outlawing poisonous weapons which *primarily* target humans. However, one may wonder whether a later customary international law norm has not developed to the effect of also outlawing such weapons that, while having another primary purpose, nevertheless cause secondary harm to humans, the civilian population in particular. While the court seemed to entertain this possibility, it swiftly held that any such norm would not be specific enough to be (p. 487) actionable under the ATS. This may exemplify the reluctance of domestic courts to rely on customary norms that have no foothold in treaty law. That said, a customary norm which prohibits the use of poisonous weapons in all circumstances, even if not directly targeting humans, may be in the process of emerging, or has perhaps already emerged although not in a sufficiently unambiguous form to be actionable under the ATS.

Van Anraat Case, Public Prosecutor and Fifteen anonymous victims v Van Anraat, Case No 2200050906-2, Decision No LJN: BA4676, ILDC 753 (NL 2007), 9th May 2007, Netherlands; The Hague; Court of Appeal

A last case of interest, as far as the legality of using certain weapons in armed conflict is concerned, is the Dutch *van Anraat* case. The court addressed the legality of the use of chemical weapons by the Iraqi regime against the Kurds in northern Iraq between 1984 and 1988 and in the war with Iran, and considered such use to be a clear violation of the 1925 Geneva Gas Protocol.[45] The case was a criminal case brought against the Dutch businessman, van Anraat, who had supplied the chemicals to the Iraqi regime, which according to the prosecutor amounted to complicity in a violation of the laws of war.

> **16** […] As results from the case file (in the period referred to in the charges), the Iraqi regime carried out multiple attacks with (among others) mustard gas during the war with Iran on places in that country, as well as on the border region between Iraq and Iran, where Kurdish population groups lived that were suspected of collaboration with the Iranian enemy. Those attacks caused the death of at least thousands of civilians (that did not participate in the conflict) and caused permanent and severe health problems to very many persons. It is beyond doubt that the regime in Baghdad by doing so committed extensive and extremely gross violations of the international humanitarian law by using a weapon that was already prohibited by the Geneva (Gas) Protocol of 17 June 1925.
>
> The defendant has made an essential contribution to these violations—at a time that many, if not all other suppliers 'pulled out' with regard to the increasing international pressure—by supplying many times in the course of several years (among other matters) very large quantities of a precursor for mustard gas; in doing so the defendant made significant profits. Those supplies enabled the Iraqi regime to (almost) continue their deadly (air) attacks in full force during a number of years. Apparently the defendant did not give his deliberate support to the afore mentioned gross violations out of sympathy for the targets of the regime, but—as it should be assumed—the defendant acted exclusively in pursuit of large gains and fully neglected the consequences of his actions. Even today the defendant does not show any sense of guilt or any compassion for the numerous victims of the mustard gas attacks.

The *van Anraat* case has mainly (international) criminal law relevance,[46] but the criminal court could only rule on van Anraat's complicity in a violation of the laws and customs of war (ie, international humanitarian law) if such a violation were proven. The court did not have to spend much thought on the question of whether the use of mustard gas by Saddam Hussein against the Kurds was prohibited under international law. It was after all the main aim of the 1925 Geneva Gas Protocol to outlaw the use of mustard gas, a weapon that had caused so many casualties during WWI.

(p. 488) VIII. Conclusion

The *corpus* of domestic court decisions relevant to international humanitarian law is sizable but not huge. Only a limited number of states have been involved in armed conflict, whereas war crimes trials conducted by third states under the universality principle are few and far between. Importantly, some domestic courts consider international humanitarian law conventions as not self-executing and thus as not conferring a private right of action on individuals and NGOs seeking to challenge governmental action. In spite of these limitations, domestic courts—although to a lesser extent and arguably with lesser authority than international criminal tribunals—have further developed some aspects of international humanitarian law, or at least have clarified the scope of international humanitarian law provisions that lack specificity (eg, regarding administrative detention periods and occasions for judicial review). When so doing, most of the time courts apply international

humanitarian law treaty law; they are wary of finding governmental action to be in violation of customary international law.

