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The law of armed conflict (LOAC) is the branch of international law that seeks to place limitations on the use of violence in an armed conflict with a view to sparing those who do not directly participate in hostilities and restricting violence to the amount necessary to achieve the aim of the conflict, which is to weaken the military potential of the adversary. LOAC is thus distinct from the international law that establishes the prohibition of the use of force in international relations and the exceptions to that prohibition (Chapter 1).

The idea that restraint should be exercised in armed conflict is not of recent vintage. Quite the opposite: rudimentary rules governing warfare can be found in antiquity and, during the Middle Ages, a highly elaborate, if grossly imperfect, code of chivalry developed in medieval Europe. The ‘modern’ LOAC, however, has developed from the middle of the nineteenth century with the adoption of a series of treaties dealing with particular aspects of warfare (Chapter 2).

LOAC does not deal with each and every instance of violence; it only applies in armed conflict. International law distinguishes between two types of armed conflict – international and non-international – and regulates these somewhat differently. Thus, any application of the substantive rules of LOAC must be preceded by an assessment as to the existence and the legal character of the armed conflict (Chapter 3).

LOAC has the same range of sources as international law generally. In view of the historical development and humanitarian nature of LOAC, however, some of these sources have particular significance, or idiosyncrasies, with implications on the application of the law in practice (Chapter 4).

In regulating or moderating the use of violence in armed conflict, LOAC must strike a precarious balance between multiple interests that are sometimes in competition (Chapter 5). Particularly significant in this regard are considerations of military necessity and humanity, as well as the concepts of chivalry and sovereignty, in the development of LOAC rules.

It has become increasingly accepted that LOAC does not govern the conduct of belligerents in an armed conflict to the exclusion of other branches of international law. In particular, international human rights law continues to apply in armed conflict and its rules interact in different ways with those of LOAC (Chapter 6).
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Perhaps the very first truism to confront any scholar or student of the international laws of war or armed conflict is that these laws operate on the essential premise that a war or armed conflict has come into existence in a legal sense – that is, as a matter of international law. After all, it is that condition of ‘war’ or ‘armed conflict’ that presents the organising logic and design of these laws. It is that condition which supplies the *raison d'être* for the intervention of international law and, for better or for worse, it articulates what these laws are actually *for*. Recognising the possibilities of this condition in its various historical iterations, international law thus counterpoised the laws of war against the so-called laws of peace, proceeding from ‘some kind of more or less definite boundary between times of war and times of peace’ ̶ 1

Evidence of this *summa divisio* of the discipline of international law – of this fragmentation between war and peace occurring at its very core – can be gleaned from the 1868 St Petersburg Declaration, where the Contracting Parties assumed an undertaking ‘in case of war among themselves’,4 and the 1904 Hague Convention relative to Hospital Ships, which addressed its Contracting Powers ‘in case of war between two or more of them’.5 Furthermore, as part of this thematic organization of international relations, the whole purpose of treaties of peace was to draw to a formal close the state of war and confirm the return to a state or condition of peace as far as the law was concerned: as Emer de Vattel informed us in his *The Law of Nations* (1758), the treaty of peace occurs ‘[w]hen the belligerent powers have agreed to lay down their arms, the agreement or contract in which they stipulate the condition of peace and regulate the manner in which it is to be

3 Neff, *War* (n 2) 15.
4 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight (‘St Petersburg Declaration’) (11 December 1868) 138 CTS 297.
5 (21 December 1904) 197 CTS 331, art 3(1).
restored and supported', an incredibly important mechanism if it is to be believed that upon their activation the laws of war came to replace the laws of peace in their solemn entirety.\(^7\)

The laws of war, then, announced the arrangements – most specifically, the rights and obligations – that would obtain during warfare, and it is for this reason that they attracted the Latin rubric of the *jus in bello*.\(^8\) As such, they should be properly distinguished from the laws of the *jus ad bellum*, which itemise the rights (and, presumably, also the obligations) of states to pursue or to inaugurate warfare in their international relations. For international law, there was thus an understandably sequence of the affliction of public violence as between sovereigns, with the *jus ad bellum* appearing earlier in chronological order than the *jus in bello* – although, to be sure, the laws of the *jus in bello* possess a much older pedigree than those of the *jus ad bellum*.\(^9\) Even so, with their shared concentration on matters of war or *bellum*, we can appreciate why both of these corpuses – that of the *jus ad bellum* and the *jus in bello* – might attract the same designation of the laws of war,\(^11\) for each in their own way involve laws of – that is, pertaining to or concerning – war. That said, at a separate level of analysis, it must be recalled that the laws of the *jus ad bellum* are predicated upon the existence of a state of peace *inter partes*, whose operation precedes any outbreak of public violence or any set of hostilities. As such, the preferred anchoring of the *jus ad bellum* would appear to be within the realm of the laws of peace,\(^12\) a position that is sure to be reinforced by the fact that international law no longer provides for ‘war’ as the common denominator between the *jus ad bellum* and the *jus in bello*: whereas the former are defined by the occurrence of ‘force’, the latter are now activated by an ‘armed conflict’ and it cannot be assumed that these fields share an exact coincidence.\(^13\)

As for the laws of war *stricto sensu* (or *jus in bello*), these pronounced upon the detail of the legal relationship as applicable between belligerent states,\(^14\) whereas the legal relationship

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7 Note Arnold D McNair advising against such ‘generalizations’ – and ‘hasty generalizations’ at that: ‘The Functions and Differing Legal Character of Treaties’ (1930) 11 *BYBIL* 100, 102.

8 It was Hugo Grotius who alerted us to how ‘practice’ had asserted more of an expansive conception of war than that provided by Cicero, where war was ‘a contention by force’: in his seminal *De jure belli ac pacis* (1625), Grotius wrote that ‘the practice has prevailed to indicate by that name [ie war], not an immediate action, but a state of affairs; so that the state of the contending parties, considered as such’: bk I, ch I, s 2.


10 And, of more recent vintage altogether, to complete this order is the *jus post bellum* – a product of post-Cold War concerns such as transformative occupation, peace-building and international territorial administration – although this, too, comes with its own antecedents: see Jens Iverson, ‘Transitional Justice: *Jus Post Bellum* and International Criminal Law: Differentiating the Usages, History and Dynamics’ (2013) 7 *IJTJ* 413.

11 As is common in the literature, and maintained by Yoram Dinstein amongst others, that ‘[t]he law of war in its totality is subdivided into the *jus in bello* … and the *jus ad bellum*’ in *The Conduct of Hostilities under the Law of International Armed Conflict* (2nd edn, CUP 2010) 3.

12 As appears to be the approach, for example, of Adam Roberts and Richard Guelff (eds), *Documents on the Laws of War* (3rd edn, OUP 2000) 1. Note, also, that certain violations of the laws of peace were characterised as ‘crimes against peace’ in the Nuremberg Charter (8 August 1945) 82 UNTS 279, art 6(a).

13 The position of the ICJ in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v US)* [1986] ICJ Rep 14, ¶ 216 (‘[c]learly, [t]he use of force may in some circumstances raise questions of such law’) needs to be contrasted with that of the Appeals Chamber of the ICTY in *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (Case no IT-94-1, ICTY Appeals Chamber, 2 October 1995) ¶ 70 (an international armed conflict exists ‘whenever there is a resort to armed force’) (emphasis supplied). See further Dino Kritsiotis, ‘The Tremors of *Tadić*’ (2010) 43 *Israel LR* 262, 278–279.

