Leiden Journal of International Law, 24 (2011), pp. 1–21
 doi:10.1017/S0922156510000567

ARTICLES

Terrorism and Armed Conflict: Insights from a Law & Literature Perspective

ANDREA BIANCHI*

Abstract
This article examines some selected issues relating to terrorism and international humanitarian law (IHL): the characterization of the nature of armed conflicts in which armed groups, qualified as 'terrorist', are involved; terrorism as a war crime; and the determination of the status and treatment (including detention) of terrorist suspects apprehended in the course of an armed conflict. The analysis emphasizes the importance of legal categories and legal qualifications of factual situations for the purpose of determining the applicable law as well as the crucial importance of taking societal practice into account when evaluating the state of the law in any given area. The main focus of the article, however, is on providing a few basic insights, drawn from the law & literature movement, on international humanitarian law and terrorism. Short of any epistemological ambition, literature is used as a remainder that the law is not a set of neutral rules, elaborated and applied independently of context and historical background; that the human condition remains central; and that legal regulation cannot be oblivious to it. Finally, mention is made of interpretive techniques, developed in the field of literary studies, that may help establish social consensus on the interpretation of IHL grey areas.

Key words
armed conflict; international humanitarian law; interpretation; law & literature; terrorism

1. Prolegomena: encounters

To speak or write on terrorism and armed conflict evokes strong feelings. This is the reason why it is an intractable problem – one that cannot be solved by expertise, in whose worship we live nowadays. If I have learnt one lesson in all these years in which I have been dealing with terrorism,[1] it is that it is almost impossible to

* Professor of International Law, Graduate Institute of International and Development Studies, Geneva [andrea.bianchi@graduateinstitute.ch]. This is the revised version of the academic year inaugural lecture at the Geneva Academy of International Humanitarian Law and Human Rights, delivered on 24 September 2009.

1 See, among others: (co-author with Yasmin Naqvi), *International Humanitarian Law and Terrorism* (2011) (forthcoming); (co-editor with Alexis Keller), *Counterterrorism: Democracy's Challenge* (2008); (ed.), *Enforcing International Law Norms against Terrorism* (2004); 'Fear's Legal Dimension: Counterterrorism and Human Rights', in L. Boisson de Chazournes and M. Kohen (eds.), *International Law and the Quest for Its Implementation: Liber Amicorum Vera Gowlland-Debbas* (2010), 175; 'Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion', (2006) 17 *European Journal of International Law* 881; 'Security Council's Anti-Terror Resolutions and their Implementation by Member States', (2006) 4 *Journal of International Criminal Justice* 1044.

convince by way of rational persuasion and legal reasoning those who hold strong views about it. Whatever efforts are made about finding a balanced approach to the thorniest legal issues, inevitably one will end up raising the sensitivities of those who hold a different view. Maybe Baxter was right when he regretted that the legal concept of terrorism, as ambiguous and imprecise as it is, was inflicted upon us, with dubious utility or added value from the legal standpoint.[2] Be that as it may, whatever one says about terrorism, strong passions are likely to be involved and strong reactions should be expected. Legal reasoning and arguments about terrorism bring immediately to the fore animosity if not sheer confrontation based on value judgements and political bias. On the other hand, international humanitarian law (IHL) is perceived as a highly technical branch of international law, the repository of which is a restricted circle of individuals, many of whom are based in Geneva. But there is one thing that the legal discourses about terrorism and IHL seem to have in common: although for entirely different reasons, both seem cryptic and fairly inscrutable. 9/11 has caused them to meet and the encounter has caused a clash of legal cultures and mindsets, which has not rendered the law applicable to them any clearer or any more accessible.[3]

Indeed, accessibility, broadly understood to include also intelligibility, is a primary value in our profession. Remember Franz Kafka's parable 'Before the Law'?[4] 'Before the law sits a doorkeeper.' To this doorkeeper, there comes a man from the countryside asking to have access to the Law, whose gate is left open for him to peer through. But the doorkeeper says he cannot grant him entry at the moment and he keeps him waiting all his life. The countryman is curious but he is afraid of the doorkeeper, who says that other dreadful doorkeepers, more powerful than him, stand by the other rooms inside. As the poor man is about to die, he waves to the doorkeeper and asks why no one else in all these years has ever begged for admittance. The doorkeeper answers 'No one else could ever be admitted here, since this gate was made only for you. I am now going to shut it'.[5] This is not what the law should be about. People must be let in, even if, inside, things are not arranged as neatly and tidily as one would expect. It is the duty of the gatekeeper to let people in and to allow them to see what there is inside. But I understand that this would diminish his power as gatekeeper. Yet I wish gatekeepers could act differently.

The legal regime of international humanitarian law might appear, at least at first sight, as the most appropriate response to acts of terrorism.[6] IHL is built upon the principle of the protection of civilian life and property, the clear distinction between

2 R. R. Baxter, 'A Skeptical Look at the Concept of Terrorism', (1973–74) 7 *Akron Law Review* 380, at 380: 'We have cause to regret that a legal concept of "terrorism" was ever inflicted on us. The term is imprecise; it is ambiguous and above all it serves no operative legal purpose.'

3 See, among others: M. P. Fisher, 'Applicability of the Geneva Conventions to "Armed Conflicts" in the War on Terror', (2007) 30 *Fordham International Law Journal* 509; E. A. Posner, 'Terrorism and the Laws of War', (2004–05) 5 *Chicago Journal of International Law* 423; J. Klabbers, 'Rebel with a Cause? Terrorists and Humanitarian Law', (2003) 14 *European Journal of International Law* 299; G. L. Neuman, 'Humanitarian Law and Counterterrorist Force', (2003) 14 *European Journal of International* Law 283.

4 In F. Kafka, *The Complete Short Stories* (2008), at 3–4.

5 Ibid., at 4.

6 Generally on the topic, see Bianchi and Naqvi, *supra* note 1, to which we remand for more detailed treatment of all the relevant legal issues, only briefly touched upon in this article.

https://doi.org/10.1017/S0922156510000567 Published online by Cambridge University Press

military objectives and civilian objects, the prevention of unnecessary suffering, and the unequivocal condemnation of acts that breach those cardinal principles. Terrorism, as commonly understood, is clearly an example of criminal behaviour, which goes against these fundamental principles of IHL. Moreover, some of the tools of IHL can also be helpful in combating terrorism – they allow the detention of persons posing a threat to the security of the state for as long as that threat lasts, they allow the targeting of individuals directly participating in hostilities, they prohibit acts of terror and terrorism, and they provide for a system of enforcement of these rules. Yet terrorism in and of itself is not inherently related to armed conflict and only comes under the regulation of IHL in certain particular situations. History as well as recent practice bears witness to the difficulty of making the factual and legal characterizations that lead to the identification of such situations. That is where the problems lie.

Against this background, rather than providing a comprehensive overview of the numerous ways in which terrorism may intersect with IHL, I have selected a limited number of issues drawn from the main domains of IHL. Incidentally, they coincide with what I think are some of the grey areas where further legal as well as policy analysis is required. These are (i) the characterization of the nature of armed conflicts, both international and non-international, involving armed groups qualified by one of the parties as terrorist groups and the question of what law is applicable to such conflicts; (ii) the characterization of terrorism as a war crime; and, more briefly, (iii) the determination of the status of terrorist suspects apprehended in the course of an armed conflict and the issue of which treatment they are entitled to, including detention standards.

The analysis will be carried out primarily by focusing on the crucial importance of legal characterization and the use of legal categories to determine normative outcomes,[7] as well as on the importance of taking societal practices duly into account when evaluating the state of the law in any given area.[8] Furthermore, throughout the paper, use will be made of literary references to illustrate the more mundane aspects of the often tragic realities underlying legal regimes. Finally, (iv) the significance of these three *τόποι* or *loci* will be appraised. In particular, reliance on the insights drawn from literature will be explained. I lay no claim to do justice to the law & literature (L&L) movement, of which I am no (conscious) adherent.[9] Mine is just

7 Characterization or qualification is the interpretive operation whereby the identification of the applicable law is made, depending on the way certain factual matrices are subsumed into pre-existing legal categories.

8 By societal practice, I mean, in this context, the conduct of social agents, primarily, but of course not exclusively, states.