A large number of pertinent decisions on international humanitarian law stem from Israeli courts. Israeli courts have rendered leading decisions on the notion of participation in hostilities, on security detention, and occupation law. They have demonstrated remarkable independence from the executive branch as they have proved willing to ascertain the reasonableness of military decision-making, notably whether a proper (proportionate) balance has been struck between the government's security imperatives and the needs of the protected persons, in particular civilians. Israeli case law shows that in situations of armed conflict, judges are willing to subject governmental action to international legal constraints.[47] In all states, however, courts remain understandably reluctant to second-guess military decisions when reviewing decisions taken in 'the heat of the battle'.

Footnotes:

1 Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.

2 *Johnson v Eisentrager* 339 US 763 (1950), 789, fn 14.

3 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (Geneva Gas Protocol) (signed 17 June 1925, entered into force 8 February 1928) 26 UST 571, 94 LNTS 65.

4 For a discussion see K F Gärditz, 'Bridge of Varvarin' (2014) 108 *American Journal of International Law* 86; S Mehring, 'The Judgment of the German Bundesverfassungsgericht concerning Reparations for the Victims of the Varvarin Bombing' (2015) 15(1) *International Criminal Law Review* 201.

5 Japan, *Ryuichi Shimoda et al v the State*, District Court of Tokyo, 7 December 1963, 8 *Japanese Annual of International Law* 212 (1964) 32 ILR 626, 640–42. See also R A Falk, 'The Shimoda Case: a Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki' (1965) 59 *American Journal of International Law* 759; H Fujita, 'Reconsidération de l'affaire Shimoda: analyse juridique du bombardement atomique de Hiroshima et Nagasaki' (1980) 19 *Revue de droit pénal militaire et de droit de la guerre* 49.

6 UNGA, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' UNGA Res 60/147 (16 December 2005) UN Doc A/RES/60/147, para 12.

7 See the discussion on the cases dealing with detention below.

8 28 US § 1350 ('The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States').

9 64 Stat 115.

10 548 US 557 (2006).

11 For a longer discussion see P Gaeta, 'The Armed Conflict in Chechnya before the Russian Constitutional Court' (1996) 7 *European Journal of International Law* 563; T G Morshchakova, 'The Chechen War Case and Other Recent Jurisprudence of the Russian Constitutional Court' (1998) 42 *Saint Louis University Law Journal* 743; W E Pomeranz,

'Judicial Review and the Russian Constitutional Court: the Chechen Case' (1997) 23 *Review of Central and East European Law* 9.

12 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) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

13 Gaeta (n 11) 564.

14 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3.

15 ibid, 574 (concluding that '[t]his decision […] clearly demonstrates that the Russian Constitutional Court has become an important institution promoting compliance with international law in the Russian legal system').

16 Geneva Convention IV (n 1); a Dutch court held, somewhat enigmatically, that a person was not a protected person 'only if he has actually been incorporated into the opposing party' (ILDC 1071 (NL 2008) para 9.2).

17 ICTY Appeals Chamber, *Prosecutor v Dusko Tadic* (Judgment) IT-94-1-A (15 July 1999), para 166 ('While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test').

18 ICTY Trial Chamber II, *Prosecutor v Limaj, Bala and Musliu* (Judgment) IT-03-66-T (30 November 2005); ICTY Trial Chamber II, *Prosecutor v Djordjevic* (Judgment) IT-05-87/1-T (17 February 2011); ICTY Trial Chamber, *Prosecutor v Milutinovic* (Judgment) IT-05-87-T (26 February 2009).

19 See D Barak-Erez, 'The International Law of Human Rights and Constitutional Law: A Case Study of an Expanding Dialogue' (2004) 2 *International Journal of Constitutional Law* 611, 619; O Ben-Naftali and K R Michaeli, 'Justice-Ability: A Critique of the Alleged Non-Justiciability of Israel's Policy of Targeted Killings' (2003) 1(2) *Journal of International Criminal Justice* 368, 378; O Ben-Naftali and K R Michaeli, 'We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings' (2003) 36 *Cornell International Law Journal* 233, 235; L Bilsky, 'Suicidal Terror, Radical Evil, and the Distortion of Politics and Law' (2004) 5(1) *Theoretical Inquiries in Law* 131, 146, 150; G Nolte, 'Preventive Use of Force and Preventive Killings: Moves into a Different Legal Order' (2004) 5(1) *Theoretical Inquiries in Law* 111.