14 As per J M Spaight, *War Rights on Land* (Macmillan 1911) 5 – or, better, as between belligerents, for the laws of war made accommodation for the so-called ‘recognition of belligerency’ in the context of civil wars. See Lassa Oppenheim, *International Law: A Treatise* (Longmans 1906) vol II, 86.
between belligerent and non-belligerent states stood to be governed by the laws of neutrality,\footnote{As the preamble of the Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (18 October 1907) 205 CTS 299 provided, its High Contracting Parties acted '[w]ith a view to laying down more clearly the rights and duties of neutral Powers in case of war on land and regulating the position of the belligerents who have taken refuge in neutral territory' (emphasis supplied). See also Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War (18 October 1907) 205 CTS 395 ('in the event of naval war') and, further, Erik Castrén, The Present Law of War and Neutrality (Academia Scientiarum Fennica 1954) 423 ('neutrality presupposes war between some Powers'). On the significance of these laws under the regime of the Charter of the United Nations, consider Patrick M Norton, 'Between the Ideology and the Reality: The Shadow of the Law of Neutrality' (1976) 17 Harvard ILJ 249.} and the relations as between non-belligerent states continued to be located within the laws of peace.\footnote{Declarations of war were but one method to the initiation of warfare according to Oppenheim – alongside ‘committing certain hostile acts of force against another State’; Oppenheim (n 14) 102; see also ibid 105. This position is in contradistinction to human rights treaties which ‘themselves make no mention of the types of situation in which the provisions are to apply’: LouiseDoswald-Beck, Human Rights in Times of Conflict and Terrorism (OUP 2011) 5. Such treaties, however, demarcate that certain measures of derogation are possible ‘in time of war’ as well as other public emergencies: ECHR art 15 and ACHR art 27 (‘Suspension of Guarantees’). Cf ICCPR art 4 (‘[i]n time of public emergency which threatens the life of the nation’) and the Arab Charter on Human Rights (22 May 2004) art 4(1) (‘[i]n exceptional situations of emergency which threaten the life of the nation’). See further Rosalyn Higgins, Derogations under Human Rights Treaties’ (1976) 48 BYBIL 281.} So, within this overall framework developed by international law, the occurrence of a state or condition of war actually yielded consequences on multiple fronts aside from the activation and application of the laws of war, making clear that the determination as any change of the status quo of a given relationship could not and should not be lightly made.\footnote{Francoise Hampson, ‘Human Rights Law and International Humanitarian Law: Two Coins or Two Sides of the Same Coin?’ (1991) 1 Bulletin of Human Rights 46, 48.} Importantly, the whole point of the laws of war was to admit a separate framework for action as between states so that, amongst other things, ‘[t]he soldier has the right to kill another soldier’,\footnote{Neff, War (n 2) 19.} and where ‘military operations could be mounted against . . . enemies en masse, without any need for the scrupulous provision of proof of guilt in each individual case, as ordinary law enforcement required.’\footnote{Otherwise known by the name of combatant immunity. Instructions for the Government of Armies of the United States in the Field, General Order No 100 (‘Lieber Code’) (24 April 1863) art 57 makes provision for the fact that [s]o soon as a man is armed by a sovereign government and takes the soldier’s oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses. No belligerent has a right to declare that enemies of a certain class, colour, or condition, when properly organized as soldiers, will not be treated by him as public enemies. Or, as is explained in the Commentary to API, the combatants’ privilege . . . provides immunity from the application of municipal law prohibitions against homicides, wounding and maiming, or capturing persons and destruction of property, so long as these acts are done as acts of war and do not transgress the restraints of the rules of international law applicable in armed conflict. Those who enjoy the combatant’s privilege are also legitimate targets for the adversary’s attacks until they become hors de combat of prisoners of war. See Michael Bothe, Karl Josef Partsch and Waldemar A Solf, New Rules for Victims of Armed Conflicts (Martinus Nijhoff 1982) 243.} Behaviour that international law would ordinarily condemn and regard as impermissible, the laws of war would thus anticipate and make permissible within the context of the privilege bestowed on combatants to participate in and also to undertake such hostilities.\footnote{See Michael Bothe, Karl Josef Partsch and Waldemar A Solf, New Rules for Victims of Armed Conflicts (Martinus Nijhoff 1982) 243.}
This set of enabling arrangements set forth by international law was not of course to be taken to mean that any and all violence would constitute ‘war’ for the purposes of the laws of war; the Instructions for the Government of Armies of the United States in the Field (or Lieber Code) of April 1863 went out of its way to explain how ‘[p]ublic war is a state of armed hostility between sovereign nations or governments’ and that ‘[i]t is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, suffer, advance and retrograde together, in peace and in war’. Nor did the condition of war become the occasion for gratuitous or uncontrolled violence during warfare, since the Lieber Code made plain that permissible violence could not occur at the hands of ‘[m]en, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army’, or, indeed, of those whom it labelled armed prowlers. The laws of war thus contained a series of prohibitions or ‘prohibitive’ laws, compliance with which was to become essential in making the distinction between lawful and unlawful combatants, and, thus, to the award, conferral or revocation of prisoner-of-war status.

As the introduction to this important and impressive volume, this chapter engages several preliminary, overarching or recurring themes that arise throughout the work. It will commence by investigating the relationship – spelt out in terms of the principle of equal application – between the jus ad bellum and the jus in bello, providing a brief synopsis of the content of the jus ad bellum and what this means (or might mean) for the application of the jus in bello. We shall then turn to consider the genealogy and structure of this law – of why, where and how it evolved in the first place – before outlining the developments that occurred after the Second World War which set down the foundations for the subject that remain with us through to this day. The next section engages the provenance (or, better, provenances) of the laws of war or, as they are now known in view of these developments, the laws of armed conflict, and presents a particular appreciation of the projected relevance of the Geneva Conventions (and their Additional Protocols) from a reading of the treaties themselves: the dual infrastructure of international and non-international armed conflicts is explained, as is the possibility of belligerent occupation occurring within the context of international armed conflicts. In the penultimate section of the chapter, some consideration is given to the diverse character of this law – that is, the nature of the propositions that are set forth and, in turn, the question of to whom such propositions are addressed. It will be seen that the expansive embrace of the Lieber Code – where ‘all men who belong[ed] to the rising en masse of the hostile country’...
and those ‘citizens who accompany an army for whatever purpose, such as sutlers, editors, or reports of journals, or contractors’30 took their place alongside the ‘public enemy armed or attached to the hostile army for active aid’31 – is a theme very much continued through to the present time, though it now contends with the narrative of human rights that has been popularised since the adoption of the Universal Declaration of Human Rights in December 1948.32 The final section of the chapter contains some concluding reflections of the themes and analyses that have brought us to that point, and which might be useful to bear in mind as one makes one’s way through the chapters of this volume.

1 The principle of equal application

In order to configure the precise relationship between the *jus ad bellum* and *jus in bello*, it should be recalled at the outset that, as originally conceived, the laws of war were never intended to prohibit or to abolish ‘recourse to war for the solution of international controversies’.33 Rather, the laws of war accepted war as a going concern, which called out for moderation and even regulation – an idea that possesses ancient cultural and religious roots.34 The notion of restricting recourse to war defines the interest of the *jus ad bellum* – and came as a much later development in international law as the 1907 Hague Convention (II) and the 1928 Kellogg–Briand Pact demonstrate.35 Its most recent iteration exists in the form of Article 2(4) of the UN Charter, which prohibits all members of the UN ‘from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations’,36 as well as the Charter framework that makes provision for individual and collective self-defence under Article 51 as it does for actions authorised by the Security Council in accordance with Chapter VII of the Charter.37 This framework is enjoined by the prohibition of intervention that is not, as such, articulated in the Charter,38 but which is well-established as a matter of custom and which has been argued to admit its own exceptions for state action (for example, the right of humanitarian intervention or the right of pro-democratic intervention).39

30 Art 50(1).
36 A principle applicable, too, to non-members of the UN on account of its customary status: *Nicaragua* (n 13) ¶ 188.
37 And which, as per art 53 of the Charter, includes ‘regional arrangements or agencies for enforcement action’ acting under the authority of the Council.
38 UN Charter art 2(7) notwithstanding.
These developments concerning the jus ad bellum – or, perhaps more accurately, the jus contra bellum\(^{40}\) – contrast with the much earlier development of the jus in bello: international law caught as it was in the grip of the increasing violence of the nineteenth century with no permanent apparatus for international dispute resolution had consequently no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose, and to busy itself only in regulating the effects of the relation.\(^{41}\)

And this it did to vivid and enduring effect with the first multilateral endeavour of its kind: the 1864 Geneva Convention with its key provision that ‘[w]ounded or sick combatants, to whatever nation they may belong, shall be collected and cared for’.\(^{42}\)

This Convention and the ones that followed are sure to explain, at least in part, why the laws of war have also attracted the designation of ‘international humanitarian law’, for their focus has been on ‘the central issue of the treatment of the individual, whether civilian or military’.\(^{43}\) but, as the Tokyo District Court was to remind us in *Ryuichi Shimoda v The State* in 1963, and as the contributions to this collection will make repeatedly clear, ‘international law respecting war is not formed only by humane feelings, but it has as its basis both military necessity and efficiency and humane feelings, and is formed by weighing these two factors’.\(^{44}\) That term has thus come with its detractors,\(^{45}\) with some even concluding that ‘[e]xamination of the historical development of these laws reveals that despite noble rhetoric to the contrary, the laws of war have been formulated deliberately to privilege military necessity at the cost of humanitarian values’.\(^{46}\) One can thus appreciate why the


\(^{41}\) William Edward Hall, *International Law* (Clarendon 1880) 52. Or, perhaps better put, ‘international law has dealt with war as a state of fact which it has hitherto been powerless to prevent’: Richard R Baxter, ‘So-Called “Unprivileged Belligerency”: Spies, Guerrillas, and Saboteurs’ (1951) 28 *BYBIL* 323, 323–324. See also the preamble of the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land (29 July 1899) 189 CTS 429 (where the High Contracting Parties considered that ‘while seeking means to preserve and prevent armed conflicts among nations, it is likewise necessary to have regard to cases where an appeal to arms may be caused by events which their solicitude could not avert’).

\(^{42}\) Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (22 August 1864) 129 CTS 361, art 6. See further Frits Kalshoven, ‘The history of international humanitarian law treaty-making’ ch 2 in this volume. This is not to deny the presence of bilateral or customary iterations of the laws of war before this period: indeed, the Lieber Code (n 20) was an exercise in ‘restatement, or summary of the existing laws of war, rather than actual new legislation.’ See Stephen C Neff, *Justice in Blue and Gray: A Legal History of the Civil War* (Harvard University Press 2010) 57.

\(^{43}\) Roberts and Guelff (n 12) 2. Or, as it has been put by Lauterpacht, ‘their object is to safeguard, within the limits of the stern exigencies of war, human life and some other fundamental human rights’. See Hersh Lauterpacht, ‘The Limits of the Operation of the Laws of War’ (1953) 30 *BYBIL* 206, 214. See also A W B Simpson, ‘The Agincourt Campaign and the Law of War’ (1995) 16 *Michigan JIL* 653, 653 (concentrating on the ‘function’ of this corpus, ie ‘humanizing war, so far as this is possible, by making it less nasty than it otherwise might be’).

\(^{44}\) (1963) 32 ILR 626.

\(^{45}\) Among whom we would include Geoffrey Best, *Humanity in Warfare* (Columbia University Press 1980) 16–17, where he said the term could be seen as implying that the laws of war have an exclusively humanitarian purpose, when their evolution has in fact reflected various practical concerns of states and their armed forces on the ground other than those which may be considered humanitarian.

‘laws of war’ or its more modern appellation of the ‘laws of armed conflict’, 47 resting on the twin normative currents of the ‘Geneva law’ (concerning the protection of victims of warfare) and ‘Hague law’ (concerning the means and methods of warfare), has proved far less controversial. 48

Be this as it may, the inspiration and logic for the innovation of the 1864 Geneva Convention stemmed from the carnage present on the battlefield at Solferino in June 1859, as witnessed and then monumentalised in Henri Dunant’s A Memory of Solferino, where some form of legal intervention was urged. 49 The idea of the resulting Convention was to extend the humanitarian hand of assistance to all wounded combatants irrespective of their identity or the side on which they fought, so that the principle of equal application is in fact embedded in the earliest manifestations of the modern canon, 50 in other words well before the arrival of any formalised system of rules known as the jus ad bellum.

