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The Principle of Distinction and Women in Conflicts in Africa

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Declaration

I certify that the thesis I have presented for examination for the MPhil/PhD degree of the London School of Economics and Political Science is solely my own work other than where I have clearly indicated that it is the work of others (in which case the extent of any work carried out jointly by me and any other person is clearly identified in it).

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Abstract

The 'principle of distinction' is core to international humanitarian law, regulating who can and cannot be targeted in armed conflict. It states that combatants and those civilians 'directly participating' in hostilities may be targeted in attack, while non-combatants may not be. The law defines what it means to be a combatant and a civilian, and sets out what behaviour constitutes direct participation.

The principle of distinction purports to be gender-neutral. However, closer examination reveals that international humanitarian law was based on a gendered view of conflict that envisaged men and women playing particular roles; men as fighters and women as victims of war. Problematically, this view often does not accord with the reality in 'new wars' today.

Across the African continent women participate in armed groups. While sometimes women fight on the front lines, frequently, women contribute to armed movements in gender specific ways. Serving as fighters, cooks, porters and armed group 'wives', women often form the backbone of fighting groups, performing functions on which armed groups are highly reliant.

The narrow framing of the principle of distinction means that many of the roles that women typically play in conflict are not recognised as 'combatancy' or 'direct participation' – even where women are actively engaged in armed movements. While this does provide more women with legal protection from attack, there are indirect negative consequences that flow from this.

Using women's participation in new wars in Africa as a study, this thesis critically examines the principle of distinction through a gendered lens, questioning the extent to which the principle serves to protect women in modern conflicts and how it fails them. By so doing, the thesis questions whether the principle of distinction is suitable to effectively regulate the conduct of hostilities in new wars.

To the powerful women who raised me, cared for me, supervised me,
and fought for my right to do what I choose to do.

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Glossary of Acronyms

APs	Additional Protocols to the Geneva Conventions on the Laws of War
AP1	Additional Protocol 1 to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflict
AP2	Additional Protocol 2 to the Geneva Conventions and relating to the Protection of Victims of Non-International Armed Conflict
AU	African Union
CA3	Common Article 3, common to the four Geneva Conventions
CAR	Central African Republic
CIL	Customary International Law
DDR	Disarmament, Demobilisation and Reintegration
DRC	Democratic Republic of Congo
ECOWAS	Economic Community of West African States
GCs	Geneva Conventions on the Laws of War
IAC	International Armed Conflict
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDP	Internally Displaced Person
IHL	International Humanitarian Law
IHRL	International Human Rights Law
LRA	Lord's Resistance Army, Uganda
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of the Congo
NIAC	Non-International Armed Conflict
POW	Prisoner of War
RUF	Revolutionary United Front, Sierra Leone
SCSL	Special Court for Sierra Leone
SPLM/A	South Sudan People's Liberation Movement/Army
UN	United Nations
UNAMIR	United Nations Assistance Mission for Rwanda

1 Introduction

This thesis critically examines the principle of distinction in international humanitarian law through a gendered lens, questioning whether it is suitable to effectively regulate modern day armed conflict, as played out in Africa. This thesis argues that the principle of distinction is inherently gendered, that applications of the principle have gendered consequences and that these gendered consequences undermine the operation of the principle and its ability to do what it purports to do; namely to provide coherent regulation of conflict, and protection for those – especially women – embroiled in war.[1]

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When one pictures conflict in Africa, images come to mind of young men on the back of four-wheel drives, carrying machine guns, leering menacingly at those around them. In the background women run, shielding small children, fearful of approaching fighters. These images, repeated in the media, movies and literature, reinforce a pervasive and polarised view of men and women in conflict: men as ruthless fighters and women as their innocent victims.

While it is true that such scenes do take place – men *do* fight and innocent women *are* frequently terrorised in conflict – these pictures only tell part of the story. Their uniform focus conceals an important narrative; that of the women who actively participate in war. Women today participate in armed struggles in a wide range of ways, with growing numbers of women serving in state armed forces and non-state armed groups. Women also contribute to armed efforts from civilian populations; from the women who live alongside army barracks selling goods and services, to the women who took to Twitter as a means of contributing to the "Arab Spring", to those forced by rebel groups to carry looted goods on their backs, their means of participation vary widely. In some settings women take part in active combat; fighting on the frontlines with rebel bands, detonating explosives and participating in military offensives. However, more often women take on support roles for armed groups, serving as cooks, porters, trainers, intelligence operatives and medics. While some occupy roles that resemble the roles of men, frequently women contribute in gender specific ways, with the tasks they undertake and the ways they carry these out shaped by culturally determined ideas about the types of roles that are appropriate for women to hold.

[1] In this thesis, the word conflict refers to "armed conflict", unless the context suggests otherwise.

Women's modes of participation in conflict are therefore diverse, taking differing forms to men – as well as to traditional notions of what it means to be a fighter in war.

Women's experiences in armed groups also differ. Some women hold leadership positions in armed groups, are empowered and respected. Others occupy the bottom rungs of fighting groups, systematically abused and exploited. Sometimes women's involvement is voluntary, spurred by the same ideology or motivations as their male counterparts. At other times their involvement is involuntary, with women abducted and forced to take part against their will. All of this creates a complex and little understood picture, which differs greatly from the prevailing picture of women in war.

International humanitarian law ("IHL" or the "laws of war")[2] is the body of law responsible for regulating armed conflict. One of the principal purposes of IHL is to provide protection from the worst excesses of violence. These laws contain a complex set of rules aimed at protecting both civilians and combatants. However if these laws are based on incorrect or out-dated understandings of women's involvement in conflict – or on an outright failure to consider women altogether – this raises questions about the extent to which they can hope to be successful in this role. It is therefore crucial to examine the laws, the underlying assumptions they are grounded on, and the effects these have for women in conflict.

Feminist scholars have begun to do that, with a growing body of scholarship examining IHL from a gendered perspective. This body of scholarship, described in chapter 4, demonstrates how the experiences of women in conflict are ignored and concealed by the laws, and points to the ways in which the laws favour the interests of men.

This thesis focuses on the gendered aspects of one part of IHL – the principle of distinction. The principle of distinction sets out the obligation on warring parties to distinguish between "combatants" and "civilians", and between those civilians who are "directly participating" in hostilities and those who are not. In terms of the principle, combatants and civilians directly participating in hostilities may be the lawful intended targets of attack, while civilians who are not directly participating may not be. A complex

[2] When referring to IHL, this thesis refers to the full body of law that makes up the laws of war, including treaty law – made up of the Hague Conventions (1899 and 1907), the four Geneva Conventions (1949) and the two Additional Protocols to the Geneva Conventions (1977) – as well as other peripherally relevant treaties, case law and customary international law.

set of laws contained primarily in the 1949 Geneva Conventions[3] (GCs) and their 1979 Additional Protocols[4] (APs) delineate requirements and definitions aimed at distinguishing civilians and combatants, specifying the privileges and obligations that come with belonging to each category. Civilian status is intended to provide legal protection from being the intended target of attack. Combatancy, on the other hand, comes with a number of privileges, including 'prisoner of war' (POW) status on capture and the right to lawfully participate in hostilities, immune from prosecution for the normally illegal acts that constitute war fighting, so long as these acts comply with IHL. In order to be eligible for such privileges, combatants need to visually distinguish themselves from civilians and to abide by IHL, with the privileges therefore operating as incentive for compliance. While mandating that fighters respect the distinction between civilians and combatants, the law also delineates the distinction with demarcations that have been revisited and revised over the years. To function effectively the legal lines drawn need to correlate with realities on the ground, as dissonance may result in confusion and non-compliance and the consequent deaths of more civilians.

International humanitarian law makes a distinction between international armed conflicts (IAC), those fought between states, and non-international armed conflicts (NIAC), those fought within states or between state and non-state actors. Different bodies of law apply to IACs and NIACs, discussed in chapter 5. IACs are well regulated, covered by the four Geneva Conventions and the First Additional Protocol (AP1). NIACs are regulated less, covered by only one Article of the GCs, Article 3, common to all four GCs, and by the Second Additional Protocol (AP2). In NIACs, less law and comparatively little analysis and consensus makes the legal situation incomprehensive, uncertain and, many would argue, wholly inadequate. However, this body of law is of particular practical importance given that today the majority of the world's conflicts are NIAC in character, or at least partially so.

While in IACs the law provides for a distinction between combatants and civilians, in NIACs the legal situation is more complex. In these conflicts there is no combatant/civilian divide – the conventions do not provide for combatant status in NIACs. State actors, who negotiated and drafted the IHL conventions, did not wish to

[3] Articles 3–4, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.
[4] Articles 43–48 and 50–52, Protocol 1 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3 and Article 13, Protocol 2 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609.

grant privileged combatant status – as well as legal and political recognition – to armed groups fighting against them.[5] The treaties therefore do not allow those in non-state groups "combatant" status, thereby excluding them from this status and its privileges. However, despite not wanting to recognise them as privileged combatants, states still wanted the right to target those fighting against them. As such, the law stipulates that non-state fighters, while not qualifying as combatants, still lose their legal protection from attack as a result of their "direct participation" in hostilities. During the time that civilians "directly participate" they may be targeted.[6] Problematically, the law does not provide a clear definition of "direct participation", the crucial threshold that renders individuals targetable. Adding to the problem is that excluding non-state actors from combatancy renders non-state actors' participation in hostilities illegal, whether they respect IHL or not, thereby removing a key incentive for compliance with IHL.[7]

The principle of distinction is one of the law's primary protection mechanisms. The principle is designed to provide guidance to fighters about whom they can and cannot lawfully target. A failure to distinguish between those who are and those who are not fighting – both in law and in fact – can lead to increased civilian deaths in conflict. The principle seeks to strike a balance between military needs and humanitarian concerns;[8] the idea is that if adhered to, fighters will be able to do what they need to do to win a war – targeting those who pose a threat to their military efforts – while preventing harm to those who pose no threat and are thereby deserving of protection. The principle's clarity, workability and continued relevance are therefore of significant practical importance.

The problem is that in recent conflicts it has become harder to distinguish combatants and civilians. Certain groups operating in modern conflicts have pushed the definitional elements of the principle to the extreme, challenging the understood lines between fighters and non-fighters. Terrorists[9], child soldiers[10] and private civilian contractors[11] are just some of the groups that blur the accepted lines between civilian and combatant. Female

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5 Crawford, Emily. *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict*. Oxford University Press, 2010.
6 Article 13(3) Additional Protocol 2.
7 Lamp, Nicolas. "Conceptions of War and Paradigms of Compliance: The 'New War' Challenge to International Humanitarian Law." *Journal of Conflict and Security Law* 16, no. 2 (July 1, 2011): 225–262.
8 Schmitt, Michael. "Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance." *Virginia Journal of International Law* 50 (2010): 795–839.
9 Hoffman, Michael. "Rescuing the Law of War: A Way Forward in an Era of Global Terrorism." *Parameters* 35, no. 2 (2005): 18–35. Quenivet, Noelle. "The 'War on Terror' and the Principle of Distinction in International Humanitarian Law." *Colombian Yearbook of International Law* 3 (2010): 155–186.
10 Sinha, Alex. "Child Soldiers as Super-Privileged Combatants." *The International Journal of Human Rights* 17, no. 4 (2013): 584–603.
11 Cameron, Lindsey. "Private Military Companies: Their Status Under International Humanitarian Law and its Impact on their Regulation." *International Review of the Red Cross* 88, no. 863 (2006): 573–598. Faite, Alexandre. "Involvement of Private Contractors in Armed Conflict: Implications Under International Humanitarian Law." *Defence Studies* 4, no. 2 (2004): 166–83.

combatants also challenge the understood distinction – and they form the primary focus of this thesis. At times legal categorisations look so different from the features of those fighting that they hardly provide meaningful classification at all.

The principle of distinction is failing in modern conflicts. Today the vast majority of casualties of conflict are civilians. Around the turn of the 20th century, civilians made up 5 per cent of those killed in war. This rose to 15 per cent during World War One, up to 65 per cent in World War Two and up to 90 per cent in the conflicts of the 1990s.[12] This dramatic rise clearly demonstrates the principle's failure to ensure that conflict deaths are restricted to combatants. Today many armed actors disregard the principle altogether, along with the rest of IHL, failing to use this to guide their actions and targeting. While often this is for reasons that have little to do with the law, some of the problem lies with IHL itself – legal inconsistencies, ambiguities and contradictions abound, particularly in the laws pertaining to NIACs. What we are left with is a legal principle in crisis.

"New wars" is the term that has been coined for the wave of conflicts that have become prevalent in recent years.[13] New wars, described in chapter 3, are complex multifaceted conflicts marked by the asymmetrical distribution of resources, weaponry and technology. These conflicts blend international and internal elements, as well as political, economic and ideological motives. New wars present numerous challenges to the principle of distinction. In these conflicts un-uniformed fighters often disguise themselves within civilian populations, intentionally violating the law's requirement that fighters physically distinguish themselves. Rather than civilian deaths being a by-product of hostilities, in new wars, the targeting of civilians forms a central strategy of conflict. The principle of distinction was designed to provide a compromise between the interests of warring parties in military victory and humanitarian aims, prohibiting killing seen as non-essential to military victory.[14] But in new wars the principle stands directly in the way of a key strategy of conflict. IHL's traditional incentivising and balancing systems are therefore strained in their application in these conflicts.[15] Further complicating the conflict landscape has been the rise of international terrorism. Actions taken by groups labelled as "terrorist groups" – often scarcely discernable from rebel groups or traditional non-state armed groups – and the military operations aimed at countering these appear to be the most recent chapter in the

[12] "Impact of Armed Conflict on Children." UNICEF, http://www.unicef.org/graca/patterns.htm. This was based on the findings of Graça Machel's report on the impact of conflict on children: Machel, Graça. *Impact of Armed Conflict on Children: Report of Graça Machel,* United Nations Department of Public Information, 1996.
[13] Kaldor, Mary. *New and Old Wars: Organised Violence in a Global Era.* Third Edition. Stanford University Press, 2013.
[14] Schmitt, supra note 8.
[15] Lamp, supra note 7.

development of armed conflict. How conflicts related to terrorism fall within new wars theory, is the subject of some discussion.[16] What is clear is that terrorism has also challenged IHL and its accepted definitions. Today, the label "terrorism" appears to operate as justification for disregarding laws, restrictions and accepted practices. Here gender gets lost even further, with the prevailing talk of male Islamist fighters paused only occasionally to describe their female victims, or more recently the women who have joined them as "jihadists' wives".

The laws of distinction purport to be gender-neutral, applying in a formally equal manner to men and women alike. While IHL contains some specific protections for female combatants, revealing that the drafters acknowledged there could be female fighters, an examination of IHL reveals that these laws were based on a certain gendered view of conflict that envisaged men and women playing particular roles – men as combatants and women as civilians.[17] However, as this thesis shows, these underlying notions do not always correlate with conditions on the ground, in which the effects of conflict, while clearly gendered, are not necessarily gendered in the ways envisaged by those creating the law. When the laws of distinction are applied to the many women whose experiences do not correspond with the gendered notions underlying the law, this has consequences – direct, indirect, beneficial and harmful – that are not clearly understood and to date have been given little attention.

Two separate yet interrelated problems are at play: the first is that IHL and the principle of distinction in general do not function effectively in new wars; the second is that in particular, the laws do not adequately incorporate the positions undertaken by women in such wars or effectively ensure women's protection. These dual problems raise questions about the continued utility of the principle of distinction, both in general and in respect of women.

1.1 Overview of the research questions and central arguments

This thesis examines the principle of distinction through a gender lens, questioning whether the principle is suitable to effectively regulate modern day armed conflict. It considers whether the principle of distinction contains provisions that effectively encompass the roles played by women in African conflicts, or, rather, whether the laws are based on incorrect or out-dated perceptions of women's roles in war, failing to reflect the

[16] Kaldor, supra note 13.
[17] Kinsella, Helen. "Securing the Civilian: Sex and Gender in the Laws of War". *Boston Consortium on Gender, Security and Human Rights*, 2004.

contemporary gendered reality and thereby failing to adequately regulate. The thesis considers whether the principle in its current formulation serves women in modern conflict, or whether it fails to do so, putting women at even greater risk or disadvantage.

This thesis focuses on women actively participating in new wars in Africa, seeking to demonstrate how the law applies to them; how they are classified and whether and how they are protected by the principle of distinction. Taking illustrative examples from a number of African conflicts, this thesis demonstrates that the principle of distinction is inherently gendered, that applications of the laws have gendered consequences and that these gendered consequences undermine the operation of the principle. By utilising provisions that do not adequately incorporate the roles played by women, the law fails to reflect the ways that people actually participate in conflict. This reduces its effectiveness and its ability to do what it purports to do; namely to provide coherent regulation of conflict and protection of non-combatants in conflict.

The overarching question explored is whether the principle of distinction is able to regulate modern conflicts. The thesis considers this central question by examining a few interwoven themes:

- One theme is women in conflict, with the research considering women's differing forms of participation and needs in conflict and its aftermath, and the ways in which IHL operates to affect women in particular ways.
- Another theme relates to new wars and to problems with the operation of IHL in these. The thesis illustrates how many of IHL's classifications are unworkable in new wars and how traditional incentives for compliance with IHL fall short in these.
- Another theme is the inadequacy of the laws pertaining to NIACs and the problems with the legal divide between IACs and NIACs – a precursory step to the application of the principle of distinction.
- A final theme is conflict in Africa, the chosen geographic focus of this thesis, with its conflicts that in many ways epitomise new wars and which demonstrate many of the problems with the application of IHL in modern conflicts.

Examination of these themes together sheds light on the gendered aspects of the principle of distinction and its functioning in new wars, as well as on the broader question of whether IHL in its current formulation is capable of effectively regulating modern conflicts. Using these, the thesis demonstrates how gendered problems with IHL

interrelate with broader problems, with gender forming one part of a complex, multifaceted picture that ultimately leads to a failing principle of distinction.

Applying the principle of distinction to women actively participating in African conflicts, reveals that the laws were drafted narrowly, effectively excluding many women from being recognised as "combatants" or "direct participants". Even when women are actively engaged in armed movements, the types of roles they typically play seldom meet the law's narrow definitions, which have been framed in traditional military ways, centring on actions that cause kinetic physical harm to an enemy. These accepted understandings of the principle leave little room for those holding non-fighting roles in armed groups, roles that women often hold.

The principle's effective exclusion of women has mixed consequences for them. On the one hand, the narrow framing of the law provides many women with legal protection from attack. If women participating in conflict do not qualify as combatants or direct participants, then they cannot be lawfully targeted in attack – clearly working in the interests of many women. However, there are also more harmful effects. For one thing, narrow definitions that prohibit fighters from targeting those who they feel to be integral to the fight against them, might encourage non-compliance with the law. Restrictive definitions that exclude women from combatancy or direct participation propagate the view that women are not actively participating in conflict. If women's contributions to war efforts are not recognised, then women are more likely to be denied places at peace negotiations or post-war political positions. A failure to recognise women's participation also leads to them being excluded from demobilisation and reintegration assistance conferred on former combatants, welfare programmes for former fighters and reparations programmes. Post-conflict societies are constructed in part in response to ideas about who took part in armed struggles. Where women's participation is disregarded, so too are women's concerns and agendas in the post-conflict period, undermining the sustainability of any peace agreement.

There are other indirect effects, too; a framing of the law that discourages recognition of women's participation entrenches stereotypes about women as *victims of conflict*. Conceptualisations that paint all women as victims tacitly allow for, or normalise, the further victimisation of women. Even within armed groups, the perception that women are not "real" combatants contributes to their being discriminated against and mistreated by their male armed group peers. Of course, these indirect effects cannot be attributed solely

to the framing of the law – victimisation and marginalisation of women is prevalent in society and would no doubt persist regardless of the legal provisions. However, it is important to acknowledge the role that the law does play in social construction, as well as the part it plays in perpetuating stereotypes about women's positions in conflict-ridden societies.

1.2 Methodology

The principle of distinction is critically evaluated by applying it to women participating in a range of ways in conflicts across Africa, seeking to determine how such women would be classified; whether they would be understood as 'combatants', or as 'civilians' and if their actions would constitute 'direct participation'. The thesis considers what the effects of such classifications would be, both for those women participating, and for women in conflict zones in general, and assesses some of the issues that such applications of the law raise.

This research occupies a space within and between several bodies of scholarship, aiming to contribute to each, to address gaps in each and to link them. This research furthers each of these discussions by honing in on a novel group (women participating actively in conflict) in an under-examined region (Africa), highlighting the issues that this grounded application raises.

A body of scholarship questions the extent to which the principle of distinction remains adequate to regulate modern conflict.[18] Much of this literature has focussed on IACs, but there has been less discussion on these issues as they relate to NIACs. Much has focused on the conflicts in which the United States and other Western powers have been involved, including those in Iraq and Afghanistan, exploring the issues these conflicts have raised for the principle of distinction – like terrorism, the use of private civilian contractors and the challenges arising from remote warfare.[19] Other types of conflicts and those in different regions have been subject to less academic and legal analysis. In particular there has been little academic focus on the principle of distinction in modern African conflicts. While the International Criminal Court (ICC) and International Criminal Tribunal for Rwanda (ICTR) have conducted some limited examination of these issues in Africa, these have not

[18] Schmitt, Michael. "The Principle of Discrimination in 21st Century Warfare." *Yale Human Rights & Development Law Journal* 2 (1999): 143–82. Swiney, Gabriel. "Saving Lives: The Principle of Distinction and the Realities of Modern War." *International Lawyer (ABA)* 39 (2005): 733–758.

[19] See, for example, Lewis, Michael and Crawford, Emily. "Drones and Distinction: How IHL Encouraged the Rise of Drones." *Georgetown Journal of International Law* 44 (2013): 1127–1166. Quenivet, supra note 9. Kidane, Won. "The Status of Private Military Contractors under International Humanitarian Law" *Denver Journal of International Law and Policy* 38 (2010): 361–419.

sought to problematize the principle of distinction, rather focusing on its application, indictments and prosecutions.

Armed conflict plays out differently in Africa than elsewhere in the world – as well as varying across the continent itself. While conflicts the world over have changed over the years, the changes in African conflicts have differed somewhat. While in other regions conflicts have become more technologically sophisticated, in Africa thousands are still killed by machetes and small arms. While in other places conflicts are commonly fought for ideological or political goals, with combatants wresting for control of key centres, in Africa long-term low-level conflicts prevail, frequently involving rebel groups operating from the bush, fighting for and sustained by resources, often with no clear political or ideological motives or command structures. Despite – or maybe because of – these differences, African conflicts are the quintessential new wars, making African conflicts a useful lens with which to examine the application of IHL to new wars. Today a significant proportion of the world's conflicts are fought on the African continent, giving research that hones in on Africa significant practical importance. The differences apparent in African conflicts, coupled with the large-scale violations of IHL and human rights witnessed in these, raise pressing questions about the extent to which IHL, drafted with a vastly different context in mind, is suitable to regulate African warfare.

International law's understandings of *jus in bello* have for the most part been shaped by conflicts involving northern states, with developments elsewhere, including in Africa, scarcely playing a role. Critical scholars have long claimed that IHL presents a Eurocentric construction of conflict.[20] To a great extent IHL was formulated in response to developments in conflicts fought by or affecting European nations and was shaped by the dominant concerns in these conflicts. When IHL was first developing conflicts in Africa were largely ignored or, when they involved colonial powers, were cruelly quashed and framed as episodes of internal unrest – out of the purview of the laws of war and certainly of no relevance to IHL's formulation.

This is changing to some extent. In recent years an international lens has begun to zone in on African conflicts. The ICC's focus on cases arising out of conflicts in Africa has brought attention to the legal aspects of African conflict. While such attention was certainly

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[20] For a discussion on the Eurocentric nature and origins of international law, see Koskenniemi, Martti. *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960*. Cambridge University Press, 2002. Anghie, Antony. *Imperialism, Sovereignty, and the Making of International Law*. Cambridge University Press, 2007. Koskenniemi, Martti. "International Law in Europe: Between Tradition and Renewal." *The European Journal of International Law* 16, no. 1 (2005): 113–124.

required, the ICC has been criticised for its almost exclusive, allegedly politically motivated, focus on Africa, with critics noting its failure to address the many other contexts where violations have been committed.[21] While the ICC's discussion of African conflicts has been invaluable, the Court's explorations have been limited. The Court has failed to explicitly consider the distinctiveness of African conflicts and the way this might affect legal reasoning and the application of legal definitions and concepts. The ICC has only taken gender issues into consideration to a limited extent. In a Separate and Dissenting Opinion of the *Lubanga* decision, Judge Odio Benito noted that the failure to consider the gendered effects of legal concepts is discriminatory – and she illustrated how these discriminatory effects can play out.[22] However, beyond this acknowledgement, some examination of "gender crimes" and some mentions of gender in relevant policy statements[23], the ICC has failed to conduct any serious level of gendered analysis.

The thesis focuses on women. Women are not merely another sub-group of study – women make up half of all people affected by armed conflict, making the study of women in conflict of tremendous practical importance. However, in addition to the reasons why focusing on women is important *for women*, considering the way IHL applies to women can also teach us broader lessons. Understanding the way the law fails such a significant portion of the population provides insight into how it fails everyone. The law's inability to adequately regulate women in conflict also provides insight into the law's inability to regulate other groups that veer from the underlying visions of the drafters of the law.

In the highly masculinised arena of conflict, the focus has always been on men. The stories told of war and the resulting understandings of conflict have been dominated by men's experiences. To date, almost all discussions on the principle of distinction, combatants and direct participation, have focused on male involvement in hostilities. At best research and discussions have been gender-neutral, failing to specifically consider women. Women's experiences of conflict have been silenced – particularly those women who have not conformed to stereotyped notions of women as victims in men's wars.

There exists a rich body of work that considers women, law and war. There are, however, certain gaps in this work that this thesis hopes to address. While a number of academics

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[21] Arguments have been made that the ICC's almost exclusive focus on Africa contributes to interventionist, imperialist assumptions. See for example, Jalloh, Charles. "Regionalizing International Criminal Law." *International Criminal Law Review* 9 (2009): 445–500.

[22] Para 16, Separate and Dissenting Opinion of Judge Odio Benito. *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, 2012.

[23] For example, see the International Criminal Court Policy Paper on Sexual and Gender-Based Crimes, 2014.

have considered the effects of IHL on civilian women,[24] few have focussed on the law's interaction with women actively participating in conflict. The gender literature has paid little attention to NIACs and to the gendered workings of IHL in NIACs. "Gender and IHL" tends to be discussed in isolation from other debates in IHL. Sadat notes how female lawyers focus on gender issues, finding themselves in an "all female ghetto", excluding and excluded by male colleagues.[25] This problem is not unique to the legal arena – in studies on conflict across various disciplines, women are either excluded or their identity as women becomes the central focus of the work. What is missing is writing that proceeds "without being gender blind, nor being blinded by their gender."[26] In the field of IHL there is a need for scholarship that integrates discussions on gender within broader discussions on topical IHL concerns, eking out the gendered elements of broader issues.

This thesis examines the law using a feminist theory lens, building on understandings that feminist scholars have developed about women, conflict and international law. In general, there has been a shortage of theoretical critiques of IHL, with much writing in this area having a military or human rights leaning. Feminist analysis, as a non-traditional lens, is therefore a valuable contribution to the IHL literature. Like all feminist writing, this thesis is motivated by a belief in the equality of men and women – equality that is severely challenged in the arena of conflict. This work considers what a gender-equal application of IHL might look like. It highlights the implications of the ways in which IHL currently applies, in doing so providing a grounded basis for assessing the law's effectiveness and for considering the possibility of transformation.

Focusing on both women and Africa challenges the principle of distinction at a double level. By placing both women and Africa at the centre of this enquiry, this work puts the margins at the centre, challenging numerous layers of assumptions underlying IHL. Historically and in the present, IHL has attempted to normalise conflict around a vision – a vision of state armies, resembling European/Western armies, consisting of uniformed men fighting each other across sovereign borders. This work seeks to refute the notions underlying IHL – notions of a *normal* war or *typical* fighters. It challenges IHL's normative vision of what conflict should be like, revealing why this vision is problematic and not

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[24] For example, Oosterveld, Valerie. "Feminist Debates on Civilian Women and International Humanitarian Law." *Windsor Yearbook of Access to Justice* 27 (2009): 385–402.
[25] Sadat, Leila. "Avoiding the Creation of a Gender Ghetto in International Criminal Law." *International Criminal Law Review* 11 (2011): 655–662.
[26] Felices-Luna, Maritza. "The Involvement of Women in Anti-Establishment Armed Groups: Deviance in the Service of a Citizenship Enterprise." *Champ Penal / Penal Field* 4 (2007), at 4.

reflective of current conflicts, and illustrating the strain that 'atypical' subjects or contexts – which are in fact highly typical today – place on an already failing principle.

One may ask, why should it matter whether IHL is gender sensitive when so many fighters disregard the law anyway? In new wars – in Africa and beyond – fighters breach the law at will, little knowing nor caring whether their actions violate international treaties and customary international law. Many fighters in Africa are scarcely educated or trained – and certainly not trained in the nuances or even the centralities of IHL. What is more, non-state actors' actions fall outside of the bounds of legality anyway, by virtue of the fact that they are violating domestic law by fighting against governments, and as such conformity with international law is unlikely to be a large influencing factor. Challenges around compliance with IHL, particularly in NIACS, are discussed in chapter 5. Given large-scale non-compliance, what difference do the gendered nuances of IHL actually make for the protection of women? In answer to this question, a belief underpinning this work is that compliance will be promoted by ensuring that IHL is workable and reflective of real situations on the ground. Laws that are aimed at situations bearing little resemblance to real modern conflicts encourage non-compliance, if for no other reason than that the law is too impractical and confusing to actually adhere to. A second belief underlying this work is that it is important to have a body of law that incentivises *all* actors to comply. To promote compliance the state-centric nature of IHL and the many barriers to non-state actors' inclusion need to be addressed. These two themes will be revisited throughout this thesis, thereby continuously addressing two key causes of non-compliance. Beyond this, this thesis does not attempt to propose solutions to the problem of non-compliance with IHL. This is a critical issue, yet one that falls beyond the scope of this work. Still, it must be borne in mind that any approaches taken to improve the law from a gendered perspective will continue to be hampered by a lack of adherence. No matter how well crafted, how gender equitable and how protective a law may be for women, if it is not complied with, its protective effects will be limited.

There are certain topics that this thesis will not explore in great detail. While recognising their importance and acknowledging the interconnected nature of the different themes in IHL, this thesis retains its narrow focus. It focuses on the principle of distinction as it relates to people, not as it applies to objects and property. As with people, only "military objectives" may be attacked, while civilian objects may not be intentionally targeted.[27]

[27] For a full discussion on civilian objects, see Sassoli, Marco. "Legitimate Targets of Attack Under International Humanitarian Law." *Programme on Humanitarian Policy and Conflict Research at Harvard University*. Background Paper Prepared

While the study of military and civilian objects has immense practical importance, this is beyond the scope of this thesis.

The thesis does not dwell on the other core principles of IHL: proportionality and necessity. "Proportionality"[28] prohibits attacks in which the anticipated harm to civilians is excessive in relation to the military advantage anticipated by the attack. Looked at in converse, it allows for a certain number of civilian casualties where these are seen as proportionate to the military advantage anticipated – a justification for civilian deaths that would otherwise be prohibited by the principle of distinction, thus giving it an important function in the practical application of distinction. "Necessity" is a legal justification for attacks on targets that result in civilian casualties. While proportionality and necessity are both touched upon at various parts of this thesis, for the most part these are only mentioned where they impact on the principle of distinction. While a rich body of literature considers proportionality and necessity,[29] there is a need for more in-depth gendered critique of these principles, a possible avenue for future research.

This thesis aims to provide a greater understanding of the nature of a problem: the principle of distinction's failure to adequately regulate women's participation in hostilities. It does not aim to solve this problem or to propose specific revisions to the law. That being said, the conclusion will briefly consider some potential approaches that could be followed to improve the legal situation, noting how they could be approached and the challenges they might raise.

This is a book study. Empirical material has been collated to provide the factual material about women in African conflict, to which the law is applied in later chapters. Rather than conducting field research, this research drew on empirical material already available, deriving from academic writing, information collected by humanitarian organisations, NGOs, the media, as well as judgments of the international criminal tribunals. Given limitations in time and funding and given the volume and quality of empirical material

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for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge (January 27, 2003).

[28] Article 51(5)(b), 57(2) and 85(3) AP1. In Rule 14 of its study on customary international humanitarian law the ICRC recognises proportionality to be customary international law. Henckaerts, Jean-Marie, and Doswald-Beck, Louise. *Customary International Humanitarian Law, Volume 1: Rules, International Committee of the Red Cross*. Cambridge University Press, 2005.

[29] See for example, Estreicher, Samuel. "Privileging Asymmetric Warfare (Part II)? The 'Proportionality' Principle under International Humanitarian Law." *Chicago Journal of International Law* 12, no. 1 (2011): 143–157. Hayashi, Nobuo. "Requirements of Military Necessity in International Humanitarian Law and International Criminal Law." *Boston University International Law Journal* 28 (2010): 39–140.

already available about women participating in African conflicts, it was felt that secondary material was sufficient – particularly given the thesis's focus on analysing the effects of the law. However, I have previously conducted fieldwork in a number of conflict-affected countries in Africa, including South Sudan, Central African Republic, Sierra Leone, northern Uganda and South Africa. As such, the secondary material was understood in light of significant experience in these contexts.

This research does not centre on specific case studies, but rather considers women across a number of conflicts in Africa. This approach allowed for a greater number of issues to be explored than a case study approach would have allowed, as different conflicts bring out distinct issues. Incorporating numerous examples more accurately illustrates the variations in women's roles and circumstances and more clearly portrays a sense of the difficulties involved in regulating in a way that suitably encompasses these variations. This approach also allows the results of this research to be more generalisable, ensuring that recommendations do not risk being suited to only one context or to a certain type of participation in conflict – arguably problems with the current law. Nevertheless, despite not using case studies, this thesis often draws on certain examples, with some conflicts coming up more frequently. These tend to be conflicts where women have played greater roles, or those that contain features that are particularly useful for this application of the law and which illustrate key points of value to the discussion. The countries that come up more often are also those where there is a greater volume of documented material on female involvement available, as well as those countries where I have personally spent time researching, as I know and understand these better.

This study is informed by a feminist perspective and is guided by a conviction that equality between men and women is of paramount importance – even where equality of treatment might also have negative effects for some women. This thesis is also written from a humanitarian perspective. The study of IHL has largely been split between those who prioritise the interests of military actors and those who are motivated by humanitarian ideals. This thesis belongs to the latter. Military necessity is discussed and considered as it is understood that only by adequately accommodating military concerns will military actors comply with IHL – which will in turn lead to greater humanitarian results.

My life experiences have played a part in shaping the research approach. I am a South African woman who grew up during South Africa's state of emergency and the closing years of Apartheid. While I did not directly participate in South Africa's armed struggles, I

lived through these times and was affected by them. Over the past years, I have worked in conflict-affected areas across Africa, conducting research on a range of projects relating to women, combatants and the law. I arrived at this topic of research through my experience in the field, directly witnessing the ways in which the law fails the women who rely on its protection. My background is that of a researcher, humanitarian worker and lawyer. I have never served in the military and have never been involved in targeting decisions. I have studied the ways in which such decisions are made in battle and the factors affecting these decisions. However, I am conscious of the fact that my understandings of IHL are limited by the fact that I have never directly applied this in combat. No amount of research can match understandings gained by personal experience of war.

1.3 Breakdown of chapters

In this thesis, chapters 2, 3, 4 and 5 each set out a central element of this research; the principle of distinction, women's participation in African conflicts, feminist theory and IACs/NIACs. Chapters 6, 7 and 8 bring this all together, conducting a practical application of the law to women in African conflicts, analysing the results and seeking to answer the central research questions posed.

Chapter 2 contains an in-depth exploration of the principle of distinction, setting out the content of the law that is critically analysed through this thesis. The chapter describes the laws of distinction in both IACs and NIACs, highlighting the areas of controversy and the places where the law is problematic. It does this so that the gendered problems with the principle, explored later in this thesis, can be considered in light of the principle's broader problems. **Chapter 3** describes Africa's conflicts and the varied ways in which women participate in these, providing the facts to which the law is applied in later chapters. The chapter also discusses new wars, locating African conflicts within this theoretical categorisation, considering the gendered aspects of new wars as well as their tricky relationship with IHL.

Chapter 4 discusses feminism and IHL, allowing this thesis to build on insights from this body of theoretical thought. After highlighting the central concerns of feminist theory and examining how these relate to conflict and female combatancy, the chapter describes the critiques that feminist scholars have made about IHL and about the principle of distinction. **Chapter 5** considers the distinction between IACs and NIACs – a preliminary legal assessment that must be made in any given situation in order to know which version of the principle of distinction is to be applied. The chapter highlights the practical and legal

difficulties in making such a classification in new wars, illustrating how this preliminary step is in fact a step that often cannot properly be made. The chapter pays particular attention to the regulation of NIACs, demonstrating the failings with this regulatory body and the problems this creates for a workable IHL system.

In **chapter 6** the law is applied to the facts. The principle of distinction is applied to women participating in a range of ways in African conflicts, seeking to see how different women would be classified, which women would be classified civilians or combatants, which types of actions would constitute direct participation and which women can therefore be the lawful targets of attack. The chapter highlights the difficulties in making such classifications and illustrates how few women actually fit within the law's narrow categories. **Chapter 7** pulls it all together. The chapter explores the differing effects that the principle of distinction has for women – positive and negative, direct and indirect, during conflict and more broadly, questioning whether ultimately the principle serves and protects women in modern conflicts or the extent to which it fails to do so. **Chapter 8** concludes the thesis, recapping the major themes and central arguments. The chapter examines different approaches that could be taken to improve the legal situation, considering the problems and risks inherent in different approaches.

The nature of warfare is constantly changing, with IHL developing alongside these changes. Among the many changes seen in recent years has been an increase in the numbers of women actively involved in the waging of war. If IHL is unable to adapt to shifts in conflict and to changing modes of participation, it will be rendered irrelevant. Revisiting the principle of distinction is an important step required to bring the law in line with the realties of modern conflict. It is hoped that this research will play a role in illuminating one facet of the failings of the principle – that relating to women – and that this may ultimately contribute to the development of a more realistic, more inclusive and ultimately better adhered to principle of distinction.

2 The Principle of Distinction

This chapter sets out the content of the law that is to be critically analysed in this work. It lays out the general critiques of the principle of distinction, against which the gendered critiques should be understood. The principle of distinction is one of the fundamental tenets of IHL. It aims to regulate the conduct of participants in conflict to provide protection to those not participating. It also operates to classify individuals, providing legal identities in times of war. The principle is of critical importance to the protection of civilians. Confusion between civilians and combatants – both in law and in fact – can result in greater numbers of civilians harmed. Where those fighting cannot tell the difference between those who pose a threat to their military efforts and those who do not, civilians are more likely to be killed. So too, if the law does not make it clear who fighters may or may not target, civilians bear the brunt. It is therefore crucial that this distinction be clearly demarcated in law and strictly adhered to in practice.

However, unlike in conflicts of the past when uniformed soldiers faced each other on demarcated battlefields, new wars make it harder to distinguish civilians and combatants. Fighting often takes place in urban centres, with fighters carrying out attacks before blending into civilian backdrops. Civilians frequently take part in hostilities, providing ad hoc support and assistance to armed movements. Terrorists and a range of un-uniformed irregular fighting groups, participating in undeclared, geographically decentralised and complex struggles, have further complicated matters, leading many to question whether the principle of distinction is still suitable to regulate the rapidly shifting face of modern conflict. Among the many groups whose activities challenge the definitions in the law are women, who provide an interesting illustration of the blurring lines between fighter and non-fighter.

This chapter begins with a brief history of the principle, tracing the ways this body of law has developed alongside changes in warfare. The chapter considers the laws of distinction in both IACs and NIACs. For IACs it describes the ways in which combatancy requirements have evolved through the treaties. It interrogates the accepted position of having two opposing categories, civilian and combatant, considering the status of other possibly emerging categorisations, like "unlawful combatant". In the discussion on NIACs, the concept of "direct participation" is discussed and the status of non-state armed groups is explored.