9 It goes well beyond the scope of this brief essay to introduce the reader to L&L, let alone to account for its scholarly contributions. Traditionally, a distinction is made between 'law in literature', which studies the representation of law and legal activities in literary works, and 'law as literature', which focuses more on the alleged commonality between legal and literary texts. In particular, interpretive techniques, borrowed from literary theory and literary criticism, are often used to approach legal interpretive issues. In fact, the two strands are intermingled and distinctions are often artificial. For an introduction to L&L, see K. Dolin, *A Critical Introduction to Law and Literature* (2007); and I. Ward, *Law and Literature: Possibilities and Perspectives* (1995). For a historical account of L&L, see M. Pantazakos, '*Ad Humanitatem Pertinent*: A Personal Reflection on the Historical Purpose of the Law and Literature Movement', (1995) 7 *Cardozo Studies in Law and Literature* 31.

https://doi.org/10.1017/S0922156510000567 Published online by Cambridge University Press

an occasional encounter that only allows for some basic insights to be drawn from a particularly inspiring way of looking at the law.[10] The lightness of the approach, however, should not be taken to understate the potential for a more profound impact on the understanding of terrorist violence and armed conflict through the looking glass of literature. Literature is a powerful reminder that the law is not a set of neutral rules elaborated independently of context and historical background, that the human condition remains central, and that legal regulation cannot be oblivious to it, including its most dramatic aspects.

Literary narratives can help us to better understand that the rigidity of legal categories may have to adjust or even yield, at times, to the pressing needs of changing societal contexts if they are to discharge the social regulatory function for which they have been created in the first place.[11] Finally, it is also worth looking at some techniques of interpretation, developed in the field of literary studies, to shed light on some of the difficult interpretive issues one is confronted with when dealing with IHL and terrorism.[12] If the grey areas of the law are to be clarified, an interpretation that focuses more on the social consensus of the actors involved about the meaning of legal prescriptions, rather than on abstract rules of interpretation, is likely to be more conducive to establishing agreement among legal operators and decision-makers on how to apply IHL rules.[13]

2. International armed conflicts

War novels have a long tradition. It is as if literature were used by humankind to exorcize the evil of war. Leo Tolstoy's saga of the Napoleonic Wars, *War and Peace*, described the disruptive effects of war on Russian aristocratic society.[14] Later, Erich Maria Remarque's *All Quiet on the Western Front* accurately illustrated the physical and mental duress of war in the trenches, the dehumanizing effect of combat, and

10 As aptly noted by P. Gewirtz, 'Narrative and Rhetoric in the Law', in P. Brooks and P. Gewirtz (eds.), *Law's Stories: Narrative and Rhetoric in the Law* (1996), 2 at 5: 'one may accept that such interdisciplinary confrontations are unlikely to achieve a grand new synthesis, and acknowledge that after such encounters the participants from the different disciplines return to their mostly separate intellectual projects. But something may still change because of an encounter. Even those who do not pursue interdisciplinary collaboration any further may return to their disciplinary solitude with some new tools and insight and analogies – devices to open up at least a few inches of fresh ground on their home turf.'

11 This is particularly apparent when law is conceived as a rhetorical and social system. See J. B. White, 'Law as Language: Reading Law and Reading Literature', (1982) 60 *Texas Law Review* 415, at 444: 'To conceive of the law as a rhetorical and social system, a way in which we use an inherited language to talk to each other and to maintain a community, suggests in a new way that the heart of the law is what we always knew it was: the open hearing in which one point of view, one construction of language and reality, is tested against another. The multiplicity of readings that the law permits is not its weakness, but its strength, for it is this that makes room for different voices, and gives a purchase by which culture may be modified in response to the demands of circumstance.'

12 The alleged commonality of the legal and literary discourse on the basis of their being both based on rhetoric and the analysis of texts and on their capacity to constitute by their own discourse a rhetorical community was underlined by James Boyd White in his seminal work *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (1973). In fact, the capacity of both disciplines, law and literature, to shape reality by language is a recurrent theme in the L&L movement.

13 For a cursory account of the most relevant debates about interpretation in literary studies, see Ward, *supra* note 9, at 43 et seq.

14 L. Tolstoy, *War and Peace* (2006). Given the editorial style constraints of this Journal, the year of publication for this and other literary works cited in this article refers to the edition owned or consulted by the author.

https://doi.org/10.1017/S0922156510000567 Published online by Cambridge University Press

the estrangement and alienation of the soldier's life.[15] Admittedly, war has changed a great deal since, even though its evil continues disrupting human lives.

If the phenomenology of war and armed conflict has changed over time, this is not without consequences for the rules regulating them. Indeed, legal categories are supposed to be applied to factual matrices that are identified beforehand in general and abstract terms. In other words, law provides regulation for certain facts or activities that – experience suggests – occur or take place in a certain fashion. Most of our work is taken up with 'characterizing' these facts with a view to determining what the applicable rules are. This premise is particularly relevant as one sets out to explore the scope of application of international humanitarian law in relation to terrorism.

According to the traditional paradigm of IHL, in particular Article 2 common to the four Geneva Conventions, international armed conflict is necessarily *inter-state* armed conflict.[16] The military intervention by the United States and other states against Afghanistan in 2001, in response to the 9/11 attacks, can be characterized as an example of an international armed conflict regulated by the Geneva Conventions. The refusal by the United States to apply the Geneva Conventions to al-Qaeda fighters and Geneva Convention III to the Taliban apprehended in the course of the conflict, with the only guarantee that the prisoners should be 'treated humanely, and to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva', casts doubt not on the characterization of the conflict, but rather on the will of a contracting party to the Geneva Conventions to apply them properly.[17]

There are two requirements in order for Article 2 common to the four Geneva Conventions to apply: the existence of an 'armed conflict' between two or more of the high contracting parties and state involvement.

As the distinction between international and non-international armed conflicts seems to be of diminishing importance in international practice, some degree of intensity, to be appreciated on a case-by-case basis, appears to be required, even when the armed forces of two or more states are involved. This criterion is instrumental to distinguish such instances of practice as 'border clashes', 'skirmishes', and 'minor incidents' that states do not tend to regard as giving rise to an international armed conflict, properly so-called.[18] To hold international humanitarian law applicable only to situations in which the violence has attained a certain threshold of intensity seems all the more reasonable as one realizes the different logic that permeates this branch of the law as opposed to the ordinary operation of domestic criminal

15 E. M. Remarque, *All Quiet on the Western Front* (1996).

16 See, e.g., D. Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?', (2005) 16 *European Journal of International Law* 171; H. P. Gasser, 'International Humanitarian Law', in H. Haug (ed.), *Humanity for All: The International Red Cross and Red Crescent Movement* (1993), 1; D. Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols', (1979) 163 (II) RCADI 117.

17 See President Bush's Memorandum on Humane Treatment of Taliban and Al Qaeda Detainees of 7 February 2002, available at www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf. For some useful insights on the Bush Administration's counterterrorism policy, particularly on the use of coercive interrogation techniques, see P. Sands, *Torture Team: Rumsfeld's Memo and the Betrayal of American Values* (2008).

18 See the *UK Manual of the Law of Armed Conflict* (2004), at 27 and 29.

law, to which situations that do not attain a certain level of intensity are more suitably deferred. Different considerations apply to the other requirement for the identification of an international armed conflict, namely state involvement.

Since the armed conflict must take place between two or more high contracting parties of the Geneva Conventions in order to be qualified as international, the issue of determining state involvement is crucial, particularly in those cases in which such involvement may be controversial. The most difficult issue has turned out to be the determination of the criteria whereby state involvement is to be ascertained for the purposes of characterizing a conflict as an international one.