The most recent invocation of this principle occurs in the 1977 Additional Protocol I, whose preamble reaffirms that the provisions of the four Geneva Conventions as well as of the Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict. 51

At the same time, we need to be aware of the fact that High Contracting Parties to all four Geneva Conventions have undertaken to respect and to ensure respect for the Conventions – and to do so in all circumstances. 52 The significance and appeal of the principle of equal application thus very much continues to resonate through to the modern period, 53 for its foundations are as much philosophical as they are pragmatic. As Michael Walzer has maintained, it is not necessarily the decision of those who are engaged in the thick of hostilities to have entered those hostilities in the first place:

47 See n 28.
49 See Henry Dunant, A Memory of Solferino (ICRC 1959 [1862]) 126.
51 Notwithstanding the fact that the ‘nature or origin’ of 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’ affected their classification status as far as API is concerned: see nn 63 and 103.
52 GCI–IV common art 1. In line with this reasoning, GCI Commentary 27 advises that the words ‘in all circumstances’ mean that, as soon as one of the conditions of application for which Article 2 provides is present, no Power bound by the Convention can offer any valid pretext, legal or other, for not respecting the Convention in all its parts. The words ‘in all circumstances’ mean in short that the application of the Convention does not depend on the character of the conflict. Whether a war is ‘just’ or ‘unjust’, whether it is a war of aggression or of resistance to aggression, the protection and care due to the wounded and sick are in no way affected.
By and large we don’t blame a soldier, even a general, who fights for his own government. He is not the member of a robber band, acting sometimes at great personal risk in a way he thinks is right. We allow him to say what an English soldier says in Shakespeare’s Henry V: ‘We know enough if we know we are the king’s men. Our obedience to the king wipes the crime of it out of us.’ Not that his obedience can never be criminal; for when he violates the rules of war, superior orders are no defence. The atrocities that he commits are his own; the war is not. It is conceived, both in international law and in ordinary moral judgment, as the king’s business – a matter of state policy, not of individual volition, except when the individual is king.54

According to this ‘moral reality of war’,55 no adverse consequences should attach to any combatant even if it were possible to determine with luminous clarity whether they were acting on behalf of a state engaged in an unjust or illegal war.56 That said, while the principle of equal application draws upon a cogent and even compelling combination of logic and historical practice,57 there are occasional traces of reasoning from the jus ad bellum to be found within the detail of the jus in bello: the international law of belligerent occupation, for instance, is activated under the 1907 Hague Regulations when ‘[t]he authority of the legitimate power has in fact passed into the hands of the occupant’;58 Geneva Convention III sets forth separate standards for the classification of combatants depending on whether they are ‘[m]embers of the armed forces of a Party to the conflict, as well as members of militia or volunteers corps forming part of such armed forces’59 as opposed to ‘[m]embers of other militia and members of other volunteers corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in order outside their own territory, even if this territory is occupied’;60 Additional Protocol I allows derogation from its prohibition to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population61 where ‘the vital requirements of any Party to the conflict in defence of its national territory against invasion’;62 and, furthermore, Additional Protocol I exempts those armed conflicts ‘in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination’ from consideration as non-international armed conflicts and places them within the scope of international armed

55 Ibid 37.
56 And it should be borne in mind that even a self-defending state can act in contravention of the jus ad bellum: ‘the fact that one or more of the parties to a conflict chooses to regard itself as being in a state of war does not relieve it of the necessity to confine its action what it is permissible in self-defence’. See Greenwood, ‘Self-Defence’ (n 39) 286. This calls into the question the operation of the principle of proportionality as a matter of the jus ad bellum – which understands the quantum of force measured as a whole – as opposed to the jus in bello which engages a much more specific metric within the law governing targeting: see David Kretzmer, ‘The Inherent Right to Self-Defence and Proportionality in jus ad bellum’ (2013) 24 EJIL 235, 236–237. See also Roberts and Guelff (n 12) 2 and 9.
57 See Roberts (n 53) 230–237.
58 HR art 43 (emphasis supplied).
59 GCIII art 4(A)(1).
60 Ibid art 4(A)(2).
61 API art 54(2).
62 Ibid art 54(5).
conflicts.\textsuperscript{63} For the most part, however, the applicable law professes its relevance to all sides in a given armed conflict,\textsuperscript{64} and this is really as it should be – for ‘it is impossible to visualize the conduct of hostilities in which one side would be bound by the rules of warfare without benefiting from them and the other side would benefit from them without being bound by them’.\textsuperscript{65}

2 Genealogy and structure

No one considering the development of the laws of war since the 1864 Geneva Convention can escape the importance of its principles, which also came to be applied to naval warfare with the 1899 Hague Convention (III).\textsuperscript{66} Furthermore, the provisions of the 1864 Geneva Convention were consolidated and supplemented by the 1906 Geneva Convention,\textsuperscript{67} which, in turn, was applied to naval warfare by virtue of the 1907 Hague Convention (X).\textsuperscript{68} The emphasis of these documents – as well as those of the 1856 Declaration Respecting Maritime Law\textsuperscript{69} and the 1868 St Petersburg Declaration – was very much to put the regulation of warfare on a ‘contractual footing’.

This emphasis was emphatically reinforced by the general participation clause (\textit{clausula si omnes}) of Hague Convention (IV), which provided that the Convention and the annexed Regulations ‘do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention’.\textsuperscript{71} Potentially, this clause could have thwarted any successful war crimes prosecutions brought at the end of the Second World War on account

\textsuperscript{63} Ibid art 1(4). However, the qualification of these armed conflicts as international armed conflict is not automatic and is subject to the procedural stipulation set out in art 96(3). See further David E Graham, ‘The 1974 Diplomatic Conference on the Law of War: A Victory for Political Causes and a Return to the “Just War” Concept of the Eleventh Century’ (1975) 32 \textit{Washington and Lee LR} 25.

\textsuperscript{64} See n 53.

\textsuperscript{65} Lauterpacht (n 43) 212.

\textsuperscript{66} Hague Convention (III) on the Adaptation to Maritime Warfare of Principles of Geneva Convention of 1864 (29 July 1899) 187 CTS 443.

\textsuperscript{67} Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (6 July 1906) 202 CTS 144.

\textsuperscript{68} Hague Convention (X) for the Adaptation to Maritime War of the Principles of the Geneva Convention (18 October 1907) 15 LNTS 340, 205 CTS 359.

\textsuperscript{69} (30 March 1856) 115 CTS 1.

\textsuperscript{70} As is maintained by John Westlake, \textit{International Law} (2nd edn, CUP 1913) pt II, 62. See in particular St Petersbg Declaration (n 4) (which ‘is not applicable to non-Contracting Parties, or Parties who shall have not acceded to it’ and ‘will also cease to be compulsory from the moment when, in a war between Contracting or Acceding Parties, a non-Contracting Party or a non-Acceding Party shall join one of the belligerents’); to similar effect, Hague Declaration (IV, 2) concerning Asphyxiating Gases (29 July 1899) 187 CTS 453; Hague Declaration (IV, 3) concerning Expanding Bullets (29 July 1899) 187 CTS 459; Hague Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons (18 October 1907) 205 CTS 403. For an ascription of these declarations as ‘[t]he first treaties governing the conduct of warfare [which] were framed as prohibitions imposed upon states parties to a conflict which operated to benefit individuals, rather than as obligations imposed or rights conferred on individuals’, see Kate Parlett, \textit{The Individual in the International Legal System: Continuity and Change in International Law} (CUP 2011) 178. Later on the same page, the description is of ‘protective obligations on parties to the conflict, rather than rights conferred on individuals’.

\textsuperscript{71} Art 2. See the discussion of Nagendra Singh and Edward MacWhinney, \textit{Nuclear Weapons and Contemporary International Law} (Martinus Nijhoff 1989) 42–45, and Meron, ‘Humanization’ (n 48) 247–248. Singh and MacWhinney actually consider (at 42) that ‘when dealing with conventions relating to war such a clause when absent should be implied in the treaty’.
of the fact a number of belligerent states were not parties to this Convention, but the Nuremberg Tribunal found that:

[the] rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption but the Convention expressly stated that it was an attempt ‘to revise the general laws and customs of war’, which it thus recognized to be then existing, but by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Art. 6 (b) of the Charter [of the International Military Tribunal at Nuremberg].

The 1949 Geneva Conventions adopted an altogether different approach from their outset, with the High Contracting Parties giving ‘prominent position’ to the undertaking made in the very first (and common) article to the Conventions – that is to respect and to ensure respect for these Conventions in all circumstances. This formulation has been regarded as a worthy advance on the stipulations set forth in the 1929 Geneva Conventions, and it produces an arrangement that departs in significant measure from what had gone before:

By undertaking at the very outset to respect the clauses of the Convention, the Contracting Parties draw attention to the special character of that instrument. It is not an engagement concluded on the basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties. Each State contracts obligations vis-à-vis itself and at the same time


74 *GCI Commentary* 25. The obligation appears at the tail-end of the 1929 Geneva Conventions, in the section dealing with application and execution of the Convention: see Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (27 July 1929) 118 LNTS 303, art 25(1) and Convention Relative to the Treatment of Prisoners of War (27 July 1929) 118 LNTS 343, art 82(1).

75 GCI–IV art 1; similarly API art 1(1), though there is no equivalent provision in APII. See further Frits Kalshoven, ‘The Undertaking to Respect and to Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit’ (1999) 2 *YBHL* 3 and Carlo Focarelli, ‘Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?’ (2010) 21 *EJIL* 125. Meron, ‘Humanization’ (n 48) 248 regards this stipulation of the Conventions as ‘epitomizing the rejection of reciprocity and the insistence on the automatic application of the Conventions’.