Broadly speaking, two central categories of critique are explored. First, this chapter highlights the many controversies relating to the wording and substance of the law, arguing that the law is uncertain in its meaning, application and interpretation. The principle of distinction can only be successful if armed actors adhere to it, and this complex set of laws should be considered with its intended audience in mind; those who are supposed to apply it in conflict – in a context like Africa often barely-educated fighters. A second set of critiques, extrinsic to the law's complexity and wording, revolve around whom the principle is favouring in being framed in particular ways. The principle is not uniform in its application and divergent rules apply to different actors in different contexts. There are divergent rules for state and non-state actors, in IACs and NIACs, and even for men and women. The constructed laws, the chosen wording and even the ambiguities benefit certain parties and prejudice others. This state-created system prioritises the interests of states. It also prioritises military interests, despite the humanitarian façade the law employs[1] – with some arguing that the principle ultimately legitimises violence by allowing the targeting of those who meet certain definitions. Among the many layers of privileging is a gendered one that is further explored in chapter 4.

2.1 A Brief Historical Overview

The distinction between combatant and civilian has had a long and fluid history, shifting alongside changes in warfare, politics and the views and beliefs of society. The laws of distinction developed gradually, progressing in response to key historical events. Tracking these changes demonstrates how this body of law can develop to keep pace with changing circumstances – suggesting it can continue to develop should new changes in warfare, like those associated with new wars, provide the need.

This section provides a brief history of the distinction between combatant and civilian. Not purporting to be a comprehensive chronicle,[2] this account rather points to key events that have influenced the development of these concepts. This history is for the most part European-focused – as is much of the history and discourse on the formation of international law. Largely absent from this historical account are shifts in conflict that took

[1] Jochnick and Normand argue that the laws of war have tended to regulate areas of warfare only after these are no longer meaningful, like by banning those methods that no longer have utility, while allowing new destructive technology. Jochnick, Chris af, and Normand, Roger. "The Legitimation of Violence: A Critical History of the Laws of War." *Harvard International Law Journal* 35 (1994): 49–95.

[2] For a more comprehensive history of the principle of distinction, see Kinsella, Helen. *The Image Before the Weapon: A Critical History of the Distinction Between Combatant and Civilian*. Cornell University Press, 2011.

place in Africa, as these played little direct part in shaping IHL.[3] While the history below is focused largely on men, who have always been the dominant players in conflict, it will demonstrate that women have also actively taken part in conflicts throughout the years, albeit in ways that differed to those in which men took part.

Since the early years of written history, combatants have been distinguished from civilians. However, the group of people perceived to belong to each category has continuously changed. Historically, a dichotomy has existed between those who wanted to limit permission to fight to privileged members of organised armies and those – often those being occupied or attacked – who preferred to enable all citizens to join in fighting, supporting a less restricted fighting class. Over the years, participation in conflict has broadened and narrowed, reflecting these positions. Once IHL began to define requirements for combatancy, a related tension became evident between those who wished to include only a restricted group under this legally privileged category and those who argued the value of incorporating a wider group of fighters within the fold of combatancy as a means to promote compliance with IHL. This history and the descriptions of the laws that follow illustrate the continual tensions between these approaches.

Although wars were fought in earlier periods, this historic overview begins in medieval times. Then fighters came from a privileged class, with wars fought by predominantly male knights. Knights' actions were constrained by ideas of chivalry, rather than by laws.[4] While the majority of recipients of knighthood were men, instances of women being given knighthoods have also been recorded. For example, the *Order of the Hatchet* in Catalonia was an order of knighthood founded purely for women in 1149, to honour the women who had fought to defend the town of Tortosa from Moor attack.

Participation in the Crusades, the religious military campaigns of the 11th, 12th and 13th centuries, was open to all Christian men. Those who went on Crusade were awarded the "Crusade Indulgence" of remission of sin. To join, Crusaders took a vow before receiving a cross from the Pope or his representatives, becoming "soldiers of the church". Men from all classes of feudal society went on Crusade – although many peasants had no choice but to accompany their lords or employers. In the earlier years many non-fighters went on

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[3] Writers have discussed IHL's relationship to non-European 'others' in the colonies and the role that this had in shaping the law. See Megret, Frederic. "From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Humanitarian Law's 'Other'," In *International Law and Its Others*. Cambridge University Press, 2006.

[4] Watkin, Kenneth. "Combatants, Unprivileged Belligerents and Conflicts in the 21st Century, Background Paper Prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge, January 27–29, 2003." *Programme on Humanitarian Policy and Conflict Research at Harvard University* (2003).

Crusade, including many Crusaders' wives, but this began to be seen as a drain on resources, leading the Pope to encourage non-fighters to remain at home and to rather donate money to fund the journeys of other Crusaders, in exchange for which they would receive the Crusade Indulgence.[5] This was an early example of recognition of the alternative contributions that women could make while not actually fighting.

The idea of privileged participation was challenged by the formation of nation-states, beginning around the time of the Hundred Years War (1337-1453). States began to garner loyalty, and willingness arose from the population to fight for their nations – rather than for feudal lords. The series of dynastic wars that brought about this change created the need for larger armies, resulting in armies being opened up to all men, greatly expanding the pool of those involved in war fighting.[6] It was during these wars that Joan of Arc famously led the French army to a number of victories, after alleging she heard the voice of God telling her to lead the army.

Following from this great expansion in armies, states began to experience problems with demobilised soldiers, who fought for pay and continuously changed allegiances. To bring forces under increased national control, military ranks and administrative structures were created, discipline was introduced and permanent pay began to be provided to soldiers. This led to the gradual development of stable and permanent national armed forces. Over the years that followed, advances in weaponry created the need for increased training and discipline, leading to armies that by the 1600s had the shape and form of modern militaries.[7] This once again entrenched a stark distinction between soldiers and the general population, with armies now consisting mostly of trained armed men.

With the onset of the revolutions of the Napoleonic era (around 1800), populations began to revolt against the feudal government system. Peasants took up arms en masse, again expanding the legions of those fighting.[8] Although it was primarily men who fought these wars, women travelled alongside military groups and were often present at the fronts. In French regiments women wearing clothes of partially military design cared for the wounded and sold tobacco and refreshments at the front. Similarly some British soldiers'

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[5] Nicholson, Helen, Frequently Asked Questions on the Xrusades, http://homepage.ntlworld.com/nigel.nicholson/hn/indexFAQ.html

[6] Gabriel, Richard and Metz, Karen. "A Short History of War, The Evolution of Warfare and Weapons". Strategic Studies Institute, U.S. Army War College, n.d. http://www.au.af.mil/au/awc/awcgate/gabrmetz/gabr0019.htm.

[7] Ibid.

[8] Talbot Jensen, Eric. "The ICJ's 'Uganda Wall': A Barrier to the Principle of Distinction and an Entry Point for Lawfare." *Denver Journal of International Law and Policy,* Vol 35, no. 2 (2007): 241–274.

wives accompanied their husbands on service and many other unofficial camp followers were attached to British regiments.[9]

Up until this point all of the mechanisms aimed at regulating conflict – including national laws, bilateral treaties, customary rules, the rules of the church and those of chivalry – had been utilitarian in nature, aimed largely at facilitating those who were fighting. This became known as the Hague Tradition, a term referring to the 19th century peace conferences in The Hague. In 1863 a new movement emerged with the founding of the International Committee of the Red Cross (ICRC), which was concerned with the protection of victims of war. This movement was known as the Geneva Tradition.[10] These two movements remain evident in the law today; Hague Laws are those concerned with regulating the means and methods of warfare, while Geneva Laws focus on the protection of specific classes of people in conflict.[11] The principle of distinction has been understood as part of Hague Law, imposing limitations on the means and methods of combat.[12]

In the mid 19th century the formal codification of the laws of war began to take place, bringing the first written manifestations of the principle of distinction. It was during an internal conflict that the written principle of distinction first appeared. During the American Civil War, President Lincoln commissioned Dr Francis Lieber to codify the laws of war based on the customs of nations. The resulting Lieber Code (1863) was issued to the Union Army, with Article 22, which hinted at an early formulation of the principle, stating:

> "Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit."[13]

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[9] "Napoleonic Wars: Women at Waterloo". Historynet.com, 2006. http://www.historynet.com/napoleonic-wars-women-at-waterloo.htm.

[10] Talbot Jensen, supra note 8.

[11] Kalshoven, Frits, and Zegveld, Liesbeth. *Constraints on the Waging of War, An Introduction to International Humanitarian Law, International Committee of the Red Cross*. 4 vols. Cambridge University Press, 2011.

[12] It has also been incorporated into Geneva law and is also accepted as constituting a rule of customary international law. The principle of distinction is thus fully embedded into IHL.

[13] Lieber, Francis, *Instructions for the Government of Armies of the United States in the Field*, Art. 22 (1863), in Swiney, Gabriel. "Saving Lives: The Principle of Distinction and the Realities of Modern War." *International Lawyer (ABA)* 39 (2005): 733–758, at 737.

Despite the presence of this clause in the Lieber Code, civilians were continuously targeted during the American Civil War. Women were subjected to specific forms of targeting, in the form of large-scale sexual violence, the invasion of their homes and the theft of their produce.[14] This was the first conflict in which Americans were conscripted, though most volunteered to enlist. While the Union and Confederate armies did not allow female enlistment, historians report that a few hundred women fought as combatants, disguised as and pretending to be men. In addition, many thousands of women "…made bandages for the wounded and knit(ted) socks to keep the soldiers' feet warm and dry" and … "worked to manufacture arms, ammunition, uniforms, and other supplies for the soldiers."[15]

The principle of distinction was formally introduced to international law five years after the Lieber Code with the 1868 St. Petersburg Declaration. While the Declaration's stated purpose was to ban small explosive bullets, its preamble noted that, "the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy."[16] At the 1899 and 1907 Hague Peace Conferences, nations attempted to comprehensively codify the laws of war.[17] The ensuing Hague Conventions incorporated a weak form of the principle of distinction. The 1907 Hague Convention's section IV on respecting the laws and customs of war on land prohibited "the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended",,[18] while the section addressing war on the sea specifically distinguished undefended locations, which could not be targeted, from industries crucial to the enemy's war effort, which could be.[19]

It is ironic that as the principle of distinction began to properly emerge in international law, civilians started to be killed in far greater numbers in conflict. The budding principle of distinction was put to the test during World War One (1914–1918). Europe became embroiled in a "total war" in which civilian-controlled industries were central to the war effort, leading to a profound temptation to attack them. Technically the distinction between "civilian" and "military" targets was largely respected during the war and for the most part "civilian targets" were not specifically attacked. However, this was diminished by the wide meaning given to the concept of "military targets", which included facilities where

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[14] Murphey, Kim. *I Had Rather Die: Rape in the Civil War*. Virginia: Coachlight Press, 2014.
[15] Women of the American Civil War, Americancivilwar.com, http://americancivilwar.com/women/women.html
[16] Preamble, *Declaration Renouncing the Use, In Times of War, of Explosive Projectiles Under 400 Grammes Weight* (1868).
[17] The 1899 conference had 26 state delegates taking part, while the 1907 conference had delegates from 43 states.
[18] Article 25, Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, 18 October 1907.
[19] Articles 1 and 2, Convention (IX) Concerning Bombardment by Naval Forces in Time of War, The Hague, 18 October 1907.

large numbers of civilians worked.[20] While not a targeted attack as such, the British navy tried to strangle the supply of food and raw material to Germany, in what was called the "hunger blockade", causing the deaths of up to 763,000 German civilians,[21] a move clearly not in keeping with the spirit of the principle of distinction. In the German invasion of Belgium, dubbed by Allied wartime propaganda as "the Rape of Belgium", civilians were targeted in a number of incidents; historians estimate that up to 6,000 Belgian civilians were killed.[22] All of this points to the principle's limited success in protecting civilians during the war. World War One had a significant impact on the women of Europe. With most young men away at war or killed, women began to work in greater numbers in industry and played crucial roles in keeping manufacturing and agricultural production alive. Large numbers of women also served as nurses in the war effort. An estimated 150,000 women served in World War One, with the largest contingents coming from Britain (80,000) and USA (30,000).[23]

World War One was the first conflict in which airplanes were used on a large scale and the first time in which aerial bombardment of civilian centres took place. Responding to this, The Hague Rules of Air Warfare were drafted by jurists at The Hague in 1923. These Rules clearly affirmed the principle of distinction, prohibiting the targeting of civilians and incorporating a comprehensive list of legitimate targets of attack. The Rules expressly prohibited attacks against enemy "civilian morale" – attacks that would become a significant feature in World War Two. Sadly, not one country endorsed these rules, with analysts speculating that these would have restricted the use of aircrafts too much for governments to agree to[24] – a demonstration of the way that IHL has been shaped to prioritise state military interests.

World War Two dealt a significant blow to the ideals of the principle of distinction. On September 1 1939, the day Germany invaded Poland, President Roosevelt sought the agreement of certain European governments that they would not bomb "civilian populations in unfortified cities", receiving agreement from France, England and Germany. Swiney notes that, "Perhaps never in the history of armed conflict has a promise been more thoroughly broken."[25] "Total war" took place on an unprecedented scale, with all

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[20] Swiney, supra note 13.
[21] The National Archives, http://www.nationalarchives.gov.uk/pathways/firstworldwar/spotlights/blockade.htm
[22] Lipkes, Jeff. *Rehearsals: The German Army in Belgium, August 1914*. Leuven University Press, 2007.
[23] Creveld, Martin van. "The Great Illusion: Women in the Military." *Millennium - Journal of International Studies* 29, no. 2 (2000): 429–442.
[24] Hanke, Heinz. "The 1923 Hague Rules of Air Warfare — A Contribution to the Development of International Law Protecting Civilians from Air Attack." *International Review of the Red Cross* 33, no. 292 (1993): 12–44.
[25] Swiney, supra note 13, at 740.

segments of society mobilised, widespread conscription and entire economies geared up for war. Despite parties to World War Two paying lip service to the laws of war, which now included the weak distinction provisions described above, military actors became increasingly willing to attack targets that would undermine civilian morale. With the aim of affecting the enemy nation's resolve to continue fighting, such targets were considered legitimate military objectives. By 1943, parties had abandoned the principle of distinction altogether. In January 1943, Roosevelt and Churchill met to discuss their strategy for the war, creating the Casablanca Directive, which called for, "the progressive destruction and dislocation of the German military, industrial and economic system, and the undermining of the morale of the German people to a point where their capacity for armed resistance is fatally weakened."[26] Both sides to the war attacked opposition cities. Germany, in addition to attacking Allied civilian populations, also proceeded with the systematic killing of large segments of the European population without distinction as to their nationalities or genders. This included European Jewry, of whom six million were killed. Women took part in great numbers during World War Two, working in war-related industries, providing logistic support to militaries and serving as nurses. Hundreds of thousands of women took on combat roles, particularly in anti-aircraft units. Large numbers of women also joined resistance movements. About 1,5 million women took part in the war effort – about 800,000 from USSR, 350,000 from USA and 300,000 from Britain.[27] Still, despite the increased numbers of women serving as soldiers, few women were obliged to enlist. The majority of adult women were exempt from conscription as they were married or had small children.[28] The two World Wars played a major role in women's military, political, economic and social emancipation.

Following the devastation of World War Two, the 1949 Geneva Conventions were drafted – and today they remain the basis of IHL, with 194 countries having ratified them in whole or with reservations. The four GCs, which regulate all aspects of IACs, outlined the principle of distinction in far greater detail. Until the GCs, the treaties regulating conflict dealt only with conflicts *between* states. It was only with the GCs that the legal distinction between IACs and NIACs was entrenched and divergent rules began to develop for each – including diverging versions of the principle of distinction.

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[26] Resulting from this, approximately one million Germans were wounded or killed in bomber attacks and 7,5 million were made homeless. Ibid.

[27] It is possibly because of the communist ideology, which emphasised gender equality, that so many women from Russia were used in the war effort. However, only about 2–3 per cent of them were military personnel. The rest served mainly in administrative or medical positions.

[28] Creveld, supra note 23.

During the Cold War "proxy wars" were fought, in which armed groups or smaller countries acted on behalf of the opposing superpowers. Seemingly internal wars were fuelled and controlled by external powers, taking on (often insidious) international elements. Anti-colonial struggles took place, like those in Kenya, Algeria, Angola and Eritrea, and religious and ethnic conflicts increased.[29] Rather than large armies with uniformed combatants being the dominant norm, there was a rise in smaller armed groups employing irregular fighters.[30] Conflicts moved further from having linear battlefields or "fronts" to increased battles taking place within civilian centres. Mao Tse-Tung wrote that in guerrilla warfare, the general civilian population is the water in which the fish (the guerrilla) survives – an observation telling of the challenges guerrilla warfare presented for the principle of distinction.[31] The GCs with their IAC focus became inadequate to regulate such conflicts. At the same time, countries that relied on voluntary recruitment began finding it more difficult to find male volunteers, leading to some militaries opening up more roles to women, including USA (due mainly to the Vietnam War), Australia, Germany, Britain, Sweden, Greece and Belgium.[32]

In 1974, responding to these changes in warfare, the ICRC brought together a number of countries for the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. The Conference deliberated for three years before producing two Additional Protocols to the GCs. AP1 dealt with IACs, while AP2 dealt exclusively with certain types of NIACs, the first treaty to do so comprehensively. The APs addressed both military and humanitarian concerns, finally bringing together the Hague and Geneva traditions.[33] As of today, 172 countries have ratified AP1 and 166 countries AP2. AP1 has been ratified by 45 African Union states and AP2 by 44.[34] Notably, a number of significant countries have not ratified them, including USA, Japan, India, Pakistan and Israel. In addition, a number of countries have made significant reservations, indicating a lack of consensus on several aspects of the Protocols.[35] Despite this, the APs were a significant development in the law and to a large extent shape IHL today.

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[29] Neff, Stephen. *War and the Law of Nations: A General History*. Cambridge University Press, 2005, at 282–283.
[30] Talbot Jensen, supra note 8.
[31] Parks, Hays. "Part IX of the ICRC 'Direct Participation in Hostilities' Study: No Mandate, No Expertise, and Legally Incorrect." *New York University Journal of International Law and Politics* 42 (2010): 769–830.
[32] Creveld, supra note 23.
[33] Talbot Jensen, supra note 8.
[34] Ewumbue-Monono, Churchill. "Respect for International Humanitarian Law by Armed Non-State Actors in Africa." *International Review of the Red Cross* 88, no. 864 (2006): 905–924.
[35] Gaudreau, Julie. "The Reservations to the Protocols Additional to the Geneva Conventions for the Protection of War Victims." *International Review of the Red Cross* 849 (2003): 143–84. An Article on which there have been significant reservations is Article 44, which relates to the principle of distinction (and specifically to combatant status for guerrilla fighters), discussed later in this chapter.

Conflicts continued to change in the years since the APs. New wars began to be fought. Since September 11 2001 there have been further shifts, both in the nature of conflict and with regard to the legal claims made in response. Responding to the attacks on the USA, America launched conflicts in Afghanistan and Iraq, as well as its global "war on terror". These conflicts, which feature distinct "new" and "old" elements,[36] have brought new challenges to accepted understandings of IHL. The US administration has proposed controversial interpretations of IHL, including relying on the categorisation "unlawful combatant" to deny legal status and rights to terror suspects. While it remains to be seen what effect this will have on the evolution of IHL, what appears evident is that some level of legal shift is taking place.

Despite frequent violations of the principle of distinction, there is now consensus on the fact that the principle constitutes customary international law.[37] However, despite this consensus, question remains as to which specific parts of the principle are customary law.[38] In 2005 the ICRC published a study setting out what it believed to be the rules of customary IHL.[39] It included within this the principle of distinction, setting out the rules of distinction that pertain to both IACs and NIACs. Rule 1 states that, "The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians." This is applicable in both IACs and NIACs, yet the study clearly states that the term "combatant" here is explicitly used "in its generic meaning", to indicate persons who do not enjoy the civilian protection against attack, yet does not imply a right to combatant status or POW status. Rules relating to combatancy status and POW status are not customary international law for NIACs.[40]

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[36] See Kaldor, Mary. *New and Old Wars: Organised Violence in a Global Era*. Third Edition. Stanford University Press, 2013.

[37] Sassoli, Marco. "Legitimate Targets of Attack Under International Humanitarian Law." *Programme on Humanitarian Policy and Conflict Research at Harvard University*. Background Paper Prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge (January 27, 2003).

[38] Dinstein, Yoram. "The ICRC's Customary International Humanitarian Law Study." In *The Law of War in the 21st Century: Weaponry and the Use of Force*, Vol. 82. International Law Studies, 2006. McCormack, Timothy. "An Australian Perspective on the ICRC Customary International Humanitarian Law Study." In *The Law of War in the 21st Century: Weaponry and the Use of Force*, Vol. 82. International Law Studies, 2006.

[39] Henckaerts, Jean-Marie, and Doswald-Beck, Louise. *Customary International Humanitarian Law, Volume 1: Rules, International Committee of the Red Cross*. Cambridge University Press, 2005. These rules have been subject to some criticism, most notably in terms of the methodology used. For a discussion, see Bellinger, John, and Haynes, William. "A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law." *International Review of the Red Cross* 89, no. 866 (2007): 443–471, or Wilmshurst, Elizabeth, and Breau, Susan. *Perspectives on the ICRC Study on Customary International Humanitarian Law*. Cambridge University Press, 2007.

[40] In terms of the study, other customary international law rules of the principle of distinction include Rule 2, stating that, "Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited" (applicable in IACs and NIACs); Rule 3, that, "All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel" (applicable only in IACs); Rule 4, stating that, "The armed forces of a party to the conflict consist of all organised armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates" (applicable only in IACs); and Rule 5, "Civilians are persons who are not

On a different track, there have been recent developments in weapons law, with laws passed that prohibit the use of weapons that violate the principles of distinction and proportionality by being too indiscriminate – including the 1997 Mine Ban Treaty and the 2010 Convention on Cluster Munitions.

IHL has been shown to be responsive, both proactively and reactively, to the changing nature of conflict. However, the extent to which the IHL provisions aimed at protection actually translate into the protection of individuals remains questionable. What follows is a description of the principle of distinction in its current formulation, setting out the laws that in a later chapter are applied to women in new wars in Africa.

2.2 The Principle of Distinction

2.2.1 The Principle of Distinction in International Armed Conflict

In IACs, regulated primarily by the GCs and AP1, a distinction is made between "civilians" and "combatants". Article 48 AP 1 states: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

The laws set out who qualifies as civilian and combatant. Combatancy requirements have changed with the various treaties. Article 1 of the 1907 Hague Regulations laid out the "qualifications of belligerents", stating that the armed forces of belligerent states as well as militias and volunteer corps could be belligerents, so long as they met four conditions: they were subordinate to responsible command, they had a fixed distinctive emblem recognisable at a distance, they carried their arms openly and they acted in accordance with the laws of war.[41]

Article 4 GC3 set out requirements to qualify for prisoner of war (POW) status – requirements that are understood to be the GC's requirements for combatancy. Armed

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members of the armed forces. The civilian population comprises all persons who are civilians" (applicable in IACs, and also in NIACs - although it states that practice is ambiguous as to whether members of armed opposition groups are considered members of armed forces or civilians). Rule 6 states that, "Civilians are protected against attack unless and for such time as they take a direct part in hostilities" (applicable in IACs and NIACs).

[41] Kalshoven and Zegveld, supra note 11.

forces of state parties to a conflict, as well as "Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict…" can qualify, provided they fulfil certain requirements. GC3 incorporated the four Hague requirements and added two additional ones; having a level of organisation or discipline, and belonging to or acting for a state party to a conflict.[42] Notably, in the text these requirements are prescribed for irregular forces, but not for regular forces. Dinstein explains that there was a presumption that due to the nature of regular forces, they would automatically meet these conditions.[43] These requirements form an onerous burden for irregular forces to meet, particularly as secrecy and surprise are key features of guerrilla warfare.[44]

AP1 altered the law significantly. Article 43 reaffirmed four of the GC requirements. AP1 made no distinction between the regular armed forces of a state and its irregular forces. It imposed the requirements on both, making this the first time that regular armed forces were expressly required to comply with the requirements to qualify as combatants.[45] Article 44 went on to change the law, stating that while combatants are obliged to comply with IHL, violations do not deprive them of the right to be combatants (or rather, of the right to POW status). Furthermore, Article 44(3) states that where owing to the nature of hostilities a combatant cannot distinguish himself, s/he is released from this obligation. Article 44(4) adds that although those who do not distinguish themselves are deprived of POW status, they must still be given every protection accorded to POWs.

Article 44 has been the subject of much criticism. Fleck explains that during drafting, those states who supported guerrilla independence movements, or who had themselves attained independence in this way, supported removing the obligations for fighters to distinguish themselves, while other states strongly opposed removing this requirement. This Article was the compromise reached after much debate.[46] Dinstein describes this Article as, "convoluted, not to say opaque", arguing that it renders the distinction between lawful and unlawful combatants to be of nominal value, thereby tilting the balance of protection in favour of irregular combatants. Whereas in the GCs the requirements were quite onerous, "The pendulum in the Article has swung from one extreme to the other, reducing *ad*

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[42] Dinstein, Yoram. *The Conduct of Hostilities Under the Law of International Armed Conflict*. Cambridge University Press, 2004.
[43] The Privy Council in *Mohamed Ali et al. v. Public Prosecutor* (1969) AC 430, at 449, held that regular armed forces also have to meet these requirements.
[44] Dinstein, supra note 42.
[45] Kalshoven, Zegveld, supra note 11.
[46] Fleck, Dieter. The Handbook of Humanitarian Law in Armed Conflicts, Oxford University Press, Second Edition, 2008.

absurdum the conditions of lawful combatancy."[47] This, he argues, will inevitably be bad for civilians as combatants will be more likely to target civilians if they believe that enemy fighters could be pretending to be civilians while still retaining the right to fight and benefitting from POW status.[48] Jensen adds that allowing fighters to operate without uniforms or distinguishing elements undermines the reciprocity elements that previously underpinned the principle.[49] There have been numerous reservations on Article 44 by signatories to AP1,[50] with Article 44 being a key reason that many countries did not ratify AP1.[51]

Civilians are defined negatively in the law – any person who does not qualify as a combatant is a civilian. Article 50 AP1 states that a civilian is any person who does *not* fit into one of the categories of combatant set out in Article 4(A)(1), (2), (3) and (6) GC3 or Article 43 AP1.

Being either a civilian or a combatant comes with privileges, restrictions and obligations. Civilians may not participate in hostilities and can be prosecuted if they do so. For the most part, civilians do not receive POW status on capture (although a few categories of civilians do – set out in Article 4 GC3). Crucially, civilians may not be the lawful intended targets of attack. This does not mean that all civilian deaths in battle are unlawful. Distinction works together with the principles of *proportionality* and *necessity*. While civilians may not be the direct intended targets of attack, if they are killed as an unintended or indirect consequence of an attack that is otherwise lawful, or as "collateral damage", this might still be lawful – so long as the attacks were proportionate to the military goal and necessary to achieve the required military objective. Importantly, a civilian's legal protection from attack is suspended if and when a civilian 'directly participates' in hostilities – a term discussed later in this chapter.

Combatants *may* be the intended targets of attack and may be attacked at all times, even when they are not actually fighting. They remain legitimate targets until they withdraw from hostilities by demobilising or becoming *hors de combat* – by laying down arms, becoming wounded or shipwrecked.[52] Combatant status comes with a number of privileges. Combatants have the right to participate in hostilities (Article 43(2) AP1) and may not be

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[47] Dinstein, supra note 42, at 47.
[48] Ibid.
[49] Talbot Jensen, supra note 8.
[50] For example, a number of states declared that they understood the application of 44(3) to be limited to situations of occupations or conflicts of self-determination. See Gaudreau, supra note 35.
[51] Parks, Hays, supra note 31.
[52] Solis, Gary. *The Law of Armed Conflict: International Humanitarian Law in War*. Cambridge University Press, 2010.

prosecuted for taking part in hostilities or for the many (normally illegal) acts that constitute war fighting (i.e. killing), in so far as these are in accordance with IHL.[53] On capture, combatants acquire POW status and are entitled to be detained and treated in a particular way, the details of which are set out in GC3. There are a number of specific protections for female POWs. Combatants have to fulfil certain obligations. They are obligated to comply with IHL. They are also obliged to physically mark themselves as combatants by wearing distinctive signs and carrying their arms openly. It is a violation of the principle of distinction for combatants to purposefully disguise themselves as civilians.

2.2.2 Creating the categories: civilians and combatants

The framing of the law is indicative of an acceptance of the fact that combatants are the opposite and corollary of civilians and that the categories are co-determined, so that a civilian is that which a combatant is not.[54] However, even when the GCs were drafted, it was evident that there was not such a clear distinction between combatants and civilians – with the Judge Advocate General of the United States War Department noting in 1945 that the distinction is "more apparent than real."[55] To a great extent the two categories were manufactured, as it served a purpose to have a binary classification – a favoured regulatory method. The question when drafting the GCs was not how to distinguish between combatants and civilians, but rather how to delineate the difference between them.[56]

When determining how widely or narrowly the definition of "combatant" was to be framed, a difficult calculation had to be made. If the law defined combatancy too widely, allowing un-uniformed fighters to qualify, this would result in the blurring of combatants and civilians and the potential erosion of the principle of distinction. However if combatancy were defined too narrowly, this would exclude fighters from the fold of the law, problematic as inclusion provides incentive for compliance with IHL.[57] Over the years, states have shifted their positions on this point. AP1 marked the shift from promoting humanitarian protection by retaining a narrow category of privileged fighters to incentivising more irregular fighters to abide by humanitarian norms by offering them privileged status.[58]

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[53] Gasser, Hans-Peter. *International Humanitarian Law: An Introduction*. Haupt, 1993.
[54] Kinsella, Helen. "*Securing the Civilian: Sex and Gender in the Laws of War*". Boston, Boston Consortium on Gender, Security and Human Rights, 2004.
[55] Nurick, Lester. "The Distinction Between Combatant and Non-Combatant in the Law of War." *American Journal of International Law* 39 (1945): 680–697.
[56] Kinsella, supra note 54.
[57] Watkin, supra note 4.
[58] Ibid.

Interrogating these categories raises questions about whether the classification requirements – and in fact the categories themselves – were ever valid, or still are today. The binary opposition of these categories should be questioned, probing whether having two distinct categories is a useful or even viable way to deal with the regulation of fighters in conflict. Among others, feminist scholars point out problems with the use of such binary distinctions[59] – discussed further in chapter 4.

A related question is whether there should only be two categories, or whether there is a need for a possible additional category for those who do not fit neatly into one of the two. Most would agree that there is no category of quasi-combatant in IHL.[60] However, over the years, a number of terms have been proposed for those who fall between the two main categories, including "non-combatant", "illegal combatant", "enemy combatant", "unlawful combatant", "belligerent", "unprivileged belligerent" and "unlawful belligerent"[61] What is clear is that *civilians who fight* have been – and continue to be – the problematic piece of the puzzle.

The idea of the "unlawful combatant" has been around for years, appearing in case law, military manuals and legal literature, although the term and its definition have never actually appeared in the IHL treaties. A person who sometimes engages in military operations, while at other times purporting to be a civilian is said to be neither civilian nor lawful combatant but rather an unlawful combatant. Such a person is a combatant, in that s/he can be targeted as such (and does not receive civilian protection from attack), but does not receive the privileges conferred on lawful combatants, like POW status or immunity from prosecution.[62] This "status" therefore offers the least protection.[63] This categorisation has gained much prominence in recent years, due largely to America using this classification as a means to deny POW status and other rights to terror suspects.[64] This

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[59] Charlesworth, Hilary, and Chinkin, Christine. *The Boundaries of International Law: A Feminist Analysis*. Manchester University Press, 2000

[60] Sassoli, supra note 37.

[61] For a discussion of the term "non-combatant" and the way its meaning has shifted over time, see Watkin, supra note 4, at 3–4.

[62] Dinstein, supra note 47.

[63] One should note that although unlawful combatants are denied POW status, they are still protected under Article 75 of AP1, which provides a minimum level of protection to those who fall into the hands of adversaries yet do not benefit from any more favourable protections. They would also remain protected by relevant provisions of human rights law. In *Al-Skeini and Others v The United Kingdom, ECHR 1093 - 55721/07, 2011*, the European Court of Human Rights held that the United Kingdom's human rights obligations applied extraterritorially to its acts in fighting the Iraq war, opening up the way for the extraterritorial application of human rights obligations in conflict situations. In NIACs they would also be entitled to protection in terms of CA 3.

[64] For a summary of arguments made by the United States Government in this regard, see, Bellinger, John. "Legal Issues in the War on Terrorism – A Reply to Silja N. U. Voneky." *German Law Journal* 8, no. 9 (2007): 871–878.

approach has been strongly criticised.[65] Crawford argues that, "Given the almost uniform resistance to US attempts to proclaim a 'Geneva' status of 'unlawful enemy combatant', it is doubtful such a legal category exists. The term 'unlawful combatant' serves a descriptive function only. Arguably, the concept has no real international legal consequences that attach to its use, regardless of what the United States has asserted."[66] The Israeli Supreme Court has also refused to accept that unlawful combatants are a distinct third category, reasoning that neither the treaties nor customary international law provide a legal basis for recognising a third category.[67]

A complex body of law therefore establishes who is a combatant. Classification is most clear for members of state armies, but less so for members of state irregular forces. There is even more confusion for civilians who fight for these forces. And as a result of AP1, there are now those classified in one way, yet treated as though they were classified in another. As the following section will illustrate, the situation becomes even more complex when applied to non-state armed groups in NIACs.

2.2.3 The Principle of Distinction in Non-International Armed Conflict

Unlike in IACs, in NIACs the important divide is not between combatant and civilian, but rather between those who play a "direct part" (or directly participate) in hostilities and those who do not. States, who created the IHL system, did not wish to grant privileged combatant status – as well as legal and political recognition – to those within their countries fighting against them.[68] Therefore, in the NIAC treaties there are no 'combatants' granted the right to participate in hostilities.[69] Crawford explains that, "By definition, any person who participates in an internal armed conflict who is not a member of the State's armed forces is an 'unlawful combatant' – that is, a person who is not immunized for their warlike acts under international law."[70] Problematically, as their mere participation in hostilities is illegal, whether they comply with IHL or not, non-state actors are left with less reason to comply with the law.[71]

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[65] See for example, Voneky, Silja. "Response – The Fight Against Terrorism and the Rules of International Law – Comment on Papers and Speeches of John B. Bellinger, Chief Legal Advisor to the United States State Department." *German Law Journal* 8 (2007): 747–760.

[66] Crawford, Emily. *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict*. Oxford University Press, 2010, at 60.

[67] *The Public Committee Against Torture in Israel et al v the Government of Israel*, HCJ 769/02, 14 December 2006, at para 28.

[68] States argued that to grant protected status to rebels and insurgents would go against the system of sovereign states. They argued that if states were to grant combatant immunity to non-state actors, they would effectively be suspending their criminal and treason laws. See Crawford, supra note 66.

[69] Sperroto, Federico. "The Legal Status of Armed Opposition Groups in Afghanistan." *openDemocracy*, March 23, 2010.

[70] Crawford, supra note 66, at 68.

[71] Lamp, Nicolas. "Conceptions of War and Paradigms of Compliance: The 'New War' Challenge to International Humanitarian Law." *Journal of Conflict and Security Law* 16, no. 2 (2011): 225–262.

Despite not wanting to recognise non-state fighters or to grant them combatant privileges, states wanted to retain the right to target those fighting against them. Therefore, Article 13(3) AP2 states: "Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities." So in NIACs the key determinant of whether one may be targeted in attack is whether one directly participates in hostilities. However, despite the fact that such significant consequences ride on this term, there has been little clarity and consensus on its meaning. The treaties provide no definition of direct participation and scholars have had greatly differing views about what direct participation entails.

The question of what *should* constitute direct participation is a difficult one. In many conflicts, particularly in civil wars, large parts of populations become involved in war efforts, even if only indirectly. Demarcating a line between those directly participating and those merely contributing indirectly – or put differently, determining the point at which that contribution should negate one's immunity from attack – is a challenging task. Some argue that direct participation should be interpreted narrowly, so that fewer activities qualify, ensuring that more people retain protection from attack. Others contend that there is more protective value in interpreting the term liberally. Schmitt argues that "…narrowly interpreting direct participation in hostilities, although appearing to expand the protection of humanitarian law to greater numbers of individuals, actually increases the risk to the civilian population. Narrow interpretations both sow confusion, and, much more nefariously, encourage disrespect for the principle among those who suffer militarily from the actions of those said not to be directly participating. In particular, in modern combat it is illogical to tie participation to the direct release of kinetic forces. Not only may non-kinetic force be deadlier, but activities far from the 'battlefield' may be as important, perhaps more so, than actually 'pulling the trigger'."[72]

The Commentaries to the APs (Commentaries) provide some insight as to what actions the drafters intended to constitute direct participation. The Commentaries, published in 1987 and written mainly by people who had taken part in the Diplomatic Conference as members of the ICRC delegation, aimed to explain the provisions of the Protocols. The Commentaries state that "Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time

[72] Schmitt, Michael. "'Direct Participation in Hostilities' and 21st century Armed Conflict." In *Crisis Management and Humanitarian Protection: Festschrift Fur*, 505–529. Fischer, Horst Berlin: BWV, 2004, at 529.

and the place where the activity takes place."[73] The Commentaries also explain that acts of direct participation are "acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces."[74] They add that acts "in preparation of" and "returning from" an attack can be included as part of incidents of direct participation – however this leads to the further questions about what these additional phrases mean. The Commentaries limit the term "preparatory operation" by specifically referring to its military nature – meaning that preparatory acts would not encompass activities like recruiting, administration, training, propaganda, political work and law enforcement. Preparatory acts would include certain types of military-related logistic support for fighting groups,[75] but would exclude non-military support tasks – the tasks typically performed by women.

The International Criminal Tribunal for the former Yugoslavia (ICTY) has weighed in on the discussion about direct participation. In *Prosecutor v Stanislav Galic*, the ICTY Trial Chamber relied on the Commentaries' definition, stating that acts of direct participation were "acts of war which by their nature or purpose are likely to cause actual harm to the personnel or *matériel* of the enemy armed forces".[76] In *Prosecutor v. Strugar*, the Appeals Chamber held that conduct amounting to direct participation is not limited to combat activities. However, it also noted that to consider all activities in support of military operations to be direct participation would render the principle of distinction meaningless in practice.[77] The ICTY Trial Chamber in *Prosecutor v. Dragomir Milosevic,* said that there is a need to distinguish between "direct participation in hostilities" and "participation in the war effort".[78] Although direct participation has been extensively discussed by the ICTY, the tribunal has added little clarity, alluding to the differences between direct and non-direct participation, yet refraining from actually defining the term. This has seemingly added more confusion to an area already laden with differing opinions.

In 2009 responding to widespread concern about the lack of clarity on this term, the ICRC released its "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law" (Interpretive Guidance).[79] This was drafted

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[73] Commentary on Additional Protocol 1, ICRC, Geneva, p. 516 (1679), in Queguiner, Francois Jean. "Direct Participation in Hostilities Under International Humanitarian Law." *Program on Humanitarian Policy and Conflict Research at Harvard University* (2003), at 2-3.
[74] Commentary on Additional Protocol 1, ICRC, (op.cit. footnote 2), para 1942, in Schmitt, supra note 72, at 508.
[75] Queguiner, supra note 73.
[76] *The Prosecutor v. Stanislav Galic*, ICTY Trial Judgment, IT-98-29-T, 2003, para 48.
[77] *The Prosecutor v. Strugar*, ICTY Appeals Chamber Judgment, IT-01-42-A, 2008, para 176.
[78] *The Prosecutor v. Dragomir Milosevic*, ICTY Trial Judgment, IT-98-29/1-T, 2007, para 947.
[79] "Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law." *International Review of the Red Cross* 90, no. 872 (2009): 991–1047.

following a long consultative process and set out the ICRC's view on how this law should be interpreted to align it with the realities of modern conflict.[80] The Interpretive Guidance establishes certain criteria for determining what behaviour qualifies as direct participation in hostilities. While not binding as law, the Interpretive Guidance sought to develop the law, filling in gaps and opening the way to new interpretations and new potential avenues of development. The fact that this was done through guidelines, rather than through a process of examining and amending the law, speaks to some of the challenges around changing IHL, discussed further in the conclusion chapter.