The divergent evaluation of the criteria of attribution to a state of the conduct of groups of individuals under the law of state responsibility, made by the ICJ in *Nicaragua* (effective control)[19] and by the ICTY in *Tadić* (overall control),[20] is known as one of the more prominent examples of conflicting jurisprudence in international law. In this respect, the most interesting insight is the one provided by the ICJ in the *Genocide* case,[21] wherein the Court held (i) that the test to determine the international character of a conflict does not need to be based on the criteria for attribution under the law of state responsibility, and (ii) that the 'overall control' of a state over an armed group, elaborated by the ICTY in *Tadić*, might well be a suitable criterion for the purpose of characterizing a conflict as international.[22] Indeed, strong policy arguments exist to promote an expansive use of the notion of state involvement. Given that the protections provided by international humanitarian law rules applicable to international armed conflicts are substantially wider and more advantageous to civilians, the attempt to expand their scope of application by broadly characterizing international armed conflicts can be regarded as a legitimate aim to be pursued in order to foster the protection of international humanitarian law. This point was accurately made by the ICTY Appeals Chamber in the *Aleksovski* case.[23]

Such recent developments notwithstanding, recent practice attests to the difficulties of characterizing an armed conflict. As regards uses of force against terrorist groups, a certain number of examples can be drawn from international practice. An apt illustration is the use of armed force against terrorist groups in a foreign state's territory not controlled by that state.[24]

---

19 *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, [1986] ICJ Reports 14, especially para. 115.

20 *Prosecutor v. Tadić*, Judgement, Case No. IT-94–1-A, Appeals Chamber, 15 July 1999. See in particular paras. 122 and 131.

21 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, Judgment of 26 February 2007, [2007] ICJ Reports 43.

22 Ibid., paras. 404–405.

23 *Prosecutor v. Aleksovski*, Judgement, Case No. IT-95–14/1-A, Appeals Chamber, 24 March 2000, para. 146 (footnote omitted): 'To the extent that it provides for greater protection of civilian victims, this different and less rigorous standard is wholly consistent with the fundamental purpose of Geneva Convention IV, which is to ensure "protection of civilians to the maximum extent possible".'

24 For a survey, see A. Bianchi, 'The International Regulation of the Use of Force: The Politics of Interpretive Method', (2009) 22 *Leiden Journal of International Law* 651; C. Tams, 'The Use of Force against Terrorists', (2009) 20 *European Journal of International Law* 359.

https://doi.org/10.1017/S0922156510000567 Published online by Cambridge University Press

For our limited purposes, let us assume that certain states, usually referred to as 'fragile states', are incapable, for structural or contingent reasons, to discharge their obligations under international law, including the obligation to prevent use of their territory for the perpetration or preparation of acts against the security of other states. The use of armed force by a foreign state against groups of individuals in the fragile state's territory causes one to wonder whether international humanitarian law should apply, provided that a certain threshold of violence is met. The state-involvement requirement is, quite obviously, problematic. If, *formally*, two states are involved, as armed force is used by one state in the territory of another state, *in practice*, hostilities do not directly involve the fragile state's armed forces, for, by definition, the latter state is not in control of the territory (or parts thereof) in which the conflict takes place.

The military intervention of the Israeli Defence Forces in Lebanon in the summer of 2006 raised similar questions. Despite Lebanon's repeated claims of lack of involvement and lack of knowledge of the occurrences in the southern part of its territory,[25] the qualification of the conflict as an international one met with widespread consensus.[26] In fact, an interpretation of Article 2 of the Geneva Conventions that expands its reach to conflicts involving a state that is unable or unwilling to disarm, disband, or otherwise control armed groups fighting against another state does not seem unreasonable.

If, in the debates within the Security Council, only sparing reference was made to the applicability of international humanitarian law – and even more rarely, to the Geneva Conventions, thus acknowledging the international nature of the conflict – this was due to the fact that primary attention was devoted to discussing the lawfulness of Israel's recourse to force.[27] Israel, however, did not consider captured Hezbollah fighters as prisoners of war and charged them with terrorist offences to be prosecuted under the ordinary justice system,[28] thus highlighting that even when states accept the constraints of the international humanitarian law applicable to international armed conflicts, they are not necessarily ready to submit to all of its legal consequences.

An even more challenging case is represented by the recent conflict in the Gaza Strip, where Israel militarily intervened to hit Hamas positions and activists in December 2008–January 2009. If the threshold of violence was surely met in the

25 Identical letters dated 13 July 2006 from the chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2006/518 (2006).

26 See the UNSC debates on the situation in the Middle East, including the Palestinian question, of 21 July 2006, UN Doc. S/PV.5493 (2006) and Resumption. Switzerland condemned the conflict and recalled IHL obligations during its statement in the meeting. However, it considered the conflict not to be of an international character for the purpose of its neutrality: see Confederation Suisse, Dépt. Fédéral des Affaires Etrangères, Rapport de politique étrangère 2007, Annexe 1 – Neutralité, 15 June 2007, available at www.eda.admin.ch. Further international reactions are reported in A. Tancredi, 'Il problema della legittima difesa nei confronti di milizie non statali alla luce dell'ultima crisi tra Israele e Libano', (2007) 90 *Rivista di Diritto Internazionale* 969, at 970–1. See also UN Human Rights Council, Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Res. S-2/1, UN Doc. A/HRC/3/2 (2006), para. 57.

27 See Provisional Agenda of the 5493rd Meeting of the UN Security Council, UN Doc. S/PV.5493 (2006).

28 See J. Dugard, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, UN Doc. A/HRC/4/17 (2007), paras. 43–45.

circumstances, the peculiar and ambiguous status of the Gaza Strip under international law further complicated an already uncertain scenario. Curiously, Security Council Resolution 1860 defined Gaza as an integral part of the territories occupied by Israel in 1967 and part of the future Palestinian state, forgetting to tell us what Gaza is at the present time![29] If an expansive reading of Article 2 could be plausible for the states parties to the Geneva Conventions, *quid* for an entity that is not yet a state?[30] Such formalistic preoccupation did not prevent many states from invoking the applicability of rules of international humanitarian law. The problem, however, is that hardly any specific indication was given as to which particular rules of international humanitarian law were applicable and why.

Looking at the reaction by states to the hostilities that brought Israel to re-enter Gaza in January 2009, it is worth noting that many states, including those belonging to the Non-Aligned Movement, looked at the situation in Gaza as one of continuing occupation by Israel.[31] With the exception of a few states that made express reference to the applicability of Geneva Convention IV, this call for respecting international humanitarian law was left unqualified, consistently with a trend, which seems to have firmly established itself in recent practice.[32] In other words, whenever military force is used on a less than negligible scale by a state, the immediate reflex for states is to invoke the applicability of international humanitarian law, regardless of any more accurate qualification of the conflict. Equally significant is the reluctance by states to invoke respect for human rights law in such contexts. This seems to be at variance with the widely shared contention, in legal scholarship, that international humanitarian law and human rights law are complementary even in a situation of armed conflict.[33]

3. Non-international armed conflict

The carnage, bloodshed, cruelty, and sufferance of war are no less disruptive in non-international armed conflicts (NIACs). It suffices to think of Ernest Hemingway's *For Whom the Bell Tolls*, most likely his most famous war novel, set against the background of the Spanish civil war.[34] The constant presence of death and the ambivalent

29 See UN Security Council Res. 1860, 8 January 2009, UN Doc. S/RES/1860 (2009).

30 As is well known, the recent submission of a declaration of acceptance of the ICC jurisdiction by Palestine under Art. 12(3) of the ICC Statute is turning out to be particularly controversial in light of the thorny issue of Palestine's alleged statehood.

31 See Provisional Agenda of the 6061st Meeting of the UN Security Council, UN Doc. S/PV.6061 (2009).

32 See the debates preceding the adoption of UN Security Council Res. 1860, Provisional Agenda of the 6061st Meeting of the UN Security Council, UN Doc. S/PV.6061 (especially the statements by the Czech Republic, on behalf of the European Union, and of Cuba, on behalf of the Non-Aligned Movement), and also Provisional Agenda of the 6063rd Meeting of the UN Security Council, UN Doc. S/PV.6063 (2009).

33 Y. Dinstein, *The International Law of Belligerent Occupation* (2009), at 69 ff. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, [2004] ICJ Reports 136, para. 106; Human Rights Committee, General Comment No. 31 (2004), para. 11: 'the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.'