76 Note, though, 1929 Geneva Wounded and Sick Convention (n 74) art 25:

> [t]he provisions of the present Convention shall be respected by the High Contracting Parties in all circumstances. If, in time of war, a belligerent is not a party to the Convention, its provisions shall, nevertheless, be binding as between all the belligerents who are parties thereto

and 1929 Geneva Prisoners of War Convention (n 74) art 82: ‘[i]n time of war if one of the belligerents is not a party to the Convention, its provisions shall, nevertheless, remain binding as between the belligerents who are parties thereto’.
War and armed conflict: parameters

vis-à-vis the others. The motive of the Convention is such a lofty one, so universally recognized as an imperative call of civilization, that one feels the need for its assertion, as much because of the respect one has for it oneself as because of the respect for it which one expects from one’s opponent, and perhaps even more for the former reason than for the latter.77

That the undertaking is cast in such categorical language and extends to ‘all circumstances’ is, perhaps, a curious formulation for the Conventions to make in view of the fact that they go on to establish a dichotomised structure that distinguishes between what these circumstances might involve in practice. The Conventions then proceed to develop differing arrangements and expectations depending on which of these circumstances actually prevails at any given point in time, requiring a distinction to be made between ‘all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them’ (otherwise known as international armed conflicts) in Common Article 2 to the Geneva Conventions78 and those ‘armed conflict[s] not of an international character occurring in the territory of one of the High Contracting Parties’ (or non-international armed conflict) in Common Article 3 of those same Conventions. It is perhaps worth recalling in this respect that the earlier iteration of ‘all circumstances’ from the 1929 Geneva Conventions was taken to mean the circumstances of peace as well as war.79

77 GCI Commentary 25. Consider, further, the thesis of Lea Brilmayer, ‘From “Contract” to “Pledge”: The Structure of International Human Rights Agreements’ (2006) 77 BYBIL 163. GCI–IV common art 2(3) does, however, appear to envisage a role for reciprocity with its stipulation that

[a]lthough one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

78 Though the language of ‘armed conflict’ had been known before: see Hague Convention (II) with Respect to the Laws and Customs of War on Land (29 July 1899) 189 CTS 429, preamble (‘while seeking means to preserve peace and prevent armed conflicts among nations’); see also Hague Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864 (29 July 1899) 187 CTS 443, art 1(1) of 1899 (‘at the beginning or during the course of hostilities’). Critically for our purposes, the concept of war had become discredited and even subject to ridicule: Edwin M Borchard, ‘“War” and “Peace”’ (1933) 27 AJIL 114, 115 (‘[i]s it not a strange doctrine that would make the existence of war depend upon recognition by anybody?’).

79 See n 76. And, even here, note the qualification recalled by Pictet:

The commentator on the 1929 Convention held that the intention behind these words was to emphasize the general obligation imposed by the Convention, and to make it plain that the Convention must be respected in peace as well as in war in the case of those of its provisions which are applicable both in peace and war. He added: ‘Can it be that the words “in all circumstances” were meant to imply civil war? We do not think so … The obligation between the States is international. But it is eminently desirable that the opposing parties in a civil war should be in mind the humane provisions of the Convention for the observance as between themselves’.

GCI Commentary 26 (emphasis supplied)

This division of realms between international and non-international armed conflicts was very much intended and deliberate, and has come to inform the direction of a good deal of subsequent conventional law – such as the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, the 1977 Additional Protocol (I) Relating to the Protection of Victims of International Armed Conflicts, the 1977 Additional Protocol (II) Relating to the Protection of Non-International Armed Conflicts – and, it would appear, the lex lata of international custom. And the occurrence of one form of armed conflict as opposed to another has significant legal ramifications on the ground: as the Geneva Conventions indicate, the occurrence of an international armed conflict triggers the plenary application of the Conventions – that is, the Conventions as a whole in their forbidding entirety.

81 (14 May 1954) 249 UNTS 240, art 19(1) of which provides that:

[i]n the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.

82 Although API art 1(3) suggests an exact coincidence with the scope of the application of the Geneva Conventions for international armed conflicts – ‘[t]his Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions’ – it is clear that art 1(4) of the Protocol intends an expanded version of this concept: see n 63. Again, references to ‘war’ in the Protocol are confined to the figurative sense of that term: ‘the laws of war’ (arts 23(1) and 67(4)); ‘methods or means of warfare’ (arts 35, 36 and 55(1)); ‘weapons, projectiles and material and methods of warfare’ (art 35(2)); ‘ruses of war’ (art 37(2)); ‘prisoners of war’ (arts 41(3), 44–47, 67(2), 77(3) and 85(4)); ‘any land, air or sea warfare’ (art 49(3)); ‘method of warfare’ (art 54(1)); ‘warfare’ (art 55(1)); ‘war crimes’ (arts 75(7) and 85(5)); and ‘right of war correspondents’ (art 79(2)). In APII, ‘war’ is in fact not even mentioned.
83 Defined in much more restrictive terms that GCI–IV common art 3 (which provides simply for ‘each Party to the [non-international armed] conflict’), API provides for its material field of application in art 1(1):

all armed conflicts which are not covered by Art. 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory to enable them to carry out sustained and concerned military operation and to implement this Protocol [emphasis supplied].

84 In March 2005, ICRC published its study on Customary International Humanitarian Law with 161 rules in total, of which 143 are applicable in international and non-international armed conflicts (including eight rules which are ‘arguably’ customary international law) – and where there would appear to be no distinction in the forms of non-international armed conflict as per the conventional structure: see Jean-Marie Henckaerts, ‘Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict’ (2005) 87 IRRC 175, 178.
85 This is a rather broad-brush claim, one that is often made, that is in fact in need of qualification as some of the provisions of the Conventions do anticipate their relevance ‘in time of peace as in time of... unspecified’ (again, unspecified), eg on dissemination (GCI–IV common art 47/48/127/145). See also the third para of GCI–IV common art 49/50/129/146 – that ‘[e]ach High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches [contained herein]’ (emphasis supplied).
– with the exception of Common Article 3 of the Geneva Conventions. This is because Common Article 3 was designed with the specific purpose of non-international armed conflicts in mind: it contains the baseline protections tailored for that very context.86

It is for this reason that Common Article 3 has been referred to as a ‘convention in miniature’,87 for it presents a discrete ‘framework’88 convention that sets out the bare minimum of obligations for all parties to non-international armed conflicts.89 In other words, as a matter of the overall operation of the Conventions, the existence of a non-international armed conflict means that the remaining protections of the Geneva Conventions are not automatically applicable,90 as Common Article 3 does go on to provide that ‘[t]he Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention’,91 a stipulation that very much reinforces the dichotomised structure of the Geneva Conventions outlined earlier. Factoring the developments of the 1977 Additional Protocols I and II, as well as those of customary international humanitarian law, we can tabulate this structure and general significance of the Conventions and Protocols as Figure 1.1.

This structure – based as it is on the Geneva Conventions and the Additional Protocols – has, for the most part, served its original purposes, but it has also been tested at recurring intervals within practice,92 whether in the form of the hostile relations between Israel and the Gaza Strip or with Hezbollah in Lebanon,93 the ‘war on terror’ between the United States and al-Qaeda,94 the recent relations between Kenya and al-Shabab95 or between the self-proclaimed Islamic State and those states which are involved in military action against it.96 Specifically, the question has been whether – and, if so, what aspect of – the international law

87 GCI Commentary 48.
88 The term (which covers ‘the general norms and institutions of the regime – for example, its objective, principles, basic obligations, and institutions ... [t]hen, the protocols build on the parent agreement through the elaboration of additional (and more specific) commitments and institutional arrangements’) seems apposite here: Daniel Bodansky, ‘The Framework Convention/Protocol Approach’, WHO/NCD/TFI/99.1, 15.
89 See Sivakumaran (n 80) 54.
90 This qualification – of the remaining protections of the Geneva Conventions – is advised because there are other aspects of the Conventions dealing with procedural matters (eg repression of abuses and infractions that relate to (or do not exclude) common art 3: hence common art 49(3)/50(3)/129(3)/146(3) (‘[e]ach High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in [common art 50/51/130/147]’ (emphasis supplied)).
91 See further Frédéric Siordet, Les Conventions de Genève et la guerre civile (ICRC 1950) and Colin Smith, ‘Special Agreements to Apply the Geneva Conventions in Internal Armed Conflicts: The Lessons of Darfur’ (2007) 2 Irish YBIL 91.
95 In particular view of the events in Nairobi in September 2013: Nicholas Kulish, Mark Mazzetti and Eric Schmitt, ‘Carnage in Mall shows Resilience of Terror Group’ New York Times (23 September 2013) A1.
96 See eg Robin Wright, ‘The Illusion of a Hostage Policy’ New Yorker (3 February 2015).
of belligerent relations regulates hostilities between state and non-state actors who are acting out with the standard appreciation of non-international armed conflicts as contained in Common Article 3 of the Geneva Conventions.\footnote{As compared with that contained in APII.} Is the framework devised by the Conventions, and then developed by Additional Protocol II, sufficient so as to account for, or be adapted to, such hostilities?\footnote{So, in *Hamdan v Rumsfeld*, 548 US 557, 631–632 (2006) the US Supreme Court said:}

Although the official commentaries accompanying common Art. 3 indicate that an important purpose of the provision was to furnish minimal protection to rebels involved in one kind of ‘conflict not of an international character’ … the commentaries make clear ‘that the scope of the Article must be as wide as possible’… In fact, limiting language that would have rendered common Art. 3 applicable ‘especially [to] cases of civil war, colonial conflicts, or wars of religion,’ was omitted from the final version of the Article, which coupled broader scope of application with a narrower range of rights than did earlier proposed iterations. … Common Art. 3, then, 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’.\footnote{See also Elizabeth Wilmshurst, ‘Introduction’ in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP 2012) 1; Philippe Sands, *Torture Team: Deception, Cruelty and the Compromise of Law* (Allen Lane 2008) 41.}