The Interpretive Guidance proposes that an act must fulfil three requirements to qualify as direct participation. Firstly, the act must be likely to adversely affect the military operations or military capacity of a party to the conflict, or alternatively to inflict death, injury or destruction on persons or objects protected against direct attack (**threshold of harm**); secondly, there must be a direct causal link between the act and the harm likely to result from that act or a coordinated military operation of which that act constitutes an integral part (**direct causation**); and thirdly, the act must be specifically designed to cause harm in support of one party to the conflict to the detriment of another (**belligerent nexus**).[81] The Interpretive Guidance restricts acts "in preparation for" an attack by stating that in order to be part of the direct participation, the act must form an integral part of the attack in question. General acts that build the capacity of an armed group to launch attacks are not included in this.[82] The effects of an act, or rather its violent consequences, do not have to be felt immediately – activities that have delayed effects, like laying explosives, can still constitute direct participation.[83]

The Interpretive Guidance's proposed interpretations veer somewhat from previously held understandings of the law and have received mixed responses.[84] Goodman and Jinks have summarised some of the central critiques.[85] Those coming from the human rights school are concerned with the threats the Interpretive Guidance's broad definition of direct participation pose for people's rights, in that it allows many to become legitimate targets. In contrast, those coming from a military perspective contend that direct participation must accord with the practical realities of military operations, with discretion and freedom of

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[80] Ibid.
[81] Part 2 V 1-3, Ibid.
[82] Part 2 V 2 a, Ibid.
[83] Queguiner, supra note 73.
[84] For some of the discussion arising in response to the Interpretive Guidance, see the Journal of International Law and Politics Issue 42:3 (Spring 2010), which hosted a forum, largely dedicated to discussing the Interpretive Guidance.
[85] Goodman, Ryan, and Jinks, Derek. "The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: An Introduction to the Forum." *New York University International Law and Politics* 42 (2010): 637–640.

action left to those planning attacks. They argue that the Interpretive Guidance unjustifiably restricts legitimate military targets.[86] A problem more relevant to this thesis is that the Interpretive Guidance provides another example of gender-neutral regulation, which does not consider women and fails to adequately encompass the roles played by women within its definitions. As with other IHL mechanisms, the Interpretive Guidance has no gender component and fails to recognise how participation plays out differently for women.

Article 13(3) AP2 holds that a person who directly participates in hostilities loses immunity from attack, "for such time as they take a direct part in hostilities". Direct participation therefore results in a temporary loss of protection. Once the direct participation has ended, the person in question regains their civilian protection and can no longer be lawfully targeted. The temporary nature of the loss of protection is a key difference between civilians directly participating and combatants, who lose their immunity for the duration of hostilities or until they leave armed forces or lay down their arms. However, questions arise about the actual duration of an act of direct participation and, in turn, the duration of the resulting loss of protection. When exactly does an act of direct participation start and end? In each case, which particular acts in preparation for the main act are included, so that the loss of protection would last during those times too? This question is dealt with in some detail in the Interpretive Guidance, which discusses the duration and modalities of the loss of protection from attack.

One of the key issues arising from the temporary loss of immunity is the potential "revolving door" problem. The concern is that the temporary loss of immunity would allow civilians to participate in fighting and then to claim immunity as soon as they stop fighting, picking and choosing when they wish to be protected and when they wish to be participating. The example is given of the 'farmer by day, fighter by night'.[87] Watkin adds that, "A "revolving door" interpretation of direct participation could lead to allegations of perfidy and the misuse of civilian status."[88] This might be perceived as unacceptable to military opponents seeking to eliminate those who fight against them, encouraging non-compliance with IHL.

A final point to make about the principle of distinction in NIACs is that GC Common Article 3 provides a minimum level of protection in certain NIACs to those "persons

[86] Ibid.
[87] Interpretive Guidance, supra note 79.
[88] Watkin, supra note 4, at 12.

taking no active part in the hostilities…" While the level of protection granted by this provision is very basic, CA3 applies more widely than AP2, which is only applicable to limited types of NIACs. This minimum set of protections is therefore important in situations where the more comprehensive AP2 does not apply.

2.2.4 Organised armed groups

The preceding section has examined the status of *individuals* participating in NIACs. However, it is also important to think about this at the group level.

While it is clear that members of non-state armed groups do not qualify as combatants, there is a lack of consensus in treaty law, state practice, military manuals, international jurisprudence and academic writing as to whether they are civilians.[89] There have been a number of approaches proposed to deal with this. One has been to classify members of armed groups as civilians who lose their protection due to their direct participation.[90] Some take this further and say that membership in armed groups is a continuous form of direct participation in which members, "owing to their continuous direct participation in hostilities, lose protection from attack for the entire duration of their membership."[91] Another view is that members of armed groups are not classified as civilians, but rather make up a separate category, which writers like Bartolini describe as "fighters" – although he admits that this is hard to infer from Treaty provisions.[92] In the same vein, the San Remo Manual on the Law of Non International Armed Conflict[93] uses the term "fighters" rather than combatants to avoid confusion with the use of the latter term in IACs. Its Article 1.1.2 (a) states: "For the purposes of this Manual, fighters are members of armed forces and dissident armed forces or other organized armed groups, or taking an active (direct) part in hostilities."

The Interpretive Guidance proposes an altogether new approach to non-state armed groups. It suggests that one must distinguish a non-state *party* to a NIAC (like a secessionist movement, rebellion or insurgency) from its *armed wing* (which it calls an "organised armed group"). In the same way that state parties to a conflict consist of their armies and other

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89 Part 2 II 1 a, Interpretive Guidance, supra note 79.

90 Bartolini, Giulio, in Matheson, Michael and Mumtaz, Jamshid, *Rules and Institutions of International Humanitarian Law Put to the Test of Recent Armed Conflicts*. Leiden; Biggleswade: Martinus Nijhoff, 2011.

91 Part 2 II 1 a, Interpretive Guidance, supra note 79. The Interpretive Guidance criticises this approach, saying it undermines the conceptual integrity of the categories that underlie the principle of distinction in that it leads to a situation where parties to a conflict have entire armed forces that remain classified as civilians. In the expert meetings leading up to the Interpretive Guidance, this approach was also criticised as it blurred the distinction between a loss of protection based on conduct and a loss of protection based on status or function.

92 Bartolini, supra note 90.

93 Schmitt, Michael, Garraway, Charles and Dinstein, Yoram. "The Manual on the Law of Non-International Armed Conflict, San Remo." International Institute of Humanitarian Law, 2006.

supportive segments of the state, like political and administrative branches of government, so too do non-state parties to conflicts have both military and non-military facets. Those in the military wing make up the "organised armed group", as opposed to all others in the movement, who merely support or are in other ways affiliated with the non-state party.[94]

The Interpretive Guidance explains how to determine who is a member of an "organised armed group", acknowledging that it may be difficult to distinguish a non-state party from its armed wing, as "there may be various degrees of affiliation with such groups that do not necessarily amount to "membership" within the meaning of IHL."[95] The Interpretive Guidance proposes that membership of an organised armed group depends on having a "continuous combat function", meaning a person's continuous function involves directly participating in hostilities. This is a way to distinguish those who are members of organised armed groups from those who "…directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative or other non-combat functions."[96] The Interpretive Guidance emphasises that even where people accompany organised armed groups, if they themselves do not hold a continuous combat function, they will not be considered *members*.[97] This proviso is important when considering women who accompany Africa's armed groups. While civilians who directly participate only lose their protection for the duration of their participation, in terms of the Interpretive Guidance, those who have a continuous combat function lose their protection for the duration of their membership of the organised armed group.[98]

The ICRC's approach to armed groups has been subject to much criticism. Watkins argues that it provides non-state armed groups with a unique status, effectively creating a third category and producing membership criteria that are not founded in either treaty or customary law. He notes that this contradicts the ICRC's claim that the Interpretive Guidance was not purporting to change the law, but rather to provide interpretations of the law within existing parameters. Watkins also points out that those providing non-combat support to non-state armed groups are protected from attack, while those playing identical roles in state armed forces are considered combatants and subject to attack.[99]

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[94] Part 2, II, 3 a, Interpretive Guidance, supra note 79.
[95] Part 2, II, 3 b.
[96] Part 2, II, 3 b.
[97] Part 2, II, 3 a.
[98] Part 1, VII.
[99] Watkin, Kenneth. "Opportunities Lost: Organised Armed Groups and the ICRC 'Direct Participation in Hostilities' Interpretive Guidance, International Law and Politics." *International Law and Politics* 42, no. 3 (2010): 641–695.

As the above description makes clear, there are significant problems relating to the principle of distinction in NIACs. One concern is the uncertainty resulting from the lack of definitions or consensus on key terms. In addition, the way the laws were drafted excludes non-state actors from combatancy privileges and from being able to lawfully fight – and hence from any incentive to comply with IHL. This model, designed by states with state interests in mind, fails to produce an inclusive system capable of motivating and regulating non-state actors. Given the increase in prevalence of NIACs today, this is becoming a growing source of concern.

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This chapter has summarised the complex web of laws that make up the principle of distinction. Different rules apply in IACs and NIACs and to state and non-state actors. The laws of war were intended to create a level of reciprocity, providing rules and a level playing field to give some order during the chaos of conflict. The law has failed in achieving this. Its uneven application privileges certain parties in ways that promotes non-compliance, arguably hindering the law's capacity to perform its intended task.

Although purporting to be gender neutral, the laws of distinction assume a certain type of combatant and civilian: male uniformed combatants and female civilians. However, as the chapter that follows will show, new wars in Africa look little like this. Women participate, yet participate in quite different ways, ways that scarcely resemble the descriptions of participation and combatancy set out in this law above. The resulting disjuncture will form the key enquiry of this thesis.

3 Women in African Conflict

Across Africa women have become embroiled in conflict. Most are civilians, fleeing hostilities, searching for refuge, struggling to protect and feed their families. Others are actively involved in the waging of war. Some women live and move with armed groups, wearing uniforms, carrying weapons and taking part in armed activities. Some take care of armed group's domestic needs, responsible for sustaining life and family on armed group bases. Some women participate voluntarily, out of conviction for an armed movement's aims. Others do what they can to avoid hostilities, yet are forcibly recruited and drawn in against their wills. From Muammar Gaddafi's band of female bodyguards, to the abducted girls of the Lord's Resistance Army (LRA), fighting with their babies tied to their backs, Africa's female fighters have been a diverse group.

Despite their differences, there are some important commonalities; African women participate in conflict in gender-specific ways, which are shaped by African cultural norms and expectations about women's behaviour. Their experiences in armed groups are influenced by the low status of women in society prior to hostilities. Holding a range of roles, often simultaneously, African women provide a striking illustration of the blurring lines between victim and perpetrator, empowered and exploited, voluntary and coerced, combatant and civilian.

This chapter will describe the women who actively participate in conflicts in Africa, providing the facts that will underpin the legal analysis later in this thesis. The chapter addresses two key elements of this thesis: conflicts in Africa and women's participation in these. It begins by describing African conflicts, placing these within a historical context and considering the differing types of conflicts and the diverse actors who participate in them. African conflicts are located within the theoretical category of new wars, and the gendered aspects of new wars are explored, as are some of the challenges around the implementation of IHL in these wars. The chapter will briefly look at female combatancy worldwide to place Africa's female fighters among their international counterparts. It will then describe the women who actively participate in African conflicts, describing how and why women are recruited, the types of roles they play in armed groups and what these experiences are like. The chapter will conclude with a description of the challenges female former fighters face in the post-conflict period.

In this chapter "Africa" refers to the African continent, including adjacent islands. The continent, as described, has 54 states,[1] 9 territories and 2 states with limited recognition. Included on this enormous landmass are the 'African-ist' countries of sub-Saharan Africa, as well as the Arabic countries of the north and eastern parts of the continent. Some of the countries that have been part of the so-called "Arab Spring", including Libya, Egypt and Tunisia, lie on the continent, and as such some aspects of the Arab Spring have been included in this discussion. This being said, the thesis's focus is on sub-Saharan Africa, with it touching on North African conflicts in comparative ways.

3.1 The diverse landscape of armed conflict in Africa

3.1.1 A brief history

To understand the nature of conflict in Africa, one needs to consider the recent political history of the continent. Africa's countries have each had vastly differing histories. This section does not attempt to provide a comprehensive history of conflict on the continent, but rather to illustrate broad and general patterns of political change and turmoil, which provide a background against which current and recent African conflicts (late 20th century to today) can be understood.

Prior to colonial times, Africa was made up of numerous kingdoms, often broken down along tribal lines. During the 1800s, European powers fought for colonial control of territory in African. African colonies were considered important for a number of reasons. They could be exploited, providing European powers with resources like crops, minerals and labour. They were also important in the building of empires and were key sources of national prestige for European powers. The colonies were also a venue for those dispersing religious gospel and "civilising" practices.[2] In 1884-1885, Germany's Chancellor Otto von Bismark initiated the Berlin Conference, in which imperial boundaries in Africa were agreed upon by European powers and guidelines were created for the acquisition of African colonies. In the years that followed, in what became known as the "scramble for Africa", European powers took control of vast portions of African territory, often through violent means.[3] By 1905 Africa was almost entirely controlled by colonialists, the only exceptions being Liberia, which had been settled by African-American former slaves, and Ethiopia, which managed to resist colonisation by the Italians. Britain and France colonised

[1] This figure is contested. It varies depending on how one classifies certain disputed territories.
[2] For more information on the history and causes of colonialism in Africa, see Duignan, Gann Peter, and Turner, Victor, eds. *Colonialism in Africa 1870 - 1960 Volume Three: Profiles of Change: African Society and Colonial Rule*. Cambridge: Cambridge University Press, 1971.
[3] Ajala, Adekunle. "The Nature of African Boundaries" 18, no. 2 (1983): 177–189.

the largest portions of the continent, with Germany, Spain, Italy, Portugal and Belgium also establishing colonies.

The borders demarcated by colonialists were often arbitrary, cutting across ethnic population lines and grouping diverse people into newly formed countries.[4] Colonialism functioned differently in different colonies, leading to distinct dynamics and, later, to differing forms of resistance in the anti-colonial conflicts. "Settler colonialism", found in former colonies like Zimbabwe, Kenya, South Africa and Algeria, saw large-scale colonialist immigration for political, economic or religious reasons. In "exploitation colonialism", found in Egypt and central Africa, fewer colonialists immigrated to the territory, with the focus being on trade and the extraction of resources. Colonial territories were governed in different ways. Largely, formal colonies were governed by colonial immigrants who formed the administrative and civil services of the colony. In protectorates, colonial powers ruled through local population groups, elevating certain ethnic or other groups to relative power – a practice that set the scene for later conflicts between local populations. Colonial powers exploited the colonies, often failing to develop, educate, or empower those within their realm.

Colonialism was central to the formation and expansion of international law, and international law promoted the cause of European imperialism.[5] Anghie notes: "This law legitimised conquest as legal, and decreed that lands inhabited by people regarded as inferior and backward were terra nullius. In other cases imperial powers claimed that native chiefs had entered into treaties which gave those powers sovereignty over non-European territories and peoples. The ability of natives to enter into such treaties was paradoxical, given that they were characterised as entirely lacking in legal status."[6] Through European expansion, international law was spread around the world, helping to make it a universal system.

Following World War One questions arose as to what to do with the colonies of nations conquered in the war. An arrangement was reached whereby Britain and France administered most of Germany's former African colonies as "mandates" supervised by the

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[4] Shah, Anup. "Conflicts in Africa—Introduction." *Global Issues*, May 12, 2010.

[5] Anghie, Antony. *Imperialism, Sovereignty and the Making of International Law*. Cambridge: Cambridge University Press, 2005. Bowden, Brett. "The Colonial Origins of International Law – European Expansion and the Classical Standard of Civilization." *Journal of the History of International Law* 7 (2005): 1–23.

[6] Anghie, Antony. "The Evolution of International Law: Colonial and Postcolonial Realities." *Third World Quarterly* 27, no. 5 (January 1, 2006): 739–753, at 745.

League of Nations.[7] Mandates were different from colonies, at least in theory, in that they were less militarised, more equitable commercially and had more of a focus on furthering the interests of local populations. The mandate system aimed to supervise powers in colonial or postcolonial positions, based on the view that countries were not yet developed enough to ensure their own political wellbeing.[8] Mandates began to shift the ways that people perceived of colonialism and European imperialism.[9]

During the 20th century self-determination began increasingly to be recognised as important, and by the 1960s and 1970s it had begun to be understood as a right.[10] The rights of colonised people to independence began to garner international support.[11] In the 1949 Geneva Conventions, wars of independence had been understood to be "non-international" and were largely excluded from the GC's ambit.[12] By 20 years later, at the 1974-1977 Diplomatic Conference leading to the APs, wars of independence had become a controversial topic. Western states were resistant to conferring formal status onto such conflicts. However, owing to international pressure, AP1 included in its ambit "…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…" (Article 1.4). Independence struggles broke out across the continent – mostly in the 1950s to 1970s. The decolonisation processes differed across different countries. While in some countries the process was peaceful with colonial powers leaving of their own accord, in others it was cruelly resisted, with a series of often-brutal wars ensuing between departing colonial powers, local groups vying for control of the territory and other interested regional parties. The anti-colonial conflicts were messy, involving numerous actors – national and international – and spilling over borders across regions.

As colonial powers departed, former colonies were left with the task of building functioning states. Departing colonisers left colonies with varying levels of administrative capacity and provided them with differing levels of continued support – or outright abandonment – depending on the nature of the colonial rule and the circumstances

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[7] Article 22 of the Covenant of the League of Nations 1919, provided for the mandates, giving particulars about the ways these should work in different areas.
[8] Nele, Matz. "Civilization and the Mandate System Under the League of Nations as Origin of Trusteeship." *Max Planck Yearbook of United Nations Law* 9, no. 1 (2005): 47–95.
[9] Callahan, Michael. *A Sacred Trust: The League of Nations and Africa, 1929–1946*. Sussex Academic Press, 2004.
[10] Article 1(2) and 55 of the United Nations Charter referred to self-determination. Both the International Covenant on Economic, Social and Cultural Rights, 1966 (Article 1), and the International Covenant on Civil and Political Rights, 1966 (Article 1), affirm the right to self-determination. A number of other international resolutions and instruments further supported this – including the United Nations General Assembly's Resolution on Decolonisation 1514 (1960).
[11] Higgins, Noelle. The Approach of International Law to Wars of National Liberation. *Martin Monograph Series. (Monograph 3). Martin Institute, University of Idaho* (2004).
[12] Article 2 of all four Geneva Conventions of 1949.

surrounding their departure. Many of the infant states lacked administrative, political, civil and other human capacity. On colonial departure, disparate and often hostile population groups began to fight for competing interests, and power struggles emerged between those vying for power.

Opinions of the International Court of Justice (ICJ) framed many de-colonial transfers, forming a legal backdrop to the struggles taking place. As an example, in 1975 the ICJ provided an Advisory Opinion on the disputed territory of Western Sahara[13], previously colonised by Spain, yet claimed by both Morocco and Mauritania, as well as by an internal movement demanding independence. The ICJ had to consider whether at the time of Spanish colonisation the territory was terra nullius (belonging to no one) and, if not, what legal claims Morocco and Mauritania had over the territory. The Court held that the territory had been terra nullius at the time of colonisation, that Morocco and Mauritania's legal ties with the territory did not imply sovereignty, and that self-determination lay with the people of Western Sahara. The ICJ's decision was largely disregarded by interested parties and in October 1975 Moroccan troops invaded Western Sahara. Today Western Sahara is still administered by Morocco, although the United Nations has never recognised Morocco's claim over the territory. The ICJ today continues to frame conflicts, as well as diverting other disputing countries from going to war.[14]

During the Cold War, Africa gained renewed importance for political, economic and strategic reasons, with colonisation giving way to competition over ideological influence. The superpowers sought to influence African states with USSR and USA pouring economic aid and arms onto the continent and interfering politically as they fought to control the balance of world power. A number of African liberation leaders were killed or deposed – sometimes with the help of foreign powers seeking to control the leadership of the fledgling countries. Among these were Patrice Lumumba, Prime Minister of the newly independent Congo, killed in 1961; Felix Moumie of Cameroon, who was poisoned in 1960; and Sylvanus Olympio, the leader of Togo, killed in 1963. Mehdi Ben Barka, the opposition leader of Morocco, was kidnapped in France in 1965 and was never found. Eduardo Mondlane, the leader of Mozambique's Frelimo, died from a parcel bomb in

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13 *Western Sahara,* Advisory Opinion, ICJ Reports, General List No. 61, 1975.

14 For example, in 1994 the ICJ delivered a judgment in the *Case Concerning the Territorial Dispute, (Libyan Arab Jamahiriya v. Chad)*, ICJ 1994, affirming Chad's sovereignty over the Aouzou Strip. The ICJ also judged on the land and maritime boundary between Cameroon and Nigeria, in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), ICJ 2002*. The countries were on the brink of war before the dispute was referred to the ICJ in 1994. In 2002 judgment was made that sovereignty over the Bakassi region rested with Cameroon. Similarly, the ICJ has ruled on a dispute between Botswana and Namibia over the Kasikili/Sedudu Island in *Case concerning Kasikili/Sedudu Island (Botswana v. Namibia), ICJ, 1999*.

1969. The superpowers fought each other through "proxy wars" as the result of a direct clash between the nuclear powers would have been disastrous. A New York Times journalist wrote that African countries were, "…turned into pawns, knights and rooks on a cold war chessboard by the superpowers…"[15] Following the end of the Cold War, superpower interest in these regions waned, with superpowers abandoning the states they had been involved in. This abandonment set the scene for conflicts that later arose.

In recent years, Africa has become significant in terms of international terrorism. In the late 1990s American embassies were bombed in Nairobi and Dar es Salaam. An Al-Qaeda cell was located in Nairobi and terror attacks took place against Israeli targets in Mombasa in 2002. In 2013 Somali group Al Shabaab attacked Nairobi's Westgate Shopping Mall killing 67 people. Counter-terror actors talk of the risk created by "ungoverned spaces". Africa's zones of instability have provided safe-haven and breeding ground for international and domestic terror groups alike, as well as for local chapters of international groups.[16] Links between terror groups have been established; for example, there have been reports that Nigeria's Boko Haram has sent new recruits to Mali for training.[17] The "horn of Africa" (in particular Kenya, Ethiopia, Djibouti, Somalia, Eritrea, Sudan) is a significant source-point for international terrorism.[18] Somalia in particular, has been considered a safe-haven; years of conflict and the decline of superpower interest in Somalia led to there being hardly any Western presence in the country, allowing terrorists to operate there relatively freely. Still, Somalia has not been as significant a terror environment as feared. The United States Institute of Peace explains that, "… Somalia's lawlessness creates conditions of insecurity—extortion, kidnapping, betrayal—that constitute a risky environment for terrorist operations. The paucity of western targets inside Somalia makes it an unlikely site for attacks. The low number of non-Somali residents make it exceptionally difficult for a foreign terrorist to go unnoticed in the country."[19] Somalia today plays a specific role as a short-term transit point, allowing men and arms to cross the porous border to Kenya. The "White Widow", British Samantha Lewthwaite, widow of one of the London 7/7 terrorist bombers, was allegedly a member of Somali group Al Shabaab. Ethnic struggles have become mixed up with terrorism. Global terrorism has created access points for international military involvement in Africa, with the presence of terrorists being used as justification for intervention – such as was seen in Mali in 2012. Today, classifying armed

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[15] Holmes, Steven. "The World; Africa, From The Cold War To Cold Shoulders." *New York Times*, 7 March 1993.
[16] Piombo, Jessica. *Terrorism and U.S. Counter-Terrorism Programs in Africa: An Overview*. Centre for Contemporary Conflict, 2007.
[17] Dreazen, Yochi. "The New Terrorist Training Ground." *The Atlantic*, October 2013.
[18] *Terrorism in the Horn of Africa*. United States Institute of Peace, Special Report 113, 2004.
[19] Ibid, at 9.

behaviour as terrorism seems to operate as justification for military actions that would otherwise be unacceptable under international law. This problem does not only stem from Western states; there has been a growing problem of African governments using counter-terror measures to curtail legitimate political protest,[20] like was seen in Libya and Egypt.

A number of African countries remain unstable today. Some have experienced repeated attempts at overthrowing and replacing governments – with some becoming so unstable that their governments have no effective control over them, with them being dubbed as "failed states".[21] Perhaps the best-known examples are Somalia and the Democratic Republic of Congo (DRC). Africa's current conflicts vary from full-scale inter-state conflicts – like those fought between Ethiopia and Eritrea and Libya and Chad – to struggles for liberation, fights for democracy, coups or political power struggles. Conflicts have been fought over ethnicity, religion, marginalisation and political beliefs. Some conflicts have spilled over into genocide.[22] Some have been short and acute, while others have been longer term and lower level. Across the continent conflicts have operated as a barrier to development and economic advancement.[23] Many African conflicts have become 'internationalised'; even quintessential internal conflicts have attracted the attention of foreign troops, rebels, media and aid organisations. Fighters, arms and refugees move easily across Africa's porous borders, with conflicts frequently spilling over into neighbouring states. For example, arms from Libya held by the Tuareg were used in the takeover of Mali's Timbuktu.[24]

The north African revolutionary conflicts that formed part of the Arab Spring have been the latest development in a region of ever-shifting tensions. Rising militant Islamism has added another source of instability, with extremist Islamist groups responsible for rising insecurity in Nigeria, Libya, Somalia, Egypt and Sudan.

3.1.2 Actors in African conflict

A range of actors operate within these divergent conflicts, each with differing goals and motivations. Mateos explains that the "net of actors" in conflict is made up of "primary

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[20] Ford, Jolyon. *Counter-Terrorism and the Rule of Law in Africa: The Second Decade After 2001*. Institute for Security Studies, 2013.

[21] There is controversy about the definition of a failed state. While some factors have been suggested to indicate state failure, there is no consensus on these. Easterly, William, and Freschi, Laura. "Top 5 Reasons Why 'Failed State' Is a Failed Concept." Aidwatch, January 13, 2010.

[22] Article 2 of the Genocide Convention defines when genocide occurs, in order to activate state's legal obligations with respect to genocide. UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, A/RES/260.

[23] *World Development Report 2011: Conflict, Security, and Development*. World Bank.

[24] "The Weapons and Ammunition of Rebel Forces in Northern Mali." *Small Arms Survey*, n.d. http://www.smallarmssurvey.org/about-us/highlights/highlight-mali-weapons.html.

actors", those who engage directly in violence, including members of armed groups, guerrillas, militias, paramilitary forces, warlords, organised criminal gangs, police, mercenaries, fundamentalist groups and regional troops; "secondary actors", who, although not directly participating in hostilities, have an interest in their continuation, including criminal networks, regional governments, business interests, local and regional traders, international governments, private security companies and those in the arms trade; and "tertiary actors", who intervene to try to manage the confrontation, including those in the diaspora, civil society, media, regional and international governments, international organisations, diplomatic and humanitarian organisations and donor agencies.[25]

African conflicts are frequently "asymmetrical", with parties diverging in terms of resources, weaponry, funds and support.[26] In liberation and civil wars, colonial or government armies, often highly resourced with modern arms and equipment, battle local fighters with lesser resources. However, these movements frequently have popular support, a different type of resource. Those fighting against states, and who are unable to match their power, often resort to guerrilla tactics. For example, the Lord's Resistance Army of northern Uganda developed the ability to fight and hide in certain terrains, enabling them to resist the immeasurably better resourced Ugandan government army for over 20 years. Lacking popular support, this group resorted to terrorising local populations in order to dissuade resistance, abducting thousands of children to build their ranks.[27]

New wars are characterised by a blurring between combatants and criminals. Armed groups frequently finance themselves through what Peterson calls the "illicit international informal economy". He explains that, "…the expansion of illicit activities – trafficking in drugs, sex workers, migrants, dirty money, black market goods – provides necessary financing for war resources. These markets defy territorial boundaries and state-based legal regimes; they are increasingly regional and even global; and deregulation amplifies opportunities for laundering 'dirty' money."[28] Armed actors develop networks to further their goals, with partnerships created between armed groups, those in organised crime, arms suppliers, corporate suppliers and corrupt governments.[29] On the African continent,

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[25] Mateos, Oscar. "Beyond Greed and Grievance, Towards a Comprehensive Approach to African Armed Conflicts: Sierra Leone as a Case Study." In *Understanding Africa's Contemporary Conflicts Origins, Challenges and Peacebuilding*. Institute for Security Studies, 2010.
[26] Arreguín-Toft, Ivan. "Contemporary Asymmetric Conflict Theory in Historical Perspective." *Terrorism and Political Violence* 24, no. 4 (2012): 635–657. Arreguín-Toft, Ivan. *How the Weak Win Wars: A Theory of Asymmetric Conflict*. Cambridge Studies in International Relations; Cambridge University Press, 2005.
[27] Butime, Herman. "Examining the Relevance of the Theories of Guerrilla Warfare in Explaining the Lord's Resistance Army Insurgency in Northern Uganda." *University of Wollongong Thesis Collection* (2012).
[28] Peterson, Spike. "'New Wars' and Gendered Economies." *Feminist Review* 88 (2008): 7–20, at 13-14.
[29] Ibid.

these activities are not restricted to African actors. For example, Lebanese group Hezbollah runs illegal operations across Africa, particularly in West Africa, providing it with the means to keep its Middle Eastern battle going. Hezbollah have had links with both legal and illegal trades, including money laundering, drug trafficking and dealing in "blood diamonds".[30] Criminal networks work to keep these conflicts going. For example, when a new government or leader emerges in Somalia, criminal networks finance those opposing this leader, regardless of who they are, as preventing a functioning government is crucial to maintaining their operations.[31] Similar logic applies to looting in conflict; people wage war in order to loot, and loot in order that they can wage war.[32]

Conflicts are frequently fought with the goal of controlling resources. In turn the spoils of these resources provide the funding to keep on fighting, creating a dangerous cycle. In Sierra Leone the market for "blood diamonds" fuelled the war and in turn funded it. Gettleman describes the thinness of motivations provided for war. "Ethnic tensions are a real piece of the conflict, together with disputes over land, refugees, and meddling neighbour countries. But what I've come to understand is how quickly legitimate grievances in these failed or failing African states deteriorate into rapacious, profit-oriented bloodshed. Congo today is home to a resource rebellion in which vague anti-government feelings become an excuse to steal public property. Congo's embarrassment of riches belongs to the 70 million Congolese, but in the past 10 to 15 years, that treasure has been hijacked by a couple dozen rebel commanders who use it to buy even more guns and wreak more havoc."[33]

State armies in Africa range from well-organised armed forces, in which tightly disciplined uniformed soldiers adhere to structured systems of command, to poorly resourced, ill-disciplined forces, who frequently mutiny and change allegiances, lack lines of authority, are incapable of sustained military action and seem scarcely different from non-state armed groups. Non-state groups, too, range dramatically from large-scale, well-organised, disciplined, trained and funded groups, to small bands of fighters that are frequently difficult, if not impossible, to distinguish from criminal groups – not least of all because they participate in both activities.

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30 "The Globalisation of Terror: Hezbollah in Africa." *International Centre for the Study of Radicalisation*. http://icsr.info/2012/02/the-globalisation-of-terror-hezbollah-in-afric. Karmon, Ely. *The Iran/Hezbollah Strategic and Terrorist Threat to Africa*. International Institute for Counter-Terrorism, 2012.

31 Gettleman, Jeffrey. "Africa's Forever Wars." *Foreign Policy*, April 2010.

32 Kalyvas, Stathis. "'New' and 'Old' Civil Wars: A Valid Distinction?" *World Politics* 54, no. 01 (2001): 99–118.

33 Gettleman, supra note 31.

As well as those who *fight* with armed groups, there are also many who merely travel or live with them, including those known in humanitarian circles as "women and children associated with fighting forces".[34] These women and children are reliant on armed groups for survival, protection and support, and in turn, armed groups rely on them for the services they provide – including selling goods and providing domestic, sexual or other services – services which might be critical to the continued functioning of armed groups, particularly in protracted conflicts.

Those not living with or near to armed groups but rather within civilian populations might also provide *ad hoc* support to armed groups, giving them supplies, lodgings, labour, assistance and information. Recent conflicts have even seen support provided on the Internet, with civilians using social media to campaign for armed movements as part of the Arab Spring.[35] Sometimes civilian support is given voluntarily by those supporting a movement's goals; sometimes it is provided involuntarily, extorted by fear, intimidation or compulsion. Frequently the line between voluntary and involuntary support is hard to distinguish – with civilians being aware that failure to "support" a group may result in dire consequences.[36]

Peacekeepers are also important actors in African conflicts. Since 1948 there have been 54 United Nations (UN) peacekeeping missions in Africa.[37] There are currently eight on-going UN operations on the continent.[38] Regional groups like the Economic Community of West Africa States (ECOWAS) and the African Union (AU) are also building their capacity to carry out peacekeeping and increasingly African peacekeeping contingents are being seen.[39] Peacekeeping operations tend to have limited mandates. Formally, these operations are present at the invitation of host states, in order to implement peace agreements or ceasefires between parties. They are not supposed to fight for either party to a conflict. In some situations peacekeeping operations are granted the mandate to intervene to protect civilians – although there tends to be a lack of clarity about what this means in practice as

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[34] "Children and Women Associated with Armed Forces and Groups, Issue Paper, Second International Conference on DDR and Stability in Africa Kinshasa, Democratic Republic of Congo, 12-14 June 2007.
[35] "The Role of Social Media in the Arab Uprisings - Past and Present." *Westminster Papers in Communication and Culture* 9, no. 2 (2013).
[36] West, Harry. "Girls with Guns: Narrating the Experience of War of Frelimo's 'Female Detachment'." *Anthropological Quarterly* 73, no. 4 (2000): 180–194.
[37] "African Peacekeeping Operations." *Council on Foreign Relations*. http://www.cfr.org/africa/african-peacekeeping-operations/p9333.
[38] These are in Western Sahara, Mali, DRC, Darfur (Sudan), Abyei (Sudan), South Sudan, Côte d'Ivoire and Liberia.
[39] Holt, Victoria, and Shanahan, Moira. "African Capacity-Building for Peace Operations: UN Collaboration with the African Union and ECOWAS." The Henry L. Stimson Centre, 2005.

mandates are not operationally defined.[40] There has been criticism about peacekeeping and its frequent failure to protect civilians, due to political reasons or limited mandates, personnel or resources.[41] The failure of UNAMIR (United Nations Assistance Mission for Rwanda) to protect civilians during Rwanda's genocide was one of the most significant, highly criticised failures in peacekeeping history.[42] In recent years, alternative approaches have been proposed to address peacekeeping failures. For example, the Arab League has recently proposed the creation of a regional fighting force to combat militants. While this may have the authority and mandate to act more strongly, it could lead to other problems, particularly as this force will not be primarily focused on civilian protection – so it could result in negative humanitarian consequences.

Although the actors mentioned above have been grouped for the purpose of description, in practice, the distinctions between them tend to be more fluid. It is the unclear dividing lines between different modes of participation and different personnel in African conflicts that create such difficulties in applying the principle of distinction.

3.2 New wars

"There is a very simple reason why some of Africa's bloodiest, most brutal wars never seem to end: They are not really wars. Not in the traditional sense, at least. The combatants don't have much of an ideology; they don't have clear goals. They couldn't care less about taking over capitals or major cities -- in fact, they prefer the deep bush, where it is far easier to commit crimes. Today's rebels seem especially uninterested in winning converts, content instead to steal other people's children, stick Kalashnikovs or axes in their hands, and make them do the killing. Look closely at some of the continent's most intractable conflicts, from the rebel-laden creeks of the Niger Delta to the inferno in the Democratic Republic of the Congo, and this is what you will find." [43]

"New wars" is the term coined for the wave of conflicts that have become prevalent since the end of the Cold War.[44] These complex, multifaceted conflicts blur numerous lines, including distinctions between public and private, internal and external, economic and

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[40] Holt, Victoria, and Taylor, Glyn. *Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges*. Department of Peacekeeping Operations and the Office for the Coordination of Humanitarian Affairs of the United Nations, 2009.

[41] For example, Boot, Max. "Paving the Road to Hell: The Failure of U.N. Peacekeeping." *Foreign Affairs*, April 2000.

[42] Dallaire, Roméo. *Shake Hands with the Devil: The Failure of Humanity in Rwanda*. Carroll & Graf, 2005. Brattberg, Erik. "Revisiting UN Peacekeeping in Rwanda and Sierra Leone." *Peace Review* 24, no. 2 (2012): 156–162.

[43] Gettleman, supra note 31.

[44] Others contend that these started from the end of World War Two. See Melander, Erik, Öberg, Magnus, and Hall, Jonathan. "Are 'New Wars' More Atrocious? Battle Severity, Civilians Killed and Forced Migration Before and After the End of the Cold War." *European Journal of International Relations* 15, no. 3 (2009): 505–536.

political, civilian and military – even war and peace.[45] Proponents of the new wars doctrine argue that "new wars" differ from "old wars" in a number of ways. For one thing, the goals of these conflicts differ. In the past, conflicts focused on territorially based geopolitical goals, frequently framed in terms of political ideologies. New wars have shifted the focus towards identity politics, where claims to power are based on identity, be it ethnic, religious, clan or linguistic.[46]

New wars tend to be largely internal in nature, though they blend international and internal elements. Kaldor explains that, "… although most of these wars are localized, they involve a myriad of transnational connections so that the distinction between internal and external, between aggression (attacks from abroad) and repression (attacks from inside the country), or even between local and global, are difficult to sustain."[47] New wars are intrinsically linked to globalisation – or as Kaldor puts it, to the "intensification of global connectedness – political, economic, military, cultural…"[48] As the world opens up due to globalisation, authoritarian states become weaker, creating a void that other actors can fill.[49]

Whereas old wars were financed by states, new wars tend to be financed through external resources,[50] including diaspora, criminality, exploitation of natural resources and the informal economy. New wars are characterised by collapsing formal economies and the resultant increase in and competition over illicit economic activities, which both maintain and incentivise these conflicts.[51] Newman explains that, "Much of new wars literature has argued that economic motives and greed are the primary underlying driving forces of violent conflict. Indeed, the violence itself creates opportunities for entrepreneurship and profit; the continuation of violence rather than military 'victory' is primary."[52]

Civilian causalities and forced displacement are significant features in new wars, where the killing of civilians might be a key strategy or goal of conflict, rather than an unfortunate by-product.[53] Whereas in old wars, states and their combatants could rely on or demand popular support, in new wars fighting groups cannot depend on this, rather opting to control populations by terrorising them. Fear and compliance is attained by targeting

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[45] Ibid.
[46] Kaldor, Mary. *New and Old Wars: Organized Violence in a Global Era*. 2nd ed. Polity, 2006.
[47] Ibid, at 2.
[48] Ibid, at 4.
[49] Kaldor, Mary. "In Defence of New Wars." *Stability* 2, no. 1 (2013).
[50] Peterson, supra note 28.
[51] Newman, Edward. "The 'New Wars' Debate: A Historical Perspective Is Needed." *Security Dialogue* 35, no. 2 (2004): 173–189.
[52] Ibid, at 177.
[53] See Kaldor, supra note 46.

civilians, expelling certain groups or committing brutal acts of violence, like sexual violence, abducting or child recruitment.

Participation also differs in new wars. A range of diverse actors operate in these – state and non-state, public and private, domestic and foreign.[54] Conflicts have moved from being "vertically organised", or dominated by state-based groups, as old wars were, to being fought by decentralised private groups with a range of motives.[55] Akkerman notes that, "State monopolies of violence are being eroded by privatization of violence. The main actors are no longer regular armies, but paramilitary groups, criminal gangs, brigades of volunteers, foreign mercenaries such as private security companies and regular foreign troops."[56] A range of armed groups operate in cooperation with each other and against each other. These complex and changing forms of participation create challenges for IHL's notions of participation and combatancy, a central theme of this thesis.

This distinction between "old" and "new" wars has been contested. Some claim that new wars theory is problematic as it is based on insufficient evidence or empirical support. Critics contend that recent data has emerged which reveals that conflicts labelled as new wars do not actually display *new* features, and that phenomena credited to new wars actually existed beforehand.[57] Another perspective is that existing evidence has been interpreted incorrectly to reach this theory and that those who emphasise the differences between new and old wars have done so based on a mischaracterisation of the categories and labels of war.[58] An argument made is that efforts by new wars proponents to find common patterns between recent conflicts have resulted in them ignoring key differences between them.[59] Responding to these criticisms, Kaldor, who coined the term new wars, points to the functionality of this categorisation – rather than to its literal "newness". Rather than the "new" having to do with any particular features, "The term 'new' is a way to exclude 'old' assumptions about the nature of war and to provide the basis for a novel research methodology."[60] She explains that this theory can have useful policy implications – as traditional categorisations of conflict do not correlate with current realities of conflict, policy prescriptions based on these tend to be confused and unhelpful.

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[54] Malantowicz, Artur. "Do 'New Wars' Theories Contribute to Our Understanding of the African Conflicts? Cases of Rwanda and Darfur." *Africana Bulletin* 58 (2010).
[55] Kaldor, supra note 46.
[56] Akkerman, Tjitske. "New Wars, New Morality?" *Acta Politica* 44, no. 1 (2009): 74–86, at 76.
[57] Ibid.
[58] Kalyvas, supra note 32.
[59] Newman, supra note 51.
[60] Kaldor, supra note 49, at 3.