34 E. Hemingway, *For Whom the Bell Tolls* (1999).

https://doi.org/10.1017/S0922156510000567 Published online by Cambridge University Press

feeling fighters committed to a cause have towards it, the disruptive impact of love encounters in a setting of peril and death, and the fear of the enemy's warfare machinery are all themes that Hemingway's talent projects from the contingencies to the universality of the human condition in a situation of conflict. The disruptive force of violence and terror are also at the centre of a recent, albeit not well known, novel by Colombian writer Evelio Rosero, who, in his award-winning novel *The Armies*, describes the devastating effects on the human psyche of witnessing the extreme violence of Colombian civil war.[35]

As far as NIACs are concerned, three remarks are in point. First, as is well known, the definition of NIAC has historically been an area of controversy in IHL. States have tended to be reluctant to admit the existence of a level of hostilities between governmental and non-governmental forces or between such forces that would trigger the applicability of IHL obligations. This is largely due to the fear that recognizing an insurgent group as a party to a conflict will give them legal status and legitimacy. One of the unfortunate consequences of 9/11 is that ever since, the military operations of governments in states experiencing internal armed conflicts have been increasingly justified as part of the global anti-terrorist campaign, rather than as acts of warfare in an Additional Protocol II (AP II) conflict, even when the conditions for the applicability of the protocol were present.[36] As a result, the prospects for peace in such situations as well as compliance with IHL standards by all parties to the conflict are unlikely to improve.

The second difficult issue, yet again one of characterization, concerns the scope of application of Common Article 3, which lays down some fundamental guarantees and minimum humanitarian principles applicable to an armed conflict not of an international character occurring in the territory of one of the high contracting parties. The two elements, which have proven controversial as regards the applicability of Common Article 3, are the identification of an armed conflict as well as the scope of the territorial-requirement clause.

As regards the requirements for the existence of an NIAC, a cursory consideration of recent practice allows one to spot a number of relevant factors that are instrumental to ascertain the existence of a conflict.

The ICTY Appeals Chamber's 1995 decision in *Tadić* stressed the importance of 'protracted armed violence' between a government and armed groups or between such groups.[37] In fact, the Trial Chamber in *Tadić* interpreted the test laid down by the Appeals Chamber as requiring evidence of (i) intensity and (ii) organization of the parties.[38] Many trial chambers have subsequently adopted this two-pronged test, which serves to distinguish 'an armed conflict from banditry, unorganized and

35 E. Rosero (trans. A. McLean), *The Armies* (2009), originally published as *Los Ejércitos* (2007). The book was awarded in 2009 the Independent Foreign Fiction Prize in the United Kingdom.

36 The experience of the Nepalese government vis-à-vis the Maoists and the government of Colombia vis-à-vis the ELN demonstrates that the terrorist label is being exchanged for recognition of an armed conflict as a precondition for peace talks.

37 *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94–1-AR72, Appeals Chamber, 2 October 1995, 35 *International Legal Materials* 32 (1996), para. 70.

38 Ibid.

short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law'.[39]

Inconsistencies remain, however. While the ICTY Trial Chamber determined that the criterion of protracted armed violence refers more to the intensity of the armed violence than to its duration,[40] the ICC Pre-Trial Chamber opted for a slightly different interpretation, finding that the criterion of 'protracted armed conflict between . . . [organized armed groups]' focused on the need for the armed groups 'to have the ability to plan and carry out military operations for a prolonged period of time'.[41]

A number of indicative factors relevant for assessing the 'intensity' criterion and the organization of the parties have been identified by the ICTY Trial Chambers, none of which is, in and of itself, essential to establish that the criterion is satisfied. However, the definitional guidance of 'armed conflict' provided by the ICTY Appeals Chamber in *Tadić* has not only been influential at the level of international tribunals. It was accepted by the Commission of Inquiry on Darfur,[42] it is reflected in the ICC Statute,[43] and it appears to have affected also the case law of domestic courts. Evidence of this can be traced to the two decisions of the Asylum and Immigration Tribunal in the United Kingdom, respectively on the qualification of the situation in Somalia in 2007 and in Iraq in 2008 as armed conflicts of a non-international character.[44] The Tribunal held that the principal criteria for an internal armed conflict being found to exist were, in summary form: 'parties to the conflict', 'degree of organisation', 'level of intensity', 'protraction', and 'other relevant factors'.[45] The Tribunal considered as a 'prominent' factor whether the conflict had been admitted to the agenda of the UN Security Council or General Assembly, and also whether the ICRC had expressed any official characterization of the conflict.[46]

The second controversial element is whether or not the conflict must be confined to the territory of a state party to the Geneva Conventions for Article 3 to apply. This was almost certainly the intention of the drafters.[47] Also, subsequent judicial

39 *Prosecutor v. Tadić*, Opinion and Judgement, Case No. IT-94–1-A, Trial Chamber, 7 May 1997, para. 562: 'The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict: the intensity of the conflict and the organization of the parties to the conflict.' This test was also adopted in *Prosecutor v. Delalić, et al.* (*Celebici* case), Judgement, Case No. IT-96–21-T, Trial Chamber II, 16 November 1998, para. 184; *Prosecutor v. Kordić and Čerkez*, Judgement, Case No. IT-95–14/2-A, Appeals Chamber, 17 December 2004, para. 341; *Prosecutor v. Limaj, Fatmir et al.*, Judgement, Case No. IT-03–66-T, Trial Chamber II, 30 November 2005, paras. 84 and 89; *Prosecutor v. Haradinaj, Ramush et al.*, Judgement, Case No. IT-04–84-T, Trial Chamber I, 3 April 2008, para. 38.

40 *Prosecutor v. Haradinaj*, Trial Judgement, ibid., para. 49.

41 *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, Case No. ICC-01/04–01/06–803, Pre-Trial Chamber I, 29 January 2007, para. 234.

42 See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General pursuant to Security Council Res. 1564 of 18 September 2004, UN Doc. S/2005/60 (2005), para. 4.

43 Compare ICC Statute, Art. 8(2)(c) and (d) with Art. 8(2)(e) and (f). See also A. Cullen, 'The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2)(f)', (2008) 12 *Journal of Conflict & Security Law* 419.

44 *HH & Others (Mogadishu: Armed Conflict: Risk) Somalia v. Secretary of State for the Home Department*, CG [2008] UKAIT 00022, 28 January 2008, para. 319; *KH (Article 15(c) Qualification Directive) Iraq v. Secretary of State for the Home Department*, CG [2008] UKAIT 00023, 25 March 2008, paras. 72–73.

45 *KH (Article 15(c) Qualification Directive) Iraq v. Secretary of State for the Home Department*, ibid., para. 81.

46 Ibid., paras. 82–83.

47 J. S. Pictet, *Commentary to IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), at 36.

https://doi.org/10.1017/S0922156510000567 Published online by Cambridge University Press

practice seems to confirm that the conflict must take place within a state.[48] However, the US Supreme Court in *Hamdan* held Article 3 applicable to the conflict between the United States and the terrorist network of al Qaeda.[49] Although technically inaccurate, from the standpoint of the traditional categories of IHL, the broad interpretation, by the US Supreme Court, of the scope of application of Article 3 was well-intentioned, at least from the perspective of providing some minimum guarantees to terrorist suspects in what the US government and the Supreme Court themselves regarded as an armed conflict.[50] The attempt has met with some scholarly approval.[51] In principle, I see nothing wrong in going beyond traditional legal categories, as these should not be regarded as immutable, but societal consensus is needed if one wants to provide a different interpretation. In this respect, it certainly is premature to state that international-law actors will subscribe to this view and adjust their practice to this judicially made interpretive development. In other words, practice has not yet sanctioned such a broad interpretation of Article 3. Nor does the contention that Article 3 guarantees are customary in nature help solve the riddle of its applicability to conflicts not occurring merely in the territory of one state. The customary nature of the substantive content of a rule and its scope of application remain two distinct questions.

Finally, I believe that it is a cause for regret that the attempt to elaborate a codification of minimum standards of humanity applicable in all circumstances never materialized. The initiative, which first originated in civil-society and legal-professional circles and was later endorsed by the United Nations,[52] seems to have

48 The ICTR has interpreted Common Article 3 in this way. See, e.g., *Prosecutor v. Rutaganda*, Judgement, Case No. ICTR-96–3, Trial Chamber, 6 December 1999, paras. 92–93: '[C]onflicts referred to in Common Article 3 are armed conflicts with armed forces on either side engaged in hostilities: conflicts, in short, which are in many respects similar to an international conflict, but take place within the confines of a single country.' See also *Prosecutor v. Musema*, Judgement, Case No. ICTR-96–13-T, Trial Chamber, 27 January 2000, paras. 247–248: '[A] non-international conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other: the parties to the conflict are not sovereign States, but the government of a single State in conflict with one or more armed factions within its territory.'