Or has the time come for a new form of armed conflict to be incorporated within this framework?\footnote{As is argued by Roy S Schondorf, ‘Extra-State Armed Conflicts: Is there a Need for a New Legal Regime?’ (2004) 37 NYU JILP 1. See further Geoffrey S Corn, ‘*Hamdan*, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict’ (2007) 40 Vanderbilt JTL 295.}

There is also the matter – touched upon in the Protocols by way of the development of the Conventions and illustrated in the last rung of our graphic overleaf – of the precise nature of the relationship between international and non-international armed conflicts, and of the possibilities for the internationalisation of non-international armed conflicts with the invariable consequence of the extent of the applicable law that that change will bring in its wake. This is separate to the mechanism of the ‘special agreement’ anticipated by Common Article 3 of the Conventions,\footnote{Special agreements are also envisaged for international armed conflicts: see eg GCI arts 10, 15, 23, 28, 31, 36, 37 and 52 – as well as art 6 (where ‘High Contracting Parties may conclude other special agreements for all matters concerning which they may deem it suitable to make separate provision’).} which might only result in the gradual conscription of the full corpus of norms applicable in an international armed conflict for non-international armed conflicts. Rather, our concern relates to the opportunities for the internationalisation of a non-international armed conflict whereby its form is revised in its entirety and where this occurs at a particular moment or point in time: we have already adverted to the recognition of belligerency,\footnote{See n 14.} which has fallen out of use but which could conceivably make a return in practice,\footnote{As was attempted by President Hugo Chavez of Venezuela in respect of the FARC in Colombia in January 2008: Chris Kraul, ‘Chavez keeps up Campaign to get Rebels off Terrorist List’ *Los Angeles Times* (20 January 2008). See further Felicity Szesnat and Annie R Bird, ‘Colombia’ in Wilmshurst (ed) (n 98) 203, 222.} and the arrangement made in Additional Protocol I for peoples fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.\footnote{See n 63.} However, the internationalisation of non-international armed conflicts...
### War and armed conflict: parameters

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<th>War</th>
<th>Armed conflict</th>
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#### International armed conflict

- ‘all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them’
  
  (Common Article 2 of Geneva Conventions)

#### Non-international armed conflict

- ‘[an] armed conflict not of an international character occurring in the territory of one of the High Contracting Parties [between] each Party to the conflict’
  
  (Common Article 3 of Geneva Conventions)

#### Applicable law

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<td>+ 1977 First Additional Protocol</td>
<td>+ (where applicable, ie, ‘all armed conflicts which are not covered by Art. 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory to enable them to carry out sustained and concerned military operation and to implement this Protocol’)</td>
<td>+ Second Additional Protocol</td>
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<td>+ Customary international humanitarian law</td>
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#### Internationalisation of non-international armed conflicts

1. Recognition of Belligerency


3. Agency

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*Figure 1.1*
can also occur in the event that there is intervention from another state, or if it is the case that a relationship of agency has been established between that other state and one of the parties to the non-international armed conflict, that is, ‘some of the participants in the internal armed conflict act on behalf of that other State’.

3 The question of provenance

Although it is clear that Common Article 2 and Common Article 3 of the Geneva Conventions intend separate demarcations for the provenances of their respective laws, nowhere are their core concepts – of international and non-international armed conflicts – subjected to sustained definition, a matter that relates to both the commencement as well as the conclusion of a given armed conflict. Yet, it is the case that both of these provisions enjoin a specific set of histories, ideas, traditions and practices and it is this context that should inform our initial understanding of the purported scope material fields of application: Common Article 2, for example, does not invest exclusive significance in the concept of ‘war’ for the activation of its laws for, we are advised, it is the existence of an ‘armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them’ that now matters – so that ‘war’ is now but one instance of an international armed conflict. In contrast, Common Article 3 does not discriminate between the different forms of non-international armed conflict with which it is concerned, but this position has now changed since Additional Protocol II only addresses those non-international armed conflicts which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

Importantly, within customary international law, it has been said that non-international armed conflicts occur when there is ‘protracted armed violence between governmental

105 Prosecutor v Tadić (Case no IT-94-1-A, ICTY Appeals Chamber, 15 July 1999) ¶ 84.
106 As is confirmed by Additional Protocols I and II – but, also, by art 1(4): supra n 56.
107 Yet I have argued elsewhere that there are elements of definition presented in the Conventions themselves when one compares what is said for Common Art 2 to what is said for Common Art 3 – and, then, taking account of what is provided for in both Additional Protocols: Kritsiotis, ‘The Tremors of Tadić’ (n 13).
109 Although consider the proposition that this position represented the status quo as it stood when the Geneva Conventions were adopted: Baxter (n 41) 323.
110 Art 1(1). No such specification exists for the material field of application of common art 3. The relation of API to common art 3 is thus of an entirely different order to the relation of API to the Geneva Conventions – for API art 1(3) provides that the Protocol ‘which supplements the Geneva Conventions ... shall apply in the situations referred to in Art. 2 common to those Conventions’.
authorities and organized armed groups or between such groups within a State', a definition that – at least on its face – does not discriminate between different forms of non-international armed conflict.

The fact that an international armed conflict can occur by virtue of a ‘declared war’ alone means that, in theory, the Geneva Conventions can become applicable without a single gunshot being fired between High Contracting Parties – a prospect that is sure to seem counter-intuitive to the reader of the Conventions as it might not at all be clear how or why their laws would be relevant in the absence of a single act of violence. Be this as it may, this formulation within Common Article 2 recalls the period prior to the Conventions when war could commence ‘through committing certain hostile acts of force against another State’, or via a declaration of war (‘a communication of one State to another that it considers a condition of war existing between them’). This traditional focus on the subjective position of states as reflected in the practice of declarations of war proved far too erratic in the end as a device for triggering the laws of war, and explains why the Geneva Conventions settled upon the much more encompassing concept of an (international) armed conflict where ‘[t]he occurrence of de facto hostilities is sufficient’.

111 Tadić (Jurisdiction) (n 13) 70. This formulation does appear to side more with the thrust of common art 3 rather than the framework of APII – but the language of ‘protracted’ armed violence captures the theme from the Protocol that it ‘shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature’. Furthermore, CIHL and Rome Statute arts 8(2)(c) and 8(2)(e) do not distinguish between different forms of non-international armed conflicts – in the same way it makes explicit the rules applicable in international and non-international armed conflicts.


113 See further Lord McNair and A D Watts, The Legal Effects of War (4th edn, CUP 1966) 76 and Bernadette Walsh, ‘Detention and Deportation of Foreign Nationals in the United Kingdom during the Gulf Conflict’ in Peter Rowe (ed), The Gulf War 1990–91 in International and English Law (Routledge 1993) 304. See also GCIV arts 35–46 and the suggestion that the Geneva Conventions would be applicable if ‘following frontier incidents, the Government concerned adopted security measures, such as internment, against the nationals of the other State who are in its territory’. See GCIV Commentary 59.

114 Oppenheim (n 14) 102. The examples given at ibid 104: occupation of a part of foreign territory, an inroad into a foreign country, the blockade of a harbour, an attack at the frontier, an attack on a man-of-war and the capture of a merchantman.

115 Oppenheim (n 14) 103. Oppenheim reporting, too, of the possibility of ‘a proclamation and manifesto of a State that it considers itself at war with another State’: ibid 102. Where a declaration of war was issued, its significance would surpass any subsequent occurrence of hostilities: ‘the war is considered to have been commenced with the date of its declaration although hostilities may not have been commenced till a much later date’: ibid 103 (¶ 94).

116 Notwithstanding 1907 Hague Convention (III): ‘The Contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war.’ These requirements were not to be regarded as customary at that time (see Spaight (n 14) 21) and, according to GCIV Commentary 17–18: ‘Since 1907 experience has shown that many armed conflicts, displaying all the characteristics of a war, may arise without being preceded by any of the formalities laid down in the 1907 Hague Convention.’

117 See GCIV Commentary 20.
And we find that this metric – that is, of observable de facto hostilities – is one that repeats itself with commendable regularity throughout the Conventions: Geneva Convention I, for example, makes reference to ‘the commencement of hostilities’ as it does ‘the end of hostilities’.118 Furthermore, a ‘time of peace’ is defined by reference to ‘the outbreak of hostilities’,119 where some of the provisions are actually made contingent ‘upon the outbreak of hostilities and during the course of hostilities’.120 The Geneva Conventions thus convey a rather particular appreciation of their own sense of their relevance – and, by framing certain obligations with reference to from or upon or even at the outbreak of hostilities, the impression is cast that this determination will be obvious and free from difficulty when practice has tended to counsel otherwise.123 And Additional Protocol I follows suit: it also invokes the language of ‘the outbreak of hostilities’ as well as ‘the beginning of hostilities’, making reference, too, to ‘the end of active hostilities’.125 For the most part, then, it would appear that the virtue of an international armed conflict is that it possesses a determinable start, followed by its course or duration and, of course, an identifiable conclusion.126

Yet, connecting with a theme from the 1864 Geneva Convention, the Geneva Conventions shall also be applicable in ‘cases of partial or total occupation of the territory of a High Contracting Party’ – and ‘even if the said occupation meets with no armed resistance’.130 This latter specification was designed to account for experiences of the Second World War ‘which saw territories occupied without hostilities’ and where ‘the Government of the occupied [territory] consider[ed] that armed resistance was useless’.131 This approach does add an important perspective to the expectation of de facto hostilities, but, in ultimo, the question of