As well as new wars as a whole being contested, component parts of new wars claims are also challenged. Scholars dispute the fact that new wars are more violent than old ones. Melander et al argue that human impact, battle severity and conflict deaths have actually been lower in the post-Cold War period than during the Cold War, a proposition they substantiate with data on various indicators, including battle-deaths and numbers of civilians killed and displaced.[61] Kalyvas notes that the perception that *civil wars* are particularly cruel predates new wars, pertaining also to civil wars that took place before and during the Cold War period. He argues that the *means* of violence in new wars may appear more jarring, leading to a false perception that violence is worse: "… our understanding of violence is culturally defined. Killings by knife and machete tend to horrify us more than the often incomparably more massive killings by aerial and field artillery bombings."[62] Kaldor responds to this, arguing that the problem with the data her critics rely on, is that this has been analysed using "old wars" assumptions. For example, "… the emphasis on battle deaths has the counter-intuitive effect of leaving out major episodes of violence. As Milton Leitenberg (2006) puts it: "There were few 'battle deaths' in Cambodia between 1975 and 1978, comparatively few in Somalia in 1990 and 1991, or in Rwanda in 1994: but it would simply be bizarre if two million dead in Cambodia, 350,000 in Somalia and 800,000 or more in Rwanda were omitted from compilations."[63] This points to one of the values of new wars theory: in helping to incorporate non-traditional conflict situations into the mould – that might otherwise be overlooked or passed over – it allows for a more inclusive view of armed violence in the modern world.

While new wars critiques raise important concerns, there does seem to be something important going on in recent conflicts that merits examination. Conflicts change constantly in nature, motives, weaponry and actors – in fact when it comes to war, change seems to be the only constant. New wars literature attempts to describe the latest shift. The exact specifics and characteristics of this change are open to discussion – and academic exchange over new wars will undoubtedly play a role in crystallising this. However, there is value in using this categorisation as it provides a tool with which to explore recent shifts, with new wars literature allowing for targeted assessment into certain aspects of modern conflicts, as well as providing a lens through which new policy approaches, solutions and regulations can be developed.

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[61] Melander et al, supra note 44.
[62] Kalyvas, supra note 32, at 114.
[63] Kaldor, supra note 49, at 8-9.

Regardless of whether one accepts this categorisation, or the details thereof, this framework is useful for the analysis of modern African conflicts, which exhibit many of the features associated with new wars. This thesis therefore treats new wars as a useful conceptual categorisation rather than a historical fact. The literature on new wars provides a theoretical basis for considering features of African conflicts, while in turn the study of African conflicts can further inform understandings about new wars.

3.2.1 Women in new wars

The gendered aspects of new wars merit consideration, an area that has to date been given little attention in new wars literature. Many features of new wars make women vulnerable. For one thing, when conflicts reach civilian populations, the proportion of female casualties tends to rise.[64] New wars are associated with large-scale displacement. Women figure more prominently in refugee and internally displaced person (IDP) populations, and displacement bears a particular toll on women.[65]

Women are highly vulnerable to sexual violence in new wars. Higher levels of close-hand violence allow for high levels of rape, with proximity between fighters and civilians providing opportunities for this to occur. The increase of small arms within communities also put women at greater risk of attack. New wars are characterised by the presence of disorganised fighters, with less organisation and discipline within armed groups lending itself towards sexual violence. As armed groups in new wars can rely less on popular support they are more likely to violently target civilians, and one form this takes is sexual violence. Sexual violence is also used as a tool for ethnic cleansing, as it is an effective means of encouraging populations to flee.[66] Reasons for sexual violence in new wars also relate to identity politics; women in society often take on the role of ethnic or cultural depiction, leading to women being targeted during these conflicts. Handrahan explains that, "If ethnicity is patriarchal, male honour and national identity are located within the female, as women's bodies are used as 'vehicles' for the symbolic depiction of political purpose. … Male ethnic violence, then, is directed inwards towards, 'their women' and outwards onto 'other's women', in order to restrict and control 'their' ethnicity and to intimidate and contaminate the ethnic 'other', respectively."[67] Children born of rape might

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[64] Smith, Dan. "Women, War and Peace." *A briefing Paper for the UNDP Human Development Report Office.* Oslo: International Peace Research Initiative, 1997.

[65] Beyani, Chaloka. "Improving the Protection of Internally Displaced Women: Assessment of Progress and Challenges." Brookings Institution, 2014.

[66] Wood, Elisabeth. "Variation in Sexual Violence During War." *Politics & Society* 34, no. 3 (2006): 307–42. Jones, Adam. "Gender and Ethnic Conflict in ex-Yugoslavia." *Ethnic and Racial Studies* 17, no. 1 (1994): 115–134.

[67] Handrahan, Lori. "Conflict, Gender, Ethnicity and Post-Conflict Reconstruction." *Security Dialogue* 35, no. 4 (2004): 429–445, at 437.

be seen to take on a rapist's ethnicity, with rape being a way to "dilute" an ethnic group, also motivating rape in new wars.[68]

The strong ethnic and nationalistic components of new wars work against women's interests. In times of war, drawing out the differences between men and women becomes a means by which in-groups and out-groups are created and solidified. Women's identities and behaviour become markers of ethnic consciousness. Women are therefore pushed towards more traditional roles, with these becoming symbols and depositories of the culture.[69] Where ethnic or cultural identities take on greater salience, there often grows a resistance to women asserting their differences or challenging cultural norms. Women are forced to conform to certain expectations regarding their behaviour and appearance. Women who fail to do so put themselves at risk.[70] In Somalia, women's submission to the boundaries of Islam has become a visible mark of victory for fighting group Al Shabaab. Al Shabaab has violently enforced strict Sharia law, forcing women to wear the Hijab and even reportedly banning women from wearing bras, which they feel to be immodest and "deceptive". Media reports tell of Al Shabaab rounding up women who appear to have firm busts, inspecting whether the firmness is "natural" and if not, flogging them.[71]

Caprioli explains that inherent in nationalism – another driving force in new wars – is an opposition towards feminist goals. As men are considered "guardians of culture and tradition", any changes to the balance of power between men and women are seen as threatening to nationalist efforts. When community is under threat, leaders encourage female populations to support collective community objectives, regardless of whether these run contrary to gender equality. Female leaders in turn avoid addressing gender equality so that they will not be seen to be undermining national or group solidarity. Women often find themselves with competing interests – their own interests as women, and the interests of their group – as defined by men. They are expected to prioritise national and ethnic security over their personal security as women.[72]

Weak states characterise new wars and state weakness can negatively impact women. Weak or collapsing states provide fewer mechanisms or facilities to protect or empower women, including judicial structures, police and protective legislation. State weakness also means

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[68] Rajagopalan, Swarna. "Gender Violence, Conflict, Internal Displacement and Peacebuilding." *Peace Prints: South Asian Journal of Peacebuilding* 3, no. 1 (2010).
[69] Caprioli, Mary. *Gender Equality and Civil Wars*. CPR Working Papers, World Bank, Conflict Prevention and Reconstruction Unit, 2003.
[70] Peterson, supra note 28.
[71] "Somali Women Whipped for Wearing Bras." *FoxNews.com*, October 19, 2009.
[72] Caprioli, supra note 69.

fewer services needed by women, including health, reproductive health and social services. New wars lead to failed formal economies, which in turn drive up the costs of goods and basic staples required by women to support their families. In times of economic trouble, more men tend to leave as migrant workers, leaving women to care for their families. Men also leave to join fighting movements, or are killed. The absence of men can cause great challenges for women, particularly in places with cultural, social and religious prohibitions on women accessing public spaces, transport, work and education. Due to gender inequality and women's socialisation, in many places women are not given the education, skills or the access to resources that allow them to cope with the challenges brought about by conflict, making it even more difficult for them when their male family members are removed.[73] Women in such situations might be forced towards transactional sex, prostitution or trafficking.

Women's gender therefore makes them highly vulnerable in new wars, a vulnerability that creates the need for explicit and targeted legal protection for women, quite the opposite of what the gender-neutral laws of IHL provide. The section that follows will consider other reasons why IHL does not function to protect women in new wars.

3.2.2 IHL in new wars

"Even if you could coax these men out of their jungle lairs and get them to the negotiating table, there is very little to offer them. They don't want ministries or tracts of land to govern. Their armies are often traumatized children, with experience and skills (if you can call them that) totally unsuited for civilian life. All they want is cash, guns, and a license to rampage. And they've already got all three. How do you negotiate with that?"[74]

Many of the key features that characterise new wars are violations of the principle of distinction. In these wars, un-uniformed fighters purposefully disguise themselves as civilians to blend into civilian backdrops – a violation of the duty of fighters to distinguish themselves. The targeting of civilians often forms a key strategy or central goal. Traditionally the principle of distinction was understood to provide a compromise between humanitarian concerns and warring parties' interests, with the principle prohibiting those actions seen as non-essential to the goal of military victory. However, in new wars, the principle of distinction stands squarely in the way of key strategies or objectives of

[73] Gardam, Judith. "War, Law, Terror, Nothing New for Women." *The Australian Feminist Law Journal* 32 (2010): 61–75.
[74] Gettleman, supra note 31.

conflict.[75] Fundamental aspects of IHL are therefore at odds with certain realities of new wars, as compared to old wars.

Lamp argues that the problem has to do with the paradigm of compliance, that which leads parties to comply with the law. IHL's enforcement system is based on numerous assumptions about the nature of parties to a conflict, their motives and their interests. For IHL's paradigm of compliance to remain relevant and plausible, a conflict would need to conform to these assumptions. The problem is that the conception of conflict underlying IHL's paradigm of compliance is very different to what is seen in new wars. IHL contains assumptions about what parties to a conflict should look like; IHL was created to regulate states. Where it did allow non-state actors into its fold, their armed forces had to look quite similar to those of states in order to be included. Parties to new wars do not align with this. In new wars, states are frequently not the principal actors. In fact, these conflicts often take place in the context of state failure. Even when state armies are involved, these have often disintegrated to badly organised, ill-disciplined, fragmented looting groups, which are not wholly different from non-state armed groups. Non-state groups in new wars seldom meet IHL's ideal of territory-controlling, law-abiding, responsible-command-led groups, to which the NIAC laws might apply.[76]

A second assumption that fails to hold true in new wars is that regardless of the aims of fighting, fighters seek to achieve those aims by defeating the military forces of an enemy. This assumption rests on the premise that their conflict aims *can* in fact be achieved by defeating enemy forces. However, in new wars, parties often do not achieve their aims by defeating enemy forces. Sometimes military victory is not possible – because a group does not have the military power, because the enemy they are fighting avoids confrontation, or because the goal they are fighting for is not one that can actually be achieved by battle victory.[77] Fighting might not be aimed at military victory, but rather at the *goal* of displacing or exterminating segments of the population – as seen in Burundi, Rwanda and Sudan. Lamp explains that, "Instead of trying to defeat the enemy militarily and seeking a political solution in subsequent negotiations, the parties in these conflicts usually attempt to create 'facts on the ground' by expelling or killing civilians, burning villages and thus reshaping the ethnic composition of a region or country. … Ethnic cleansing will secure an area for

[75] Bassiouni. Cherif. "The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors." *The Journal of Criminal Law and Criminology (1973-)* 98, no. 3 (2008): 711–810. Lamp, Nicolas. "Conceptions of War and Paradigms of Compliance: The 'New War' Challenge to International Humanitarian Law." *Journal of Conflict and Security Law* 16, no. 2 (2011): 225–262.
[76] Lamp, supra note 75.
[77] Ibid.

an ethnic group much more firmly and lastingly than a military victory followed by negotiations."[78] Military victory might also be seen as less beneficial than keeping conflict going, with actors profiting economically or socially from an enduring state of conflict,[79] as seen in Sierra Leone and the Democratic Republic of Congo.

The problem therefore is that in new wars, IHL is incompatible with warring parties' strategies and goals. It is no longer the case that actors can still achieve their goals within the framework of these rules – an assumption underlying IHL. Rather, in new wars IHL stands squarely in the way of actors achieving their goals. Instead of IHL outlawing only those acts unnecessary to winning, in new wars the law has a prohibitive effect on parties' ability to achieve their aims.[80] This is likely to affect parties' willingness to comply.

Other structural factors also encourage non-compliance in new wars. One factor is the exclusionary effect of IHL's reach. In terms of the law, non-state actors cannot qualify as combatants who are legally entitled to fight, and they can always be prosecuted domestically for their actions in war. This means their actions are conducted from the space of illegality, regardless of whether they abide by IHL or not.[81] Combatancy privileges provide incentive for compliance with IHL and denying privileges to non-state actors removes any such incentive. Simply put, non-state actors are less likely to support a law that is consistently disadvantageous to them.

Many factors therefore negatively affect compliance with IHL in new wars – a situation that can only be bad for women, who will be deprived of the law's protective reach. Of course, it is important to not blame IHL for more than its part. The reasons for violations of IHL and for the targeting of civilians are complex – pertaining to strategies of war, ethnic hatred, asymmetry of resources, fighting capabilities and other factors. The problematic law might exacerbate these problems, but should not be seen as being the overarching cause. As Jakob Kellenberger, former President of the ICRC, noted, "One should have no illusions that there are any legal tools or policy arguments that can avail in those instances when the law is being systematically flouted, if the political will to abide by it is lacking."[82]

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[78] Ibid, at 234–235.
[79] Gettleman, supra note 31.
[80] Lamp, supra note 75.
[81] Ibid.
[82] Kellenberger Jakob, foreword, in Mack, Michelle. *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*. International Committee of the Red Cross, 2008, at 2.

Other principles of IHL are also challenged in new wars. Many actions are justified by the principle of "military necessity", which in essence justifies those actions required for parties to succeed in their military goals. This poses a problem in new wars; if harming civilians *is* a goal of conflict, or if targeting civilians genuinely does facilitate military aims, should the killing of civilians be justified in terms of military necessity? If sexual violence as a "weapon of war" is demonstrated to be an effective tool for achieving conflict aims, does military necessity justify its use? The problem with necessity in new wars is returned to in chapter 6.

3.3 Women in combat

The section that follows paints the picture of women in arms around the world, in order to locate African female fighters within a growing global trend.

3.3.1 The scope for female participation in different types of conflicts

Scholarship, supported by empirical data, suggests that different types of conflicts provide differing scope for female participation. Conflicts are fluid and even within particular conflicts, attitudes to women shift and change.

Women feature less in IACs than in NIACs, as the former are fought primarily by state armies, which tend to be more male dominated.[83] Armed movements working towards liberation goals, or working against state authority, tend to provide more practical and ideological space for female involvement. Liberation movements often strive for wide-ranging goals of transforming society – often including in these goals improvements in the status of women. This makes them more receptive to female involvement. Sometimes the practical needs of liberation groups lead them to recruit women, and this in turn leads to the groups adopting a woman's rights agenda.[84] Despite such goals, gender roles often tend to be perpetuated in liberation groups. It is not always the case that liberation struggles bring increased space for gender equality and female participation. Moghadam explains that there are broadly speaking two modes of revolution – with variations within these. One is modernising, including in its aims the emancipation of women, with women's elevation seen as linked to progress. In the second, as groups fight for freedom, they cling to traditional and patriarchal practices as these come to represent their identity.[85]

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[83] Alison, Miranda. "Women as Agents of Political Violence: Gendering Security." *Security Dialogue* 35, no. 4 (2004): 447–463.
[84] Ibid.
[85] Moghadam, Valentine. *Modernising Women: Gender and Social Change in the Middle East*. Boulder, Colarado: Lynne Rienner, 1993.

Other types of movements tend to provide less space for women's involvement or for a women's empowerment agenda. Where armed groups are fighting for survival – against starvation, attack or other dangers – there is little time and energy for women's rights and these issues often fall from a group's agenda.[86] At the other extreme, rebel groups that fight for control over resources with few political goals tend to have little in the way of women's rights objectives. Where women do form part of these groups, they tend to be exploited – much like the minerals and resources the groups exploit. During its war, Sierra Leone's RUF exploited Sierra Leone's lucrative diamond fields, using abducted girls to guard the mines and weapons stockpiles, and sexually abusing them en masse. Although many thousands of women were forced to join the RUF, women's liberation and advancement never entered their agenda.

In ethnic struggles, where ethnic or cultural identity takes on a greater salience, as is common in new wars, there tends to be resistance to women asserting their differences or challenging cultural norms by taking part in hostilities.[87] The same is the case where struggles are linked to religion. Women's compliance with traditional roles becomes a marker for the strength of culture and community – and women's deviations are seen as a threat.[88] As such, combatancy roles for women are discouraged and women tend to be victimised – by the enemy, by those in their own groups and even by fellow women in their communities. Islamist extremist groups generally exclude women from the public space and from any meaningful participation. When militant Islamists take over an area, they often impose Sharia law and women are subjugated and excluded from public life. Interestingly, Islamist groups have not consistently excluded women. In 2010 it was reported that hard-line Somali Islamist group Al Shabaab was training a limited number of women.[89] Nigeria's Boko Haram have abducted many women, some of whom have reportedly become fighters, being trained to shoot and lay bombs, and sent on operations.[90] Islamist encroachments can also open up space and provide incentive for women to stand up against this. In Somalia hundreds of women have reportedly been recruited by the government army to join the fight against Al-Shabaab.[91] There has recently been much media attention garnered towards the Kurdish women taking part in the fight against ISIS.

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[86] Mazurana, Dyan. *Women in Armed Opposition Groups in Africa and the Promotion of International Humanitarian Law and Human Rights: Report of a Workshop Organized in Geneva by Geneva Call and the Program for the Study of International Organization(s) August 26–29, 2004*.
[87] Peterson, supra note 28, at 16.
[88] Ibid.
[89] "Somalia Al-Shabab Militants Training Women Fighters." *Alshahid Network*, 2013.
[90] *"Our Job is to Shoot, Slaughter and Kill": Boko Haram's Reign of Terror in North-East Nigeria.* Amnesty International, 2015.
[91] Nuune, Rashid. "Women on the Frontlines. Gender No Barrier to Carrying an AK47." *Somalia Report*, August 22, 2011.

Paradoxically, a movement's aim to suppress women can provide opportunity for them to speak up and fight against them, creating dramatic contrasts.

3.3.2 The international picture

In recent years there has been an increase in the numbers of women serving in both state armies and non-state armed groups world-over. Care must be taken to not overstate women's involvement; women are still far less active in combat than their male counterparts. As of 2008 (the most recent statistic that could be located), 5 per cent of state soldiers around the world were female.[92] Today most countries allow women into their armed forces in some capacity, yet this is a fairly recent development.[93] Women were only accepted into most armies since the mid 20th century. In United States women were permitted to enlist from 1948; the United Kingdom, 1949; Canada, 1951; Germany, 1975; Netherlands, 1979; and Spain, 1988. In countries with compulsory draft, a separate question has been whether women should be drafted. Today only China, Eritrea, Israel, Libya, Malaysia, North Korea, Peru and Taiwan have compulsory draft for women.[94] Many countries have resisted mandatory conscription for women, perceiving this as symbolic of military weakness or desperation. A high-ranking woman in the South African National Defence Force commented in 1989 that conscripting women "would have been bad from a morale point of view. … It would almost be acknowledging defeat to have to resort to using women."[95]

The fact that many state armies now enlist women does not mean that women are necessarily allowed to *fight* in active combat. Most countries still do not allow women into active combat, with female soldiers' roles often restricted to administration, logistics and medical services. Only a few countries allow women into combat, including Australia, New Zealand, Canada, Denmark, Finland, Italy, Germany, Norway, Israel, Serbia, Sweden, Switzerland and USA (where the bar on women in combat was only overturned in 2013). Even in these countries, the combat roles available to women are restricted. Partly as a result of this exclusion, women are denied the opportunity to rise to top military ranks and are deprived of military promotions. A noteworthy example is Israel, which has a 2-year compulsory draft for women (as opposed to 3 years for men), but with certain combat

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92 Juma, Monica, and Makina, Anesu. "Africa: Women Not Afraid of the Frontline." Africa Policy Institute, The Monitor (Kampala), 2008.

93 For a history of women in the military see Titunik, Regina. 'The Myth of the Macho Military', *Polity* 40(2), (2007): 137–163. King, Anthony. "Women in Combat." *The RUSI Journal* 158, no. 1 (2013): 4–11. For information about women in American, British and Canadian state armies, state policies and the consequences of these, see, Barry, Ben. "Women in Combat." *Survival: Global Politics and Strategy* 55, no. 2 (2013): 19–30.

94 Women in the Military, CBC News Online, May 30, 2006.

95 Interview with SADF women colonel 1989, in Cock, Jacklyn. "Women and the Military: Implications for Demilitarization in the 1990s in South Africa." *Gender & Society* 8, no. 2 (1994): 152–169, at 156.

positions reserved for men. Despite the fact that women make up 33 per cent of the Israeli Defence Force and 51 per cent of its officers, the top military positions are still held by men.[96]

Despite their increasing numbers, female soldiers are often mistreated by others in their ranks. Californian Congresswoman Jane Harman famously remarked that a female American soldier is more likely to be raped by a fellow soldier than killed by enemy fire in Iraq.[97] The sexual assault rate in the American military is twice the rate of the American civilian population. Women often do not report these assaults out of a fear of being ostracised, a concern that reporting will affect their chances of military promotion and a belief that little would be done by the military structures anyway.[98] It is therefore clear that sexual assault is not unique to the African military experience – although forms of sexual violence do differ.

The proportion of women in non-state groups is higher than those in state armies, although exact statistics are hard to come by. While the proportion of women in non-state groups varies across geographic regions, on average it ranges from between 10 to 30 per cent of fighters.[99]

There has been an increase in the number of female suicide bombers. As of 2007, of the 17 groups worldwide that used suicide bombing as a tactic, more than half employed female suicide bombers. Between 1985 and 2006, over 220 female suicide bombers conducted an estimated 15 per cent of all suicide bombings.[100] Female suicide attackers can be of particular value to terror groups. As a result of widely held assumptions that women are less violent, women can pass more easily through checkpoints, can blend into crowds arousing less attention and their clothing can more easily conceal explosives. Female suicide bombers also garner more media attention – with attacks by women receiving eight times as much media coverage than those by men, a fact that is invaluable to groups that aim for highly publicised attacks.[101] Bloom explains that, "This tactic also makes the terrorists appear more threatening by erasing the imagined barriers between combatants and non-combatants, terrorists and innocent civilians. This is the underlying message

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[96] "More Female Soldiers in More Positions in the IDF." *Website of the Israeli Defence Force*. 2013. http://www.idf.il/1086-14000-en/Dover.aspx.
[97] Gibbs, Nancy. "Sexual Assaults on Female Soldiers: Don't Ask, Don't Tell." *Time*, March 8, 2010.
[98] Ibid.
[99] Denov, Myriam. *Girls in Fighting Forces: Moving Beyond Victimhood*. A Summary of the Research Findings on Girls and Armed Conflict from CIDA's Child Protection Research Fund, 2007.
[100] Bloom, Mia. "Female Suicide Bombers: A Global Trend." *Daedalus* 136, no. Winter (2007): 94–102.
[101] Schweitzer, Yoram. "Female Suicide Bombers: Dying for Equality?" Jaffee Centre for Strategic Studies, 2006.

conveyed by female bombers: terrorism has moved beyond a fringe phenomenon; insurgents are all around you."[102]

Women are increasingly present in peacekeeping operations, though the percentages of women are still low. While in 1993 women made up only 1 per cent of military personnel deployed as United Nations (UN) peacekeepers, in 2012 women made up 3 per cent of military personnel and 10 per cent of police personnel in UN missions – out of an estimated 125,000 peacekeepers.[103] Three all-female UN police forces have been deployed; one made up of Indian women in Liberia, and two forces of Bangladeshi women in Haiti and DRC. As of 2013 there were three women leading peacekeeping operations and one female acting head. Peacekeepers tend to be combatants of national armies, deployed abroad as part of peacekeeping operations. South Africa deploys the largest numbers of female peacekeepers, however as a per centage of its overall deployments, women only make up 14–15 per cent of peacekeepers (as of 2011). Fifty-four per cent of Namibia's peacekeepers are female, however as it deploys a relatively small number of peacekeepers, the actual number of women is low. Thirty-one per cent of Zimbabwean peacekeepers are female.[104] Increased participation by women in peacekeeping was mandated by a number of Security Council Resolutions, including by SC Res 1325, illustrating the value of regulation in promoting this.

Women also serve as private military contractors – groups that are becoming increasing active in modern conflicts. One reason private security companies hire women is that they are cheaper and will work for lower wages. Female contractors are often put into administrative roles. Largely the more "frontline" and dangerous the task a private group is sent into, the fewer women are sent.[105]

3.4 Women in war in Africa

The section that follows will aim to paint a picture of the women who take part in African conflicts, setting out the facts about female participation in conflict to which the principle of distinction will be applied in later chapters.

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[102] Bloom supra note 100, at 101.
[103] "Women in Peacekeeping." United Nations Peacekeeping, http://www.un.org/en/peacekeeping/issues/women/womeninpk.shtml.
[104] Southern African Women Making Inroads into the Peace and Security Sector, Institute for Security Studies, 2012.
[105] Creveld, Martin van. "The Great Illusion: Women in the Military." *Millennium - Journal of International Studies* 29, no. 2 (2000): 429–442.

The exact proportions of women in African state armies is unknown, however it is thought to be no more than the world average for state armies, which in 2008 was five per cent. The southern African regional average is 10.5 per cent.[106] The most gender-integrated army on the continent is the South African army, in which women make up 27 per cent of the forces. The Namibian army has 26 per cent women and Seychelles and Zimbabwe have 20 per cent each. The DRC has approximately seven per cent women, while Malawi and Mozambique have five per cent each.[107] African non-state armed groups range dramatically in the numbers of women they employ; however, at the top end, some groups have had 30–40 per cent women – including certain groups in DRC,[108] Eritrea[109] and Sierra Leone. Much of what is described in the sections below pertains to women in non-state groups.

A large proportion of female combatants are recruited before they turn 18. Girls under 18 have been part of fighting forces in Angola, Burundi, DRC, Eritrea, Ethiopia, Liberia, Libya, Mozambique, Rwanda, Sierra Leone, South Africa, South Sudan, Sudan and Uganda.[110] In Sierra Leone, while women were estimated to have made up 25 per cent of fighters, girls under 18 were estimated at about 12 per cent of all fighters.[111] It is often harder to find numbers for women *over* 18, as many adult women do not go through formal disarmament demobilisation and reintegration (DDR) processes, while girls (as with boy soldiers) are frequently assisted through tailored processes for child soldiers by dedicated organisations and agencies, allowing for better statistics.[112] Girls have been important actors in African conflicts and girl soldiers, like women, are often critical to the continued functioning of armed groups. McKay and Mazurana emphasise that girls "… are not, and never have been, simply 'camp followers'; they are essential to the economy of armed forces, troop morale, their survival and reproductive needs."[113]

Drawing a line between adult female fighters and girl fighters can be misleading. Coulter et al note: "In many African societies a girl becomes a woman at marriage or after child birth, events that frequently take place before they turn 18. … the clear-cut distinction between child and adult as defined by 'the straight 18' principle (18 as the minimum age for all

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106 Juma, Makina, supra note 92.
107 Southern African Women, supra note 104.
108 Verhey, Beth. "Reaching the Girls Study on Girls Associated with Armed Forces and Groups in the Democratic Republic of Congo." Save the Children, 2004.
109 Krosch, Sara. "'A New Race of Women': The Challenges of Reintegrating Eritrea's Demobilized Female Combatants." (Masters Thesis, Clark University, Worcester, Massachusetts), 2005.
110 McKay, Susan, and Mazurana, Dyan. *Where Are the Girls? Girls in Fighting Forces in Northern Uganda, Sierra Leone and Mozambique: Their Lives During and After War*. Rights & Democracy, 2004.
111 Coulter, Chris. "Female Fighters in the Sierra Leone War: Challenging the Assumptions?" *Feminist Review* 88, no. 1 (2008): 54–73.
112 Ibid, at 58.
113 Jean-Louis Roy, in the preface of McKay and Mazurana, supra note 110.

forms of military recruitment) in an analysis of female fighters in Africa tends to obscure both their lived realities and their needs in relation to the context within which they are operating."[114] Transition from girlhood to womanhood can be fluid.[115] Girls are subjected to certain experiences because they *will* be women. This thesis often describes women and girls together, as in practice their experiences are similar and they are not differentiated by those on the ground. Put differently, women's experiences do not necessarily change when they reach the age of 18.

However, despite the fact that women and girls are described together, it is important to recognise girls as a distinct category. Importantly, additional law applies to girl soldiers, over and above the rules of IHL that pertain to women. International law prohibits the use of child soldiers, including girls. Article 38 of the Convention on the Rights of the Child (1989) notes that States must take all feasible measures to ensure that children who are not yet 15 do not take a direct part in hostilities.[116] In the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2000) this age was shifted to 18.[117] The African Charter on the Rights and Welfare of the Child (1990), which also prohibits the recruitment of children, defines a child as "every human being below the age of 18 years."[118]

An important point to consider in the context of child recruitment – and one that relates to the principle of distinction – is the issue of direct and indirect participation. Article 38 of the Convention on the Rights of the Child[119] states that children cannot be recruited to play a *direct* part in hostilities. The Optional Protocol to the Convention on the Rights of the Child[120] states that children cannot "take a direct part in hostilities." So too, Article 22.2 of the African Charter on the Rights and Welfare of the Child[121] calls on States to ensure that children do not play a *direct* part in hostilities. Like these human rights conventions, in IHL Article 77(2) of AP1 also uses the word "direct". In contrast, AP2 prohibits *any* participation of children, with Article 4(3)(c) AP2 stating that, "children who have not

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114 Coulter, Chris, Persson, Mariam, and Utas, Mats. "Young Female Fighters in African Wars Conflict and its Consequences." *Policy Dialogue, Nordiska Afrikainstitutet* 3. NAI Policy Dialogue (2008), 1–54, at 8, footnote 2.

115 Charlesworth, Hilary, and Chinkin, Christine. *The Boundaries of International Law: A Feminist Analysis*. Manchester University Press, 2000.

116 Article 38, Convention on the Rights of the Child, 20 November, 1989, A/RES/44/25. One should note an interesting anomaly in this Convention. For the purposes of the Convention as a whole, a "child" is defined as any person below the age of 18. However, Article 38, which deals with child soldiers, diverges from the rest of the Convention, making the relevant age 15 for the purposes of that clause only.

117 Optional Protocol to the Convention in the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May, 2000, A/RES/54/263, Article 1.

118 Article 2, The African Charter on Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49, 1990.

119 Convention on the Rights of the Child, supra note 116.

120 Optional Protocol to the Convention on the Rights of the Child supra note 117.

121 African Charter on Rights and Welfare of the Child, supra note 118.

attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities".[122] The Rome Statute prohibits the use of children under 15 to "participate actively in hostilities" in both IACs and NIACs.[123] So, AP2 aside, what is prohibited by international law is the recruitment of children into *direct* participation in hostilities.[124] However, as this chapter describes, many women and girls are used by armed groups in *indirect* – or non-fighting support – roles, roles that can be equally detrimental to children's wellbeing. The provisions' use of the word "direct" excludes girls in indirect roles from their ambit.[125]

Armed groups in Africa recruit women for a range of reasons. Sometimes women are recruited as there are not enough men to fight, as men might have fled or been killed or captured, leaving the need for additional labour.[126] At times women are recruited because they are believed to excel at certain tasks. For example, in many African countries women carry items like water and firewood on their heads and are therefore used to moving swiftly with heavy loads. When the Ugandan army launched operation Iron Fist in 2002 to destroy Lord's Resistance Army's (LRA) bases in South Sudan, the LRA needed to keep moving, so they required porters to carry their food and weapons. They therefore began abducting more women, using them to carry these loads.[127] Women can carry out jobs that men are unable to, like gaining access to civilian centres without drawing attention as men might. Women are frequently recruited to perform tasks that men do not wish to perform, or tasks that are not considered culturally appropriate for men, such as cooking and cleaning for armed groups.[128] Women as the more powerless in African populations are a cheap and easily exploitable labour source. They can be coerced into action as they have less power to assert themselves and lower expectations of fair treatment. There are also symbolic reasons for recruiting women; women might be recruited to send a message to the population that a movement is inclusive and is campaigning for *all* the population's goals – as seen with Mozambique's FRELIMO and South Sudan's People's Liberation Movement (SPLM).

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122 Articles 8(2)(b)(xxvi) and (e)(vii) of the Rome Statute make child recruitment a crime, "Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities." Article 4 of the Statute for the Special Court for Sierra Leone gives the court power over "Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities."

123 Arts 8(2)(b)(xxvi) and 8(2)(e)(vii).

124 The question of which actions fall within the prohibition on recruiting child soldiers has been considered by various tribunals, most notably in the ICC's Lubanga trial, where one of the questions raised was whether girls who had been used by armed groups in support and sexual roles were 'actively' participating in hostilities. The Lubanga trial judgements interpreted 'active participation' broadly to include both direct and indirect participation. Lubanga is appealing his conviction, with one of the bases of appeal being that 'active' participation should be limited to direct participation in hostilities.

125 Hardwood, Catherine. "Guest Post: A Matter of Distinction: 'Active' and 'Direct' Participation in Hostilities and the War Crime of Using Child Soldiers." *Spreading the Jam*, July 2014.

126 Alison, supra note 83. Alison makes this point in relation to the LTTE in Sri Lanka, however this is applicable in other contexts too.

127 McKay, Mazurana, supra note 110.

128 Alison, supra note 83.

In turn, women join armed movements for a number reasons. In many African conflicts women have been forced to join armed groups – seen in Angola, Burundi, DRC, Ethiopia, Liberia, Mozambique, Sierra Leone, Somalia, Sudan and Uganda.[129] Abductions frequently take place as part of violent raids, in which women and girls – often together with men and boys – are forcibly removed from their homes and taken to armed group bases. Others join voluntarily: out of belief in the cause; for financial gain; because they have no alternative means for survival or protection; in order to escape problems at home; or because their parents, siblings or spouses were part of a movement.[130] Women frequently join because they feel unsafe *as women* in times of conflict – fearing violence – including sexual violence – and hoping for the relative protection recruitment might offer.[131] In some armed groups, women are able to learn new skills and to improve their education and career options. Joining armed movements can allow women positions of power not otherwise available to them in the traditional patriarchal communities they come from.[132]

It is sometimes difficult to distinguish voluntary and involuntary recruitment, as women join out of a combination of choice, pressure and fear. Sometimes, while not actually abducted, women are threatened and fear the consequences of not joining armed groups. In Mozambique those who refused to assist FRELIMO were taken to be enemy collaborators, threatened and sometimes killed. While many may have felt sympathy for the group's objectives, their decisions to join may not have been entirely due to these sympathies.[133] West explains that FRELIMO portrayed female participants "… as volunteers committing "acts of heroism" on behalf of the revolution, even if these young people might have felt that they had no option but to comply with FRELIMO "requests" of them."[134]

The idea that underage girls can *voluntarily* enlist is contested. Radhika Coomaraswamy, United Nations Special Representative for Children and Armed Conflict, testified to the ICC in its Lubanga hearings about the difficulties in distinguishing voluntary and involuntary recruitment in children because of their lack of alternative options, survival mechanisms and role models.[135] The same argument can be made for adult women.

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[129] McKay, Mazurana, supra note 110.
[130] Ibid.
[131] Mazurana, supra note 86.
[132] McKay, Mazurana, supra note 110.
[133] West, supra note 36.
[134] Ibid, at 185.
[135] *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, 2012, at 280.

Another argument is that because of their age, children do not have the legal capacity to consent to recruitment, rendering any child recruitment non-consensual. It is clear that a voluntary/involuntary binary is too simplistic to describe women's participation – a theme revisited later in this thesis.

Once they are part of armed groups, some women are trained and readied for war. The quality and content of trainings vary between groups and within groups. Sometimes men and women are trained together or in the same ways, and sometimes they are trained wholly differently. Trainings might include physical fitness, instruction on the use of weapons, ambush skills, pillaging techniques, defence, sabotage and other fighting methods. Often this training is designed to harden recruits to help them to kill without conscience. In Sierra Leone's Revolutionary United Front (RUF) women, like their male counterparts, were given someone to kill as part of their training and threatened with death themselves if they refused to comply. Ideological indoctrination can also be included, making women more willing to fight.[136] Like men, women might be trained to hate those in opposing groups, being taught how opposition fighters were responsible for the war or for the deaths of their family members. In many settings women have been given alcohol and drugs as part of their indoctrination – as once addicted, they become easier to control. A Sierra Leonean woman explained, "When they saw how nervous and uncomfortable we were [during the training], they gave us drugs. … Before the injection, I was nervous, afraid and unsure of myself. Later, after the injection, I felt more confident."[137]

Women play a range of roles within armed groups. These roles vary between groups, and can shift and change within groups through the course of a conflict. The roles played by women are of particular importance for the purpose of this thesis, as they determine whether women "directly participate" or not, important for the application of the principle of distinction.