49 *Salim Ahmed Hamdan v. Donald H. Rumsfeld, Secretary of Defense, et al.*, 126 S.Ct. 2749 (2006), 29 June 2006, at 36 (of slip opinion).

50 M. Milanovich, 'Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killing Case', (2007) 89 *International Review of the Red Cross* 373, at 378.

51 See, e.g., M. Sassoli, 'Terrorism and War', (2006) 4 *Journal of International Criminal Justice* 959, at 966: a sustained "war" between one or several states, on the one side, and a transnational terrorist group such as Al Qaeda on the other side could theoretically fall under the concept of a non-international armed conflict.'

52 'Fundamental Standards of Humanity', Report of the Secretary-General submitted pursuant to Commission Res. 2000/69, UN Doc. E/CN.4/2001/91 (2001); 'Fundamental Standards of Humanity', Report of the Secretary-General submitted pursuant to Commission Res. 1998/29, UN Doc. E/CN.4/1999/92 (1998); 'Minimum Humanitarian Standards', Analytical report of the Secretary-General submitted pursuant to Commission on Human Rights Res. 1997/21, UN Doc. E/CN.4/1998/87 (1998). See also 1990 Declaration on Minimum Humanitarian Standards (the 'Turku Declaration'), UN Doc. E/CN.4/1995/116 (1995). One should note also standard minimum rules for the treatment of prisoners, UN Doc. A/CONF/611 (1955) adopted on 30 August 1955 by the first United Nations Congress on the prevention of crime and the treatment of offenders. Their purpose is to provide a well-ordered penal arrangement so as to preserve the human dignity of the detainee. They were updated by the UN General Assembly in a resolution entitled 'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment', UN General Assembly Res. 43/173 of 9 December 1988, UN Doc. A/RES/43/173 (1988). See P. H. Koojmans, 'In the Shadowland between Civil War and Civil Strife: Some Reflections on the Standard-Setting Process in Humanitarian Law of Armed Conflict', in A. J. M. Delissen and G. J. Tanja (eds.), *Humanitarian Law of Armed Conflict: Challenges Ahead: Essays in Honour of Frits Kalshoven* (1991), at 239.

lost momentum in recent years.[53] The blurring of the traditional categories of international humanitarian law and the challenges currently brought to its scope of application attest to the handy character that any such standards would have had in the recent circumstances of the war on terror. Had a carefully drafted document been produced and adopted at the UN level, listing a minimum set of fundamental standards of humanity applicable in all circumstances, it would have been more difficult for states to circumvent fundamental humanitarian protections by simply mischaracterizing the factual situation in which they are to apply.

4. International criminal law

The compelling reasons that led to the negotiations of the Geneva Conventions after the end of the Second World War are well known. The atrocities committed against civilians during the war surely account for one of the most, if not the most, important. Such atrocities are often evoked and the most touching accounts, memoirs, and novels have been written to describe the horror. Rarely, however, has the story of the victims been described or fictionally represented from the perspective of the butchers. I was indeed stunned at reading a novel that was a great success in the French-speaking world, apparently less so in English-speaking countries. The book I am referring to is *Les bienveillantes*, by Jonathan Littell,[54] later translated into English as *The Kindly Ones*.[55] Quite apart from the genial title, which makes reference to the transformation of the terrible Erinyes, the goddesses of vengeance and punishment, into the good-hearted Eumenydes in Aeschylus' cycle of tragedies *Oresteia*,[56] the book is a real masterpiece – in particular for the way in which it realistically accounts for the carnage and the massacres perpetrated by the SS *Einstazgruppen* in Occupied Eastern Europe and for all the other atrocities that were committed by the Nazis in concentration and extermination camps. Fear, angst, humiliation, debasement, terror, and even the grotesque are skilfully represented by the author, who makes us experience, through the medium of literature, the feelings of the civilian victims. Gruesome bodily details add up to the disconcerting uneasiness one gets in reading about horror. Even the unsaid, what is left for the reader to imagine, is a powerful representation of horror and human depravation.

Civilians are now protected by IHL, and some of these rules – like the principle of distinction – are considered intransgressible principles of IHL, to use the cacophonous but unambiguous term used by the ICJ.[57] Civilians cannot be attacked and are protected in a number of different ways, including from collective

53 See Human Rights Council, 'Fundamental Standards of Humanity', Report of the Secretary General', UN Doc. A/HRC/7/62 (2008), para. 38, in which the SG, after summarizing recent developments in international law, observed, based on previous reports, that 'while there [is] no need to develop new standards, there [is] a need to ensure respect for existing rules of international law aimed at ensuring the protection of persons in all circumstances and by all actors'.

54 J. Littell, *Les bienveillantes* (2006).

55 J. Littell, *The Kindly Ones* (2010).

56 Aeschylus (trans. A. Shapiro and P. Burian), *The Oresteia* (2003).

57 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, [1996] ICJ Reports 226, para. 79.

punishment, reprisals, and acts of terrorism. Article 33 of the fourth Geneva Convention expressly lays down this prohibition. Furthermore, Article 51(2) of Additional Protocol I prohibits acts or threats of violence the primary purpose of which is to spread terror among the civilian population. Analogous provisions are contained in Protocol II applicable to non-international armed conflicts.[58]

The political and legal association of terrorism with war in recent times has had the effect of bringing to the fore the question of whether acts of terror perpetrated in armed conflict constitute war crimes. International and hybrid courts alike have grappled with the criminal elements of 'acts of terror' and 'terrorization', resulting in the development of new practice on the matter.

The recognition that such offences may amount to war crimes transpired in the mid 1990s. The ICTR Statute included acts of terrorism within the list of war crimes in NIACs.[59] Although the ICTY was not given the same specific competence, the Trial Chamber and the Appeals Chamber of the ICTY held in 2003 and 2006, respectively, that the crime of terror is covered by Article 3 of its statute concerning the violation of the laws and customs of war.[60] This was done in the *Galić* case in which the ICTY condemned General Galić, the responsible commander of the Bosnian Serbs during the siege of Sarajevo, for acts of terror, as a consequence of the shelling and sniping campaign directed against civilians. In particular, General Galić was found guilty of acts the primary purpose of which was to spread terror against the civilian population, according to Article 51(2) of Additional Protocol I (AP I). The Appeals Chamber held that this was a violation of a customary rule of international law, which engaged the individual's criminal liability, under customary law, at the time of the commission of the acts.[61] The minority harshly criticized this finding. In particular, Judge Schomburg contested the method and the evidence used by the majority in construing the relevant norms of customary international law.[62] Be that as it may, the *Galić* jurisprudence was later followed also by the Special Court for Sierra Leone.[63]

In its 2007 judgement in *Milošević*, the ICTY Trial Chamber elaborated upon the notion of terror in the civilian population, as distinct from the normal effects of legitimate warfare on a civilian population. The Trial Chamber described terror as

58 See Art. 4(2)(d) and Art. 13(2) of AP II.

59 Art. 4(d) ICTR Statute (Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II) (giving jurisdiction over 'acts of terrorism').

60 *Prosecutor v. Galić*, Judgement, Case No. IT-98–29-T, Trial Chamber, 5 December 2003; *Prosecutor v. Galić*, Judgement, Case No. IT-98–29-A, Appeals Chamber, 30 November 2006.

61 *Prosecutor v. Galić Appeal Judgement*, ibid., para. 79.

62 *Prosecutor v. Galić Appeal Judgement*, ibid., Judge Schomburg's Partly Dissenting Opinion.

63 *Prosecutor v. Brima et al.* (AFRC Case), Judgment, Case No. SCSL-04–16-T, Trial Chamber, 20 June 2007, and Judgment, Case No. SCSL-04–16-A, Appeals Chamber, 2 February 2008; *Prosecutor v. Fofana et al.* (CDF Case), Judgment, Case No. SCSL-04–14-T Trial Chamber, 2 August 2007, and Judgment, Case No. SCSL-04–14-A, Appeals Chamber, 20 May 2008; *Prosecutor v. Sesay et al.* (RUF Case), Judgment, Case No. SCSL-04–15-T, Trial Chamber, 2 March 2009, and Judgment, Case No. SCSL-04–15-A, Appeals Chamber, 26 October 2009. It is to be regretted that the SCSL missed the opportunity of specifying the constitutive elements of the crime of 'acts of terrorism' derived from Art. 4(2)(d) of Additional Protocol II, since it has consistently interpreted this provision as encompassing or being analogous to the narrower offence of 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population' in Art. 13(2) of Additional Protocol II or Art. 51(2) of Additional Protocol I.