118 GCI art 17(3).
119 Ibid art 17(4); also, GCIII arts 67 (‘at the close of hostilities’), 111 (‘until the close of hostilities’), 118(1) (‘after the cessation of hostilities’), 118(2) (‘after the cessation of hostilities’); GCIV arts 45(2) (‘after the cessation of hostilities’), 46, 130(3), 133(1), 133(3) and 134 (‘the close of hostilities’).
120 GCI art 23(1), 28(2), 31(2) and 40(3). See further GCI art 42(3); GCIII arts 21(3), 43(1), 58(1) and 112(1) (‘upon the outbreak of hostilities’). Cf GCIII art 35(2)(b) (‘at the outbreak of hostilities’).
121 As indeed is the case with GCI art 23(2); see also arts 28(2), 28(3) and 48; GCI art 33 and 49; GCIII arts 33(3), 109(2), 109(3) and 128; GCIV arts 14(1), 45(5), 70(2), 14(2), 132(2) and 145.
122 See nn 118–121.
123 For unsettled it be: Howard S Levie, ‘The Status of Belligerent Personnel “Splashed” and Rescued by a Neutral in the Persian Gulf Area’ (1990-91) 31 Virginia JIL 611.
124 API art 60(2).
125 Ibid art 73.
126 Ibid art 33(1).
127 Ibid art 79(1) (‘areas of armed conflict’). Also actions, offences or reasons ‘related to the armed conflict’ (arts 75(3), 75(4), 75(5), 75(6), 76(2), 76(3), 77(4) and 77(5)) and ‘in time of armed conflict’ (arts 82, 83(1) and (2)).
128 Hence, art 75(6): ‘Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.’ Also art 99(1).
129 Which provided that hospital and ambulance personnel ‘may, even after enemy occupation, continue to discharge their functions in the hospital or ambulance which they serve, or may withdraw to rejoin the units to which they belong’: 1864 Geneva Convention art 3(1) alongside the ‘defeat of the enemy armed forces on land’, Oppenheim (n 14) 113 regarded the ‘occupation and administration of the enemy territory’ as the means by which the purpose of war – ‘the overpowering of the enemy’ – was to be achieved.
130 Common art 2(2).
131 See GCIV Commentary 21.
belligerent occupation remains one of fact that should be decided in accordance with the 1907 Hague Regulations which require that territory is ‘actually placed under the authority of the hostile army’.132

By an extension of this logic, belligerent occupations can thus come to a ‘close’133 in the same manner in which they came to pass – involving a determination of fact based on realities on the ground. In truth, the same could be maintained for international armed conflicts given the objective dispensation set forth in the Geneva Conventions,134 but the view has been held that – as a matter of custom – the law of armed conflict applies from the ‘initiation’ of such conflicts ‘and extends beyond the cessation of hostilities until a general conclusion of peace is reached’.135 This calls to mind the old instrument of the treaty of peace, once the most common mechanism for ending a state of war though it was of course open to belligerents to ‘abstain from further acts of war and glide into peaceful relations without expressly making peace through a special treaty’.136

As part of their fundamental mission, treaties of peace do need to be distinguished from armistices for this latter cohort of agreements do not bring to a formal close the state of war: in fact, Oppenheim remarked that ‘they ought not to be called a temporary peace, because the condition of war remains between the belligerents themselves, and between the belligerents and neutrals on all points beyond the mere cessation of hostilities’.137 That said, in more recent times, it has been contended that the armistice has experienced a diversification of meaning from its original designation of the suspension of hostilities138 to the modern position where:

the locution employed in the general practice of States for a suspension of hostilities is cease-fire (or truce)…. As for armistice, in the current practice of States, it denotes a termination of hostilities; even though it does not introduce peace in the full sense of that term. The decisive point is that a modern armistice completely divests the Parties of the right to renew military operations at any time and under any circumstances whatever.

132 HR art 42. See further Oppenheim (n 14) 173, and Adam Roberts, ‘What is a Military Occupation?’ (1984) 55 BYBIL 249.
133 As anticipated by GCIV art 77. However, consider GCIV art 6(2):

In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.

The transient nature of belligerent occupations is also implicit in HR art 43.
134 And considered earlier at n 117. See further Marko Milanovic, ‘The End of Application of International Humanitarian Law’ (2014) 96 IRRC 163.
135 Tadić (jurisdiction) (n 13) ¶ 70.
136 And subjugation of the adversary: Oppenheim (n 14) 275. Yoram Dinstein identifies implied mutual consent, debellatio and unilateral declarations as other means by which the formal termination of war can be secured: see War, Aggression and Self-Defence (5th edn, CUP 2012) 48. See also W Michael Reisman, ‘Stopping Wars and Making Peace: Reflections on the Ideology and Practice of Conflict Termination in Contemporary World Politics’ (1998) 6 Tulane JICL 5, 6.
137 Oppenheim (n 14) 243.
138 And where it was ‘interchangeable in substance with a truce or a modern cease-fire’: Dinstein, War (n 136) 41–42. See also Reisman (n 136) 16.
By putting an end to war, an armistice today does not brook resumption of hostilities as an option.139

Violations of the traditional armistice therefore stood to be governed by (or, better, within) the framework of the laws of war – rather than the *jus ad bellum* of the laws of peace – as is evident from Articles 36–41 of the 1907 Hague Regulations.140

No such detailed arrangements append to the conclusion of ‘situations’ of non-international armed conflict from either Common Article 3 of the Geneva Conventions or from Additional Protocol II.141 However, the commentary to Additional Protocol II maintains that its application could cease ‘after the end of hostilities’,142 for some of its specifications actually attach to ‘the end of the armed conflict’.143 So, while the occurrence of hostilities defines some of the elements of Common Article 3 – ‘[p]ersons taking no active part in the hostilities’144 – and Additional Protocol II –

> [a]t the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained,145

– it is also clear that the protections might not be confined to this temporal framework: Common Article 3 issues its prohibitions for ‘any time and in any place whatsoever’,146 a formulation that is repeated for the fundamental guarantees announced in Additional Protocol II.147 A distinction

139 Dinstein, *War* (n 136) 42. As evidence of this current practice, Dinstein adduces the 1949 General Armistice Agreements between Israel and Egypt, Lebanon, Jordan and Syria as well as the 1953 Panmunjom Agreement Concerning Military Armistice in Korea where ‘[t]he metamorphosis in the perception of armistice reached its zenith’: ibid 43. If this is so, it is not fully clear why South Korea has endeavoured – especially under President Roh Moo-hyun – to conclude a peace treaty, and why such a move has been persistently resisted by the US: see Choe Sang-Hun, ‘South Korea’s Leader Calls for Haste on Treaty to End Korean War’ *New York Times* (14 November 2007). That this new version of armistice ‘does not introduce peace in the full sense of that term’ – or, ibid 43, does ‘not produce peace in the full meaning of the term’ – is explained on the grounds that ‘[w]hereas a treaty of peace is multi-dimensional (both negating war and providing for amicable relations . . .), an armistice agreement is restricted to the negative aspect of the demise of war’: ibid 47.


141 As per GCI–IV common art 62/61/141/157. Consider, further, the obligation of the parties to the conflict to ‘further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention’: see text at n 91.

142 Emphasis supplied. Or, as it is put, ‘the end of its applicability’ of APII: *AP Commentary* 1360. The silence of the text is used as an opportunity to defer to logic – as this ‘means that the rules relating to armed confrontations are no longer applicable after the end of hostilities’; the measures taken restricting people’s liberty ‘taken for reasons related to the conflict’ should however ‘cease at the end of active hostilities’: ibid. See in particular arts 2(2) and 4(1).

143 Art 2(2).

144 Common art 3(1).

145 Art 6(5).

146 Common art 3(1). Furthermore, the protections for the wounded and sick – who ‘shall be collected and cared for’ – are not qualified by any reference to hostilities: common art 3(2).

147 Art 4(2). Also, see art 2(1) regarding the personal field of application (‘all persons affected by an armed conflict as defined [in this Protocol]’) and art 5(1) regarding persons whose liberty has been restricted (‘for reasons related to the armed conflict’). Note, too, the distinction drawn in art 13 between ‘military operations’ and rules that ‘shall be observed in all circumstances’, art 13(1).
does therefore need to be drawn between the end of active hostilities and the general close of hostilities, with practice tending to side with the latter consideration, but it is surely open to parties to non-international armed conflicts to seek and to achieve a ‘peaceful settlement’ of some sort.

In theory, the end of an international or non-international armed conflict marks the close of the laws related to both sets of circumstances established by international law – but some have argued that, together with the concept of belligerent occupation, the neat categories put forward by the Geneva Conventions and retained by the Additional Protocols are not sufficient to meet the challenges of the modern world: Adam Roberts, for example, has concentrated on the phenomenon of transformative (belligerent) occupations of the order of the Israeli-occupied territories in the Middle East (1967), Northern Cyprus (1974) and Iraq (2003) which involve ‘fundamental changes in the constitutional, social, economic, and legal order within an occupied territory’ and which ‘typically arises after a war – whether civil or international – and/or after a foreign military intervention; and it is likely to end in a different way, as a stable government emerges in the territory itself. In such circumstances’, he reasons, ‘the jus in bello is unlikely to be a perfect fit [and] it might even be tempting to invoke an emerging or future jus post bellum as a better basis for handling these situations.’

At base, the problem of the normative infrastructure is that it posits that the belligerent occupant ‘shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country’. The organisational premise of this law means that ‘[t]here is not an atom of sovereignty in the authority of the occupant’, but some of the experiences after the Second World War have emphasised that this is a ‘cautious, even restrictive assumption in the laws of war’ where ‘occupying powers should respect the existing laws and economic arrangements within the occupied territory, and should therefore, by implication, make as few changes as possible’. Hence the inclination towards developing a further – and, very importantly, separate – aspect of the corpus for regulating bellum, ‘a new umbrella labeled jus post bellum’.