In some armed groups women serve in combat positions. They are given arms and fight in much the same ways as men would. Women have served in active combat in Angola, Burundi, DRC, Eritrea, Ethiopia, Liberia, Mozambique, Rwanda, Sierra Leone, Somalia, Sudan and Uganda. Women sometimes even lead combat units or battalions.[138] In some armed groups women serve in mixed battalions, while in others there are women-only wings or battalions. South Sudan's SPLA has a female battalion, Kateeba Banaat (translated

136 Denov, supra note 99.
137 Ibid, at 6.
138 Mazurana, supra note 86.

as "the girls' battalion"), formed in 1984. Although trained in combat skills, the women of the group were only allowed into active combat on one occasion, an unsuccessful attack on the town of Njoko, before an SPLA ruling was made that women could no longer serve in active combat. The battalion and subsequent female battalions were redirected to other roles.[139] In 1967, FRELIMO in Mozambique formed the Destacamento Feminino (DF), an all-female detachment. Its members were sent to Tanzania for politico-military training, similar to that given to male recruits. The women of DF operated in a number of different capacities and in limited cases took part in active combat, however as with Kateeba Banaat, halfway through the war FRELIMO decreed that women could no longer participate in active combat.[140]

Women have shown themselves to be as capable of committing violent acts as men. They have been complicit in perpetrating terrible crimes, often against civilians. Sometimes these acts have been coerced; in Sierra Leone, at fear of death, women were forced to kill, beat, cut off limbs and torture others, including their own family or community members. Sometimes this was done to bind them to the group, making them doubt whether their families and communities would accept them back following these acts. At other times these acts have been voluntary. There can be advantages to women in acting in violent and cruel manners. For example, "… in the context of Sierra Leone, the more aggressive girls were seen to be and the more destruction and looting they undertook, the more valued they were within the ranks of the RUF. Girls became increasingly conscious of the fact that the more violent they were, the safer they became within the armed group. … engaging in extreme forms of violence also brought privileges within Sierra Leone's RUF, such as better access to food and looted goods, and in some cases led to promotion within the ranks."[141] Women who acquire combat skills and carry guns can better ensure their own protection – including from those within their own armed groups.[142]

Women also serve in military-related support roles, acting as guards, spies, intelligence operatives, messengers, minesweepers, porters and medics, often at the frontlines. Sometimes they act as military and political strategists and communications officers. They might train others on military tactics or on how to fight and use weapons.[143] Women can be highly effective in gathering intelligence and mobilising support, as they can move around

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139 Stone, Lydia, 'We were all soldiers': Female Combatants in South Sudan's Civil War, in Bubenzer, Friederike, and Stern, Orly. *Hope, Pain & Patience: The Lives of Women in South Sudan*. Jacana Media, 2012.
140 West, supra note 36.
141 Denov, supra note 99, at 15.
142 Ibid.
143 Mazurana, supra note 86.

attracting less attention than unfamiliar men. Some women in the SPLA, which fought for independence from Sudan, were tasked with gathering intelligence. To do this they would pose as traders, traveling into Sudan, gathering information on route. One woman explained: "When you are a woman other women will make friends with you and be very open. In Khartoum I could make friends with the Ministers' wives and they would just open their mouths automatically, and talk with another woman. In the villages I would sit with my children, and there you could learn what the people thought, what was happening, and who was moving from here to there. … I am not fighting with a gun, but I am fighting with my mouth."[144] African female combatant's roles often looking nothing like the roles IHL assumes for combatants. In Algeria's War of Independence about 2000 women joined the armed resistance, the *Maquis,* where they were tasked with jobs like informing the civilian population about the political situation and providing them with information on hygiene."[145]

Most women hold domestic roles for armed groups, acting as cooks, child-carers and providers of sexual or reproductive services. Women often play similar roles in armed groups to those they did at home before recruitment, namely cooking, cleaning and serving men.[146] The importance of these roles to the continued functioning of armed groups should not be understated. Denov explains that, "Domestic work within the context of armed groups is often regarded as peripheral and insignificant. It is increasingly being recognized, however, that armed groups cannot function without such labour. Given an armed group's lack of resources, manpower, their need to keep moving, and their often-limited organizational structure, the domestic activities and loads carried by girls are invaluable to the very survival and success of a fighting force."[147]

Women often hold many roles concurrently, moving between them.[148] A female combatant might fight in battle, but then also be expected to cook, clean and be available for sex.[149] The ICC's Lubanga judgment describes how in DRC, in addition to cooking and domestic duties, girls held many of the same fighting, guarding and other roles that boys did.[150] The moment when combat duties end and support duties begin are not clear or defined. Rather, these are understood to be dual but continuing parts of female fighter's roles – much like

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144 Stone, supra note 139.
145 Sajjad, Tazreena. "Women Guerillas: Marching Toward True Freedom? An Analysis of Women's Experiences in the Frontlines of Guerilla Warfare and in the Post-War Period." *Agenda: Empowering Women for Gender Equality* no. 59 (2004): 4–16, at 7-8.
146 McKay, Mazurana, supra note 110.
147 Denov, supra note 99, at 7–8.
148 Mazurana, supra note 86.
149 Verhey, supra note 108.
150 Prosecutor v Thomas Lubanga Dyilo, supra note 135.

juggling work and family duties in a non-conflict setting. As such, trying to categorise women, deciding who is a fighter, who merely 'supports' armed groups, and if they do both, when each is happening, is often not possible – although this is just what the principle of distinction seeks to do. Even the line between those who are *members* of armed groups and those who merely support the group peripherally can be fluid. Krosch's description of a female combatant in Eritrea illustrates this: "… when food stocks ran low, Rigbe moved her family to the Gash Barka Region to find work around the military camps at the front. Laundry, gardening, trench digging, cooking and companionship became her new occupations as she followed the EPLF for four years. Eventually she was trained to fire weapons, repair trucks and to care for the wounded and sick. When I asked Rigbe why she became a fighter in the Liberation Struggle she simply replied that they were her 'family'."[151]

African women have been involved in genocide. By 2006 almost 2000 women had been incarcerated in Rwandan prisons for genocide offences – less than six per cent of all genocide related detainees. Women participated in various ways in the genocide, though historic records and court testimonials show that for the most part they did not actually commit murders themselves; although in some cases they did. Hutu women were involved in looting Tutsi property, stealing from dead Tutsis and reporting on those who were hiding. They also supported the men involved in killing, cooking for them, encouraging them and bringing them food at the roadblocks.[152] Following the genocide, 47 women were placed on the list of "Category 1" suspects (out of a list of 2202), which included planners, organisers and instigators of the genocide and those in leadership positions in politics, military and the church. The most famous was Pauline Nyiramasuhuko, the former Rwandan Minister for Family Welfare and the Advancement of Women, accused of ordering the deaths of thousands of Tutsis. Nyiramasuhuko was the first woman convicted by the ICTR. Her conviction included, among other things, ordering Interhamwe to rape Tutsi women, and she was charged as responsible as a superior for rape.[153]

One of the "roles" that women are expected to fill in armed groups are providers of sexual services. The sexual uses of female combatants have taken various forms. In Angola girls were expected to perform sexual acts on male fighters during military campaigns and following attacks – as rewards for victory. Girls would perform sexual dances to maintain

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151 Krosch, supra note 109.
152 Hogg, Nicole. "Women's Participation in the Rwandan Genocide: Mothers or Monsters?" *International Review of the Red Cross* 92, no. 877 (2010): 69–102.
153 *The Prosecutor v Pauline Nyiramasuhuko*, ICTR-98-42-T, 2011.

the morale of male soldiers and to make sure they remained alert at times when attacks were imminent and expected.[154] In some groups women are deemed sexually available to all the group's men to use as they will. A study about girls in armed groups in Uganda, Mozambique and Sierra Leone found that nearly all girls abducted by rebel groups were raped and that gang rape and sexual torture were prevalent parts of the experiences of abducted girls – with girls in some groups being raped by numerous men, often on the same day.[155] Sometimes women and girls are allocated as sexual partners to particular male members of groups. These arrangements have sometimes been called "bush marriages" or "AK-47 marriages" and the women are known as "wives".[156] Many thousands of girls, mostly in their early teens, were abducted by Uganda's LRA and threatened with torture and death if they attempted to escape. Girls were allocated to male rebels as "wives", with larger numbers of girls allocated to rebels with greater seniority in the group. Joseph Kony, leader of the LRA, was said to have had around 88 "wives" as of 2007. While the "wives" needed to service their husbands sexually and to take care of their domestic needs, like cooking, cleaning and child rearing, they were also trained to fight and used in both combat and military support roles.[157] Being allocated as a "wife" can provide some level of protection, as "wives" are only expected to service their "husbands", rather than being sexually available to all members of the group.[158] In Sierra Leone some "wives" of commanders held considerable power and influence within RUF compounds. When commanders were on mission, their "wives" would control their compounds. "Wives" were involved in determining how looted items should be distributed, deciding who from the compounds should be sent on raiding, abduction and spying missions, and enforcing discipline in the camps. Some commanders' "wives" had bodyguards and even advised their "husbands" on military strategies.[159] In addition to women within armed groups providing sexual services, many militaries and armed groups support prostitution bases nearby or attached to military bases.[160]

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154 Denov, supra note 99.

155 McKay, Mazurana, supra note 110.

156 The RUF trial in the Special Court for Sierra Leone found that forced marriage is distinct from sexual slavery. The Appeals Chamber in *Prosecutor v Alex Tamba Brima, Ibrahim Bazzy Karmara and Santigie Borbor Kanu* held that forced marriage was an "other inhumane act", meaning that it fell into the category of crimes against humanity. The court emphasised the psychological and mental elements to the harm caused by this crime, and the additional injury caused by the use of the term "wife". Mallesons, Stephen. "Special Court for Sierra Leone – Forced Marriage as an 'other Inhumane Act'." *Humanitarian Law Perspectives,* Topic 6(a) (2010).

157 Ekiyor, Thelma, *Female Combatants in West Africa: Progress or Regress?* WANEP – From the Field, 5th Edition (2002).

158 Lowiki, Jane, and Pilsbury, Allison, *Disarmament, Demobilisation and Reintegration, and Gender-based Violence in Sierra Leone*, excerpts from "Precious Resources, Adolescents in the Reconstruction of Sierra Leone", Women's Commission for Refugee Women and Children, (2002).

159 McKay, Mazurana, supra note 110.

160 Turpin, Jennifer. "Many Faces, Women Confronting War." In *The Women and War Reader, Lois Ann Lorentzen and Jennifer Turpin*. New York University Press, 1998.

In some contexts women are responsible for child rearing and taking care of the reproductive needs of a group – particularly necessary in longer-term conflicts. The LRA had special "breeder camps" set up for this purpose. A camp called Nsitu was created for mothers with babies and children, where there was a higher level of security and where the basic needs of mothers and their children were provided for. Once the children grew old enough they themselves were recruited into the LRA.[161] Of course not all groups operate in this way. In Burundi, when women in the CNDD-FDD gave birth, they were forced to hand over their children to families who were not in the area in which they were fighting. Congolese girls testified in the ICC's Lubanga case that if they fell pregnant, they might be thrown out of the armed group, landing up on the streets of Bunia.[162] In South Sudan, a decision was made by late SPLA leader John Garang that women should be kept away from active combat in order that that they could "keep up the reproductive front" to maintain the population levels, replacing the many South Sudanese who were dying in the war.[163] There, giving birth was framed as women's contribution to the war effort. Women travelled to and from the frontlines to be impregnated, before returning to the bush to resume normal duties. When a man died in battle, his wife would be 'taken over' by another man, who would support her and her children and impregnate her again.[164]

For some women armed group experiences are wrought with violence and abuse, with breaches of the rules, mistakes and misbehaviour dealt with by beatings and punishments. In other groups women are treated well – they are respected for the roles they play and their contributions and presence are valued. Many experience greater levels of gender equality within armed groups than in the societies in which the groups are found, with armed groups allowing more opportunities and power than would have been possible had they not joined.[165] In some contexts, women have earned leadership positions in armed groups and have risen up the ranks of command. However, for the most part, the top positions tend to be retained by men, despite the fact that there are women within the ranks. In Algeria's *Maquis*, life was reported to be very similar for men and women, with women taking part in all aspects of the war efforts. However, despite this, the command was all male and there were only a few women in key decision-making roles.[166] In some

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161 McKay, Mazurana, supra note 110.
162 Prosecutor v Thomas Lubanga Dyilo, supra note 135, at para 891.
163 Stone, supra note 139.
164 *No Standing, Few Prospects: How Peace Is Failing South Sudanese Female Combatants and WAAFG*. Human Security Baseline Assessment, Sudan Issue Brief. Small Arms Survey, 2008.
165 Mazurana, supra note 86.
166 Sajjad, supra note 145.

contexts, where women are promoted to positions of power, they face a lack of respect, with male troops refusing to follow their orders.[167]

An important source of labour and support for armed groups is that which is provided to them from civilian populations (as opposed to from their "members"). Non-state groups are often highly reliant on community support, assistance and information, as well as being dependent on communities for food, resources and shelter. The ways that armed groups treat civilians is influenced by this need for support. Where possible, armed groups attain this support voluntarily, as might be possible in liberation struggles or where armed groups fight for popular causes. In South Sudan, popular support was critical to the SPLA's success, with most of the population contributing to the war effort in some way. A South Sudanese woman explained, "Even if you are young you can do something. You can grind sorghum. Your father and brother and husband have gone to the war, so if you remain at home looking after the family you are also fighting. You are taking care of the children and the people who are suffering. You dig the garden and take some to the war and some for the children."[168]

Community support may be less readily available where groups are not driven by ideologies acceptable to those in the local population. In such cases, armed groups might gain "support" by force, often by directing extreme levels of violence towards civilians, as is frequently seen in new wars. Armed groups in many countries have attacked communities, forcing community women to serve them while the groups loot and pillage. Coomaraswamy, then Special Rapporteur on Violence Against Women, reports that, "When fighters took control of a village, sometimes a fighter would force a woman from the village to cook for him. When women crossed checkpoints, sometimes a fighter would take a woman from the checkpoint and force her to cook for him. Women reported that being forced to cook for a soldier meant that she was subjected to his control in a variety of ways: more than half of the women who were forced to cook experienced sexual violence."[169]

As with armed group membership, when dealing with civilians, the line between voluntary and coerced support is not always clear. In Mozambique's zonas libertados (the liberated zones), FRELIMO called on civilians to help the guerrillas by providing food, portering

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[167] Mazurana, supra note 86.
[168] Stone, supra note 139, at 33.
[169] Coomaraswamy, Radhika. *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences*. United Nations, Commission on Human Rights, Fifty-fourth Session, 1998.

and providing information about the enemy's movements. "Sympathy for the insurgency was widespread in these areas, but fear and respect for FRELIMO guerrillas were inseparable: those who refused to aid FRELIMO were considered by the Front to be collaborators with the colonial regime and were threatened and sometimes executed."[170]

Support from civilian populations can take numerous forms. During the uprisings of the "Arab Spring", many took to Twitter or social media to call people together, publicise news about protests and garner support for the movements.[171] In a more extreme form of participation, some women reportedly go on "sexual Jihad" – offering themselves into sexual service for those fighting Islamic Jihads. In 2014/5, there were many reports of women traveling to Syria to serve the fighters of the Islamic State sexually or as wives. Similar reports have been made in Africa, with Tunisian authorities claiming that women have offered themselves sexually to Jihadists in Tunisia – although these claims have been disputed.[172]

The concern for the purposes of this thesis is that while assisting armed groups civilians might not be discernable from members of the groups. They are therefore vulnerable to attack by the opposing side. This potential for confusion is not adequately mitigated or addressed by the current framing of the principle of distinction. The challenges for the principle caused by the increased presence of civilians on the battlefield have been well documented.[173] However, these discussions have focused on male civilian participation (like private civilian/ security contractors), not considering the unique involvement of civilian women and the particular risks this leads them.

Women's participation in African conflicts must be considered against the backdrop of existing constructions of gender on the continent. Female combatants violate these constructions, often taking on roles that veer greatly from those accepted in their traditional societies. However, simultaneously, traditional notions remain evident in the treatment, use and abuse of female combatants. Women in African conflicts play roles that differ substantially to traditional understandings of combatancy. The complex, often abusive and involuntary circumstances surrounding women's membership of armed groups are incongruent with the picture of responsible combatancy on which IHL is premised. Yet

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170 West, supra note 36, at 183.
171 "The Role of Social Media in the Arab Uprisings, supra note 35.
172 "Tunisia's 'Sexual Jihad' - Extremist Fatwa or Propaganda?" *BBC*, October 27, 2013.
173 Cameron, Lindsey. "Private Military Companies: Their Status Under International Humanitarian Law and its Impact on their Regulation." *International Review of the Red Cross* 88, no. 863 (2006): 573–598. Faite, Alexandre. "Involvement of Private Contractors in Armed Conflict: Implications Under International Humanitarian Law." *Defence Studies* 4, no. 2 (2004): 166–83.

in research, rhetoric, demobilisation efforts and IHL, the experiences of men continue to be taken as 'normal'.[174]

3.5 Female fighters in the post-conflict period

The post-conflict period can be a difficult time for women. Peace treaties may officially end war, yet insecurity lingers, albeit at lower levels. Former enemies return home to the same communities and peace agreements do little to prevent the anger and violence that spills over.[175] Violence remains a constant feature in women's lives post-conflict.[176] This is not restricted to the public space – it enters the home too, with reported high levels of domestic violence in the periods following conflict. Levels of sexual violence sometimes increase or subsist at conflict-levels.

Gender-relations shift during conflict, with women taking on roles not otherwise available to them within armed groups and in broader society.[177] However, increased spaces for women in conflict do not necessarily translate to greater space post-conflict. Many men returning from war want things to return to 'normal' and for women to resume their former positions – leaving the public space and households to be once again headed by men. Some women find this reversal difficult, creating friction. Men whose positions in society and the family feel under threat sometimes resort to violence against women.[178] In many contexts, women have been drawn to armed struggles by the fact that groups incorporate women's empowerment within their stated goals. However, gains made in terms of women's empowerment are quickly reversed post-conflict, with promises of women's rights slipping off the agenda as soon as peace is reached – as seen in Mozambique[179], Eritrea[180] and South Sudan,[181] among others. In some places conditions for women arguably become worse than prior to hostilities. Some of the countries of the "Arab Spring" were relatively liberal before the uprisings yet became more conservative post-revolution. Tunisia was previously one of the most secular Islamic states and its women enjoyed full legal equality since the 1950s. Following their 2010–2011 revolution,

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174 Mazurana, supra note 86.
175 *Intrastate Conflict and Gender*. Information Bulletin. Office of Women in Development, USAID, 2000.
176 Manjoo, Rashida, and McRaith, Calleigh. "Gender-Based Violence and Justice in Conflict and Post-Conflict Areas." *Cornell International Law Journal* 44 (2011): 11–31. Ward, Jeanne. *If Not Now, When?: Addressing Gender-Based Violence in Refugee, Internally Displaced, and Post-Conflict Settings: A Global Overview*. Reproductive Health for Refugees Consortium, 2002.
177 Harders, Cilja. "Gender Relations, Violence and Conflict Transformation." In *In Austin, Fischer, Giessmann (eds.) 2011. Advancing Conflict Transformation. The Berghof Handbook II*, 132–55. Opladen/Farmington Hills: Barbara Budrich Publishers, 2011.
178 Stern, Orly. "This Is How Marriage Happens Sometimes." In Bubenzer, Friederike, and Stern, Orly. *Hope, Pain and Patience: The Lives of Women in South Sudan*. Jacana Media, 2012.
179 West, supra note 36.
180 Krosch, supra note 109.
181 Aldehaib, Amel. *Sudan's Comprehensive Peace Agreement Viewed Through the Eyes of the Women of South Sudan*. Fellows Programme Occasional Paper. Institute for Justice and Reconciliation, 2010.

the Islamic Ennahda was voted in, with a series of concerning developments following suit, including the creation of a new draft Constitution that referred to women as "complementary to men".[182] In Egypt, the Moslem Brotherhood, which took over following the 2011 toppling of Mubarak's government, was also more conservative in terms of women's rights. Egypt has seen a dramatic increase in sexual assaults since the revolution, many of which have been conducted by mobs of men on Tahrir Square while political protests take place.[183] One of the reasons given is that men feel threatened by women's increased space – and sexual assaults are used to get women to go back inside.[184] The situation improved to some extent since Abdel Fattah el-Sisi, who has a better attitude towards women's rights, ousted the Brotherhood in a military coup. Post-conflict societies can move in various directions; reverting to traditionalism, moving towards democracy, or working with hybrid systems that mix these. However, whichever the direction, the results for women tend not to be great, with women's concerns often similarly ignored.

In folklore about bravery and revolution, women's roles in conflict are quickly forgotten, with the men of the struggles being pedestalled and celebrated. While women may have played active roles in armed struggles, these are seldom given the recognition they deserve. As a result, women tend to be denied the rewards of participation, left out of peace negotiations and passed over for political positions post-conflict. Where women are included in political and peace processes, this is often done to meet internationally encouraged quotas and to please donors, yet women are not given a proper place and are given little real opportunity to provide their input.[185] Of course the fact that women's wartime roles are not acknowledged can also have beneficial effects for them. Rwandan lawyers have alleged that judges trying genocide cases have sympathy for women, causing them to acquit or to look for reasons to acquit women.[186] Hogg explains that, "There is also some evidence that in the pursuit of justice following the genocide, women have benefited from the 'chivalry' of men. … male witnesses, investigators, prosecutors and judges are so infected by gender stereotypes that they either cannot perceive of women as criminals or feel protective towards them in spite of their suspected or proven criminality."[187]

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182 "Arab Spring Revolutions Don't Reach Women." *DW.DE*, November 25, 2012.
183 *Gender-Based Violence Against Women Around Tahrir Square*. Amnesty International, 2013. Kingsley, Patrick. "80 Sexual Assaults in One Day – The Other Story of Tahrir Square." *The Guardian*, July 5, 2013,
184 Auger, Bridgette. On Location Video: Assaulted in Tahrir, Global Post, February 8 2013.
185 Mazurana, supra note 86.
186 Hogg, supra note 152.
187 Ibid, at 81.

Female former combatants face numerous challenges post conflict. As well as experiencing many of the same obstacles that male former combatants face – including difficulties returning home and finding viable employment – female ex-combatants also experience a host of problems particular to women. They are often stigmatised and marginalised and sometimes rejected by their communities, as has been documented in Uganda[188], CAR[189] and South Sudan[190]. Much of this stigma centres on sex. They are stigmatised as they are assumed to have had sex in armed groups, because of the "shame of being raped", or for becoming pregnant while unmarried.[191] Women leaving armed groups with children have particularly hard times, as children act as evidence of sex, rape and the violation of cultural taboos.[192]

Given the stigma and rejection, many female former combatants are left destitute. Lacking other viable options, many enter the sex trade. Female combatants frequently reintegrate by themselves rather than going through formal DDR processes aimed at assisting former combatants to reintegrate into civilian life. Sometimes they choose not to be formally demobilised as they wish to keep their involvement in armed groups secret or to downplay it, fearing the stigma they are likely to face on their return to their communities.[193] Some women choose to remain with their rebel "husbands" post conflict, despite the fact that they may not have entered these unions voluntarily. In many African countries, having *a* husband, even such a husband, is seen as preferable to not having one. The fear of not finding a husband is a major concern for African women and women leaving armed groups have particular difficulties in this regard.[194] Women who have served in armed groups often have difficulty returning to traditional gendered structures once they have been exposed to alternative models of interaction.[195] Community members often perceive female former combatants as troublesome, bad influences or undesirable. The problems do not stem entirely from community prejudices. McKay and Mazurana report that girls released from armed groups displayed, "Anti-social behaviour—such as being aggressive, quarrelsome, using abusive language, killing and eating others' animals, abusing drugs and smoking—

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188 "Uganda: Bleak Future for Former Female Fighters." *IRINnews,* 8 March, 2011.
189 Lamb, Guy, and Stern, Orly. *Assessing the Reintegration of Ex-Combatants in the Context of Instability and Informal Economies, The Cases of the Central African Republic, the Democratic Republic of Congo and South Sudan.* World Bank, Transitional Demobilization and Reintegration Program, 2011.
190 Stone, supra note 139.
191 Hobson, Matt, *Forgotten Casualties of War: Girls in Armed Conflict*, Save the Children, United Kingdom, 1-27, (2005).
192 McKay, Mazurana, supra note 110.
193 Verhey, supra note 108.
194 McKay, Mazurana, supra note 110.
195 Alison, supra note 83.

violated gender norms and affected their ability to readjust to their community and the community's response to them."[196]

Women who participate in hostilities struggle to have their needs met post-conflict, in part because their experiences are different to those of men, misunderstood and not recognised as meaningful participation in hostilities. While male former combatants can readily have their war-wounds treated, many women cannot, as these injuries are sexual and stigma around sexual violence prevents women seeking help.[197] Some solutions proposed to assist female former fighters are wholly inappropriate. For example, some humanitarian agencies and local population groups have suggested that women should marry their "bush husbands" or captors, to assist in their reintegration and ensure continued maintenance or support. No one would ever suggest that boys or men formalise their relationships with their captors as a reintegration solution.[198]

The picture is not all bad. Despite the challenges, women have been shown to have tremendous agency in the post-conflict period. Across the continent, women have been involved in working towards peace, particularly at the local level. In West Africa, organisations like the Mano River Union's Women's Peace Network have been highly active, supported by broader regional women's networks like *Femmes Africa Solidarite* – collaborations that have allowed women to transmit ideas between conflict zones.[199] The Pro-Femmes/Twese Hamwe Collective in Rwanda, an association of 35 women's organisations, played a significant part in facilitating dialogue between Hutus and Tutsis in post-genocide Rwanda.[200] And one should not overlook the contribution of 'ordinary' women who work to rebuild their families and communities following war. This above all else is what allows societies to resurface and rebuild following conflict – although, like much other female participation, these contributions do tend to be overlooked.

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Ranging from empowering experiences where women fight for social change, to situations of kidnap, sexual slavery and abuse, one cannot neatly sum up the experiences of female fighters and commit them to one category or to a neat legal definition. However, despite

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196 McKay, Mazurana, supra note 110, at 36.
197 Jean Claude, Omba, Kittel, France and Piette, Dannielle. "Stigma of Victims of Sexual Violence's in Armed Conflicts: Another Factor in the Spread of the HIV Epidemic?" *Epidemiology: Open Access* 03, no. 02 (2013).
198 Mackenzie, Megan. "Securitizing Sex?" *International Feminist Journal of Politics* 12, no. 2 (2010): 202–221.
199 Cockburn, Cynthia. "Gender Relations as Causal in Militarization and War." *International Feminist Journal of Politics* 12, no. 2 (2010): 139–157.
200 *Intrastate Conflict and Gender*, supra note 175.

the variations there remains some value in thinking about these women as a group. Women participate in conflict against a backdrop of African norms and cultural practices, with patriarchy and high levels of gender violence informing and shaping their involvement. Women across the continent are held to similar expectations about acceptable female behaviour and suffer similarly when transgressing these norms, even when doing so involuntary. Stigma, fear of societal ostracisation and limited alternative opportunities shape their armed group experiences.

The women who participate in African conflicts have largely been neglected in academic legal literature. The laws of distinction, drafted with a different context and different participants in mind, strain at the seams when applied to them. However as new wars become the norm and conflicts look increasingly different to the wars of the 20th century, fighters like the women in Africa begin to resemble the norm, making an examination of the adequacy of the laws in dealing with such groups imperative.

4 Gender and International Humanitarian Law

Conflicts are gendered spaces. They affect men and women differently. Feminist scholars have sought to expose the distinct experiences of women in conflict. They have questioned how IHL responds to conflict's gendered nature and how the law contributes to and perpetuates gendered disparities. They have argued that the predominantly male drafters of the IHL conventions held a particular gendered view of conflict, in which certain roles were held by men and women respectively; combatants were perceived to be men, while women were envisaged as civilians or victims of war. Despite the fact that IHL was couched in largely gender-neutral terms, these notions shaped the development of the law and remain pervasive in IHL today.

This chapter reviews the literature on feminist theory and its application to conflict and IHL. Feminist theory frames this discussion on the principle of distinction as applied to women in Africa, aiming to give coherence to the many topics discussed in this thesis, and linking this research to a large body of work developed by feminist scholars. The chapter begins with a discussion on feminism, defining the central concepts and concerns of this body of thought, before honing in on the ways these relate to conflict. While this thesis focuses primarily on women, gender analysis is relational. The chapter therefore describes the role of masculinity and how it underlies militarism. Feminist views on female combatants are explored, as are the views of others in society about women who fight. The chapter then goes on to examine the critiques that feminist scholars have made about IHL and the principle of distinction. Finally, it considers some approaches that have been used to try improve the gendered state of the law, including international criminal law and the Security Council's Women, Peace and Security Agenda.

4.1 A brief introduction to feminist theory

Feminist theory comprises analytical and political claims. Analytically feminists claim that gender is a key feature of social differentiation operating to shape society.[1] Gender relations are a vital ordering principle pervading society's systems of power, a role that is scarcely acknowledged.[2] Feminists are concerned with the ways that women's experiences are silenced. They attempt to give voice to these silences, by asking questions about women: Where are the women? What are women going through in various situations? What would various policies, laws and concerns look like if women were properly taken into

[1] Lacey, Nicola. "Feminist Legal Theory and the Rights of Women." In *Knop, Karen (ed), Gender and Human Rights*. Oxford University Press, 2004.
[2] Handrahan, Lori. "Conflict, Gender, Ethnicity and Post-Conflict Reconstruction." *Security Dialogue* 35, no. 4 (2004): 429–445.

consideration? In the area of conflict, so long perceived as the quintessential male arena, feminists have sought to portray the experiences of women: What do women go through in war? What do they need? In what gender specific ways do women participate in conflict and its aftermath?

Politically, feminists operate from the position that the way that gender shapes the world is unjust. As such, they are dedicated to changing this. Feminists examine the status of women, with the express purpose of using these understandings to improve women's lives, transforming society and achieving women's empowerment. Feminist writing is grounded in the assumption that women are oppressed and that society, family structures and legal systems support this oppression. They seek to expose the relationships of domination and subordination, and to explore the mechanisms through which this dominance occurs and the reasons it persists.[3] In the realm of conflict, feminists seek to understand how the various mechanisms that support, maintain and regulate conflict work to subordinate women.

A school of feminist thinkers have directed their inquiries towards law.[4] There are many different legal feminisms but what they have in common is a view that the way the law treats women is different from the way it treats men, and contend that the law is instrumental in the continuing subordination of women. Across many branches of law – from employment, to inheritance, to family law – feminist scholars have illustrated how laws play a role in perpetuating unfair gendered dynamics. Feminist legal enquiries have been directed towards international law, and towards specific parts of international law.[5] Charlesworth and Chinkin explain that a feminist analysis of international law can play two roles. First, it deconstructs the values – explicit and implicit – underlying the international legal system, challenging them for having an incomplete basis; one that excludes women while purporting to represent all. Second, it allows for a reconstruction of international law, recreating the basic concepts in ways that do not facilitate male domination.[6] This dual approach is utilised in the feminist analysis of IHL below, enabling a deconstruction of the role of the principle of distinction and its limitations in protecting women, as well as a reconstruction, which casts the role of women differently under IHL.

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[3] Dalton, Clare. "Where We Stand: Observations on the Situation of Feminist Legal Thought." In *Feminist Legal Theory: Foundations and Outlooks*. Vol. 1. Dartmouth Publishing Company Limited, 1995.
[4] For an overview of feminist legal theories see, Olsen, Frances. *Feminist Legal Theory*. Vol. 1 and 2. The International Library of Essays in Law and Legal Theory. New York University Press, 1995.
[5] Buss, Doris, and Manji, Ambreena (eds). *International Law: Modern Feminist Approaches*. Oxford: Hart Publishing, 2005. Kouvo, Sari, and Zoe Pearson. *Feminist Perspectives on Contemporary International Law*. Oxford: Hart Publishing, 2011.
[6] Charlesworth, Hilary, and Chinkin, Christine. *The Boundaries of International Law: A Feminist Analysis*. Manchester University Press, 2000.

A number of key concepts form the basis of feminist thought. Although concepts in this chapter are defined for the purpose of explanation, in reality these concepts are more fluid and variable than descriptions suggest. The distinction between 'gender' and 'sex' underpins many feminist ideas. It is arguably the failure by many to understand this difference that is at the route of stereotyping, discrimination and the rigid division of roles according to sex. In 1955, sexologist John Money coined the distinction between sex and gender. "Sex" he said, referred to the biological differences between men and women, while "gender" referred to specific qualities or roles filled by the different sexes, and included the range of characteristics of masculinity and femininity. Money described "gender roles" as being the things that people do or say to disclose their identity as either men or women.[7] It took some time for this idea to catch on, and it was only in the 1970s when the Western feminist movement took this on that the distinction between sex and gender gained steam. Not everyone accepts the clear distinction between sex and gender. Critics argue that the interaction between these is highly complex and that a greater understanding is required about the ways that biological traits interact with the social environment to shape individuals' capacities.[8] However, what is clear is that the way in which people *act out* their sex is important, is learned, is culturally varied and is determined by more than just biological difference. Humans are taught to act as a particular gender, and the ways in which they act as men or women interact with and are influenced by social expectations.[9] In societies where the genders are presented and played out vastly differently, there can be significant negative consequences for those deviating from these norms, consequences that limit the fluidity in both sex and gender.[10] The term gender also refers to other aspects of sexual and gender identities, in addition to male/female identities.[11]

Gender stereotypes are generalisations about the attributes and roles appropriate to the two genders. Stereotypes often incorporate inaccurate assumptions, assumptions that attribute to each of the sexes traits that are not inherent but learned. Stereotypes ignore or are blind to individual traits. As with gendered behaviours, people learn stereotypes from others in

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[7] Money, John, and Coleman, Eli. *John Money: A Tribute*. Routledge, 1991.
[8] Fausto-Sterling, Anne. *Myths Of Gender: Biological Theories About Women And Men, Revised Edition*, Basic Books, 1992.
[9] Schwalbe, Michael. *The Sociologically Examined Life: Pieces of the Conversation*. 4th ed. McGraw-Hill Humanities/Social Sciences/Languages, 2007.
[10] Hurst, Charles. *Social Inequality: Forms, Causes, and Consequences*. Boston: Pearson, 2012.
[11] In General Recommendation 28, the CEDAW Committee notes that, "The term gender refers to socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women." General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW, 2010.

their society. Gender stereotypes can be deeply damaging and there can be negative consequences for those failing to act as the stereotypes dictate. A key goal of the feminist movement is to challenge stereotypes about female roles, behaviours and positions, exposing them as what they are: learned, socially constructed behaviours that are not innate to women and that can be altered to accommodate differences in choice or circumstance.[12]

Stereotypes about men and women, and socially constructed expectations around gender appropriate behaviour, are glaringly evident in conflict. From time immemorial societies have constructed the ways that men and women should act in war, constructions that have varied over the years. Largely, throughout history perceptions have existed about women being peaceful and against war, experiencing it predominantly as victims. Men on the other hand have been perceived as fighters, being physically stronger and more inclined to such endeavours. Those who have deviated from these expectations have been judged harshly. Men who "desert" or refuse to fight have been labelled weak, unpatriotic or unchivalrous. As a means of domination, men have been deemed "feminised", including by rape in war. Female fighters have been labelled as deviants and ostracised during and after conflict. People struggle to accept such deviations from the gendered scripts. Some people's means of reconciling this is to remove subject's genders, metaphorically speaking. Hogg described the ways in which women who took part in the Rwandan genocide were said not to be women, but rather to be like men or to be likened to monsters.[13] Even Grotius, one of the earliest founders of the laws of war, wrote that women should be spared in war, unless they have committed a crime that ought to be punished in a special manner, or "unless they take the place of men."[14]

Gender stereotypes can be harmful to both men and women, exposing them both to risks. While women are subject to specific types of risks in conflict, men are at a higher risk of being intentionally harmed or killed – in large part due to stereotypes about men being violent and to perceptions that all men are combatants, or at least potential combatants. From World War Two, to Bosnia, to East Timor, sex-selective killings of men have been a common occurrence. Paradoxically, despite the fact that men are at greater risk of being targeted, there tends to be more of an emphasis on protecting women in conflict. Because they are stereotyped weak and vulnerable, they are prioritised in evacuation and protection

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12 Cook, Rebecca. *Gender Stereotyping: Transnational Legal Perspectives*. Pennsylvania Studies in Human Rights. Philadelphia: University of Pennsylvania Press, 2010.

13 Hogg, Nicole. "Women's Participation in the Rwandan Genocide: Mothers or Monsters?" *International Review of the Red Cross* 92, no. 877 (2010): 69–102.

14 Grotius, Hugo, "Moderation with Respect to the Right of Killing in a Lawful War, Book 3, Chapter 11, The Law of War and Peace, 1625.

initiatives, consequently putting men at further risk.[15] Gender stereotypes affect compliance with the principle of distinction, ultimately risking both men and women's safety.

Arising from the concept of gender is the concept of "gender-neutrality", often found in laws or policies. Gender-neutrality is based on the notion that to avoid discrimination, policies should not differentiate on the basis of sex. "Formally equal" policies therefore do not contain gender distinctions. However, this notion is problematic, given the unequal starting points for men and women. One cannot create equality in an inherently unequal situation merely by treating everyone alike. Formally equal laws can have highly discriminatory effects for women, when men and women's starting positions are so different. Gardam explains that, "Reform based on the equality model has been convincingly demonstrated to be a singularly blunt instrument to achieve any change for women in a world where they do not live out their lives as the equal of men."[16] While equality between men and women is a central goal of the feminist project, equality as a tool can be unjust when applied in situations where disparities exist without taking them into account and explicitly addressing structural inequalities.[17] Many feminist thinkers support having "substantively equal" laws that provide for differences in treatment and are designed to redress inequality and solve particular problems.[18] Gender specificity and gender neutrality are binaries; the best results might come from identifying a balance or middle ground between them, as this thesis seeks to find for the principle of distinction.

Much legal discourse is based on pairs of binaries or opposites, with terms like objective/subjective, protector/protected and active/passive pervading the law.[19] The law, as it is constructed, is reliant on these binaries, with each part of an opposing pair being mutually dependent on the other. These binaries have become so entrenched in our ways of thinking that they are often perceived as natural or universal.[20] Binary distinctions are clearly evident in the area of conflict. Opposing distinctions like combatant/civilian, military necessity/humanitarianism, victim/perpetrator, protector/protected pervade IHL and the conflict space. Feminists seek to challenge these binaries and the fact that they are perceived as natural. They question whether for each there should be only two positions lying in direct opposition to one another, or rather whether alternatives or middle positions

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[15] Carpenter, Charli. "'Women and Children First': Gender, Norms, and Humanitarian Evacuation in the Balkans 1991-95." *International Organization* 57, no. 4 (2003): 661–94.
[16] Gardam, Judith. "Women and the Law of Armed Conflict: Why the Silence?" *International and Comparative Law Quarterly* 46, no. (1997): 55–80, at 58–59.
[17] Krill, Françoise. "The Protection of Women in International Humanitarian Law." *International Review of the Red Cross* 249 (1985).
[18] MacKinnon, Catharine. "Substantive Equality: A Perspective." *Minnesota Law Review* 96, no. 1 (2011): 1–27.
[19] Charlesworth, Chinkin, supra note 6.
[20] Ibid.

could exist, positions that merge elements of both. Feminist critiques point out how gender informs these binaries and how there is a gendered (hierarchical) coding in these systems of binary opposites. Often, one in each pair represents the masculine – consider "combatants" in relation to "civilians" or "military necessity" in relation to "humanitarianism" – and tends to be prioritised in law and policy.[21]

An important binary discussed in feminist writing is the public/private divide, which sees the world as divided into public and private spaces or issues.[22] State matters and government actions are considered public, while private lives – including family lives – are private. Traditionally, legislation, policy and international treaties have been seen to apply to the public sphere, while the private sphere has been seen as outside the realm of regulation. The public/private divide is controversial. Feminists argue that a clear line between public and private does not exist as the impacts of disadvantage in the private sphere spill over and influence the public sphere.[23] As an example, women's (private) burden in child rearing affects their ability to participate in public life.[24] Other feminist scholars have accepted a public/private divide yet have pointed their criticisms towards the way the divide has been framed. They argue this framing creates the false belief that the differences between public and private are givens, rather than social constructions worthy of interrogation.[25]

A public/private divide is strongly evident in conflict and its regulation. Conflict can be seen as the pinnacle of the public sphere, with state agents operating formally in public settings for public goals. Combatants, operating on behalf of the state, represent the public; civilians, the private.[26] However, here too the divide is problematic. MacKinnon argues that there can be no private sphere when women's personal lives have become political and when the degradation of women is part of the public order.[27] Even within the public realm of the military, women are used in domestic support roles. Sexual violence increases in conflict – private acts, heightened by public conflict. Refugee and IDP camps also marry public and private in manifest ways.

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[21] Ibid.
[22] Pateman, Carole. "'Feminist Critiques of the Public/Private Dichotomy.'" *The Disorder of Women. Democracy, Feminism and Political Theory*. Cambridge: Polity Press, 1989.
[23] MacKinnon, Catharine. *Toward a Feminist Theory of the State*. 2nd Edition. Harvard University Press, 1991.
[24] Lacey, supra note 1.
[25] See for example, Gavison, Ruth. "Feminism and the Public/Private Distinction." *Stanford Law Review* 45, no. 1 (1992): 1–45.
[26] Gardam, supra note 16.
[27] MacKinnon, supra note 23.

Little thought has apparently been given to whether and how accepted binaries function in the African context. Conditions in Africa frequently fall somewhere between the traditional binary points. In African cultures, individuals are perceived to be responsible for their communities and communities have responsibility over the lives of individuals – with even the African Charter on Human and People's Rights (Banjul Charter) emphasising that the rights of each individual should be exercised with regards to the rights of others.[28] In contexts where community members are enmeshed in each other's lives, are community structures public or private? How does one rule a divide between these spheres? Lewis, who writes about African Islamic feminism, discusses the binary of secular/religion, noting how on the African continent this binary is more rigid in concept than in practice.[29] Looking at conflict, Africa's low-level, sporadically flaring-up conflicts fall in the space between order/anarchy and war/peace.

Focusing on women, as this thesis does, risks creating an impression that women are all the same and are all affected by experiences in similar ways. There is a danger of essentialising, or implying that women have a set of common immutable attributes. Discussing women as a category risks concealing the many differences between them – like race, class, religion, socio-economic status and ethnicity – differences that are fundamental to shaping women's experiences.[30] While there may be political, analytical and strategic value to highlighting the common experiences of women, it is crucial that this is done in a way that does not disregard their differences. While gender is the primary unit of analysis in feminist research, to properly understand women's experiences requires assessing gender and its interrelationship with other factors of social differentiation. 'Intersectionality' requires examining relationships across multiple dimensions, seeking to understand how different categories operate together and how systems of oppression reflect the intersections between various forms of discrimination.[31] Feminists assess the intersection between gender discrimination and other forms of discrimination, including racism and classism. These factors are critical in considering African conflicts, where *racial* and *ethnic* factors are dominant concerns, and where *poor* women are more likely to become involved with armed groups, to be sexually exploited, or to be unable to escape conflict.[32]

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[28] Chapter 2: Duties, Article 27–29, African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3.
[29] Lewis, Desiree. "Introduction: African Feminisms." *Agenda* no. 50 (2001): 4–10.
[30] Charlesworth, Chinkin, supra note 6.
[31] Crenshaw, Kimberle. "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color." *Stanford Law Review* 43 (1991): 1241–99. Carastathis, Anna. "The Concept of Intersectionality in Feminist Theory." *Philosophy Compass* 9, no. 5 (2014): 304–14.
[32] Lorentzen, Lois, and Turpin, Jennifer, eds. *The Women and War Reader*. New York University Press, 1998.