'the intentional deprivation of a sense of security . . . [a] fear calculated to demoralise, to disrupt, to take away any sense of security from a body of people who have nothing . . . to do with the combat'.[64] In determining what constitutes terror, 'the circumstances of a particular armed conflict must be taken into account'.[65] Thus, for example, the greater the proximity of the theatre of war to the civilian population, the more it will suffer from both fear and intimidation; such would be particularly the case, according to the Trial Chamber, in armed conflict conducted in an urban environment, where legitimate attacks against combatants may cause intense fear and intimidation in the civilian population.

What is interesting about this strand of case law is that it implies that under IHL, and more particularly under Article 51(2) of AP I and Article 13(2) of AP II, what seems to be determinant for the identification of the *mens rea* of terrorization is the primary purpose of the act, which must be the specific intent of spreading terror among the civilian population. No actual harm is required, the identity of the perpetrators as well as their motive being regarded as irrelevant.[66] The specific intent might not always be as easy to prove as in *Galić*, but that is a distinct issue.

Interestingly enough, this debate echoes the doubts one is left with as to the real intent of Adolf Verloc, the protagonist of Joseph Conrad's novel *The Secret Agent*, set in nineteenth-century London at the time of the anarchist bombing of the Greenwich Observatory.[67] In carrying out his anarchist bomb attack, which resulted in the killing of his brother-in-law, Verloc's motives are unclear. His wife, Winnie, who, upon learning what had happened, stabbed him to death, must have had her own conviction about it, but Verloc's stated intention of causing no casualties leaves the reader in doubt as regards his *dolus* or specific intent.

5. Status, treatment, and detention

The notions of legal status, treatment, and detention are symbiotically connected in IHL. A person's legal status in armed conflict determines whether they may be detained, for how long a period, and on what grounds. Status may also entail a specific regime of treatment by the authority in whose hands the person finds himself or herself, including rules regarding interrogation, conditions of transfer, and so on and so forth. The specific judicial guarantees assigned to persons being detained on criminal grounds are also directly linked to status. Uncertainty – at least in terms of recent practice – surrounds the legal status to be attributed to terrorist suspects due to the difficulty, or reticence, of states to accord (i) POW status to members of militia groups belonging to a party to a conflict who have allegedly committed terrorist

64 *Prosecutor v. Milošević*, Judgement, Case No. IT-98–29/1-T, Trial Chamber, 12 December 2007, para. 886.
65 Ibid., para. 888.
66 Cf. *Office of the Public Prosecutor of the Italian Republic, Milan Court of Appeal v. Bouyahia Maher Ben Abdelaziz, Toumi Ali Ben Sassi, and Daki Mohamed*, n. 1072, 17 January 2007 (Italy, Court of Cassation, 1st crim. section) in (2007) 17 *Guida al Diritto* 90, in which the Italian Court of Cassation held that an attack against a military target is to be considered a terrorist attack when, given the actual and concrete circumstances, the consequences would entail certain and inevitable harm to the life and physical well-being of civilians, resulting in the spread of panic among the general public (paras. 4.1 and 6.4).
67 J. Conrad, *The Secret Agent* (2008).

acts, or (ii) civilian status to persons who are not members of the armed forces but who may have been involved in acts of terrorist violence during armed conflict.[68]

Blatant disregard for categorizing properly the status of individuals apprehended in the course of an armed conflict has produced the aberrant and abhorrent phenomenon of Guantánamo and secret detention centres.[69] Legal categorizations under IHL have been preposterously used to justify the inapplicability of the Geneva Conventions to the war against international terrorists, with a view to depriving individuals of their fundamental rights, regardless of the nature of the offences of which they are accused.[70]

'Guilt is never to be doubted', used to say the Officer in another upsetting short novel by Franz Kafka: *In the Penal Colony*.[71] In a powerful allegory of oppressive power, Kafka describes a penal colony in which the Officer operates a Machine, which, automatically, without any trial or defence, sentences to death and executes (after torturing them) all those who are put inside it.

The complexity and rigidity of IHL categories may have provided an excuse to set the law aside altogether and to use the logic of Kafka's Machine in its stead. It is of note that in this domain, some initiatives geared towards simplifying or clarifying the regulatory framework got under way recently, with the ICRC the initiator and the main driving force behind them. Reference is hereby made to the administrative-detention guidelines, which cleverly put together a set of 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence',[72] and to the 'Interpretive guidance

68 See, e.g., J. Steyn, 'Guantanamo: The Legal Black Hole', (2004) 53 *International & Comparative Law Quarterly* 1; K. Dörmann, 'The Legal Situation of "Unlawful/Unprivileged Combatants"', (2003) 85 *International Review of the Red Cross* 45. It is of note that in 2006, the Israeli Supreme Court determined that members of Palestinian terrorist organizations were civilians due to the fact that they did not meet the definition of combatant under Art. 1 of The Hague Regulations (1907), Art. 13 of GC I and GC II, or Art. 4 of GC III (1949). Notably, the Court rejected the recognition of a third category of 'unlawful combatants', although it determined that '[r]ules developed against the background of a reality which has changed must take on dynamic interpretation' (*The Public Committee against Torture in Israel et al. v. The Government of Israel et al.*, HCJ 769/02, 14 December 2006 (Israel Supreme Court), para. 28).

69 It is impossible to account for the vast literature on the Guantánamo Bay detention centre. For an early assessment of the status of Guantánamo detainees, referred to also by the US Supreme Court in *Hamdi v. Rumsfeld*, 542 U.S. 507, at 518 (2004), see Y. Naqvi, 'Doubtful Prisoner-of-War Status', (2002) 84 *International Review of the Red Cross* 571. On secret detention centres in Council of Europe member states, see the Council of Europe Parliamentary Assembly Resolution 1562 of 27 June 2007 and recommendation 1801, upholding Mr Dick Marty's Report. For a legal opinion of Council of Europe member states' obligations under international law, see the Council of Europe Venice Commission's Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners, Opinion 363/2005, 11 October 2006, Strasbourg, Council of Europe, 2006.

70 For a detailed account of the legal issues related to status, treatment, and detention of terrorist suspects in time of armed conflict, see Bianchi and Naqvi, *supra* note 1, Chapter 6.

71 Kafka, *supra* note 4, at 140 ff.

72 See J. Pejic, 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence', (2005) 87 *International Review of the Red Cross* 375; See also Chatham House and ICRC, *Report on Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict* (2008), reproduced in (2009) 91 IRRC 859. Finally, worthy of mention in this context is the Copenhagen Process on the Handling of Detainees in International Military Operations, launched at the initiative of the Danish Government and other sponsors in 2007 (see the information provided by Denmark for the Secretary General's report on the status of the Additional Protocols related to the protection of victims in armed conflict and on measures to strengthen the existing body of international humanitarian law, UN Doc. A/63/118 (2008) at wwwo.un.org/ga/sixth/63/Addtl_Prot_TEXT/ADD_Denmark.pdf).

of the concept of direct participation in hostilities under IHL',[73] which is a bit less of a simplifying or clarifying effort, but which nonetheless was prompted by the same compelling needs. Indeed, I believe that this is the way forward for all of those grey areas and lacunae with which the interpreter is confronted in dealing with issues related to terrorism and armed conflict. Soft-law instruments are likely to be far more expedient and effective than any formal step taken at the diplomatic level. Moreover, they have the advantage of engaging the actors in a process of adjustment without the rigidities of formal amendments to the Geneva Conventions and related instruments. Inevitably, when societal consensus is not there, they will reflect the divide, although, by their very existence, they may contribute to diminishing the areas of disagreement and exclude some of the least desirable outcomes.