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148 Sivakumaran (n 80) 253; indeed, the law does make provision for this distinction: text at nn 142–143.
149 As was identified in Tadić (Jurisdiction) (n 13) ¶ 70.
150 As per the earlier discussion at nn 93–99.
152 Ibid 619. On the speculative or tentative nature of this field, see Inger Österdahl and Esther van Zadel, ‘What will Jus Post Bellum mean? Of New Wine and Old Bottles’ (2009) 14 JCSL 175 (where the jus post bellum is defined (at 178) as ‘a broad regulatory framework which contains substantive legal rules governing transitions from conflict to peace, as well as rules on the interplay of these substantive rules in case of conflict’). With its emphasis on transition, this characterisation suggests that we remain within the state of war or armed conflict – and, thus, presumably the jus in bello – and raises the fundamental question as to why we do not argue for a more comprehensive regulatory framework within that context or rubric. At another point of their defence, Österdahl and van Zadel, refer to ‘a new category of law applicable in the post-conflict phase’ as ‘both needed and useful’: ibid 185. See more generally Eric Patterson (ed), Ethics Beyond War’s End (Georgetown University Press 2012).
153 HR art 43.
154 Lassa Oppenheim, ‘The Legal Relations between an Occupying Power and the Inhabitants’ (1917) 33 LQR 363, 364.
155 Roberts (n 151) 580.
bellum’,

notwithstanding the fact that the law confers a rather broad compass of power on the belligerent occupant ‘to restore, and ensure, as far as possible, public order and safety’ in the territory it has occupied, as it does an escape clause from the requirement it makes to respect the laws in force therein. Furthermore, the law of belligerent occupation is not to be treated alone: it assumes the existence of the laws of the displaced sovereign, and, in its advisory opinion in Legal Consequences of the Construction of A Wall in the Occupied Palestinian Territory in July 2004, the ICJ concluded that

while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.

Further afield, in the context of non-international armed conflicts, Christine Bell has argued that the contents of peace agreements have begun to ‘show some steps’ in a similar direction, and that, taken as a whole, their contents are deserving of their own treatment and even designation. She has further suggested that the lex pacificatoria:

can be understood as a transnational area of law that like all forms of transnational law ‘is built on a process of convergence of ideas, across national boundaries’. The lex hovers between three possible conceptions of its nature: first a set of persistent practice of peace-makers that take on a normative quality through their persistent use across conflicts; second, an autonomous legal regime responding to transitions from conflict – what some now describe as a ius post bellum; and third, an emerging body of rules capable of standing as an alternative to a tainted and partisan domestic law.

As articulated, the lex pacificatoria posits itself as broader in its scope and ambition than the proposed jus post bellum and comprises three principal components: the normative force of

156 Ibid 582. Stephen Neff recalls ‘certain general conceptual features’ of the jus victoriae which, he reminds us, ‘was never, so to speak, a “thing in itself” in the sense of being a free-standing body of law about peace-making as such’: Stephen C Neff, ‘Conflict Termination and Peace-Making in the Law of Nations: A Historical Perspective’ in Carsten Stahn and Jann K Kleffner (eds), Jus Post Bellum: Towards a Law of Transition from Conflict to Peace (Asser 2008) 77, 79.

157 HR art 43. See further Yoram Dinstein, The International Law of Belligerent Occupation (CUP 2009) 91.

158 HR art 43 (‘while preventing, unless absolutely prevented, the laws in force in the country’). As recognised by Roberts (n 151) 582 (‘this suggestion has been tempered by awareness of the importance of effective implementation of the present body of occupation law, which is seen as remaining relevant to many problems raised in modern occupations’).

159 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136 ¶ 109. As far as the ICCPR is concerned, the Court concluded that ‘[i]n the exercise of the powers available to it on [the] basis [of an occupying power], Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights’: ibid ¶ 112. This set of considerations is sure to affect whether the applicable international law is ‘insufficient’ to the demands or expectations placed upon it, as per Carsten Stahn, Jus Post Bellum: Mapping the Disciplines’ in Stahn and Kleffner (eds) (n 156) 93, 98.


peace agreements (or, as it is termed, the 'literal laws of the peacemaker');\textsuperscript{162} the idea of hybrid self-determination (as experienced through state redefinition, disaggregation of power and dislocation of power)\textsuperscript{163} and, finally, the dynamics of ‘a “new law” of third party enforcement’.\textsuperscript{164} And it is in this context that we are invited to view one of the possible effects of the \textit{lex pacificatoria} ‘as a set of normative expectations that shape how peacemakers attempt to reconcile the use of amnesties with the international law that claims regulatory force’.\textsuperscript{165} That said, if it is true that ‘[t]his law of the peacemaker potentially forms part of a broader “law of peace”’,\textsuperscript{166} it is not clear why this shift of provenance to an emerging \textit{lex pacificatoria} is made necessary if the law on amnesties for Additional Protocol II is conceived in terms of ‘the end of hostilities’\textsuperscript{167} as well as the broader pragmatism of these conventional arrangements.\textsuperscript{168}

4 Structure of commitments

We have already adverted to the ‘prohibitive’ nature of much of what passes for the law of armed conflict,\textsuperscript{169} but, in terms of the range of propositions at stake in this field, this does not convey the fact that the law furnishes certain \textit{entitlements} for taking action as well: Additional Protocol I, for example, confirms that attacks can be undertaken against military objectives in the event of hostilities – but confines this possibility to military objectives,\textsuperscript{170} and while Additional Protocol I outlaws belligerent reprisals against protected persons and objects,\textsuperscript{171} civilians and the civilian population,\textsuperscript{172} civilians objects,\textsuperscript{173} cultural objects and places of worship,\textsuperscript{174} objects indispensable to the survival of the civilian population,\textsuperscript{175} natural environment,\textsuperscript{176} and works or installations containing dangerous forces (such as dams, dykes and nuclear electrical generating stations),\textsuperscript{177} custom provides for greater latitude in terms of the ‘right’ of taking belligerent reprisals.\textsuperscript{178}

\begin{enumerate}
\item \textsuperscript{162} Ibid 286.
\item \textsuperscript{163} Ibid 108.
\item \textsuperscript{164} Ibid 22.
\item \textsuperscript{165} Ibid 240. Amnesties, too, are the concern of Neff, ‘Conflict’ (n 156) 90 in the context of the \textit{jus post bellum} for non-international armed conflicts.
\item \textsuperscript{166} Bell (n 160) 5.
\item \textsuperscript{167} As per APII art 6(5).
\item \textsuperscript{168} See the discussion at nn 142–143 and 148–149.
\item \textsuperscript{169} See test at n 24.
\item \textsuperscript{170} API art 52(2) (defined as ‘those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage’).
\item \textsuperscript{171} Ibid art 20.
\item \textsuperscript{172} Ibid art 51(6).
\item \textsuperscript{173} Ibid art 52(1).
\item \textsuperscript{174} Ibid art 53(c).
\item \textsuperscript{175} Ibid art 54(4) (as defined in art 54(2)).
\item \textsuperscript{176} Ibid art 55(2).
\item \textsuperscript{177} Ibid art 56(4) (as defined in art 56(1)).
\item \textsuperscript{178} Hence, CIHL r 145 (‘[w]here not prohibited by international law, belligerent reprisals are subject to stringent conditions’). Cf CIHL r 148 on non-international armed conflicts (‘[p]arties to non-international armed conflicts do not have the right to resort to belligerent reprisals. Other countermeasures against persons who do not or who have ceased to take a direct part in hostilities are prohibited’). See further Christopher Greenwood, ‘The Twilight of the Law of Belligerent Reprisals’ (1989) 20 \textit{Netherlands YBIL} 35, and Meron, ‘Humanization’ (n 48) 249 (that ‘the domain of legitimate reprisals has shr[u]nk dramatically’).
\end{enumerate}
All of this said, it is appropriate for us to bear in mind that, as far as their application is concerned, the Geneva Conventions and Additional Protocols do not confine themselves to High Contracting Parties as sole addressees for action; High Contracting Parties, it is true, assume the greater burden of the commitments of the Conventions and Protocols, so that it stands to reason that it is the High Contracting Parties that are engaged ‘to respect and to ensure respect for the present Convention in all circumstances’\(^\text{179}\) as well as ‘to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of’ the Conventions,\(^\text{180}\) which is further to any of the common rules to be applied to all parties to an armed conflict in consequence of the principle of equal application.\(^\text{181}\) The Geneva Conventions and Additional Protocols are, thus, home to differential arrangements that are contingent on the identification of the actor or actors in question,\(^\text{182}\) and, from this framework and the chapters that follow in this edited volume, there can be no doubt about the plurality of actors that are assumed to be involved in armed conflicts: at one point, for example, the 1907 Hague Regulations turn their attention to the levée en masse (in other words, ‘[t]he inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops’),\(^\text{183}\) to the besieged,\(^\text{184}\) and to the work of governments,\(^\text{185}\) relief societies\(^\text{186}\) and officers in command;\(^\text{187}\) as far as Common Article 3 of the Geneva Conventions is concerned, ‘each Party’ to a non-international armed conflict must by definition mean that it is not a High Contracting Party,\(^\text{188}\) and ‘[a]n impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict’.\(^\text{189}\) Furthermore, it is stated that the provisions of the Conventions shall constitute no obstacle to the humanitarian activities of the International Committee of the Red Cross or any other impartial humanitarian organization [which] may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of wounded and sick, medical personnel and chaplains, and for their relief.\(^\text{190}\)

Yet, if these components represent the overall thematic organisation of the laws of the Geneva Conventions and Additional Protocols, there is also the perception that the system

\(^{179}\) GCI–IV common art 1.

\(^{180}\) GCI–IV common art 49(1)/50(1)/129(1)/146(1) – and where, in common art 49(2)/50(2)/129(2)/146(2) each High Contracting Party ‘shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts’.

\(^{181}\) See text at n 53.

\(^{182}\) An excellent example is the ‘system’ of the Protecting Power, on which, see API art 5.

\(^{183}\) HR art 2; see further, GCIII art 4(A)(2) and (6).

\(^{184}\) HR art 27.

\(^{185}\) Ibid art 7.

\(^{186}\) Ibid art 15.

\(^{187}\) Ibid art 26. See also art 33.

\(^{188}\) Otherwise there would be no point in making a separate set of arrangements for non-international armed conflicts.

\(^{189}\) GCI–IV common art 3.