There are numerous branches of feminism, each of which provides a different lens though which to understand women's experiences, and contributes differing insights to the problems posed in this thesis. Feminists do not speak with one voice and differing schools of feminism disagree on analysis, interpretations and the appropriate courses of action required to improve things. The feminist critiques of IHL described later in this chapter integrate arguments from the differing schools, making it useful to understand the schools these arguments stem from. The liberal equality model of feminism embraces liberal values, such as that all people are created equal and that women should therefore not be treated unequally on the basis of their gender. The challenge with this paradigm is in ensuring it concerns itself with *true* equality and not with nominal or formal equality. The sexual difference model of feminism argues that the law should not conceal gender differences but rather it should take them into account, as only by recognising and addressing differences can the law improve women's conditions. Radical feminism focuses on patriarchy as the system of power that organises society and dictates male supremacy. It advocates for a radical restructuring of society to defeat patriarchy. Postmodern feminism argues that women's social conditions are socially situated, so that there is no such thing as a universal women's experience or voice. Those in this school seek to understand the ways race, class and others axes of difference intersect with gender. Postcolonial or third world feminists argue that racism, colonialism and the after-effects of colonialism are intrinsically bound with the gendered experiences of non-white, non-Western women. They criticise Western feminists for creating the impression that Western women's issues are the issues that women face the world over, ignoring the unique experiences of other – including African – women.

The 1985 UN Conference on Women in Nairobi and the 1995 UN Conference on Women in Beijing served as catalysts for African women's organisations and African feminism. Nevertheless, the African feminist movement has had challenges in getting its messages out. Salami explains that, "…with limited access to funding, technology and a huge publishing industry, the kind of theoretical imperialism where white feminist work is considered theory while feminist work in Africa is considered practical is possible."[33] Tamale points to the fact that in Africa feminists are called "gender activists", a term that lacks "political punch".[34] While the feminism struggle has progressed considerably in the West, it remains at a different stage in Africa, with battles that have largely been resolved elsewhere still being fought. The feminist movement has faced backlash in Africa, with

[33] "White Women, Black Men & African Feminists." *MsAfropolitan*, 2013. http://www.msafropolitan.com/2012/01/white-women-black-men-african-feminists.html.
[34] Tamale, Sylvia. "African Feminism: How should we change?" *Development* 49, no. 1 (2006): 38–41, at 39.

ideas persisting that women's rights are Western constructs, which go against the traditional African way of life. A core challenge in Africa is balancing the equality of women with the highly valued right to culture – two rights which often directly conflict. Feminists and human rights activists alike argue that certain values, like equality, triumph cultural relativism.[35] However, actors who attempt to promote the one by entirely disregarding the other tend to be unsuccessful in this context. African feminists emphasise the connections between gender, race and imperialism. They argue that women's socially determined identities take on different forms in Africa compared to the West,[36] as do domination and resistance. For example, in Africa, domination by men fits within the context of domination by elders, with African women falling to the bottom rung.

4.1.1 Masculinity and militarism

Kahssay describes military culture as, "… hyper-masculine, anti-feminine, violence-idealizing and authoritarian…"[37] Masculinity in the military is developed and manipulated, with armed groups fostering hyper-masculinity to promote military performance by troops. Wood explains that, "… to persuade men to fight and endure all the terrors and hardships of war, societies need members willing to stand fast under fire. An extremely common way in which that is accomplished relies on the development of sharp distinctions between genders: to become men, boys must become warriors. … leaders persuade soldiers that to be a real man is to assert a militaristic masculinity."[38] The hardships men endure in conflict are tempered by positive feelings evoked by militarised masculinity; men defend their homeland and their women and, in doing so, exercise important parts of citizenship and communal belonging.[39] Masculinity in the military is all encompassing; research has documented how even women in the military see themselves as becoming masculinised.[40]

Militarised masculinity is anti-feminine. It removes femininity from anything having to do with combat. Combat is associated with strength, while weakness is seen as feminine.[41] Particular constructions of masculinity and femininity are promoted to facilitate militarisation, entrenching gender identities underpinned by patriarchal attitudes.[42]

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[35] Zechenter, Elizabeth. "In the Name of Culture: Cultural Relativism and the Abuse of the Individual." *Journal of Anthropological Research* 53 (1977): 319–47.
[36] Tamale, supra note 34.
[37] Kahssay, Jihan. "Feminist Legal Theory: Challenges Facing Women Combatants." *Feminist Legal Theory*, October 5, 2012.
[38] Wood, Elisabeth. "Variation in Sexual Violence During War." *Politics & Society* 34, no. 3 (2006): 307–342, at 326.
[39] Handrahan, supra note 2.
[40] See for example, Baaz, Maria Eriksson, and Stern, Maria. "Making Sense of Violence: Voices of Soldiers in the Congo (DRC)." *The Journal of Modern African Studies* 46, no. 01 (2008): 57–86.
[41] Kahssay, supra note 37.
[42] Cock, Jacklyn. "Women and the Military: Implications for Demilitarization in the 1990s in South Africa." *Gender & Society* 8, no. 2 (1994): 152–169.

Militarism helps to sustain patriarchy, while patriarchy in turn sustains militarism.[43] Combat units emphasise the taking of power through violence, and violence is internalised as idealistically masculine, courageous and superior.[44] This sets the tone for harm against women and sexual violence. Brownmiller notes that, "War provides men with the perfect psychological backdrop to give vent to their contempt for women. The maleness of the military--the brute power of weaponry exclusive to their hands, the spiritual bonding of men at arms, the manly discipline of orders given and orders obeyed, the simple logic of the hierarchical combat--confirms for men what they long suspect: that women are peripheral to the world that counts. Men who rape are ordinary Joes, made unordinary by entry into the most exclusive male-only club in the world."[45]

Militarised masculinity leads to female combatants being ostracised and excluded. It makes them vulnerable to gender specific abuses – from both the enemy and those within their own ranks. The perceived link between masculinity and militarism causes militaries to neglect female soldiers' development, thereby becoming self-fulfilling.[46] Labelling the military as masculine shadows the parts that women – or rather stereotypically feminine traits – can contribute to effective military operations. Many traits required for military success are in fact traits perceived as "feminine" – like camaraderie, discipline and service.[47] Militarised masculinity can be harmful for combat effectiveness, leading to discrimination and mistrust of women in the ranks – a problem, given the military's focus on group tasks and effective teamwork.[48]

Uniforms add to the masculinised leaning of the military. Women in militaries are expected to dress like men. Moran notes that, "As Western observers, we take it for granted that women will take on the clothing and accoutrements of men in times of war. This form of transvestism deemed acceptable and unremarkable in the West, is rarely commented upon. We assume that women entering formerly all-male domains … will dress 'like men'."[49] As with the way that uniforms are tailored to a masculine norm, military uniforms often centre on Western dress. However, in contrast to mainstream versions of military uniforms, military dress takes on quite different forms and symbolisms in other regions – some of

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[43] Cockburn, Cynthia. "Gender Relations as Causal in Militarization and War." *International Feminist Journal of Politics* 12, no. 2 (2010): 139–157.
[44] White, Aaronette. "Fanon & the African Woman Combatant", in Nhema, Alfred, and Tiyambe Zeleza, Paul, eds. *The Roots of African Conflicts: The Causes and Costs*. Edition 1. Ohio University Press, 2008.
[45] Brownmiller, Susan. *Against Our Will: Men, Women and Rape*. Paw Prints, 2008, at 32.
[46] Kier, Elizabeth. "Uniform Justice: Assessing Women in Combat." *Perspectives on Politics* 1, no. 02 (2003): 343–347
[47] Titunik, Regina. "The Myth of the Macho Military." *Polity* 40, no. 2 (2008): 137–63.
[48] Kier, supra note 46.
[49] Moran, Mary. "Warriors or Soldiers? Masculinity and Ritual Transvestism in the Liberian Civil War." In *Feminism, Nationalism, and Militarism*. Arlington, VA: American Anthropological Association, 1995, at 83.

which are gendered in wholly different ways. Coulter, who researched combatants in Sierra Leone, notes that, "… the Sierra Leone war deconstructed any notion of a combat-clad, crew-cut, clean-shaven soldier, as hardly any of the irregular armed combatants conformed with this soldier image. Here, fighters ranged from traditional male hunters, naked or dressed in beads and charms, male rebels sometimes wearing wigs and women's clothes, as well as female and child combatants. … In the 'West', a potent and powerful masculinity needs to shed all feminine attributes and qualities, whereas in this region of West Africa … it is the mixing and transgressing of gender boundaries that increases power. … The rebels were frequently demonized and de-humanized, but they were not feminized."[50] It is interesting to consider the contrasting messaging behind such symbols of war. Male soldiers in West Africa dressed as women, feminising themselves as a source of added power. In this context, male rape was less common, although not unheard of. In different conflicts where femininity is reviled, men are raped to "feminise" them – as a means of demonstrating their weakness. This illustrates how malleable gendered symbolism can be. Uniforms play a symbolic part in this, sending out visible gendered messages intended to invoke reactions. Uniforms or distinctive markings, called for by the principle of distinction to distinguish combatants, are in practice both gendered and Westernised, revealing how a purportedly neutral legal requirement conceals underlying ideals – ideals that break down when applied in Africa or when applied to non-traditional actors, such as women taking part in hostilities.

Despite how militarism adversely impacts women, women play a key part in the process of militarisation. They provide ideological support for this, helping to socialise boys and men to the idea that men are strong and aggressive and helping to police that role. A body of literature illustrates how even "maternal thinking" (the reasoning and thinking of mothers,[51] arguably the most deeply feminine process), while traditionally seen as resistant to conflict, can in fact be moulded in ways that are congenial to military thinking, making women supportive of war, even encouraging their sons to fight.[52] Women help make militarism more palatable to society, creating societal impressions of peace and harmony during hostile situations. For example, during South Africa's Apartheid, white women were

[50] Coulter, Chris. "Female Fighters in the Sierra Leone War: Challenging the Assumptions?" *Feminist Review* 88, no. 1 (2008): 54–73, at 65.
[51] Ruddick, Sara. *Maternal Thinking: Toward a Politics of Peace*. Beacon Press, 1995. Elshtain, Jean. "On Beautiful Souls, Just Warriors and Feminist Consciousness." *Women's Studies International Forum* 5, no. 3–4 (1982): 341–348.
[52] See for example, Kaplan, Laura. "Woman as Caretaker: An Archetype That Supports Patriarchal Militarism." *Hypatia* 9, no. 2 (1994): 123–33. Scheper-Hugher, Nancy. "Maternal Thinking and the Politics of War." *Peace Review* 8, no. 3 (1996): 353–58.

encouraged to be gentle and ladylike, sustaining the impression of a polite society, thereby concealing the cruel nature of the regime.[53]

Militarism and the related norm of "military necessity" hold important places in IHL. The basic structure of IHL implicitly justifies and protects that which is required to win in war. Masculinity plays a role in producing armies that can triumph in conflict and hence is promoted by the IHL regime. A section later in this chapter will illustrate how masculine interests are prioritised by IHL, thus further entrenching the place of masculinity in the war-making endeavour.

4.1.2 Views about women in combat

Female combatants deviate from commonly held views about what women should be like. They transgress societal norms about "acceptable" female behaviour. Female combatants challenge both stereotypes about women as victims and men as perpetrators.[54] Fighting and violence is men's terrain. Women are regarded more peaceful, so violent women are perceived as abnormal. Interestingly, these stereotypes sometimes work in opposite directions; in rural Sierra Leone, women were not understood as more peaceful, but rather as being wild, dangerous and in need of control. When women joined rebel groups, it was said the groups unleashed their *true* nature: that which was unpredictable and wild.[55] Deviations from normal behaviour make people uneasy, and this unease is at the root of discrimination against female combatants.[56] Female combatants evoke other prejudices too, including those about sex. As rape is a prevalent aspect of female fighters' experiences, prejudices against those who have sex outside of marital structures overlap with the prejudices around transgressing behavioural norms, leading to overlapping layers of stigma.

People deal with their unease at female fighters in different ways. Some notionally strip female combatants of their feminine status. For example, female terrorists are "…presented as having masculine characteristics, being asexual or failing to correspond biologically or psychologically to their nature."[57] Hogg describes how female genocide perpetrators in Rwanda were seen as "monsters" rather than as women. Some described them as "non-women", as it was seen as impossible for women to commit such acts.[58] A different approach is that female perpetrators are painted as being victims of men who

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[53] Cock, supra note 42.
[54] Coulter, supra note 50.
[55] Ibid.
[56] Durham, Helen, and O'Byrne, Katie. "The Dialogue of Difference: Gender Perspectives on International Humanitarian Law." *International Review of the Red Cross* 92, no. 877 (2010): 31–52.
[57] Hogg, supra note 13, at 101.
[58] Ibid.

manipulate them or coerce them into action.[59] For example, much of the discourse on female suicide bombers centres on women having been manipulated or brainwashed – a barrier to women being recognised as true conscious participants in armed processes.

Good or bad, female fighters garner attention. Coulter describes how both during and after the war in Sierra Leone, people loved to recount how brutal the rebel women were, how cold blooded, how cruel. People would emphasise at length how the fighting women were even tougher than men – a claim that has not been borne out by research.[60] The media too is fascinated by female fighters. Kurdish female fighters have been a media favourite in reporting on Isis.[61] Reporting on female combatants in Africa in the Western media often reveal racist as well as sexist attitudes. A BBC article on female fighters in Liberia describes them as "street-wise girls with attitude but they have the military hardware to back up the look." An accompanying photo depicts them as sexy "ghetto" women.[62] Another article, describing the head of Liberia's Black Diamond, notes, "She's all sleek muscle and form-fitting clothes, with an AK-47 and red beret. She has a bevy of supporting beauties, equally stylish, who loiter nearby, polished fingernails clutching the cold steel of semi-automatic weapons."[63] Coulter, who sourced these articles, points out that this sexualised language is consistent with the ways the western media depicts black women in other contexts.[64]

For years debates have raged about whether women should be allowed to serve in the military, and in particular, whether they should serve in combat roles[65]. Many arguments have been made about why the frontlines are inappropriate for women. Some centre on the fact that women are not physically big and strong enough to fight. In recent years these arguments have begun to carry less weight, as conflicts have become more technologised, often fought remotely using high-tech weaponry that allows significant firepower to be released at the click of a button, requiring little physical strength. Arguments have been made that women are not psychologically tough or brave enough to handle the hardships of combat. Much of the debate centres on how including women will affect military

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[59] Felices-Luna, Maritza. "The Involvement of Women in Anti-Establishment Armed Groups: Deviance in the Service of a Citizenship Enterprise." *Champ Penal / Penal Field* 4 (2007).
[60] Coulter, supra note 50.
[61] For example, Dearden, Lizzie. "'Isis Are Afraid of Girls': Kurdish Female Fighters Believe They Have an Unexpected Advantage Fighting in Syria." *Independent*, December 9, 2015.
[62] "Liberia's Women Killers." *BBC*, August 26, 2003. http://news.bbc.co.uk/2/hi/africa/3181529.stm.
[63] Itano, Nicole. "The Sisters-In-Arms of Liberia's War." *The Christian Science Monitor*, August 26, 2003.
[64] Coulter, supra note 50.
[65] See for example, Chinkin, Christine. "Women and Peace: Militarism and Oppression." In *Human Rights in the Twenty-First Century, Mahoney, Kathleen, Mahoney, Paul (eds)*, 1993. MacKinnon, Catharine. *Feminism Unmodified*. Harvard University Press, 1987.

effectiveness.[66] Some argue that having women in the military stands in the way of male bonding, group cohesion and group morale. Of course this disregards competing dynamics that also threaten cohesion, those that are not as societally tolerated today. As an example, Heinecken argues that in the South African National Defence Force, racial, cultural and language differences have a far greater negative influence on group cohesion than gender does.[67] A related argument is that including women in combat units will prevent the development of militarised masculinity, crucial to war fighting.[68] Those countering this argument contend that there is no evidence that masculine identities actually improve combat performance – in fact, some claim this can harm military effectiveness.[69] Other arguments centre on the fact that if women are allowed in combat, male soldiers will put themselves at risk to protect them, or conversely, that if women go into combat, men will no longer feel the need to protect women in other areas of life, with allowing women to be subject to violence in the military being tantamount to cultural endorsement of violence against women more generally.

The exclusion of women from combat frontlines must be considered in light of the increasingly ambiguous notion of the 'frontline'. Frontlines today are fluid, with frequent strikes to the 'rear', aimed at destroying supply lines or combat bases. Sophisticated combat technology means that more strikes are made remotely, often from locations hundreds of miles away.[70] As conflicts become less linear, women who are not allowed to serve as frontline combatants, yet who are allowed to play support roles in the field are still put in dangerous and exposed situations. Yet, because they are not permitted to serve in frontline combat, they are sometimes not provided with adequate training on how to protect themselves, making them all the more vulnerable.[71]

Feminist scholars have weighed in on the debate about women's inclusion in combat, often with differing views. At the one end, liberal feminists argue that equality dictates that women should have the same obligations to serve and defend as men.[72] They argue for full inclusion of women in the military – including an equal use of women in combat positions,

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[66] King, Anthony. "Women in Combat." *The RUSI Journal* 158, no. 1 (2013): 4–11. Mitchell, Brian. *Weak Link: The Feminization of the American Military*. Gateway, Regnery and Fenner, Lorry. *Women in Combat: Civic Duty or Military Liability?* Controversies in Public Policy. Georgetown University Press, 2001. "10 Reasons to Keep Women Out of the Infantry." *The Patriot Post*. Accessed January 16, 2014.

[67] Heinecken, Lindy. "Affirming Gender Equality: The Challenges Facing the South African Armed Forces." *Current Sociology* 50, no. 5 (2002): 715–728.

[68] Goldstein, Joshua. *War and Gender: How Gender Shapes the War System and Vice Versa*. Cambridge: Cambridge University Press, 2003.

[69] Kier, supra note 46.

[70] Cock, supra note 42.

[71] "Former Troops Say Time Has Come for Women in Combat Units." *CNN*. January 24, 2013.

[72] Stiehm, Hicks (ed). *It's Our Military Too: Women and the U.S Military*. Women in the Political Economy. Temple University Press, 1996.

equal conscription for women and equal treatment of female veterans. At the other end are those feminists who believe that women are inherently more peaceful and that a commitment to feminism should correlate with a commitment to peace.[73] Proponents claim that women have a tendency towards giving life rather than taking it, and that inherently feminine traits are not compatible with militarism. They believe that women should not strive to join the military, but rather, that equality should be achieved by freeing men from this.[74] Other feminists contest this claim, denying the inherent link between women and peace, arguing that women's tendencies towards peace and passivity are socially conditioned – and that mistaking this confuses sex and gender. An alternative feminist argument is that women should be included in the military as their feminine characteristics may affect the ways conflicts play out, thereby changing policy from within.[75] This later sentiment has underscored the Security Council's approach in its Women, Peace and Security Agenda[76], discussed below.

Liberal feminists downplay the inherent abilities of men and women. The argument has been made that the differing physical capabilities of men and women are due to socialisation, and that women can in fact carry as much as men – the important issue is training.[77] This approach is criticised by others who argue that in treating gender differences as entirely socially constructed and not seriously addressing them, feminist activists fail to provide military women with the tools they need to challenge those who raise the physical difference argument.[78] Downplaying the differences between men and women also downplays the ways that women can be of particular value to militaries. Critics also argue that feminist claims based on an individual's rights, which fail to consider organisational needs, are not effective for an entity like the military, which is at heart all about subsuming an individual's rights for the greater good.[79] Critics of feminist arguments point to the paradox in what feminists are claiming for military women. On the one hand feminists claim that female combatants can be equally fierce fighters, while at the same time they portray them as victims of sexual harassment, in need of special protection.[80] This critique in fact reveals the difficult duality inherent in female combatants' roles, a duality that will be returned to throughout this thesis.

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[73] Carter, April. Should Women Be Soldiers or Pacifists? in Lorentzen, Lois, and Turpin, Jennifer, eds. *The Women and War Reader*. New York University Press, 1998.
[74] Ibid.
[75] Heinecken, supra note 67.
[76] For example, United Nations Security Council, Security Council Resolution 1325 (2000) [on women and peace and security], 31 October 2000, S/RES/1325.
[77] This argument was made by Representative Patricia Schroeder, 1991, who pointed to famous female athletes as demonstration of the fact that trained females can carry as much and run as fast as some men.
[78] Miller, Laura. "Feminism and the Exclusion of Army Women from Combat." *Gender Issues* 16, no. 3 (1998): 33–64.
[79] Ibid.
[80] Ibid.

4.2 Feminist Critiques of International Humanitarian Law

There are many gendered problems evident in IHL. IHL aims to regulate the actions of those taking part in hostilities, in order to provide protection to those in conflict. However, feminist scholars in this area seek to show that IHL would be more successful in meeting its goals if it took better account of gender. The sections below will summarise the central feminist critiques of IHL.[81]

4.2.1 IHL's gendered origins

An examination of IHL's history reveals that the laws were based on certain assumptions about the respective roles of men and women in conflict. The early history of the law provides clues as to the law's gendered origins. One of the main voices that helped to shape the laws of war was Hugo Grotius. Writing in the 17th Century, Grotius noted that in war, "Children should always be spared; women, unless they have been guilty of an extremely serious offense; and old men."[82] Grotius reasoned that women should be spared as they do not have the capacity to devise war. In the same way that children do not deserve to be killed, as they have not yet attained the use of reason, the same holds true for women – unless women commit acts deserving of punishment, which would render them to be like men.[83] Many Enlightenment theorists, to whose writings the origins of modern international law can be traced, argued for the immunity of women based on their innocence or their inherent inability to wage war.[84] An entire chapter of Alberico Gentili's work was dedicated to the immunity of women and children from attack[85], while Francisco Suarez, writing in the early seventeenth century, noted that, "…it is implicit in natural law that the innocent include children, women and all unable to bear arms".[86]

While women have been viewed as 'innocents', men have been presumed to be the opposite. Throughout the years, men have been seen as presumptive combatants, regardless of whether they participated in armed movements or not.[87] As Vitoria, the Enlightenment theorist, noted, "Everyone able to bear arms should be considered

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[81] Key writings in this area include Kinsella, Helen. "Securing the Civilian: Sex and Gender in the Laws of War." Boston Consortium on Gender, Security and Human Rights, 2004. Gardam, Judith. "Gender and Non-Combatant Immunity." *Transnational Law & Contemporary Problems* 3 (1993): 345–370. Durham, O'Byrne, supra note 56,

[82] Grotius, supra note 14.

[83] Ibid.

[84] Carpenter, supra note 15.

[85] Gentili, Alberico. *De Jure Belli Libri Tres*. Book. 2, Chapter 21, 1612.

[86] Suarez, Francisco. Seleccion de Defensio Fidei y Otras Obras, Ediciones Desalma, Buenos Aires, 1966, p 332–5.

[87] Carpenter, supra note 15.

dangerous and must be assumed to be defending the enemy king: they may therefore be killed unless the opposite is clearly true."[88]

Centuries later with the drafting of the GCs and the APs, these ideas remained, albeit presented in more delicate ways. Ideas about strong men and weak women underlie the GCs and their Commentaries, becoming evident in numerous places. For example, Article 14, GC3, states that, "Women shall be treated with all the regard due to their sex…" The GC Commentaries list points that should be considered in determining what "regard due" to a woman's sex actually means. These include: "weakness" and "pregnancy and child-birth."[89] The inclusion of "weakness" provides insight into the types of consideration the drafters were entertaining when thinking about women.[90] The GCs and their Commentaries are filled with references to "honour" and "modesty", further pointing to a particular view of women on the part of the drafters – drafters who were often male military lawyers and diplomatic representatives.

With the drafting of the 1977 APs, the requirements for distinguishing combatants and civilians moved in the direction of being based on acts, rather than on the "role status" of the persons in question, allowing for some departure from these gendered ideas. However, the designations of acts retained a gendered quality, with the recognised acts being those typically performed by men. Past understandings informed understandings in the APs and have continued to inform legal developments that have occurred since then.[91]

4.2.2 Protective provisions for women of limited use

The IHL conventions set out protections for civilians in war. Female civilians are covered by the protections aimed at civilians generally.[92] The conventions also contain some provisions specifically aimed at women. Article 27, GC4 states that women are protected against attacks on their honour, including rape, forced prostitution and indecent assault. Article 76, AP1 holds that women should be the objects of special respect and should be protected from rape, forced prostitution and other forms of indecent assault. Article 76, GC4 notes that female civilian internees, or women accused of offences, must be kept in separate quarters to men and placed under the immediate supervision of women, while Art 97, GC4 holds that female internees may only be searched by women. Similar provisions

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[88] Quoted in Carpenter, supra note 15, at 672.
[89] Commentary to Article 14, Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, p.143, paragraph 2, 'The Special Position of Women'.
[90] Bennoune, Karima. "'Do We Need New International Law to Protect Women in Armed Conflict?'" *Case Western Reserve Journal of International Law* 38 (2006): 363–391.
[91] Kinsella, supra note 81.
[92] Article 3(1) of GC4.

apply in NIACs. The conventions also contain specific protections for women in specific roles, like women who are pregnant or nursing small children. Article 16, GC4 states that, "The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect." Article 23, GC4 instructs parties to permit the free passage of consignments of essential foods, clothes and tonics intended for children, expectant mothers and maternity cases, and states that in the distribution of relief consignments, priority should be given to expectant mothers, maternity cases and nursing mothers, as well as to children.

Unfortunately, the rules of IHL aimed at protecting civilians tend to be fairly ineffective. The conventions protect civilians from some intentional actions of warring parties, yet they fail to protect them from the dangers of military operations.[93] Proportionality and necessity still allow much scope for the unintentional harming of civilians, discussed later in this chapter. Another problem is that the rules for protecting civilians generally tend to take *male* civilians as their starting point, largely assuming that *all* civilians are the same as men, having the same risks and experiences.[94]

In contrast to the limited protections for civilians in GC4, the other three GCs address different aspects of the protection of combatants. Here too women are included in the general provisions aimed at all combatants. There are also a number of provisions specifically aimed at female combatants. Most of the provisions for female combatants relate to female POWs. Female POWs should be accommodated in separate dormitories (Art 25, GC3), under the supervision of women, and separate sanitary conveniences should be provided for women (Art 29, GC3). In NIACs too, women deprived of their liberty must be held in separate quarters, under female supervision, except where families are held together (Art 5, AP2). GC1 and GC2, which deal with wounded and sick in the armed forces at sea and in the field respectively, both state that, "Women shall be treated with all consideration due to their sex."[95] The problem is, as this thesis argues, the restrictive definitions of combatancy prevent many women from qualifying as such, meaning they would not be eligible for these protections – one reason that the law's restrictive definitions prejudice women.

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[93] Gardam, supra note 81.
[94] Gardam, supra note 16.
[95] Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949, Article 12, and Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, Article 12.

There are, therefore, several protections in the conventions specifically aimed at women. However, for the most part, these protections are reserved for women in particular roles: women who are pregnant, rearing children or serving as combatants. However, the lives of women go beyond these roles. As many women affected by conflict do not occupy these positions, most protections will not apply to them. The fact that women are protected *while* they are pregnant, mothering or held as POWs, is not sufficient to conclude that women generally are adequately protected by the law.[96] It is in its general protections that the law fails to provide adequate protection for women.

4.2.3 Formal equality in inherently unequal situations

On the face of it IHL is gender-neutral, based on a model of formal equality. Throughout the treaties there are reiterations of the fact that the law should be applied without discrimination based on sex, and that "no adverse distinction" should be founded on one of a number of categories, including sex.[97] Only "adverse" distinction is prohibited – differentiation of women is permissible, so long as this is deemed favourable or operates to provide them with specific protection. The limited protective provisions pertaining to women, described above, fall into this category.[98]

Feminist scholars have raised concerns about whether a formally equal system of law can achieve substantively equal results, given existing inequalities and given the vastly different ways in which conflict affects men and women.[99] Conflict exacerbates existing gender disparities and gender discrimination. The Beijing Platform for Action confirms that, "women and girls are particularly affected [by violence in armed conflict] because of their status in society and their sex."[100] Violence against women in conflict should not be understood as something unique – rather, it is the magnification of harmful practices towards women in peacetime. Existing patriarchal ideas and violent practices against women are allowed to flourish in conflict, uncapped and exacerbated by the violent environment.[101] The heightened risks that women face as a result creates the need for targeted protections for women – quite the opposite of what largely gender-neutral law

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[96] Gardam, supra note 16.
[97] For example, Articles 12 of GC1 and 2, Art 16 of GC3, Art 27 of GC4, Art 75 of AP1 and Art of AP2 provide for treatment without any adverse distinction founded on sex.
[98] Oosterveld, Valerie. "Feminist Debates on Civilian Women and International Humanitarian Law." *Windsor Yearbook of Access to Justice* 27 (2009): 385–402.
[99] Gardam, Judith, and Charlesworth, Hilary. "Protection of Women in Armed Conflict." *Human Rights Quarterly* 9, no. 1991 (2000): 148–66.
[100] Article 135 Beijing Platform for Action, The United Nations Fourth World Conference on Women, 1995.
[101] Bennoune, supra note 90.

provides. Formally equal laws ignore the particular vulnerabilities of women in conflict[102], making no reference to the impact of gender discrimination in worsening acts against women in war – and therefore providing no relief for this.[103]

Of course, there are also dangers in creating too many gender specific laws. Gender specific laws run the risks of essentialising and over-emphasising the differences between men and women in ways that are unconstructive – in doing so perpetuating harmful stereotypes. It was in an effort to cater for women's differences that the current women-related provisions of IHL were created, provisions that are themselves subject to criticism – in part because of their heavy concern with biology.[104] A balance is therefore required between having adequate recognition of women's difference and not over-emphasising difference in harmful ways. Both opposing concepts, "gender specificity" and "gender neutrality", are problematic in their own ways. Gender neutrality is based on a fiction – the idea that both genders have similar experiences that a uniform law can effectively address. On the other hand, gender specificity caters to particular types of women, believing that all women fit into these categories. Both approaches to law are therefore based on false premises.

Tension exists among feminist legal scholars around equality, sameness and difference – and about the correct approach to adopt to these.[105] Liberal feminism calls for equality based on similarity of treatment. Others argue that this is not radical enough to address existing inequalities. This thesis will consider these positions in the context of the principle of distinction – currently an example of gender-neutral drafting. If the ways that women participate in conflict are different, should gender-specific combatancy or direct participation requirements be created for women? Or rather, should existing requirements be broadened in a gender-neutral way to further incorporate the types of roles played by women? Even the latter would be an improvement on the existing position of merely disregarding women and taking men's typical modes of participation as being those that apply to everyone.

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[102] Coomaraswamy, Radhika. *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*. United Nations, Commission on Human Rights, fifty-fourth Session, 1998.
[103] Bennoune, supra note 90.
[104] Barrow, Amy. "UN Security Council Resolutions 1325 and 1820: Constructing Gender in Armed Conflict and International Humanitarian Law." *International Review of the Red Cross* 92, no. 877 (2010): 221–234.
[105] See for example Lacey, supra note 1.

4.2.4 IHL's focus on women as victims or mothers – the dangers of perpetuating stereotypes

IHL paints women in two ways: as victims, or in terms of their relationships with others.[106] Throughout the law one can detect a reductionist approach to gender; gender is reduced to women, woman are reduced to victims, and female victimisation is reduced to sexual violence[107] – reductions that conceal the different aspects of women's (and men's) experiences of conflict.

IHL sustains the notion of women as victims in a number of ways. Provisions pertaining to women frequently relate to special protections for women. Provisions addressing sexual violence focus on the *protection* of women rather than on the *prohibition* of sexual violence.[108] The failure of IHL to acknowledge that men also experience sexual violence further sustains the female victim/male perpetrator paradigm.[109] The language on sexual violence is framed in terms of women's honour, modesty and chastity. Article 27, GC4 states that, "women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault." The reference to honour, rather than to the physical and psychological harms of sexual violence is problematic.[110] It implies that women who have been sexually violated are dishonoured – a view already prevalent in many parts of the world, with significant negative repercussions for women, and a view that IHL should not be perpetuating. The inclusion of such provisions lets those who drafted the conventions determine what constructs a women's honour and what deems it removed. Being raped becomes a double assault – first, on a women's body, and second, on her honour, in part as a result of IHL deeming this to be the effect of sexual violence. As IHL deals with protection it has much cause to address women through a victim lens. But doing so, however well intentioned, can have the consequence of entrenching perceptions and stereotypes about women as victims.

IHL frequently relates to women in terms of their relationships with others, rather than in their own right. Out of the 42 IHL provisions that deal specifically with women, more than half deal with women *as* child-bearers or *as* mothers – and merely protect women because they are playing these roles.[111] Even the protections against sexual violence seem geared at women *as* men's 'property'. By talking about rape in terms of honour rather than violence,

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[106] Bennoune, supra note 90
[107] Sellers, Patricia Viseur. "Gender Strategy Is Not a Luxury for International Courts." *American University Journal of Gender, Social Policy & The Law* 17, no. 2 (2009): 301–23.
[108] Oosterveld, supra note 98.
[109] Barrow, supra note 104.
[110] Oosterveld, supra note 98.
[111] Durham, O'Byrne, supra note 56.

this frames women as 'belongings' of their husbands or families. When women are raped, the men to whom they belong are seen as victims of this harm – their wife/family member's honour – the source of their value – has been infringed.[112] This feeds into the idea behind rape as a weapon of war – a weapon that is used by men against men through the bodies of their women.

While IHL was shaped by gendered norms existing in society – both identified and implicit – the law in turn has influenced the gendered conditions on the ground.[113] These gendered conditions then go on to affect later developments of the law. Recently, this has been evident in the development of international criminal law, where shifts in gendered attitudes have worked their way into the jurisprudence, thereby shaping the law. Kinsella describes the mutually reinforcing role of law in shaping society and society in shaping law. She complains that, "The scholarship that does engage in an analysis of gender and the laws of war focuses primarily on the *protection* of women within the law rather then *the production* of women in the law and, importantly, the production of the laws of war themselves."[114]

With its male-oriented understandings of combatancy and direct participation, the principle of distinction plays a role in perpetuating stereotypes about men and women in conflict. Laws that paint men and women in certain ways entrench expectations of how women *should* be and *should* act. Those who stray from these expectations are stigmatised. In these ways the law's framing becomes harmful to women.

4.2.5 A gendered hierarchy implicit in the law

IHL entrenches hierarchies and systems of power: combatants over civilians, public over private, military interests over other concerns. Implicit in these hierarchies is a privileging of male concerns.

IHL elevates the interests of men in a number of ways. The IHL rules pertaining to women are portrayed as being less important than other rules.[115] This can be inferred in a number of ways. Rules dealing with women tend to be drafted in a different type of language to other provisions – as mentioned above, provisions are framed in terms of the *protection* of women rather than as express *prohibitions* on offences against them.[116] None of the

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112 Charlesworth, Chinkin, supra note 6.
113 Kinsella, supra note 81, and Nguyen, Athena, The Influence of Gender Stereotyping on International Humanitarian Law, 2010, available at http://works.bepress.com/athena_nguyen/1.
114 Kinsella, supra note 81, at 2.
115 Gardam, supra note 16. Oosterveld, supra note 98.
116 Oosterveld, supra note 98.

violations against women, known as "gender crimes", are designated as "grave breaches" by the conventions,[117] suggesting that gender crimes were not treated as seriously.[118] In an attempt to address this, the international criminal tribunals have read rape and other violations against women into the grave breaches.[119] However the need for this additional step of judicial interpretation demonstrates that crimes against women were not originally considered and prioritised. Recently, the "G8 Declaration 2013" contained an acknowledgement by G8 members that rape in armed conflict is a grave breach of the GCs.[120]

The gendered hierarchy is clearly evident in the principle of distinction. The principle rests on a distinction that is intrinsically gendered. Combatants represent the masculine – the male warriors who defend society, while civilians represent the feminine – those who must be protected.[121] Implicit in this is a privileging of the male, manifested through the privileging of combatants. The masculine nature of "combatancy" is retained by having a law narrowly defined around the types of roles typically played by men in conflict. One can detect a ranking of the value of lives in the structure of the law: the men of one's own side take priority, followed by the women of one's own side. Next are the men of the enemy, and the enemy's women are seen as least important. Despite being less valuable, women are used to further men's goals. Women's images are manipulated to encourage men to fight. Women at home are portrayed as vulnerable and in need of protection.[122] Alison explains that, "'Our women' are chaste, honourable, and to be protected by 'our men'; 'their women' are unchaste and depraved. Wartime propaganda presents the (male) enemy as those who would rape and murder 'our' women and the war effort is directed at saving 'our' women."[123]

A privileging of the male can also be seen in the public/private divide. As with other areas of law, IHL focuses on the public, with its extensive regulation of combatants and the military. By precluding women from "combatancy" with restrictive definitions, women are removed from the reach of the law. Even when regulating the public space, the law stops

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117 Grave breaches are those rules in the Conventions that confer jurisdiction on all state parties to prosecute their violations, and which create a duty for states to seek out perpetrators and to enact legislation designed to prevent these breaches occurring. These are found in GC1, Art 50; GC2, Art 51; GC3, Art 130; GC4, Art 147; GC3, Art 130; and GC4, Art 147.

118 Gardam, supra note 13.

119 Goldstone, Richard, and Dehon, Estelle. "Engendering Accountability: Gender Crimes Under International Criminal Law." *New England Journal of Public Policy* 19, no. 1 (2003): 121–145.

120 Declaration on Preventing Sexual Violence in Conflict, G8, April 11 2013.

121 Gardam, supra note 81.

122 Charlesworth, Chinkin, supra note 6.

123 Alison, Miranda. "Wartime Sexual Violence: Women's Human Rights and Questions of Masculinity." *Review of International Studies* 33, no. 1 (2007): 75–90, at 80.

short of regulating women's experiences in these. Within militaries, women tend to be utilised in domestic support roles – roles viewed as private and hence unregulated by law. Sexual violence was, until recently, largely shielded by the law's "public" focus – ignoring the fact that the primary cause of these "private" harms was in fact the "public" conflict.

4.2.6 The gendered nature of civilian immunity

The choice of who can and cannot be targeted is laden with value judgements, bringing together considerations of law, military strategy, command hierarchy and public opinion.[124] Determinations of which attacks are permitted or prohibited by the law reflect the values underlying the law and reveal the concerns of those who created and those who maintain the system. There are numerous layers of privileging embedded in targeting rules. These include a privileging of state concerns over non-state ones, a privileging of Western interests over non-Western (including African) concerns, a privileging of military needs over humanitarian ones, and a privileging of male interests over female ones.

Civilian immunity is the central norm underlying the principle of distinction. It holds that civilians should be legally immune from attack. Notions of guilt and innocence underlie the norm. Those who are "innocent" are seen as deserving protection, while those who are "guilty" deserve to be targeted. Theorists have offered competing ideas about how the lines between guilt and innocence should be drawn. One model is act-based, with guilt earned by those who actually *act* guilty.[125] Some classify *fighting* in a war as the only guilty act, while others consider work in war-supporting industries as also constituting guilty acts deserving of targeting. A different model is to interpret innocence as harmlessness and guilt as dangerousness, so those who pose a threat are seen as deserving of attack.[126] No matter which of these models one leans towards, in practice all the calculations of guilt versus innocence lead to the same gendered results: men are guilty; women are innocent and deserving of protection.[127]

The civilian immunity norm is not inherently gendered – rather it has been configured in a gendered way. Carpenter provides an illustrative example of this, using the norm of "dressing appropriately". While gender biases might inform what constitutes appropriate dress, appropriate dressing is not intrinsically dependent on gender. Similarly, he argues, civilian immunity is not a "gender norm" – it is not intrinsically dependent on gender – but

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124 Kinsella, supra note 81.
125 Hartigan, Richard. *The Forgotten Victim: A History of the Civilian*. Chicago: Precedent Publishing Inc, 1982.
126 Teichman, Jenny. *Pacifism and the Just War: A Study in Applied Philosophy*. Oxford: Basil Blackwell, 1986.
127 Sjoberg, Laura. *The Paradox of Double Effect: How Feminism Can Save the Immunity Principle*. Boston Consortium on Gender, Security and Human Rights, 2006.

rather, it is "gendered", in that in practice women are more likely to be associated with civilian status than men. While the norm itself is gender-neutral, with *all* civilians held to be protected, in practice gender biases give shape to the norm.[128]

A range of actors operate together to entrench the gendered 'shape' of civilian immunity. Military actors in the field make assumptions based on gender, including assumptions that men they see are fighters and women civilians – assumptions that have led to sex-selective killings of men in many contexts. At the level of rhetoric, state actors frequently refer to gender when condemning the killing of civilians or when offering justification for collateral damage.[129] For example, before killing the men at Srebrenica, General Ratko Mladic publically announced that the Army of Republika Srpska had freed women, children and the elderly, thereby demonstrating compliance with civilian immunity. Humanitarian evacuations of women and children further entrench this gendered norm. Perversely, evacuations of women and children legitimise the killing of men by creating the impression that those who remain – the men – must be fighters, or potential fighters, or those more worthy of targeting.[130] Evacuating women and children also removes those whose murders would attract the most negative attention by the international community, further enabling the killing of men. Humanitarian agencies play a role in this too, by using gendered discourse when encouraging the protection of civilians.[131] Attacks against civilians are criticised with reference to the fact that women and children are harmed. Their "calls to action" often incorporate warnings about "innocent women and children" being at risk. Even Security Council Resolutions frequently condemn violence against civilians, "especially women and children", and call for the evacuation of women as a first priority.[132]

4.2.7 Proportionality and military necessity

Some of the protection conferred by the principle of distinction is lost as a result of the other core principles, proportionality and necessity. The term "proportionality" is not used in the Hague or Geneva Conventions; rather it is derived from the IHL articles prohibiting indiscriminate attacks. Article 51(5)(b), AP1 includes in those acts considered indiscriminate, attacks, "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."