20 See, on this case, O Ben-Naftali and K R Michaeli, 'Public Committee Against Torture in Israel v. Government of Israel: Case No HCJ 769/02: Supreme Court of Israel, Sitting as the High Court of Israel, December 13, 2006' (2007) 101 *American Journal of International Law* 459; Ben-Naftali and Michaeli, 'Justice-Ability (n 19) 368; M Lesh, 'The Public Committee Against Torture in Israel v the Government of Israel: the Israeli High Court of Justice Targeted Killing Decision' (2007) 8 *Melbourne Journal of International Law* 373; N Melzer, 'Targeted Killing or Less Harmful Means? Israel's High Court Judgment on Targeted Killing and the Restrictive Function of Military Necessity' (2008) 9 *Yearbook of International Humanitarian Law* 87; H Moodrick-Even Khen, 'Can We Now Tell what "Direct Participation in Hostilities" Is?: HCJ 769/02 the Public Committee against Torture in Israel v. the Government of Israel' (2007) 40 *Israel Law Review* 213; J A Rubel, 'A Missed Opportunity:

the Ramifications of the Committee Against Torture's Failure to Adequately Address Israel's Ill-Treatment of Palestinian Detainees' (2006) 20 *Emory International Law Review* 699.

21 Additional Protocol I (n 14) Article 51(3).

22 N Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009).

23 *Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v Israel and ors*, Original Petition to the High Court of Justice, HCJ 769/02, ILDC 597 (IL 2006), 13 December 2006, Israel; Supreme Court; Supreme Court as High Court of Justice, para 40.

24 *al–Basyuni Ahmad and ors v Prime Minister and Minister of Defence*, Original Petition, Case No HCJ 9132/07, ILDC 883 (IL 2008), 30 January 2008, Israel; Supreme Court; Supreme Court as High Court of Justice, para 21.

25 ibid, para 20.

26 Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III) (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, Article 4A reads as follows: 'Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

> 1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
>
> 2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
>
> (a) That of being commanded by a person responsible for his subordinates;
>
> (b) That of having a fixed distinctive sign recognizable at a distance;
>
> (c) That of carrying arms openly;
>
> (d) That of conducting their operations in accordance with the laws and customs of war.

27 *Israel v Srur (Muhammad) and ors*, Decision on Jurisdiction, Case No 548/06, Case No 549/06, Case No 550/06, ILDC 845 (IL 2007), 4 December 2007, Israel; North District; Nazareth; District Court, para 9.

28 Pub L No 109-399, 120 Stat 2600 (2006) (United States).

29 10 USC s 948b(c).

30 cf, however, *Boumediene and ors v Bush and ors*, Decision, 553 US 723 (2008); ILDC 1039 (US 2008), discussed below.

31 10 USC s 948b(d).

32 A C Arend, 'Who's Afraid of the Geneva Conventions? Treaty Interpretation in the Wake of Hamdan v. Rumsfeld' (2007) 22 *American University International Law Review* 709; G P Fletcher, ' "Hamdan" Confronts the Military Commissions Act of 2006' (2007) 45 *Columbia Journal of Transnational Law* 427; S Ghoshray, 'Hamdan's Illumination of Article III Jurisprudence in the Wake of the War on Terror' (2007) 53 *Wayne Law Review* 991; G J A Knoops, 'Of the Law of International Criminal Tribunals Within Terrorism and "Unlawful" Combatancy Trials After Hamdan v. Rumsfeld' (2007) 30 *Fordham International Law Journal*

599; F Ní Aoláin, ‘ “Hamdan” and Common Article 3: Did the Supreme Court Get It Right?’ (2007) 91 *Minnesota Law Review* 1523; E Shamir-Borer, ‘Revisiting Hamdan v. Rumsfeld’s Analysis of the Laws of Armed Conflict’ (2007) 21 *Emory International Law Review* 601; S Solomon and D Kaye, ‘The International Law of Hamdan v Rumsfeld’ (2007) 8 *Yearbook of International Humanitarian Law* 149; M Sonn, ‘Hamdan v. Rumsfeld: a Bad Decision with the Best Intentions: Why the Court Was Wrong in Interpreting the Geneva Conventions and What Should Be Done’ (2007) 19 *Pace International Law Review* 143.