\(^{190}\) GCI art 9.
affords ‘individual rights’, and how these might relate to the human rights elsewhere assured by international law. To be sure, the 1929 Geneva Convention Relative to the Treatment of Prisoners of War did invoke the language of ‘rights’ to frame some of its commitments – ‘[p]risoners of war have the right to have their person and their honour respected’; they shall also ‘have the right to inform the military authorities in whose power they are of their requests with regard to the conditions of captivity to which they are subjected’ – and, in an apparent continuation of this theme, the Geneva Conventions announce by way of a common and oft-neglected provision that the wounded, sick, shipwrecked, prisoners-of-war and protected persons ‘may in no circumstances renounce in part or entirety the rights secured to them by the present Convention’.

Part of the concern inspiring this formulation was the ‘profound modifications’ in the legal or political structure encountered by nationals of states as a result of hostilities, but it is also important to observe that the terms of the Geneva Conventions have been conceived according to the status of their respective addressees, and that, separate to any notion of ‘rights’, the language often used to describe the work that these Conventions do is in terms of the ‘protections’ and ‘benefits’ they provide.

191 See eg Meron, ‘The Geneva Conventions and Public International Law’ (2009) 91 IRRC 619, 624. The term ‘individual rights’ is also used in GCIV Commentary 79. So, for purposes of illustration, the position on levées en masse (n 183) is not framed in terms of the ‘rights’ of the inhabitants who come together to resist invading troops – but, rather, is addressed to the armed forces of High Contracting Parties as it is provided that these inhabitants ‘shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war’. Cf the formulation in GCIII art 4(A)(2) and (6).


193 Art 3(1).

194 Art 42(1): also, art 42(2): ‘They shall also have the right to address themselves to representatives of the protecting Powers to indicate to them the points on which they have complaints to formulate with regard to the conditions of captivity.’ Furthermore, according to art 62(1), the prisoner-of-war ‘shall be advised of his right [to assistance by a qualified counsel of his choice, and, if necessary, to have recourse to the services of a competence interpreter] by the detaining Power, in due time before the trial’ and ‘[e]very prisoner of war shall have the right of appeal against any sentence rendered with regard to him, in the same way as individuals belonging to the armed force of the detaining Power’ under art 64. These ‘rights’ are separate to those of the High Contracting Powers, eg ‘to conclude special conventions on all questions relative to prisoners of war, on which it seems to them expedient to have particular regulations’ (art 83(1)) and to denounce the Convention (art 96(1)).

195 Common art 7/7/7/8 (and, indeed, by special agreements referred to earlier in the same Conventions). However, the 1929 Geneva Wounded and Sick Convention (n 74) makes less reliance on the language of ‘rights’: ‘[t]he right of requisition recognized for belligerents by the laws and customs of war, shall only be exercised in case of urgent necessity and only after the welfare of the wounded and sick has been secured’ (art 16(2)); ‘[i]n cases of loss [of their armlets or the certificates of identity belonging to medical personnel] they have the right to obtain duplicates’ (art 21(5)); medical units ‘shall also have the right, so long as they shall lend their services to a belligerent, to fly their national flag’ (art 23(2)). Reference is also made to ‘the privileges of the Convention’ (art 16(1); see also art 18(4)).

196 GCIV Commentary 73 (eg occupation, debellatio, change of government or civil war).

197 Or, that the Conventions ‘provide certain categories of people with a status which does not depend on any political events which may occur’: ibid.
provide.Indeed, notwithstanding the wording of this common provision of the Conventions, it has been translated as ‘intimating to States party to the Convention[s] that they could not release themselves from their obligations towards protected persons, even if the latter showed expressly and of their own free will that that was what they desired.’

‘Rights’ within the Conventions have nevertheless been ‘affirmed’ in certain quarters, ‘doubtless under the influence of the theoretical trends which also resulted in the Universal Declaration of Human Rights’ of the same period – and which has ‘led to define in concrete terms a concept which was implicit in the earlier Conventions’. Yet, as one moves from theory to practice and towards the practical application of these rights, ‘to assert that a person has a right is to say that he possesses ways and means of having that right respected, and that any violation thereof entails a penalty’, but all of this was absent from the original (that is, 1864) Geneva Convention. Nevertheless, the narrative of criminal repression – or the invocation of international criminal law – becomes a much more tangible force with the advent of the 1949 Geneva Conventions, but it is also the case that Protecting Powers were designed to serve as a ‘means open to [protected] persons for the defence of their rights’.

198 Ibid (‘protection of the Convention’, ‘the persons who benefit by [the Convention]’); ibid 74 (‘partial or total renunciation of the protection accorded to [protected persons] by the Convention’, ‘renounce the benefits of the Convention’, ‘Conventions designed to protect the individual’); ibid 75 (‘standards of treatment which depend as little as possible, for their application, on the wishes of those concerned’); ibid 76 (‘[r]ules of this kind were in the common interest and could be renounced by the beneficiaries only under the pressure of external circumstances, against which it was the very purpose of the Convention to protect them’, ‘[r]efERENCE might also be made in municipal law to the rules for the protection of the person’, ‘keen desire to provide war victims with complete protection’), and ibid 77 (‘provisions of the Congress of Vienna relating to the slave trade: “the protection of the individual”’. See also GCIV common art 6(2)/6(2)/6(2)/7(2) – that wounded, sick, shipwrecked, prisoners-of-war and protected persons shall continue to have the benefit of such agreements as long as the [respective] Convention is applicable to them, except where express provisions to the contrary are contained in the aforesaid or in subsequent agreements, or where more favourable measures have been taken with regard to them by one or other Parties to the conflict.

Finally, see the criticism developed by Hampson, ‘Human Rights Law’ (n 18) 49.

199 See n 192.

200 GCIV Commentary 74.

201 Ibid 77. See also Meron, ‘Humanization’ (n 48) 251.

202 GCIV Commentary 77.

203 Which contains ‘nothing on the subject’: ibid 78. The subsequent 1907 Hague Convention (IV) (n 71) provided in art 3, simply, that ‘[a] belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces’.

204 Specifically, the arrangement made for grave breaches. As Schindler (n 192) 941 observes, however, ‘[a] peculiarity of the law of war is that its rules are directly binding on individuals’; see further, Theodor Meron, ‘International Criminalization of Internal Atrocities’ (1995) 89 AJIL 554 and Denise Plattner, ‘The Penal Repression of Violations of International Humanitarian Law Applicable in Non-International Armed Conflicts’ (1990) 30 IRRC 409.

205 GCIV Commentary art 8/8/8/9. So, according to GCIV Commentary 78: ‘[i]t through the Protecting Power that protected persons will be able most readily to obtain the intervention in their behalf of their state of origin’. This mechanism has not been put to great use, however: Cassee (n 192) 4. Consider, too, the role of the ICRC in GCIV Commentary art 9/9/9/10 and 10/10/10/11, which ‘enjoys prerogatives under the Convention which will enable it to act in the interests of the protected persons’: GCIV Commentary 78. According to GCIV Commentary 84:

the problem also arises with regard to violation of the rights of protected persons by their own Governments. Although the Convention contains no formal indication in this respect, it is justifiable to consider that the terms of art 7 may entail an important consequence. It should be possible in States which are parties to the Convention and which recognize that any violation of individual rights is justifiable, for the rules of the Convention, which are assimilable with those rights, to be evoked before an appropriate national court by the protected person who has suffered the violation.
That said, it is also clear that any ‘system’ of individual rights coming forward from the Geneva Conventions and Additional Protocols is itself the subject of evolution and change, and this cannot but take account of the overall environment in which such rights are used and presumed to operate:

Undoubtedly, owing to the still undeveloped character of international law, the safeguards protecting the rights conferred on persons to whom the Convention relates are by no means complete, effective, or automatic as those of national legislations. Nevertheless, [the ‘rights’ provision of the Conventions] is of the greatest assistance to all protected persons. It allows them to claim the protection of the Convention, not as a favour, but as a right, and in case of violation, it enables them to employ any procedure available, however rudimentary, to demand respect for the Convention[s’] terms. Hence the importance of the dissemination of the Convention[s] . . . with special reference to the individual character of the rights which the Convention[s] confer.206

Finally, assuming that any system of ‘[r]ights entails obligations’,207 the question arises as to who is to assume these obligations as a matter of fact and of law: that the rights of the Conventions shall not be renounced does appear to suggest that an obligation of some sort might be placed on the self-same holders of these rights to that end,208 but the ICRC has explained that ‘the general effect of the Conventions was to impose obligations on the States which were parties to the Convention rather than on individuals’ – and it is this context that framed the provision made for individual rights.209

206 GCIV Commentary 79. Indeed, it is maintained (ibid 76) that:

[...]

207 GCIV Commentary 79.

208 That is, ‘can also be considered as obligations directly incumbent on the persons protected’: ibid.

209 Ibid 79–80 (emphasis supplied). Note how the invocation of ‘rights’ informs some of the obligations presented in, eg GCII art 40(4) (‘[i]n no circumstances may the said personnel be deprived of their insignia or identity cards nor of the right to wear the armband’ and API art 32 (‘the activities of the High Contracting Parties, of the Parties to the conflict and of the international humanitarian organizations mentioned in the Conventions and in this Protocol shall be prompted mainly by the right of families to know the fate of their relatives’).
It is worth bearing in mind, too, that the Conventions – and their Protocols\textsuperscript{210} – do not actually confine themselves to \textit{binding} states to particular courses of action; other belligerent actors can also be so bound,\textsuperscript{211} and, alongside the mechanism for individual accountability instituted by the Conventions and the Protocols,\textsuperscript{212} we are presented with an ever-effective infrastructure for upholding these laws that is sure to be encountered many times in the pages that follow.\textsuperscript{213}

\textsuperscript{210} For APII, see n 83 – and, with its provision concerning those ‘fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination’, API: n 63.


\textsuperscript{212} See Meron, ‘International Criminalization’ (n 204).

\textsuperscript{213} One that forms the foundations of the approach of Rome Statute art 8.