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128 Carpenter, supra note 15.
129 Ibid.
130 Carpenter, Charli. *Innocent Women And Children: Gender, Norms And the Protection of Civilians*. Gender in a Global/Local World. Ashgate Publishing Co, 2006.
131 Ibid.
132 Carpender, supra note 15.

Proportionality also derives from Article 57(2), AP1, which deals with precautions in attack, and Article 85(3), AP1, which deems violations of proportionality to be grave breaches. Proportionality can be framed in two ways: as a principle that limits harm to civilians, or, conversely, as a principle that allows for certain numbers of civilians to be targeted. One can use proportionality to argue that an attack is unlawful as a disproportionate number of civilians would be killed by it. Conversely, one can justify the deaths of civilians by arguing that the losses were proportionate to the military advantage gained, thereby rendered lawful by the principle of proportionality. Depending on how it is used, the principle can have protective results or it can diminish the protections conferred by the principle of distinction. Civilian women protected by the principle of distinction might be unintended casualties of attacks on lawful targets, condoned by the proportionality principle.

Proportionality requires a balancing of comparative effects: the anticipated collateral injury to civilians and the anticipated military advantage. One should note that it is *anticipated* advantages and *anticipated* losses that are considered, not the *actual* effects of a strike. What counts is what was foreseen and anticipated at the time an attack was launched. Actual losses may help to infer what actors anticipated before the fact.[133] The clear problem with proportionality is its application. These are notoriously difficult calculations to make as one is balancing unlike things and comparing anticipated events. What is the relative value one gives to each civilian death versus a particular military target? How do you quantify each? Who gets to decide? Is it subjective or objective?

The ways in which these judgements are made are gendered. There is no agreed standard for making these calculations and so these decisions largely fall to the discretion of the actors involved.[134] Decisions tend to be made by military men, reflecting their positioning of interests.[135] Saving the lives of their soldiers is regarded as worth losing civilians for, with military leaders considering lower-risk, higher-casualty methods as legally acceptable. This is justified by the reasoning that these male combatant's lives are more valuable as they are working to protect society – or to protect women. Military priorities, made by men and reflecting male concerns, are seldom questioned when making these proportionality assessments – these are taken as givens.

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133 Estreicher, Samuel. "Privileging Asymmetric Warfare (Part II)? The 'Proportionality' Principle under International Humanitarian Law." *Chicago Journal of International Law* 12, no. 1 (2011): 143–157.
134 Fenrick, William. "Applying IHL Targeting Rules to Practical Situations: Proportionality and Military Objectives." *Windsor Yearbook of Access to Justice* 27 (2009): 271–283.
135 Gardam, supra note 16.

Proportionality calculations count numbers of casualties – or civilians dead. More men, including male civilians, are killed in conflict. Women tend to be targeted in other ways, like through the use of sexual violence. Women might be disproportionately affected by actions other than direct targeting strikes, like those that destroy infrastructure or that lead to population displacement. However, the harms that disproportionately affect women are not factored into proportionality assessments. An attack that is devastating for women – like one that destroys access to healthcare or food supplies[136] – might be considered proportionate, as it does not have a high body count. It is therefore the harms that most strongly affect men that form the basis for determining whether actions have disproportionate effects, discussed further in chapter 7.

Military necessity is the other core principle of IHL. When creating the IHL system, states were concerned with protecting their interests in winning conflicts. They wanted to ensure the IHL conventions would not unduly restrict their actions on the battlefield in ways that would prejudice their national interests. The necessity principle was created to safeguard this interest.[137] While military necessity is seldom referred to in the conventions, it pervades IHL by underlying other rules, with military necessity prioritised, safeguarded and promoted in numerous provisions. Military necessity is a ground of justification for attacks on targets with high civilian costs. "Direct participation" is in fact a military necessity restriction on the principle of distinction – the ability to target civilians who directly participate in hostilities cuts into the blanket protection conferred on all civilians in the name of military necessity.

As with proportionality, military necessity can operate in opposing directions. Depending on how it is framed, it can be used to elevate military interests or to promote humanitarian concerns. Framed in the converse, the principle puts constraints on the military, with rules prohibiting attacks that are not militarily necessary[138] – such as the rule that any attack must be aimed at contributing to the military defeat of an enemy, and that an attack must be directed against a military objective. Military necessity is difficult to measure; its modes of determination are uncertain and subjective. Although necessity is a factor to consider in determining the lawfulness of an attack, this requirement in some ways begs the very question it poses, thereby leaving further discretion to the military actors making these decisions. Military necessity is a binary of humanitarianism, with the IHL system

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136 Sjoberg, supra note 127.
137 Schmitt, Michael. "Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance." *Virginia Journal of International Law* 50 (2010): 795–839.
138 Ibid.

supposedly designed to create a balance between these positions.[139] The former, which reflects male concerns, tends to be privileged. Rules and actions aimed at humanitarian protection are only tolerated in so far as they do not hinder states' ability to win in war.[140]

4.3 Feminist challenges to the legal situation

The preceding sections have pointed to the gendered problems apparent in IHL. While there have been no notable moves to amend IHL to tackle these problems, in recent years legal developments in other areas of law have addressed some of the gendered problems pertaining to law and armed conflict. The sections below will describe developments in international criminal law as well as the Security Council's "Women, Peace and Security Agenda".

International Criminal Law

International criminal law (ICL) is the body of law used to prosecute violations of IHL. This law has been applied by the ICC and ad hoc tribunals like the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL).

Inclusion of "gender justice" was of the most vehemently resisted aspects of ICL.[141] Some of the earlier cases before the ad hoc criminal tribunals refused to hear testimony on or consider sexual violence [142] For example, the Trial Chamber in the SCSL's *Civil Defence Forces* case determined in the pre-trial phase that counts of sexual violence should not be included in the indictment,[143] with the Trial Chamber later confirming that sexual violence was inadmissible.[144] Women who took to the stands were prohibited from describing the rapes that took place against them – being asked instead to restrict themselves to describing surrounding events.[145] In time this began to change, with "gender crimes" being included in various indictments and judgements, and a body of jurisprudence developing around gender and sexual violence. In the ICTR's *Akeyesu* case, rape was characterised as

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139 Adedeji, Lanre. "Maintaining the Balance Between Military Necessity and Humanity." *The Lawyers Chronicle*, n.d. http://thelawyerschronicle.com/maintaining-the-balance-between-military-necessity-and-humanity/

140 Gardam, supra note 81.

141 Copelon, Rhonda. "Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law." *McGill Law Journal* 46 (2001): 217–40.

142 Kelsall, Michelle Staggs, and Stepakoff, Shanee. "'When We Wanted to Talk About Rape': Silencing Sexual Violence at the Special Court for Sierra Leone." *The International Journal of Transitional Justice* 1 (2007): 355–74. Kendall, Sara, and Staggs, Michelle. *Silencing Sexual Violence: Recent Developments in the CDF Case at the Special Court for Sierra Leone.* UC Berkeley War Crimes Studies Center, 2005.

143 *Decision of Prosecution Request for Leave to Amend Indictment*, SCSL 20 May 2004.

144 *Decision on the Prosecution's Motion for a Ruling on the Admissibility of Evidence*, SCSL, 24 May 2005.

145 Kelsall, Stepakoff, supra note 142.

an instrument of genocide.[146] In the ICTY's *Celebici* case, sexual violence was recognised as torture. *Celebici* also looked at sexual violence against male detainees.[147] In time the tribunals gave content to various gender-related crimes and expanded the definitions of other (non-gender) crimes to incorporate violations against women.

Some states vigorously opposed the inclusion of "gender crimes"[148] in the ICC's Rome Statute. Amongst these were states with strong religious lobbies, which considered their inclusion a threat to religious beliefs. As an example, the crime of "forced pregnancy" was opposed by those who linked this to legalised abortion.[149] However, despite resistance, as a result of intense lobbying by women's groups (led by the Women's Caucus for Gender Justice), and in response to increased awareness about the crimes against women in Rwanda and Bosnia,[150] gender crimes were included in the Rome Statute. Article 7 includes as crimes against humanity: rape, sexual slavery, enforced sterilisation and other forms of sexual violence of comparable gravity. It also includes these as war crimes in IACs (Article 8(2)(b)(xxii)) and NIACs (Article 8(2)(c)(vi)).

Despite movement in the right direction, ICL's progress on gender has been limited. Beyond examining gender crimes, the tribunals have not conducted any serious level of gender analysis. Feminist efforts have not resulted in structural changes to ICL – rather, just adding women in at certain places. While gendered aspects have been read into crimes, Bennoune notes that, "…creatively patching together interpretations of texts to find space for women's experiences of war may not ultimately be enough."[151] The tribunals' work on gender therefore remains in its early stages, with a way to go before ICL can be said to be inclusive and responsive of women's concerns.

It may be argued that understandings about gender in ICL – imperfect as they are – will trickle down into the interpretation of IHL, helping to integrate gendered notions into this body of law, thereby remedying IHL's gendered problems. However, the potential of ICL to "fix" IHL should not be overstated. Such a process of legal influence is fraught with

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146 *The Prosecutor versus Jean-Paul Akayesu*, Case No. ICTR-96-4-T, 1998, paras 732–734.
147 *The Prosecutor v Delalic, Mucic, Delic and Landzo (Celebici)*, Trial Chamber Judgement, 16 November 1998, Case No. IT-96-21-T. paras 494–496.
148 The ICC's 2014 Policy Paper on Sexual and Gender-Based Crimes defines gender-based crimes as, "…those committed against persons, whether male or female, because of their sex and/or socially constructed gender roles. Gender-based crimes are not always manifested as a form of sexual violence. They may include non-sexual attacks on women and girls, and men and boys, because of their gender."
149 Hall Martinez, Katherine. "Ending Impunity for Gender Crimes under the International Criminal Court." *The Brown Journal of World Affairs* VI, no. 1 (1999): 65–85.
150 Sadat, Leila. "Avoiding the Creation of a Gender Ghetto in International Criminal Law." *International Criminal Law Review* 11 (2011): 655–662.
151 Bennoune, supra note 90, at 387.

difficulty, and is always influenced by differing agendas – some facilitative and others not. ICL deals only with specific aspects of IHL – those relating to punishable crimes. The nuts and bolts of IHL are not addressed by ICL's narrow focus, meaning that ICL's interpretations cannot "fix" problems in those areas. While ICL deals with war crime prosecutions *after* the fact, IHL is important *during* the engagement of conflict. IHL serves an important role in regulating military behaviour on the battlefield, and is used in the creation of national militaries' rules of engagement and the creation of military manuals. Ex post facto prosecutions do not assist with the shortcomings of IHL as a regulatory mechanism.[152]

Most women do not have the offences committed against them in war heard at international tribunals. At best these might be tried in domestic courts, which use domestic law and are unlikely to incorporate ICL's complex jurisprudence into decision-making. Rules of the Rome Statute only become part of domestic law if they have been specifically incorporated by domestic legislation – and the ad hoc tribunal's laws are only binding in the specific countries the tribunals address. Domestic courts are more likely to consider IHL than ICL, given that IHL often forms the bases of national rules of engagement. There are many countries where ICL lacks legitimacy. Far fewer countries have ratified the Rome Statute than the GCs.[153] The ICC's perceived biases have eroded the legitimacy of the court in Africa – African countries oppose its almost exclusive focus on African conflicts and its apparent reluctance to prosecute crimes committed in other parts of the world.[154] The ICC's decision to indict sitting leaders, including Sudan's Bashir and Kenya's Uhuru Kenyatta, have led to unified condemnation and resistance by African leaders and the African Union.

It is therefore clear that IHL retains importance in itself and cannot rely on ICL to take care of its inadequate inclusion of gender. This confirms the need for a body of IHL that is functional in itself and is not reliant on other laws to create 'patches' through interpretation. It is implausible to argue that because the tribunals are dealing with gender, there is no need for IHL to improve itself in this regard. If anything, the fact that the tribunals have had to do so much work reading in gender concerns, reveals the extent to which IHL has failed to address these issues sufficiently and the problems caused by this.

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[152] Ibid.

[153] As of April 2012, 121 states have ratified or acceded to the Rome statute, as opposed to 194 countries that have ratified the Geneva Conventions.

[154] The ICC's focus on Africa has been criticised as contributing to interventionist, imperialist assumptions. See for example, Jalloh, Charles. "Regionalizing International Criminal Law." *International Criminal Law Review* 9 (2009): 445–499.

Women, Peace and Security

A series of Security Council (SC) Resolutions form what is known as the Women, Peace and Security Agenda. In October 2000, the SC unanimously passed SC Resolution 1325, the result of years of lobbying by women's organisations.[155] It was the first time the SC had directly addressed the distinct impact of armed conflict on women, giving official recognition to the diverse experiences and roles of women in war.[156] There have been seven related Resolutions since: SC Resolutions 1820 (2008), 1888 and 1889 (2009), 1960 (2010), 2106 and 2122 (2013) and 2242 (2015). In adopting these Resolutions, directed towards all UN member states, the SC has established a normative framework to guide its approach to women in conflict. This provides direction to individual member states, aimed at guiding their actions on women, peace and security.[157] The Resolutions have given political recognition to the fact that gender is relevant to peace and security – a paradigm shift in the way the international community approaches security from a gender perspective.[158]

The Resolutions recognise women as agents: agents of peace and agents for the protection of people's rights. They also recognise women as agents of war – female combatants are mentioned by reference to DDR for women.[159] The Resolutions emphasise the importance of including women in peacekeeping operations, in civil, military and police functions, encouraging states to provide more female personnel to operations – another endorsement of women in military roles. This marks a move away from the pervasive notion of woman as victims, which has dominated international discourse. Disappointingly, despite the recognition of women in alternative roles, the Resolutions repeatedly revert to the assumption that women are peaceful, with numerous references to women taking part in peace-making initiatives – problematic, given the part that this can play in entrenching stereotypes.[160]

While improved attitudes and discourse on women at the international political level is important, and may in time lead to the political leverage required to improve IHL from a

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155 For a history of the adoption of SC Res 1325, Cohn, Carol, Kinsella, Helen, and Gibbings, Sheri. "Women, Peace and Security Resolution 1325." *International Feminist Journal of Politics* 6, no. 1 (2004).

156 Pratt, Nicola, and Richter-Devroe, Sophie. "Critically Examining UNSCR 1325 on Women, Peace and Security." *International Feminist Journal of Politics* 13, no. 4 (2011): 489–503.

157 The Global Network of Women Peacebuilders, In-country and Global Monitoring of UNSC Resolution 1325, *Women Count – Security Council Resolution 1325: Civil Society Monitoring Report,* 2012.

158 Ibid.

159 Article 13 reads, "Encourages all those involved in the planning for disarmament, demobilization and reintegration to consider the different needs of female and male ex-combatants and to take into account the needs of their dependants", S/RES/1325 (2000).

160 Heathcote, Gina. "Feminist Politics and the Use of Force: Theorising Feminist Action and Security Council Resolution 1325." *Socio-Legal Review* 7 (2011): 23–43. Otto, Dianne. "A Sign of Weakness - Disrupting Gender Certainties in the Implementation of Security Council Resolution 1325." *Michigan Journal of Gender & Law* 13 (2007): 113–175.

gender perspective, the Resolutions themselves do not actually rectify the gendered problems in IHL. They are more helpful in post-conflict reconstruction than they are during conflict, as beyond barring specific acts of sexual violence, they do little to regulate warring parties' actions in hostilities. Article 9, SC Res 1325, "Calls upon all parties to armed conflict to respect fully international law applicable to the rights and protection of women and girls, especially as civilians, in particular the obligations applicable to them under the Geneva Conventions of 1949 and the Additional Protocols thereto of 1977…"[161] However, given the gendered problems inherent in IHL, will simply mandating the full implementation of this law help? What version of IHL is the Resolution promoting and mandating? Is it the existing gender-insensitive version, or a more gender-evolved version? If it is the latter it hopes to promote, then steps will need to be taken to address the gendered problems within IHL – and the failure to think about these problems in turn becomes a failing with 1325 and the Women, Peace and Security Agenda.

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Although IHL and the principle of distinction are gender-neutral, they were based on a particular gendered view of conflict that envisaged men and women playing particular roles. The problem is that this underlying vision of conflict does not accord with the reality on the ground, in which the effects of conflict, while clearly gendered, are not necessarily gendered in the same ways envisaged by the drafters. The result is gender-neutral law, with particular gendered origins, applied to a quite differently gendered situation on the ground. Later chapters of this thesis examine the consequences of this discord. The chapter that follows discusses the distinction between IACs and NIACs, another area where the law's vision comes into conflict with the factual situation in new wars.

[161] S/RES/1325 (2000)

5 The Divide Between IACs and NIACs – A Precursory Step for the Principle of Distinction

"As a new wave of violent conflicts has ravaged Africa, borders and conventional peace processes have done little to contain them. A cold war between Ethiopia and Eritrea has spilled over into Somalia, where Eritrea has supported the jihadist group al Shabaab in its fight against the Ethiopian-backed government in Mogadishu. Meanwhile, the group has helped fuel the illegal ivory trade and launched terrorist attacks in neighboring Kenya, one of which killed 67 people in a Nairobi mall last fall. Sudan and South Sudan have supported insurgencies in each other's backyards, and Sudanese Janjaweed militias have fought in eastern Chad and the Central African Republic (CAR). The Lord's Resistance Army, a Ugandan rebel group led by Joseph Kony, has sought refuge and wreaked havoc in the Democratic Republic of Congo, CAR, and South Sudan. And civil war in Congo has been the deadliest of them all, long subject to cross-border destabilization from Rwanda and Uganda." John Prendergast, 2014.[1]

It is no longer the norm that conflicts are either IAC or NIAC in character. A defining feature of new wars is the merging of international and internal features. The distinction between IACs and NIACs, one of the central axioms on which IHL is premised, has been greatly challenged, as a series of complex conflicts have been fought, overflowing across state borders and spanning vast and disparate geographic territories. In many of today's IACs, concurrent internal struggles take place within warring countries. NIACs exhibit unparalleled levels of international involvement: from foreign intervention to rebel groups coming from or sheltering in neighbouring countries, to the presence of international peacekeepers, humanitarian aid and foreign trade. Africa's porous borders allow for the passing of troops and civilians, including large numbers of women who cross conflict-riddled borders for refuge, subsistence or community.

Despite the fact that so many recent conflicts do not fit neatly into law's categories of IAC and NIAC, this divide remains a central axiom of IHL, and the legal consequences of being labelled IAC or NIAC are significant. Most crucially this divide indicates the legal framework applicable to a conflict, hence determining the status, rights and obligations of parties, as well as the rules to be used post-conflict to prosecute wartime violations. The rules of distinction differ significantly in IACs and NIACs. While those fighting in IACs can be classified "combatant", granted combatant immunity and protected by POW status, the principle is more limited in NIACs, where fighters have no right to fight, no privileges

[1] Prendergast, John. "The New Face of African Conflict, In Search of a Way Forward." Foreign Affairs, March 12, 2014.

and no protected status. They also have none of the adjoining incentive for compliance with IHL. So one of the key factors affecting the legal status of participants to a conflict is the way the conflict they are fighting in is classified. However, with complex facts on the ground, a prevalence of covert operations and significant political interests at stake, there are often disagreements over appropriate classifications. These disagreements are evident in judicial processes and analyses following conflicts – and are heightened all the more during hostilities, when facts and intentions are concealed by politics, chaos and the 'fog of war'.

It is not just factually that the line between IACs and NIACs is blurring. In recent years, the bodies of law regulating these have also begun to merge to some extent. Developments in ICL and international human rights law (IHRL) have had the effect of shrinking the substantive differences between the laws pertaining to IACs and NIACs. Customary international law (CIL) has also developed to the point that it applies more similarly in IACs and NIACs. The evident merging of the international and non-international, both in fact and in law, the numerous problems arising from this legal divide and the inadequacy of the laws pertaining to NIACs, have led to questions about the remaining value of this divide and to call for a unified body of IHL applicable to all armed conflicts.

This chapter discusses the divide between IACs and NIACs, a crucial precursory step to the application of the principle of distinction. The chapter explains how this classification should be made in terms of the law, illustrating the problems inherent in trying to do so and demonstrating how one of the foundational steps for the application of the principle of distinction is a step that often cannot properly be made. The chapter describes how conflicts today, and new wars in particular, factually blur the lines between IACs and NIACs. It points to those conflicts that have presented particular challenges for this divide – 'internationalised' conflicts, 'transnational' conflicts and those relating to international terrorism – and considers the approaches proposed to allow the law to incorporate these. The chapter examines the means by which these bodies of law are beginning to merge, looking at developments in ICL and IHRL and at the part played by CIL in reaching this position. Finally, the chapter will consider the arguments that have been made for the removal of the legal divide between IACs and NIACs, as well as the barriers to its removal – including the part that the principle of distinction plays in preventing a harmonised law.

5.1 History of the divide between international and non-international conflicts

Religion was the dominant influence in the early regulation of conflicts. In the Christian world, views about conflict were shaped by a belief in the inequality between Christians and heathens, as well as by the notion that rulers' power was conferred by God. Early canonist writers distinguished "external wars", fought between Christians and infidels, and "internal wars", fought among Christians.[2] Followers of Islam also distinguished conflicts among believers from those against non-believers. Early followers of Islam preached that Islam was to be spread until the whole world fell under Islamic rule. As such, they believed that the only relationship that could exist between believers and non-believers was that of *jihad*. In time, as the Muslim world was divided into separate states, it became necessary to distinguish conflicts fought against non-Islamic states and those fought between Muslims, and from the 12th century onwards, distinct rules and methods of fighting were developed for these differing types of conflicts.[3]

From the 1648 Peace of Westphalia, secular nation-state sovereignty based on territoriality began to emerge, diminishing the influence of religion.[4] International law began to develop around the concept of states, each with its own sovereign. It was understood that to have a "real" war required having two sovereign states as opponents. A legitimate enemy needed to meet certain requirements. Gentili wrote, "He is an enemy who has a state, a senate, a treasury, united and harmonious citizens, and some basis for a treaty of peace."[5]

Until the 20th century, internal conflicts, most notably colonial wars, were not considered to be *real* wars, but rather internal matters of domestic security.[6] This was despite the significant levels of militarisation and violence often used by states in dealing with these. However, while this was the formal approach, state practice did not always reflect this. Abi-Saab explains that, "This legally radical separation of internal wars from the international level, was not... as rigorously observed in practice as it sounded in theory. One can cite numerous instances, both before, and particularly after the Napoleonic wars, of

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2 Bartels, Rogier. "Timelines, Borderlines and Conflicts, The Historical Evolution of the Legal Divide Between International and Non-international Armed Conflicts." *International Review of the Red Cross* 91, no. 873 (2009): 35–67.
3 Ibid.
4 Hassan, Daud. "The Rise of the Territorial State and the Treaty of Westphalia." *Yearbook of New Zealand Jurisprudence* 9 (2006): 62–70.
5 Gentili, Alberico. 'The Three Books on the Laws of War', in J.B. Scott (ed), *The Classics of International Law*, Clarendon Press, Oxford, 1933, at 24–25.
6 Moir, Lindsay. "The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflicts to 1949." *International & Comparative Law Quarterly* 47, no. 02 (1998): 337–361.

intervention by major European powers against democratic uprisings …"[7] Nevertheless, notions of 'real' wars being international – and being the only ones suited to regulation – persisted and shaped the early IHL conventions.

Regulation of conflict leading up to the 20th century applied only to international conflicts. There was one exception to this – when states recognised non-state fighters as *belligerents*. When this occurred, the laws of war were extended to those conflicts. Internal struggles needed to pass various tiers of severity before they could be said to be *belligerency*. Starting at the most minor, *rebellions* were episodes of violence that were intermittent or that presented merely brief challenges to governments, which they could quell using only police or internal security measures. *Rebels* had no rights or protections under international law, and foreign states could not intervene in support of rebels without this being considered illegal intervention. A step above was *insurgency*, situations of sustained, longer-lasting and more considerable violence. Where states recognised *insurgency*, this revealed that they understood insurgents to be their opposition in fighting, not just criminals. Conflicting parties could choose to apply the laws of war to insurgents. However, recognising insurgents did not mandate states to apply the law – they had the choice. Finally, *belligerency* was reached when internal fighting was so significant and sustained that it made sense for both sides to be treated equally by law. Once a group was formally recognised as *belligerents*, the laws of war applied to them and they were treated in the same ways that states would be in conflict, subject to the same rights and obligations.[8] Although recognition of belligerency was discretionary, belligerency could only be recognised on the fulfilment of certain requirements.[9] Both host and third party states could recognise belligerency and this recognition could be express or implied.[10] Recognition of belligerency was significant for the principle of neutrality – a crucial feature in the international relations of the time. This doctrine allowed states to declare their neutrality towards belligerents, in exchange for which they received an internationally recognised protection from involvement.[11] Just as states could not intervene in internal situations, they could also not declare neutrality towards these – with the exception being when belligerency was recognised. In practice,

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[7] Abi-Saab, Georges. "Non-International Armed Conflicts." In *International Dimensions of Humanitarian Law*, BRILL (1988): 217–240, at 217–218.

[8] Bartels, supra note 2.

[9] The requirements were that a group must have taken possession of part of a territory, set up a government of their own and operated in line with IHL. Oppenheim, Lassa. International Law: A Treatise, Vol. II, War and Neutrality, Longmans, Green and Co, London, 1906.

[10] For example, in the American Civil War, President Lincoln imposed a naval blockade on the whole Southern coast and this was understood to be recognition of the Southern army as belligerents. In the Spanish Civil War, it was argued that some of the government's announcements regarding prisoners and their designating certain areas as zones of war subject to blockades, constituted recognition of the Nationalists as belligerents.

[11] "The Law of Neutrality." In *Annotated Supplement to The Commander's Handbook on the Law of Naval Operations, A. R. Thomas & James C. Duncan (Editors)*, Vol. 73. International Law Studies, 1999.

recognition of belligerency was used as a political tool. States would recognise belligerency out of self-interest, rather than from a sense of feeling bound by law to do so.[12] Recognition was exercised in an ad hoc manner, and there were many situations where it could legally have been granted, yet where states chose not to. By the 20th century, the doctrine of recognition of belligerency had become obsolete.[13]

In the late 19th century began what Moir terms the "age of codification".[14] Francis Lieber attempted to codify the laws of war during the American Civil War, with the 1863 Lieber Code becoming the basis for the IHL treaties that followed. Despite the fact that the Code was drafted during a civil war, it was geared towards IACs – or at least towards situations where belligerency had been recognised. Lieber was reportedly hesitant to include "section X", entitled "Insurrection – Civil War – Rebellion", for fear of creating the impression that the Code was directed primarily at these sorts of conflicts.[15] Following from the Lieber Code, a number of international conventions codified the laws of war, including the 1864 Geneva Convention, the Hague Conventions of 1899 and 1907, and the 1929 Geneva Conventions. These early conventions applied only to international conflicts.[16]

The push for IHL to be extended to NIACs came from the ICRC, which argued that there was no reason that IHL's protections for victims of war should extend only to those affected by IACs.[17] Since the start of the 20th century, the ICRC had been trying to assist NIAC victims, yet were frequently prevented from doing this by governments who viewed assistance to victims who sided with insurgents as interference or aiding criminals.[18] In 1912 at the 9th International Conference of the Red Cross, the ICRC put forward a draft Convention on the role of the Red Cross in civil wars and insurgencies, a proposal that was readily dismissed. Following World War One, in 1921 the ICRC was able to include this issue on the agenda of the 10th International Conference and a resolution was passed affirming a right of relief for victims of civil wars and disturbances. In 1938, at the 14th International Conference, a further resolution was passed, envisaging the application of certain essential principles of the laws of war in civil conflicts.[19] Around this time, the Spanish Civil War (1936-1939) took place, with its intensity and brutality demonstrating to

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[12] Moir, supra note 6.
[13] See Bartels, supra note 2.
[14] Moir, supra note 6.
[15] Bartels, supra note 2.
[16] Moir, supra note 6.
[17] Kretzmer, David. "Rethinking the Application of IHL in Non-International Armed Conflicts." *Israel Law Review* 42, no. 1 (2009): 8–45.
[18] Bartels, supra note 2.
[19] Ibid.

states that NIACs could not simply be ignored by international law.[20] A number of colonial uprisings with high fatalities and devastating effects – including the Iraqi revolt against British rule (1920) and the Syrian revolt against the French (1925-1927) – also illustrated the problems of leaving such situations unregulated.

The ICRC pushed for the 1949 Geneva Conventions to apply fully in NIACs. State parties, however, were resistant to this, fearing international obligations would restrain them in their internal dealings. The 1947 Conference of Government Experts for the Study of the Conventions for the Protection of War Victims produced a draft Article that proposed that the principles of the new Geneva Conventions apply to civil wars, so long as the non-state parties to these conflicts applied the laws too. In 1948, the ICRC submitted a revised version of the Article to the 17th International Conference.[21] The Conference approved this text, with slight modifications,[22] and the modified text was proposed to the 1949 Diplomatic Conference.[23] A number of states there were opposed to the proposed Article, with competing views put forward as to if and when the laws should apply in NIACs. A committee vote revealed that delegations were largely in favour of extending the application of the conventions to NIACs, but were not in favour of the draft Article before them, preferring to delineate more clearly those NIACs to which the conventions would apply. After much debate, a new draft Article was created, adopted as "Common Article 3" (CA3) by 34 votes to 12.[24] CA3 has been referred to as a "treaty in miniature". This Article, repeated in all four GCs, sets out the basic minimum protections applicable in NIACs.[25] It provides significantly fewer protections than are provided for in IACs. Importantly, while CA3 marked the first time the rules of IHL were explicitly applied to NIACs, this Article also entrenched the legal distinction between IACs and NIACs, with concepts like "civil war" or "domestic disturbance" reconceptualised as "non-international armed conflict".[26]

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[20] Crawford, Emily. "Unequal Before the Law: The Case for the Elimination of the Distinction Between International and Non-International Armed Conflict." *Leiden Journal of International Law* 20, no. 2 (2007): 441–465.

[21] According to Pictet's Commentary on the Geneva Convention, this Article read as follows: "In all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the principle of the present Convention shall be obligatory on each of the adversaries. The application of the Convention in these circumstances shall in no way depend on the legal status of the Parties to the conflict and shall have no effect on that status." Pictet, Jean. *The Geneva Conventions of 12 August 1949: Commentary*. International Committee of the Red Cross, 1952, at pp 42–43.

[22] They accepted it with the omission of the words "especially cases of civil war, colonial conflicts, or wars of religion."

[23] The text of the Final Record shows that the words "principles of the present Convention" were replaced with "provisions of the present Convention", promoting a fuller application of the Convention than the original Red Cross draft Article.

[24] Bartels, supra note 2.

[25] Mack, Michelle. *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*. International Committee of the Red Cross, 2008.

[26] Crawford, supra note 20.

Anti-colonial struggles were often not described as conflicts, as colonial powers did not wish to acknowledge them as anything other than internal unrest. The British characterisation of the Mau Mau uprising in Kenya was a clear example of this. Instead, anti-colonial struggles were often characterised as law-enforcement operations, resulting in large-scale operations that were not regulated as conflicts. The failure to recognise these as conflicts contributed to Africa's absence from the historic annals of conflict, and to the Euro-centric leaning of the development of international law. Anti-colonial conflicts were in fact critical to the development of international law, serving as the means by which non-European states – previously seen to lack sovereignty – were conferred with sovereignty and included as active members of the international system.[27]

Colonial departures exposed ethnic, religious and tribal rivalries, setting the scenes for the conflicts that followed. Badly placed colonial borders split ethnic or tribal groups, while bringing together hostile groups into the same "countries". This provided the basis for national conflicts that would inevitably merge the international and internal, as ethnic groups supported fellow group members across national borders and enemy tribes within countries fought for domination, power or independence. In Sudan, for example, two culturally diverse groups were joined within the same country, under the domination of the Arab population of the North, leading to a 30-year independence-war by the South, followed by inter-ethnic power struggles in South Sudan, once independence was gained.

During the latter half of the 20th century there was growing recognition of the right to self-determination,[28] and of the right to assert this, using force where necessary. It began to be understood that where people *fought* for self-determination, this needed to be seen as more than just a domestic issue.[29] During the 1960s, the UN General Assembly passed two resolutions recognising the need for certain uniform basic rules to apply to all conflicts, regardless of their nature. Resolution 2444[30] talked of the need to respect human rights in all armed conflicts, while Resolution 2675[31] laid out basic principles for the protection of civilians in armed conflicts, emphasising that this referred to conflicts of all types. An

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[27] Anghie, Antony. "The Evolution of International Law: Colonial and Postcolonial Realities." *Third World Quarterly* 27, no. 5 (2006): 739–753.
[28] Batistich, Marija. "The Right to Self-Determination and International Law." *Auckland University Law Review* 7 1013 (1995): 1019–23. McCorquodale, Robert. *Self-Determination in International Law*. Aldershot; Brookfield, Ashgate/Dartmouth, 2000.
[29] Crawford, supra note 20.
[30] GA Res. 2444, UN Doc. A/7218 (1968).
[31] GA Res. 2675, UN Doc. A/8028 (1970).

increased international acceptance of the need for a more inclusive approach to the regulation of conflict became evident.[32]

Between 1974 and 1977, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts was held, which adopted the 1977 APs.[33] AP1 addressed IACs, expanding their meaning and scope and extending the categories of conflict considered IAC in nature. Notably, it added to those conflicts considered IAC, conflicts in which people fight against colonial domination, alien occupation or racist regimes in the exercise of their right to self determination (Art 1(4) AP1). During this process, diplomats tried to negotiate clarifications to CA3, eventually leading to AP2 being adopted, the first international treaty to exclusively address NIACs. The negotiations for AP2 were controversial, centring on two opposing positions: first, that from the point of view of victims of conflict, the distinction between IAC and NIAC was artificial and humanitarian protections should be applicable regardless of the conflict type; and second, that state sovereignty remained an important pillar of international law and hence international law should not regulate internal situations.[34] AP2 was the resulting compromise.

There have been other developments in the years following the APs. New wars began to be fought. Neighbouring countries also fought proxy wars against each other, often by supporting rebel groups operating on their neighbour's soil. Another development was the rise in international criminal tribunals, whose jurisprudence began to thresh out the divide between IACs and NIACs, considering how this divide plays out in certain new wars. Further development has occurred since the attacks of September 11th 2001, in the context of the "war on terror". Both the actions of international terrorists and the global efforts to counter them have created new types of conflicts, leading to questions about if and when these actions constitute "armed conflict", and whether these would be IAC or NIAC in nature.[35] Contradictory views have been put forward about this, not least of all by the American government, whose controversial stance has been widely disputed. In recent years the legal spotlight has shifted to focusing on USA, rather than on Europe, as it used to be.

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[32] Crawford, supra note 20.
[33] Ibid.
[34] Levie, Howard. *The Law of Non-International Armed Conflict: Protocol II to the 1949 Geneva Conventions*. Martinus Nijhoff Publishers, 1987.
[35] Sulmasy, Glenn. "The Law of Armed Conflict in the Global War on Terror: International Lawyers Fighting the Law War." *Notre Dame Journal of Law, Ethics & Public Policy* 19, no. 1 (2014): 309–16. Graham, David. "The Law of Armed Conflict and the War on Terrorism." In *Issues in International Law and Military Operations, Richard Jacques (Ed)*, 80 International Law Studies, 2006.

This history above has illustrated how understandings about the international and internal character of conflicts have continued to shift, both in society and in law. The law has responded to the circumstances of the time, progressively delineating the divide between IACs and NIACs in response to these.

5.2 Problems in the regulation of non-international armed conflicts

Unlike IACs, to which the four GCs and AP1 apply, in NIACs, only CA3 and AP2 are applicable. NIACs therefore have less law, the applicable rules are less detailed, and they are more limited in terms of the situations they apply to. However, in contrast to the minimal law available, the *need* for coherent regulation of NIACs is great. Today, the bulk of the world's wars are NIAC, or at least primarily so, a pattern that holds true in Africa. To give a sense of numbers, the Department of Peace and Conflict Research at Uppsala University has categorised all armed conflicts taking place since World War Two. Of the 225 conflicts fought between 1946 and 2001, they have classified 163 as NIAC. Only 42 conflicts were classified IACs, while the remaining 21 were classified as "extra-state" – conflicts where a state fights a non-state group operating from the territory of a third country, discussed later in this chapter.[36]

It is not only their prevalence that creates the need for coherent regulation of NIACs. It is also the nature of these conflicts, and the evident violations of IHL that characterise them. NIACs frequently exhibit appalling levels of violence; Africa's civil conflicts have epitomised this – from the butchering of body and limb by rebel groups in Sierra Leone, to the land-scorching policies of Darfur, to the genocidal killings of Rwanda and Burundi. More particularly, in internal conflicts, close-hand violence, inter-community fighting and a focus on identity politics can lead to high levels of sexual violence and to numerous threats to which women are vulnerable.

As the history above suggested, a main reason for the dearth of law in NIACs was states' reluctance to have international law hinder their ability to address threats within their countries.[37] Governments were also hesitant to grant legal status and rights to those within their countries fighting against them, and feared that if internal conflicts were regulated, this would grant rebels legitimacy. However, counteracting the notion that the application of IHL is always contrary to the interests of states, it can in fact be in states' interests to

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[36] Gleditsch, Nils. "Armed Conflict 1946-2001: A New Dataset." *Journal of Peace Research* (2002): 615–637.
[37] Murphy, John. "Will-O'-the-Wisp? The Search for Law in Non-International Armed Conflicts." In *Non-International Armed Conflict in the Twenty-First Century*, 88: 15–36. International Law Studies. Naval War College Press, 2012.

have IHL apply, with IHL in some ways allowing states greater power to act to curtail internal threats.[38] For one thing, where IHL is applicable, the principle of distinction applies, allowing states to kill those directly participating in hostilities. In the normal (non-conflict, non-IHL) course of events, killing is only permitted in exceptional circumstances; human rights law protects the right to life and every time a person is killed specific justification is required as to why that killing was necessary. The principle of distinction allows states to kill with no need for justification other than the fact that they were directly participating in hostilities at the time they were targeted.[39] IHL therefore legalises killings that would otherwise be in violation of IHRL.[40] IHL is also advantageous to states when it comes to investigations. Normally, when people are killed by law enforcement actors, states are obliged in terms of IHRL to hold enquiries as to the circumstances of their deaths, with a failure to conduct an independent enquiry being a breach of a state's duty to protect the right to life. Where IHL applies, there is no duty to investigate every killing – investigations are only required where there is evidence the killings were in violation of IHL.[41] A further reason states might want IHL to apply is for the principle of proportionality, which allows for a certain number of civilians to be killed as collateral damage. Outside of IHL no such allowance exists and states are not permitted to target objectives when they know civilians will also be killed.[42]

State interests aside, there are other reasons it is difficult to regulate NIACs. For one thing, NIACs are diverse, with conflicts ranging from those that are highly organised, to those that are scattered, unstructured and hardly discernable from criminal activities. There tend to be a wide range of actors involved in NIACs, who are all differently placed to comply with IHL – from highly organised groups with effective hierarchies to disorganised bands of splintered factions that lack discipline or clear leadership structures. The small rival rebel groups operating locally in north-western Central African Republic have little in common with a well-organised mass movement like South Sudan's SPLM, which, during the Sudan war, had training bases across the borders, international spokespersons and strict codes of conduct – and these groups' capacity and motives to comply with IHL differ significantly. These variances make it challenging to find one law suitable to regulating such diverse actors and situations. Attempts to paint them all with one brush-stroke can result in overly

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[38] Kretzmer, supra note 17.
[39] Ibid.
[40] This reasoning was apparent in the Israeli Supreme Court's targeted killings case (*Public Committee Against Torture v Government of Israel*, 13/12/2006, HCJ 769/02,), where Israel saw it could only succeed if its arguments were based on IHL, as it was only under IHL that members of armed groups attacking Israel or Israelis could be targeted even while there was no imminent danger.
[41] Kretzmer, supra note 17.
[42] Ibid.

broad and ill-suited laws.[43] This is this same problem that makes the principle of distinction so challenging to formulate in NIACs – as hard as it is to regulate diverse armed actors, it is equally challenging to classify them into clear groupings that can neatly determine who is an appropriate target of attack or not.