33 *United States v Hamdan* (Salim Ahmed), Ruling on defence motion for Article 5 status determination, ILDC 747 (US 2007), 17 December 2007, United States.

34 For a discussion of the entire proceedings see J C Dehn, ‘The *Hamdan* Case and the Application of a Municipal Offence: The Common Law Origins of “Murder in Violation of the Law of War” ’ (2009) 7 *Journal of International Criminal Justice* 63.

35 *Boumediene and ors v Bush and ors* (n 30).

36 See *North Sea Continental Shelf Cases* (*Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands*) [1969] ICJ Rep 4, 42.

37 Annex to Convention (IV) respecting the Laws and Customs of War on Land: Regulations concerning the Laws and Customs of War on Land (Hague Regulations) (signed 18 October 1907, entered into force 26 January 1910) 36 UST 2277.

38 ‘Israeli Cases: Beit Sourik Village Council vs. the Government of Israel, Commander of the IDF Forces in the West Bank, 30 June 2004’ (2007) 13 *Palestine Yearbook of International Law* 401; ‘HCJ 2056/04 Beit Sourik Village Council v. the Government of Israel’ (2005) 38(1–2) *Israel Law Review* 83; E Holmila, ‘Another Brick in the Wall?: the Decision of the Israeli Supreme Court in the Case of Beit Sourik Village Council v. the Government of Israel and Commander of the IDF Forces in the West Bank (HCJ 2056/04, 30 June 2004)’ (2005) 74 *Nordic Journal of International Law* 103; J Litwack, ‘A Disproportionate Ruling for All the Right Reasons: Beit Sourik Village Council v. the Government of Israel’ (2006) 31 *Brooklyn Journal of International Law* 857;

M Pertile, ‘Beit Sourik Village Council v. the Government of Israel: a Matter of Principle (and Neglected Rules)’ (2005) 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 677.

39 Geneva Convention IV (n 1) Article 27; Hague Regulations (n 37) Articles 43 and 46.

40 D Barak-Erez, ‘Assigned Residence in Israel’s administered Territories: the Judicial Review of Security Measures: Review of H. C. 7015/02, Ajuri v. IDF Commander in the West Bank, 3 September, 2002’ (2004) 33 *Israel Yearbook on Human Rights* 303; D Vagts, ‘Ajuri v. IDF Commander in West Bank. Case No HCJ 7015/02. (2002) Isr L Rep 1. Supreme Court of Israel, September 3, 2002’ (2003) 97 AJIL 173.

41 A M Gross, ‘Human Proportions: Are Human Rights the Emperor’s New Clothes of the International Law of Occupation?’ (2007) 18 *EJIL* 35.

42 *Bethlehem Municipality v Ministry of Defence of Israel and Israeli Defence Force Commander in the Judea and Samaria Area*, Petition to the High Court of Justice, HCJ 1890/03, PD 59(4) 736, ILDC 368 (IL 2005), 3 February 2005, Israel; Supreme Court; Supreme Court as High Court of Justice, para 8.

43 For a discussion of the case see A E A Zierler, ‘The Vietnamese Plaintiffs: Searching for a Remedy After Agent Orange’ (2007) 21 *Temple International and Comparative Law Journal* 447; M G Palmer, ‘Compensation for Vietnam’s Agent Orange Victims’ (2004) 8 *International Journal of Human Rights* 1.

44 *Sosa v Alvarez Machain*, 542 US 692 (2004). See also *In re Estate of Marcos Human Rights Litigation*, 25 F 3d 1467, 1475 (CA9 1994) ('Actionable violations of international law must be of a norm that is specific, universal, and obligatory').

45 Geneva Gas Protocol (n 3).

46 See also C Barker, B Myers, and H van der Wilt, 'International Criminal Law' Chapter 15 in this volume.

47 It is of note, however, that in other states, eg the US, judicial review of procedural aspects of governmental conduct in armed conflict could be based on constitutional law rather than international law.