6. Appraising the τόποι

As announced at the outset, the cursory treatment of the topics related to terrorism in armed conflict has been carried out on the basis of a tripartite structure. First, I have stressed the fundamental importance of characterization, as the identification of the applicable rules is dependent on the way in which one subsumes certain factual matrices into pre-existing legal categories. Second, I have, as much as possible, made reference to societal practice, namely the conduct of the actors involved in international legal processes. Third, I have often had recourse to literature. Let me now briefly take up these three *τόποι* or *loci* to illustrate their significance.

6.1. Characterization/qualification

All the substantive issues I have touched upon presuppose an issue of characterization: the international or non-international nature of the conflict and its applicability to conflicts involving terrorist groups, the characterization of terrorism as a war crime, and the qualification of the status of terrorist suspects for the purpose of determining their treatment in armed conflict. This process of characterization, as any other interpretive exercise or practice, is hardly ever a neutral one.

Categories are not immutable abstractions into which sets of facts can be squeezed regardless of whether or not they fit.[74] They are neither written in stone nor must they be taken to function invariably in a binary mode, in an all-or-nothing, either/or, black-or-white kind of fashion.[75] Moreover, their characteristic traits of boundedness and fixity are more apparent than real. First, the very choice of which

73 The document, adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009, is reproduced in (2008) 90 *International Review of the Red Cross* 991.

74 For a contemporary form of formalist thinking, see F. Schauer, 'Formalism', (1988) 97 *Yale Law Journal* 509; and, more recently, by the same author, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (2009).

75 An interesting critique of the significance and use of legal categories comes from 'cognitive legal studies' and 'cognitive linguistics'. For a sample of the work of its most eminent representatives, see: G. Lakoff, *Women, Fire, and Dangerous Things: What Categories Reveal about the Mind* (1990); G. Lakoff and M. Johnson, *Metaphors We Live By* (2003); C. Fillmore, 'Frame Semantics and the Nature of Language', in *Origins and Evolution of Language and Speech* (1976) 280 *Annals of the New York Academy of Sciences* 20; C. Fillmore, 'Scenes-and-Frames Semantics', in A. Zampolli (ed.), *Linguistic Structure Processing* (1977), at 55; C. Fillmore, 'Frame Semantics', in Linguistic Society of Korea, *Linguistics in the Morning Calm* (1982), at 111; C. Fillmore, 'Towards a Descriptive

https://doi.org/10.1017/S0922156510000567 Published online by Cambridge University Press

categories to use may produce dramatically different outcomes. Second, what categories actually mean or stand for is, in itself, subject to interpretation. By no means is this heading towards any relativism of sorts, as choices must be justified and interpretive processes must be grounded on social consensus.[76] But categories ought to be regarded as having some degree of flexibility, within the constraints I have just mentioned, and be looked at as an asset and as a potential tool for change when the societal body demands a readjustment of normative policies. Ultimately, this is an invitation to think not exclusively *within* the law, but also *about* the law.[77] And if we think about the law, we cannot abstract ourselves from its underlying social reality. This latter remark leads me to the second *τόποσ*.

6.2. Societal practice

The conduct of the actors of international legal processes cannot be overlooked. Law finds its reason in the existence of a community, all the more so in international law, where the law stems directly from the societal body. Claims are put forward and they are either accepted or rejected against the background of what is perceived to be the law by the actors themselves. There cannot be any effective regulatory, adjudicatory, or enforcement schemes in international law in the absence of a sufficient degree of societal consensus. It is quite obvious that I am not talking about states' consent in the old positivistic or voluntarist fashion.

Two major indications seem to originate from the analysis of societal practice. First, there is consensus on keeping the regulatory framework of international humanitarian law in place. Universal participation in the Geneva Conventions attests to the importance of this patrimony of consensus. Second, there are grey areas in this body of law on which consensus is either broken or evolving in a different direction from that which inspired their adoption. In many instances, it is preposterous to say that the law says this or that. It is the task of academic analysis not to direct the course of future political action, but rather to warn about which consequences the development of certain normative policies might entail. In these areas, it is of paramount importance to reconstruct or build up consensus among the social agents, particularly states and such institutional actors as the ICRC. Soft law can play an important role in this respect.

Whatever branch of the law one is concerned with, including IHL, an effort should be made never to indulge what I would term 'armchair theorizing', namely making abstractions and developing theories that are far removed from the social reality that they aim to regulate. Admittedly, a certain strand of scholarship has favoured the emergence of such a bias, particularly by projecting into the practice the ideal

---

Framework for Spatial Deixis', in R. J. Jarvella and W. Klein (eds.), *Speech, Place and Action: Studies in* Deixis *and Related Topics* (1982), at 31; and S. L. Winter, *A Clearing in the Forest: Law, Life and Mind* (2001).

76 For a more detailed analysis, see A. Bianchi, 'Textual Interpretation and (International) Law Reading: The Myth of (In)Determinacy and the Genealogy of Meaning', in P. Bekker et al. (eds.), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (2010), at 34.

77 A powerful critique of the way in which legal academics and practitioners think about the law is expressed in the works of P. Schlag. Among his most inspiring contributions, see: P. Schlag, '"Le Hors de Texte, C'est Moi": The Politics of Form and the Domestication of Deconstruction', (1990) 11 *Cardozo Law Review* 1631; 'The Problem of the Subject', (1991) 69 *Texas Law Review* 1267; *The Enchantment of Reason* (1990).

of an absolute, rational coherence, detached from reality and removed from the actual practices of the agents. According to Pierre Bourdieu, this amounts to a most serious epistemological error, that of 'putting a scholar inside the machine', with the undesirable effect of 'picturing all social agents in the image of the scientist, or, more precisely, to place the models that the scientist must construct to account for practices into the consciousness of agents as if they were the main determinants, the actual cause of the practices'.[78] While such transpositions might help one's academic career, they are highly unlikely to contribute to the cause of protecting individuals in armed conflict.

6.3. When IHL encounters literature

Finally, let me broach the last *τόποσ* or *locus* and this time the term is indeed in point, as I am talking of the literary references that I have used. One might be tempted to think that such references are but the affectation of erudition by not too humble a writer. The irony is that the same writer despises such affectations. Moreover, tradition has it that a good lawyer must be fairly ignorant and not too curious about what the law is about and, most of all, about what happens outside the law. Incidentally, these are the words of one of the most eminent international lawyers of the last century, Sir Gerald Fitzmaurice, admittedly not an ignorant person.[79]

Literature has a powerful universalizing, often cathartic, role.[80] Suffice to think of *The Pianist*,[81] the memoirs of Wladyslav Szpilman, the Polish pianist who survived the Holocaust and whose story was brought to the screen in Roman Polanski's Academy-Award-winning movie.[82] When the Nazi officer spots Szpilman in one of his hideouts in Warsaw towards the end of the German occupation, the world seems to collapse and death draws near. And yet Szpilman starts playing Chopin's Nocturne in C sharp minor . . . and all of a sudden, the officer is reconciled with his lost humanity and we relieve the tension just in time to realize that, for once, reality and its fictional representation are one and the same thing. Touching . . . .

Through literature, we may perceive or even see things that not even the most sophisticated legal analysis will ever allow us to see or even to imagine. Literature is also a powerful reminder that what terrorism and armed conflict are about is not just legal technique and rules of IHL. They are about death, wounds, blood, maiming, bereaved persons, hatred, madness, terror, fury, fear, angst, vomit, urine, stench, disease, annihilation, death again.

---

78 P. Bourdieu, 'The Scholastic Point of View', (1990) 5(4) *Cultural Anthropology* 380, at 384.

79 G. Fitzmaurice, 'The United Nations and the Rule of Law', (1952) 38 *Transactions of the Grotius Society* 135, at 142: 'but the real fault of the lawyers . . . is that they have not, as lawyers, been single-minded enough, and have not resisted the temptation to stray into other fields.'

80 'The narrative of atrocity could be seen as a good in itself, offering its own special form of redress through catharsis and of rectification through the truths of storytelling.' J. Stone Peters, 'Literature, the Rights of Man, and Narratives of Atrocity: Historical Backgrounds to the Culture of Testimony', (2005) 17 *Yale Journal of Law and Humanities* 253, at 255–6.

81 W. Szpilman, *The Pianist: The Extraordinary Story of One Man's Survival in Warsaw, 1939–1945* (2000). The episode referred to in the text can be read at 177 ff.

82 *The Pianist* (2002), directed by Roman Polanski, starring Adrien Brody.

Literature provides healthy insights on the most mundane aspects of the extreme violence of war and helps us look at it either from the microcosm of the individual or from the universal perspective of humanity. Either way, it puts the human condition at the centre of analysis.[83] By drawing attention to the concrete experiences of the individual or the collectivity, literature may provide stories that express particular points of view, may create empathy and awareness that all those who are the subjects or the addressees of legal rules are also individuals in specific historically situated, real contexts. The abstract rationalization of the law and the too often complex character of legal regulation can be mitigated by an approach that is more considerate of facts, history, context, and society with a view to making legal processes more attuned to their underlying social realities.[84] To have recourse to literature to develop such reflexivity shows the need for a certain type of sensitivity rather than for the application of a particular legal methodology.[85] It creates a critical conscience and smoothes the rigidities of legal categories by emphasizing their contingent, mutable character. Far from being a neutral account of reality,[86] this approach, which focuses on particular experiences and individual lives, ought to be seen simply as an instrument to develop awareness that certain abstract characterizations of the law and its general rationalizing aspiration may not be left to operate in a human vacuum.[87] Does that provide an immediate instrumental utility? I do not know, but it makes us more circumspect, hopefully more reflexive, and it helps to enhance the responsibility that comes with our profession.[88]

One may say that this is not our business as lawyers, that Richard Posner's harsh criticism of law and literature as a misunderstood relationship is well taken, as the human condition has nothing to do with the legal setting.[89] I personally do not agree with that. Nor am I willing to accept this type of criticism from one of the founders of the law and economics movement who has placed at the centre of his rational-choice

83 See the well-known quote about why judges should study poetry: 'Judges should study poetry for the same reason all of us should – because from it we can learn what it really means to be human.' W. T. Braithwaite, 'Why, and How, Judges Should Study Poetry' (1988) 19 *Loyola University of Chicago Law Journal* 809, at 825.

84 'treating law as narrative and rhetoric means looking at facts more than rules, forms as much as substance .... It means examining not simply how the law is found but how it is made .... And because its focus is story as much as rule, it encourages awareness of the particular human lives that are subjects or objects of the law, even when that particularity is subordinated to the generalizing impulses of legal regulation', Gewirtz, *supra* note 10, at 3.

85 For the proposition that literature helps expand sympathy and break up the often compelling forms of instrumental rationality prevailing in Western culture, see J. B. White, 'Law and Literature: No Manifesto', (1987) 39 *Mercer Law Review* 739, at 741.

86 See P. Brooks, 'Narrativity of the Law', (2002) 14 *Law and Literature* 1, at 2: 'narrative is morally a chameleon that can be used to support the worse as well as the better cause.'

87 The idea that the normative order in which we live can only be understood by reference to the narratives and myths by which the community structures its organized life lies at the heart of the well known essay by R. Cover, 'Foreword: *Nomos* and Narrative', (1983–84) 97 *Harvard Law Review* 4, at 4: 'No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.'

88 Commitment to studying the 'language' of law as 'the one thing that can activate the law, and change it' is considered crucial by the L&L movement. See Ward, *supra* note 9, at 26. All the more so, as one realizes that law tends to be conceived 'as an independent rational structure, built up of stable denotations that corresponds to an objective reality', with lawyers and law students failing 'to recognize that discourse is itself a polyphonic construct, coloring and colored by human experience', E. Perry Hodges, 'Writing in a Different Voice', (1988) *Texas Law Review* 633, at 638.

89 R. Posner, *Law and Literature: A Misunderstood Relationship* (1988); *Law and Literature* (2009).

theory not an individual human being, but a fiction: the *Homo oeconomicus*.[90] Yet even Posner acknowledges the importance of teaching and discussing certain aspects of law and literature, 'such as interpretation, the use of literary techniques in legal writing, the claimed humanizing effect of literature on law'.[91] Such recognition recasts, in more moderate terms, the heated debate between Posner on the one hand and the L&L movement on the other and shows that different sensitivities to reading and doing law may be complementary tools rather than opposite views of the profession . . . and the world.

To me, literature is a powerful force, which may help us free ourselves from the shackles of formalism and rigidity, inject some ethical values into what is too often perceived as an aseptic, detached, value-free professional activity. Literature has value as an antidote to the venomous attitude of conceiving the law merely as technique[92] and as a reaction to the increasing application of economic analysis and social-sciences methodology to legal studies.[93]

But reference to literature is also inspiring, as it allows us to realize that, also in law, different narratives may be at work at the same time and that they are not necessarily interwoven into a single common thread. The need to play with various narrative levels is a lesson as important to the successful writer as it is to the good lawyer.[94] Finally, law as literature can teach us a fundamental lesson about how to deal with social or community practices and how to reconstruct the meaning of rules by way of interpretation. By pointing out that the authority of interpretation does not lie in the self-evident and immutable character of the text, but rather in the social consensus of an interpretive community of agents and by underscoring that it is precisely this social consensus that makes an interpretation authoritative, literary criticism may teach an important lesson to law.[95] That is an interesting line of inquiry that lawyers should further explore.[96]

---

90 See his seminal work *Economic Analysis of Law* (1973), now in its 7th edition (2007). The idea that 'the central, unique and irreplaceable contribution of the law and literature movement' is precisely that of avoiding becoming 'the person posited as economic man' is put forward by R. West, 'Economic Man and Literary Woman: One Contrast', (1987) 39 *Mercer Law Review* 867, at 874–5.

91 Posner, *supra* note 89, at 548.

92 For an inspiring account of the allegedly technical, 'managerial' culture prevailing nowadays in international law, see M. Koskenniemi, 'The Fate of International Law: Between Technique and Politics', (2007) 70 *Modern Law Review* 1.

93 See Gewirtz, *supra* note 10, at 13.

94 On the simple lessons that lawyers might draw from 'at least a dollop of literary technique', see R. H. Weisberg, 'Three Lessons from Law and Literature', (1993) 27 *Loyola of Los Angeles Law Review* 285, at 287.

95 On the concept of 'interpretive community', see S. Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) and, by the same author, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989). As is known, the notion of 'interpretive community' was developed by Fish in connection with literary studies, to explain the question of the source of interpretive authority (see *Doing What Comes Naturally*, at 141). Fish describes an interpretive community as 'not so much a group of individuals who shared a point of view, but a point of view or way of organizing experience that shared individuals in the sense that its assumed distinctions, categories of understanding, and stipulations of relevance and irrelevance were the content of the consciousness of community members who were therefore no longer individuals, but, insofar as they were embedded in the community's enterprise, community property. It followed that such community-constituted interpreters would, in their turn, constitute, more or less in agreement, the same text, although the sameness would not be attributable to the self-identity of the text, but to the communal nature of the interpretive act' (ibid.).

96 For an attempt in this direction, see Bianchi, *supra* notes 24 and 76.

7. Conclusion

When facing the horror of the extreme violence of war and the heinous character of acts of terrorism, law is expected to provide a suitable regulatory framework and effective mechanisms to punish deviant behaviour. IHL is generally thought to be sufficiently well suited to do so. However, some of its general categories and specific rules are often perceived as either too rigid or too complex. Furthermore, in dealing with them, lawyers usually show little consideration for the underlying social realities. It may very well be that law's 'self-enclosure' is the price to be paid to account for its distinctiveness. I honestly do not know whether this is true, but I certainly think it would be a pity were it to be so.[97]

IHL aspires to humanizing war. It seems to me difficult to attain that goal without any empathy with the human condition at times of extreme violence. Literature is no substitute for law; it simply helps to understand better the human context in which the latter operates. For this purpose, legal technique is just not enough. While law and literature as disciplines tend to present themselves in utterly different terms, there is a certain affinity between them. Both are concerned with the interpretation of texts, both create and rely on symbols and myths and use rhetoric in a self-constitutive fashion, and both shape reality through language. Even such an occasional encounter is enough to realize that they are not irreconcilable ways of looking at the world.

97 See Brooks, *supra* note 86, at 9: 'much of the law's efficacy and force derive from its self-enclosure, its capacity to impose an exclusionary rule on attempts to open up its hermeticism.'

https://doi.org/10.1017/S0922156510000567 Published online by Cambridge University Press