There are also challenges around non-state actors' compliance with IHL. IHL was designed to be reciprocal, with parties being restricted in their actions by matching rules, aimed at levelling the playing field. Kretzmer explains that, "Like other branches of international law, LOAC originally rested on assumptions of symmetry and reciprocity. Symmetry demands that the same rules apply to Parties on opposing sides of an armed conflict; reciprocity, that each Party's duty to respect these rules rests on reciprocal respect by the enemy."[44] However there is little reciprocity in the law when it comes to non-state actors. Different IHL rules apply to members of state and non-state groups, even where they are performing the same tasks. The oft-cited example is the cook; the cook in a state army can be lawfully targeted, while the cook in a non-state armed group is protected as they are not "directly participating" in hostilities. In the cook example, the non-state state cook is advantaged. Normally, in this uneven structure, non-state actors are disadvantaged.

In denying non-state actors combatancy privileges, states created an uneven system of law. Problematically, the privileges they denied them were also the main motivators for compliance with IHL. What is left is a system where non-state actors are expected to comply with this law, yet receive few of the benefits of compliance. It is hardly surprising that they may not wish to abide by rules so clearly disadvantageous to them. Adding to this, the normal compliance mechanisms of international law, including state pressures, sanctions and incentives, do not necessarily function with non-state actors.[45] Compounding the problem is the fact that many non-state actors have little or no training in IHL – often even less than the minimal amount provided to state combatants[46] – and therefore have scant knowledge of the content of IHL. The ICRC has taken some steps to encourage IHL compliance by non-state actors, however this remains a significant challenge.[47]

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[43] Mack, supra note 25.

[44] Kretzmer, supra note 17, at 11.

[45] Mack, supra note 25.

[46] For information about non-state groups and IHL, see Ewumbue-Monono, Churchill. "Respect for International Humanitarian Law by Armed Non-State Actors in Africa." *International Review of the Red Cross* 88, no. 864 (2006): 905–924. Sassòli, Marco. "Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law." *International Humanitarian Legal Studies* 1 (2010): 5–51.

[47] The main methods that are used to get non-state armed groups to adhere with IHL are unilateral declarations, special agreements, ceasefire agreements and Organisation of African Unity Resolutions. Another method is for armed groups to integrate IHL principles into their military doctrines. See, Ewumbue-Monono, supra note 38, or Mack, supra note 25. Examples of special agreements are a 1962 agreement in Yemen, and a 1967 agreement in Nigeria – both negotiated by the ICRC – containing commitments to abide by the Geneva Conventions.

Women are extremely vulnerable to harm in NIACs, creating a great need for strong protective law. However, at this time when women are most in need of the law's protection, women are forced to rely on the scant law available in NIACs – which has fewer specific protections,[48] and which so many parties fail to adhere to. Barrow aptly explains that, "… the prevalence of non-international armed conflict challenges the foundations of international humanitarian law. Although this is a general dilemma, when considered in the light of gendered understandings of armed conflict, the challenges appear even more acute. Provisions are not sophisticated enough to respond to the complex intersection of gender, ethnicity and other aspects of identity, which may be all the more pertinent in non-international armed conflicts as nationality is not the dominant differentiation between parties."[49]

5.3 What are IACs and NIACs in terms of the law?

To apply the principle of distinction, one first needs to ascertain whether a conflict is an IAC or NIAC, as this will determine which version of the principle applies. This section sets out how these categories are defined in IHL. Drawing on examples from new wars, it also illustrates the difficulties in applying these definitions in practice.

5.3.1 International Armed Conflicts

IAC refers to conflicts between states. Article 2, common to all four GCs, defines IACs by setting out the situations to which the GCs apply. It notes that, "… the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." The inclusion of the phrase "or any other armed conflict" was significant, as it negated the need for a *declaration* of war or war-making *intention* on the parts of parties. Rather, the determination of whether armed conflict is taking place is a matter of fact, achieved when a threshold of violence has been reached.

AP1 applies in the same circumstances as the GCs (Art 1(3), AP1). However, in AP1, an additional type of conflict was added to those deemed IAC, albeit solely for the purpose of the application of AP1. Article 1(4) states, "The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial

[48] Although AP2 was the first time rape was specifically mentioned in an IHL Convention, the specific protections provided for in NIACs are less.

[49] Barrow, Amy. "UN Security Council Resolutions 1325 and 1820: Constructing Gender in Armed Conflict and International Humanitarian Law." *International Review of the Red Cross* 92, no. 877 (2010): 221–234, at 223.

domination and alien occupation and against racist regimes in the exercise of their right of self-determination…" The application of this additional category is far from straightforward. Not all conflicts where people fight for self-determination meet the criterion in this clause – only those where they are fighting against the three above-mentioned categories of domination. If a conflict is fought to assert the right to self-determination against a regime that is not colonial, an alien occupation or a racist regime, then AP1 will not apply. The challenging question is: how do you distinguish struggles for self-determination that qualify in terms of Art 1(4) from those that do not? The terms in Art 1(4) are broad, they are not defined in legal terms and no clear guidance is provided on their application.[50] Does colonialism refer only to European rule, or does it also refer to domination by African powers? Consider South Sudan – would the SPLA's fight for liberation from Sudan qualify? Was Sudan's rule over South Sudan colonial, alien or racist? Arguments could certainly be made that it was, although these are not obviously convincing. In the post-colonial period, we are still drawing on colonial categories, which have questionable applicability in this context.

Things become complicated when there is more than one "liberation movement" involved in a struggle. Crawford explains that, "The Protocol contains no system for determining which liberation movement can be considered the 'legitimate' representative of those seeking self-determination."[51] Some argue that for AP1 to apply, those fighting on behalf of a population must be *recognised* as actually representing a people as their liberation movement – hence requiring a collective recognition by states or regional organisations. There is mixed opinion as to whether this is in fact a legal requirement.[52] When different "liberation movements" fight each other, AP1 does not apply.[53] Revisiting the South Sudan example, what should be made of the fact that at one point the SPLA split into competing factions who fought each other? Would this affect their status as a liberation movement for the applicability of AP1? The answers are unclear. One cannot draw on state practice to clarify the requirements, as the self-determination scenario envisaged in Art 1(4) has never been formally recognised – often because the states concerned have not ratified AP1.[54]

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[50] Vite, Sylvain. "Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations." *International Review of the Red Cross* 91, no. 873 (2009): 69–94.
[51] Crawford, supra note 20, at 447.
[52] During the negotiations on AP1, a clause was tabled requiring the recognition of regional organisations, however this was not included in the final version of the text. See, Mastorodimos, Konstantinos. "The Character of the Conflict in Gaza: Another Argument Towards Abolishing the Distinction between International and Non-International Armed Conflicts." *International Community Law Review* 12, no. 4 (2010): 437–69.
[53] Crawford, supra note 20.
[54] Vite, supra note 50.

Another factor that complicates things is state succession. W*hen* a territory becomes, or declares itself to be, an independent state can affect whether a conflict is IAC or NIAC. If independence was declared before the outbreak of war, this could support the finding that a conflict is IAC. Such was the case in Bosnia, which declared independence in 1992 on the eve of the outbreak of war, meaning it was arguably a separate country when fighting broke out. On the other hand, if a party declares itself an independent state following conflict, the conflict would be NIAC, only taking on a two-state character following the termination of hostilities and the resultant declaration of independence. This was the case in South Sudan, which only declared independence from Sudan in 2011, following a referendum six years after the official ending of hostilities. But this in itself raises questions; most critically, when does an entity become an independent state? Is the pivotal moment the declaration of independence? Or is recognition of this declaration by other states required? Or is it the achievement of the factual requirements of statehood that is important?[55] In turn, the question of whether a conflict is IAC or NIAC has significance for state succession – whom a conflict was fought between determines who may take power after the conflict and who the parties to a peace agreement might be.

In the ICTY's *Tadić* decision, the Appeals Chamber considered the definition of IACs, elaborating on those situations that would qualify as such. Duško Tadić, a Bosnian Serb former member of the paramilitary forces and a leader of the SDS, was indicted for his participation in attacks on, and murder and mistreatment of Bosnian Muslims and Croats in the Prijedor municipality of Bosnia Herzegovina. In order for the "grave breaches" regime to apply pursuant to Article 2 of the Rome Statute, the crimes in question needed to have been committed in the context of an IAC, meaning the Chamber needed to determine whether Tadić was acting in an IAC. The Appeals Chamber held that a conflict is an IAC if it is fought between two or more states. An internal conflict taking place within the territory of one state can become international if the military forces of another state intervene, or if some of the participants to the internal conflict act *on behalf of* another state. This refers to NIACs that have been "internationalised", as discussed below. The Chamber held that an IAC can exist concurrently with a NIAC in particular circumstances.[56]

5.3.2 Non-International Armed Conflicts

NIACs are conflicts in which at least one of the parties is not a state. These can include conflicts between a state and a non-state entity, or conflicts between two non-state entities.

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[55] The requirements for statehood are set out in the Montevideo Convention on the Rights and Duties of States, 1933.
[56] *The Prosecutor v. Tadic*, ICTY Appeal Chamber, IT-94-1, 1999, para. 84.

GC CA3 lays down rules that apply in "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties". CA3 does not define "conflict not of an international character", nor does it elaborate on the types of situations it was envisaged this Article would apply to. While some argue that this definitional omission was a mistake, others contend that this was deliberate, planned to allow future conflicts of types unanticipated by the drafters to fit within a relatively unrestrictive phrase.[57]

There are some clues in the law as to the meaning of the phrase. The use of a negative formulation is notable, revealing that a NIAC is that which does not qualify as IAC. During the various amendment stages leading to the GCs, a list was developed that was included in the Commentaries, which provided indication of the types of situations the drafters anticipated would be covered by CA3. In this list were included factors such as that a non-state party in covered conflicts must have an organised military force, an authority responsible for its acts, must act within a determinate territory and have the means of respecting IHL. They must also have territory on which they have de facto control as a civil authority. In addition, the government must have recognised the party as insurgents or belligerents.[58] The Commentaries noted that, "… the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities--conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country."[59]

AP2 too does not define NIACs. It does, however, limit the scope of those NIACs that the Protocol applies to. Article 1(1), AP2 states that the Protocol shall apply to all armed conflicts *not* covered by AP1, "… 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." AP2's application is therefore limited by a number of qualifiers, which also render AP2 only applicable in situations that in many ways resemble IACs.

The satisfaction of these qualifiers can be difficult to ascertain, as these might shift over the course of a conflict. In civil wars, territory is frequently lost and retaken. An armed group

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[57] Pejic, Jelena. 'Status of Conflict', in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2007.
[58] Commentary on the Geneva Conventions, supra note 21.
[59] Ibid, at p37.

might have the ability to apply AP2 at one point, but lose it later for operational reasons if they are weakened and shrunken by fighting. As such, during the course of a single conflict, there might be different conclusions as to whether AP2 applies or not.[60] In new wars, the requirement of territorial control can be particularly limiting, as controlling territory is less central to the conflict endeavour than it was in old wars. Armed groups do not seek to control territory, and when towns are occupied, this is often done temporarily, in order to rest, restock, pillage and move on, rather than with any aim of holding onto control. There are of course exceptions to this, with some groups still seeking to control territory – consider for example, Bosnian Serb groups in the Bosnian war – illustrating the inherent inconsistency of new wars.

There are other limitations too; AP2 does not apply to conflicts *between* non-state groups. It requires a state to be one of the parties – a significant excluding factor in African conflicts, where rebel groups frequently fight each other. So too, when there are "side-conflicts" within a civil war, when armed groups fight each other at the same time as a conflict is fought against a state – common in new wars – these side-conflicts do not count as part of the NIAC to which AP2 applies.[61] Practically this means that certain parts of fighting activities will be regulated by AP2, while other parts will remain unregulated. Another excluded situation is where there is no recognised government, but rather different groups vying for control of a government, like in Somalia (at certain times between 1991 and present) and Angola (1961–1974).[62] It bears repeating that AP2 does not apply to certain wars of national liberation, those that are rendered IAC for the purposes of applying AP1. AP2 therefore does not apply to a large segment of the internal conflicts taking place today. As well as the numerous substantive limitations, AP2 only applies in countries that have ratified it. Importantly, where AP2 does not apply – for substantive or ratification reasons – CA3 might still apply, as its threshold is lower than AP2's.

Both CA3 and AP2 state that a conflict must "take place in the territory of a High Contracting Party". There is some debate about whether NIACs actually need to take place *within* the territory of a single state for CA3 or to AP2 apply. Some contend that NIACs are those conflicts in which at least one of the parties is not a state, regardless of where they occur. This was the position the United States Supreme Court took in *Hamdan v Rumsfeld*[63], when it accepted as its definition of NIACs, all conflicts *not* fought between two state

[60] Schindler, Dietrich. "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols." In *Recueil Des Cours, Collected Courses, Volume 163*, by Béat de Fischer, 117–64. Martinus Nijhoff Publishers, 2007.
[61] Crawford, supra note 20.
[62] Ibid.
[63] *Hamdan v. Rumsfeld*, 548 U.S 67, 2006.

parties. In this way it included the global "war on terror" within its understanding of NIAC. This has been a controversial approach. Dinstein argues that, "…the idea that a NIAC can be global in nature is oxymoronic: an armed conflict can be a NIAC and it can be global, but it cannot be both."[64] The ICRC has taken a pragmatic approach to this, arguing that since the GCs have been almost universally ratified, this makes their territoriality criteria irrelevant, leaving the relevant factor to be the status of the participants rather than the conflict's geographic location.[65] There is no consensus on this point. However, depending on the approach taken, if conflicts not within the territory of a single state are omitted, then many of Africa's new wars would be excluded from the reach of IHL, as these often overflow beyond the territory of a single state. As an example, the Ugandan government's fight with the LRA spread into South Sudan, CAR and DRC, since the LRA fled Uganda around 2006. While this fight is clearly not an IAC, imposing the territoriality requirement would render CA3 and AP2 non-applicable. This is the central issue in the debate on transnational conflicts, discussed later in this chapter.

As the above illustrates, IACs and NIACs can occur simultaneously, and NIACs regulated by the law can take place alongside NIACs that are unregulated. This can lead to a complicated web, where different laws apply to different facets of larger conflict situations. All of this is further complicated by the requirement that violence reaches a certain threshold in order for IHL to apply.

5.3.3 The threshold of violence

In both IACs and NIACs, the trigger for IHL to apply, is the existence of an "armed conflict". Violence that does reach this level is not regulated by IHL. The problem is that the term "armed conflict" is not defined in IHL and there is little clarity as to the level of violence that constitutes the lower threshold of this term. Sassoli explains that, "As for the lower threshold of an armed conflict, no clear-cut criteria exist, but relevant factors include: intensity; number of active participants; number of victims; duration and protracted character of the violence; organization and discipline of the parties; capability to respect IHL; collective, open, and coordinated character of the hostilities; direct involvement of governmental armed forces (vs. law enforcement agencies); and de facto authority by the non-State actor over potential victims."[66]

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[64] Dinstein, Yoram. "Concluding Remarks on Non-International Armed Conflicts." In *Non-International Armed Conflict in the Twenty-first Century*. Vol. 88. International Law Studies. Naval War College Press, 2012, at 400.
[65] Mastorodimos, supra note 52.
[66] Sassoli, Marco. "Use and Abuse of the Laws of War in the War on Terrorism." *Law and Inequality: A Journal of Theory and Practice*. 22 (2004): 195–221, at 201.

Whether something constitutes "armed conflict" is influenced by whether a situation is IAC or NIAC. Even minor uses of force between states tend to be considered armed conflict for the purposes of rendering IHL applicable. The threshold is higher in internal situations, where fighting must reach a higher level of intensity to constitute armed conflict.[67] In *Tadic*, the ICTY Appeals Chamber held that an armed conflict exists, "whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state."[68] Sassoli notes that "protracted nature" is a problematic requirement as at the outset of hostilities one cannot know how long a conflict will last. It is hard to accept that IHL would not be applicable at the start of a conflict but would only become applicable once a conflict became protracted.[69] A different approach proposed is that for internal violence to become armed conflict depends on the motives of the armed group involved; to qualify, armed groups need to fight for a political cause, hence excluding criminal gangs from being seen as parties to NIACs. Opponents argue that this requirement has no basis in IHL.[70][71]

IHL does not apply to internal tensions, strikes, demonstration, riots, criminal activities, or sporadic or isolated acts of violence – occurrences that do not reach the level of armed conflict. This is even the case where the military is used to deal with these.[72] However, what one often sees in Africa's new wars are long-term, low-level situations, which flare up in sporadic bouts, which taken on their own would not meet the threshold of violence. This means IHL would not be applicable, despite the high levels of inter-personal violence present in these. New wars highlight the tricky continuum between war and peace. They often do not constitute a singular major event leading to defined results, but rather they linger. In fact, keeping them lingering might be exactly what armed actors are working towards. This can make IHL's threshold approach extremely difficult to apply in these.

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[67] Odermatt, Jed, "New Wars and the International/Non-International Armed Conflict Dichotomy", at 7, nd, available at: http://www.isisc.org/portal/images/stories/PDF/Paper%20Odermatt.pdf.

[68] *The Prosecutor v Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Case No. IT-94-1-AR72, at para 70.

[69] Sassoli, Marco. "Transnational Armed Groups and International Humanitarian Law." *Program on Humanitarian Policy and Conflict Research at Harvard University, Occasional Paper Series* 6 (2006).

[70] In the *Limaj* case the ICTY considered this issue. The defence had challenged the notion that the fighting was armed conflict, arguing that the actions of the Serbian forces had not been aimed at defeating the enemy's army, but rather at the ethnic cleansing of Kosovo. The tribunal rejected this argument, holding that the intention of the parties are irrelevant to whether there is an armed conflict. They held that there are only two relevant criteria: the intensity of the conflict and the organisation of the parties. *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgement (Trial Chamber), 30 November 2005, at para 170.

[71] Vite, supra note 50.

[72] Schmitt, Michael. "The Principle of Discrimination in 21st Century Warfare." *Yale Human Rights & Development Law Journal* 2 (1999): 143–82.

Gender activists mirror the view that conflicts are not events that start and stop once they reach certain thresholds. Cockburn explains that gender organisations, "…tend to see 'war' not just as spasms of war-fighting, but as part of a continuum leading from militarism (as a persisting mindset, expressed in philosophy, newspaper editorials, political think tanks), through militarization (processes in economy and society that signify preparation for war), to episodes of 'hot' war, and thence to cease fire and stand-off, followed perhaps by an unsteady peace with sustained military investment, beset by sporadic violence that prefigures a further round in the spiral."[73] The threshold system disregards the fluid nature of conflict, attempting to pinpoint unrealistic start and end moments. Most importantly, this disregards the fact that dangers to civilians, and to women, precede the threshold points and continue well after them – and that IHL's protective laws are needed in those times too.

Determining if and when a situation constitutes armed conflict can be difficult in practice. Various indicators often point to contradictory conclusions. To illustrate, the 2011 Egyptian revolution was restricted mainly to violent incidents and protests and did not appear to reach the level of full-blown armed conflict. However, during these incidents, upwards of 846 people were killed in clashes between security forces and protesters.[74] The protest movement was coordinated, attained mass involvement and ultimately led to an overthrow of the country's leadership – features indicative of armed conflict. It is unclear what number of deaths, or what types of events, would have been required to render this an armed conflict. In Libya similar protests did ignite into armed conflict when, in February 2011 in Benghazi, protesters clashed with security forces that fired into the crowd. The protests grew into a rebellion that soon spread across the country. Johnston points out that in Libya, an internal uprising developed into a NIAC, which was later transformed into an IAC by foreign intervention, before later being "re-internalised" to a NIAC by the international recognition of the National Transitional Council as Libya's legitimate government.[75]

The determination of whether a situation is armed conflict is frequently used as a political tool rather than a legal determination. There are political reasons for states wanting to acknowledge – or not acknowledge – situations as armed conflicts. This has been clearly demonstrated by the Security Council's inconsistent referrals to "armed conflict" in its

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[73] Cockburn, Cynthia. "Gender Relations as Causal in Militarization and War." *International Feminist Journal of Politics* 12, no. 2 (2010): 139–157, at 148.
[74] "Egypt Unrest: 846 Killed in Protests - Official Toll." *BBC*, April 19, 2011.
[75] Johnston, Katie. "Transformations of Conflict Status in Libya." *Journal of Conflict and Security Law* 17, no. 1 (2012): 81–115.

Resolutions. Sometimes the SC effectively makes a determination that a situation has crossed the threshold, by referring to IHL's applicability in that situation – in effect labelling a situation as armed conflict without expressly acknowledging this. As early as March 2011, SC Resolutions on Libya talked about compliance with IHL – probably because Ghadaffi did not have strong supporters on the SC who could influence it not to do so. In contrast, SC Resolutions on Syria have not mentioned armed conflict or IHL – rather being restricted to describing "troop movements", "military concentrations" and other actions associated with conflict. Resolutions on Syria have mentioned violations of human rights, but not of IHL. This has been a result of Russia's refusal to allow the situation to be labelled armed conflict. The politicised use of this determination is problematic, demonstrating how in this area political considerations are frequently given more value than the wording of the law.

The failure to deem IHL applicable to situations means civilians in these do not benefit from the protections purposefully created for civilians in hostile situations. Although this thesis argues that IHL's protections for women are inadequate, these still offer better protection than the alternatives, which are a reliance on domestic law and human rights law to regulate hostile actions – discussed further in the conclusion chapter. When disturbances reach the IHL threshold, this brings more international scrutiny to the way governments act, which can also have protective effects for civilians.

It is worth mentioning a different category, which, while not falling within the threshold of "armed conflict", frequently overlaps with it. The legal regime pertaining to genocide and the IHL armed conflict regime, anticipate complete separation between these phenomena. However, this separation is a fiction – in reality armed conflict and genocide often occur together or are intrinsically related, making this another legal categorisation where the law and the reality do not correlate. Of course there are reasons for this legal separation; one does not assume that regular armed forces, those whom IHL is directed at regulating, will commit genocide. Genocide can never be justified in jus ad bello and as such there is no reason for IHL to regulate it.

The above sections have demonstrated that the legal classifications of IACs and NIACs are far from straightforward. However, despite the difficulties, these demarcations remain critical, determining which law applies and revealing the boundaries at the ends of each category: when a situation is an IAC as opposed to a NIAC, and when it is a NIAC as

opposed a more minor disturbance. As complex as this is in theory, it becomes even more difficult when applied to real situations on the ground.

5.4 Distinguishing IACs and NIACs in practice

Conflicts in Africa spill over borders. Conflict border crossings happen at all levels – from the top political level, with the intervention of foreign leaders into neighbouring states, to fighting groups crossing over borders, all the way to the local level. The cross-border actions at the "top" levels are well documented. Charles Taylor, former president of Liberia, was tried by the Special Curt for Sierra Leone for actions he committed in Liberia that fuelled Sierra Leone's war.[76] Jean-Pierre Bemba Gombo, a politician from DRC, was tried by the ICC for crimes he committed in CAR. Court records describe armed groups conducting incursions into neighbouring countries, and travelling across borders to secure weapons and other resources required to fuel their efforts.

Something that garners less international attention is how borders are crossed at the "local" level during hostilities. Women form an integral part of this, crossing borders as refugees, for trade, for subsistence and for survival – creating a less visible international element to largely internal conflicts. Small-scale cross-border trade can be a key survival mechanism in conflict, one that is largely taken up by women. Women have greater success in wartime cross-border trading, as men struggle to cross over, more likely to be suspected of rebel involvement. A study in Africa's Great Lakes region found that 74 per cent of traders along four conflict-riddled borders were women.[77] The same was the case along the Sierra Leone/Liberian border during their wars.[78] Cross-border trade is tough work, with women travelling long distances, carrying heavy loads. Like with other roles that women play in conflict, the women who take part are stigmatised: "… the fact that they leave the house early, return home late, are away from their husbands and must speak on friendly terms with the border authorities and others (to ensure their goods cross the border at the lowest possible cost) is considered to be morally "bad"; they are often considered as "free women"."[79] Female traders are vulnerable to sexual harassment and exploitation, often by border officials, with common reports of women needing to pay for border crossing favours with sex.[80]

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[76] *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-1-T, 26 April 2012,
[77] Titeca, Kristof, and Kimanuka, Celestin. *Walking in the Dark: Informal Cross-Border Trade in the Great Lakes Region*. International Alert, 2012.
[78] *Informal Cross Border Trade Report, Liberia.* UN Women.
[79] Kristof, Kimanuka, supra note 77, at 35.
[80] Ibid.

This "local" level movement – and particularly that of women – is lost in assessments of whether situations are IAC or NIAC, scarcely influencing how conflicts are classified. When women cross borders in helping armed groups or in sustaining day-to-day lives, there is little talk of this "internationalising" conflicts. Yet thinking about the IAC/NIAC divide from the perspective of grassroots behaviour is important. Considering how women behave along borders provides a more accurate picture of the real international or internal nature of a conflict – a view that this divide in the law misses out on. Considering women's cross-border behaviour in conflict reveals how blunt the law's lines are, and how IHL's IAC/NIAC divide provides an incomplete sense of the nature of situations.

The sections below will examine other problem categories that exhibit features dominant in new wars, which demonstrate the challenges with labelling conflicts IACs or NIACs.

5.4.1 Internationalised conflicts

An "internationalised" conflict occurs when a foreign state(s) intervenes in what was a NIAC, "internationalising" it – or rendering it an IAC for the purpose of the application of IHL. Internationalising can take many forms. It can occur when a foreign state sends troops to support one side of a NIAC; it can take the form of a foreign government providing *indirect* support from a distance; and it can take the form of fighting between second and third countries intervening on both sides to a NIAC.[81] Of course, in all domestic conflicts today there tends to be some level of international involvement – even if just at the level of rhetoric, SC Resolutions, or the presence of peacekeepers or humanitarian actors. A certain level of international involvement must be reached before a conflict can be said to be "internationalised".

Few conflicts illustrate "internationalising" as clearly as the DRC's wars. The First Congo War began in 1996. Rwanda was concerned that members of the *Rassemblement Républicain pour la Démocratie au Rwanda* militia, mostly Hutus entrenched in the refugee camps in eastern Zaire (now DRC), were planning to invade Rwanda. In response Rwanda, Uganda and Angola provided support to Laurent-Désiré Kabila's Congolese rebel group, the *Alliance of Democratic Forces for the Liberation of Congo-Zaire* (ADFL), which swiftly moved across DRC, taking control of towns and mines as they went. By May 1997 Kabila had taken the capital, Kinshasa, and proclaimed himself as president. Kabila soon ordered all Rwandan and Ugandan military forces to leave the country. Rebel groups began to threaten the new government, repelled only by the intervention of a number of other African states.

[81] Vite, supra note 50.

In August 1998, beginning the Second Congo War, the *Banyamulenge*, a group of ethnic Tutsi Congolese in Goma, mutinied and were offered assistance by Rwanda and Uganda, forming the *Rally for Congolese Democracy* (RDC), quickly dominating the eastern provinces of the country. The Rwandan government allied with Uganda and Burundi, occupying a portion of north-eastern Congo. Kabila sought the help of Rwandan Hutu refugees in eastern Zaire to expel Rwanda from the country. Soon the governments of Namibia, Zimbabwe, Angola, Chad, Libya and Sudan also became involved in support of the Kabila government. About eight nations and 25 different armed groups – both internal to DRC and external or externally supported – were involved in about 10 separate sub-conflicts, in what became the deadliest conflict in modern African history, and the largest "belligerent" inter-state conflict since World War Two. The NIAC character of the conflict was quickly lost to the international involvement, with the conflict becoming IAC for the purposes of IHL.[82]

Different approaches have been put forward as to how the law should deal with internationalised conflicts. The "fragmented approach" holds that where there are both international and non-international elements to a conflict, depending who the parties are to each particular interaction, different laws will apply. As such, the rules of IAC and NIAC apply at different times within the same greater conflict.[83] The fragmented approach leads to practical problems in trying to ascertain what law applies when. Vite illustrates some difficult questions that can arise: "What status needs to be given to civilians taken captive by foreign forces and then handed over to the local group? … does a different set of rules need to be applied depending on whether those persons were arrested by the foreign forces or directly by the local group?"[84] Such issues have arisen in Afghanistan's current conflict.[85]

A different approach is that where a foreign state intervenes on behalf of one of the parties to a NIAC, then IAC laws become applicable to the entire conflict. This was the approach proposed by the ICRC in a 1971 report to the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, which read: "When, in case of non-international armed conflict, one or the other party, or both, benefits from the assistance of operational armed forces afforded by a third State, the parties to the conflict shall apply the whole of the international humanitarian law

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[82] See, *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* ICJ, 45 ILM 271, 2006.
[83] Schindler, supra note 60. This fragmented approach was arguably the approach implicitly favoured by the ICJ in the *Nicaragua* decision, when in its analysis of the conflict the Court differentiated between the conflicts between the Nicaraguan government and the Contras, and those between the Nicaraguan government and the USA. Vite, supra note 50. In the *Lubanga* decision, the ICC confirmed that a NIAC could exist alongside an IAC.
[84] Vite, supra note 50, at 86.
[85] *Detained and Denied in Afghanistan: How to Make U.S. Detention Comply with the Law*. Human Rights First, 2011.

applicable in international armed conflicts."[86] This proposal was rejected by the Conference, as governments feared this would encourage civil war parties to seek foreign intervention, in order that IAC rules and protections would apply.[87]

The international criminal tribunals have addressed internationalised conflicts, with the ICTY in particular pondering the question of which body of law to apply to internationalised situations. In the *Tadic* Appeals Chamber, the majority recognised the clashes between Bosnian government forces and Bosnian Serbs and Croatian rebels as being NIAC, unless "direct involvement" of the Federal Republic of Yugoslavia could be shown. The court held that the Yugoslavian conflict had both international and non-international aspects.[88] In the *Mladic* Indictment it was noted that sufficient evidence of direct involvement would render the conflict IAC, and once a conflict was internationalised in this way, IAC laws would apply until the cessation of hostilities.[89] In *Celebici* the Trial Chamber held that if a conflict was found to be international, then "the relevant norms of international humanitarian law apply throughout its territory until the general cessation of hostilities, unless it can be shown that the conflicts in some areas were separate internal conflicts unrelated to the larger international armed conflict."[90]

The ICTY developed a number of tests aimed at determining whether there was sufficient foreign involvement to render a conflict international. The tribunal adopted the test for state responsibility developed by the ICJ in *Nicaragua.*[91] The majority in the *Tadic* Trial Chamber held that in terms of *Nicaragua,* there needed to be a relationship of "dependence and control" between a foreign state and paramilitaries for them to be considered organs of that state. Their relationship needed to be strong enough that the rebel's acts could be imputed to that state. In the *Rajic*[92] Indictment, the court debated the quantum of involvement necessary to render a conflict IAC. The court considered the *Nicaragua* dependence and control test, but held that a more appropriate test was that of "general political and military control". Finally, the *Tadic* Appeals Chamber developed the test of

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[86] Conference of Government Experts on the Reaffirmation and Development of IHL applicable in Armed Conflict, Para 290.
[87] Crawford, supra note 20.
[88] *The Prosecutor v. Tadic*, ICTY Appeal Chamber, IT-94-1, 1999.
[89] *The Prosecutor v Karadzic and Mladic*, ICTY, Review of the Indictment Pursuant to Rule 61, IT-95-5-R61 and IT-95-18-R61, 11 July 1996, at para. 88.
[90] *The Prosecutor v Delalic, Mucic, Delic and Landzo (Celebici)*, ICTY Trial Chamber, IT-96-21-T, 1998, at para 209.
[91] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Merits), (Nicaragua v United States),* ICJ, 1986, 105–115. Here the ICJ looked to determine, "… whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras,* for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government." (para 109).
[92] *The Prosecutor v Rajic*, ICTY, Review of the Indictment Pursuant to Rule 61, IT-95-12-R61, 1996.

"overall control", recognising that the degree of control required varies according to the circumstances of the case, and differs between private individuals and those in organised groups.

In *The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007*, the ICJ disagreed that the tests for internationalisation and for state responsibility need be the same. It held that, "… logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict."[93] The ICJ did not agree with *Tadic's* "overall control" test as it related to state responsibility, as it felt it broadened the scope of state responsibility beyond the fundamental principles governing the law of international responsibility. The ICJ would not comment on the test's suitability for establishing internationalising, as this was not in issue in that case.

The common view is that a conflict does not become an IAC if a government has invited a foreign army to assist it in fighting a NIAC within its country.[94] Not all agree with this point. Byron contends that once a civil war is taking place, the argument can be made that a government no longer has competent authority under international law to invite another state to assist, as it is no longer the legitimate authority.[95] This came into issue in 2011, when an intervention force, the Gulf Coordination Council, helped to crush protests by Shi'ite Muslims in Bahrain. Bahrain's Sunni government had requested the force to intervene in line with a defence pact with the Council. The force's largest contingent came from Saudi Arabia, which was worried about the spillover these protests might have on its own Shi'ite population in the oil-rich eastern part of its country. Opposition groups alleged that this foreign intervention was an international act of war.

International forces or peacekeepers are frequently placed in situations to maintain peace, rather than to fight. Such forces do not have the stated aim of supporting either party to a conflict and do not have a mandate to use force, other than in self-defence. As such, the

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[93] *The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* I.C.J. 2007, at para 405.
[94] Vite, supra note 50.
[95] Byron, Christine. "Armed Conflicts: International or Non-International." *Journal of Conflict & Security Law* 6 (2001): 63–90.

mere presence of these forces does not automatically make them *parties* to a conflict – and does not automatically render a situation international.[96] Such international forces can become "parties" in two situations. The first is if they act in support of one of the parties to a conflict. For example, in 2012, United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) provided military support to the Congolese government to repel an offense south of Kibumba by rebel group, *M23*, rendering them a party to hostilities. Similarly, the African Union's mission in Somalia has aimed to bolster Somalia's government in its fight against *al Shabaab*. Second, even if a force is not supporting one of the parties, the status of the force will be determined using the criteria normally used to evaluate the existence of NIACs. As such they will be considered "parties" if their involvement reaches the required level of intensity. Where international forces do qualify as parties to a conflict, most would argue that their involvement renders a conflict IAC, even if the fight in which they become involved is a fight against a non-state armed group. The ICRC take the opposite view, arguing that whether a conflict will be rendered IAC or NIAC depends on who the international force is fighting against.[97]

As IHL only recognises conflicts as IACs or NIACs, "internationalising" is a way of bringing conflicts that mix these within IHL's classification. This legal approach does not challenge the categories in the law, but rather, finds a way to frame situations to fit within the law's demarcations. In contrast, transnational conflicts, discussed now, do not fit within IHL's categories, nor do they purport to do so. "Transnational conflicts" are a non-legal category, or a lens outside of IHL's confines, hence challenging the existing categorisations in the law.

5.4.2 Transnational conflicts

Transnational conflicts are not IAC, in that they are not fought between two state parties; yet they are not NIAC, as they take place beyond the boundaries of just one state. Transnational conflicts can take various forms: they can be fought between a state and a non-state armed group, or between different non-state armed groups. The defining feature is that they transcend national borders. As noted above, in terms of CA3 and AP2, for the NIAC laws to be applicable, a conflict has to take place "within the territory of a single state". This leads to question about how to classify these situations.

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[96] Vite, supra note 50.
[97] Ibid.

Different types of transnational conflicts bring up distinct legal issues. "Exported" NIACs (or "delocalised conflicts" or "extraterritorial NIACs") occur when parties to a NIAC carry their fighting over onto the territory of a second state with the consent of that second government, be it explicit or tacit. While in terms of the parties involved (government fighting a non-state group) this is a standard NIAC, from a territorial perspective there is internationalising.[98] As an example, during the height of Uganda's conflict against the LRA, Ugandan troops went on the offensive, chasing the LRA over the border into South Sudan – from where the LRA continued its attacks into Uganda. A second type is "cross-border NIACs". Here state forces conflict with a non-state armed group operating on the territory of another state. This is not a spillover from their own NIAC, but an entirely different conflict.[99] Of course, if that armed group "belongs to" the state on whose land it is fighting, this would render it IAC. But, where this is not the case, the legal classification becomes more difficult.

There is disagreement on how the law should deal with transnational conflicts. Some argue that these are an altogether new category of conflict that cannot be accommodated by the IAC/NIAC divide. Some propose that a third legal category should therefore be created, distinct from IACs and NIACs.[100] Still others argue that transnational conflicts are not really "armed conflicts", and as such, other bodies of law, including human rights law, should be used to regulate them.[101] A different school contends that current laws can in fact be interpreted to allow transnational conflicts to fall within existing categorisations. One means (favoured by the ICRC) is to argue that the requirement that NIACs take place *within* the territory of one state is not actually a legal requirement – in which case, if a state is engaged in conflict with a non-state armed group, this will qualify as NIAC, regardless of the fact that they are operating across an international border.[102]

It is entirely likely that in 1949, with the drafting of the GCs, the territorial rider was not created with the purpose of excluding transnational conflicts. Such conflicts were not common at that point and, as such, were not a concern of those negotiating the provisions. However, in the post September 11th 2001 period these conflicts have risen prominently on the international agenda – in part because of international terrorism.

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98 Schondorf, Roy. "Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?" *New York University International Law and Politics* 37, no. 1 (2004).
99 Vite, supra note 50.
100 Schondorf, supra note 98.
101 Vashakmadze, Mindia. *The Applicability of International Humanitarian Law to "Transnational" Armed Conflicts*. Working Paper 34. EUI Working Papers, 2009.
102 Vite, supra note 50.

5.4.3 International terrorism

"If the US war on terror is the 'father of all wars', Africa's conflicts are his angry and rebellious offspring, sharing the same disrespect for borders and the close connections to private profiteering. Open conflict is only the surface eruption of much deeper-seated contradictions, vivid ulcers on the skin of an unhealthy body politic governed by a militarist mindset."[103]

Much debate on transnational conflict has taken place around the "war on terror". Immediately following the September 11th 2001 World Trade Centre attacks, the US administration asserted that the fight against Al-Qaeda was not an IAC, but was also not covered by CA3 (America is not signatory to AP2, so this law did not apply), hence leaving a gap in regulation – meaning that actions could be taken that were not restricted by IHL (although other bodies of law, like IHRL, were still arguably applicable). In 2006 the US Supreme Court in *Hamdan v. Rumsfelt* adopted a different approach. It held that the fight against Al-Qaeda was a NIAC, falling under the ambit of CA3, despite the fact that it was not taking place within any one country – with the Court thereby abandoning CA3's territorial rider.[104] Since then, and highly controversially, the US has used the fact that its fight against Al-Qaeda has been categorised NIAC as a means to deny POW status to opponents, who they label "unlawful combatants", another controversial interpretation. The Obama administration has retained this approach, albeit with minor changes. The US approach has been criticised, not only for its questionable legal foundations, but also for the practical problems it presents. Even those within the administration have acknowledged the problems with using the NIAC framework to regulate the "war on terror". For example, Bellinger, former US legal advisor to the Bush administration, conceded that, "Common Article 3, while containing important baseline protections, does not provide a comprehensive set of rules to govern detention of combatants in non-international armed conflict."[105]

The pertinent question is whether either of the categories – IAC or NIAC – are appropriate to regulate the fight against terror, or whether it is appropriate to apply IHL to terrorism at all. Sassoli explains: "It is uncontroversial to state that international terrorism represents a considerable challenge to the international community and that international law must meet this challenge. What is controversial is whether this challenge must, or at

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[103] Mama, Amina. "Where We Must Stand: African Women in an Age of War." *OpenDemocracy, 50.50 Inclusive Democracy*, November 28, 2012.

[104] Following from that ruling, the United States has taken steps to ensure that their counterterrorism actions are compliant with CA3. This has included ensuring that the Department of Defence Detainee Directive, the Army Field Manual on Interrogation and the CIA's interrogation and detention programme are compliant with CA3. Bellinger, John. "Legal Issues in the War on Terrorism – A Reply to Silja N. U. Voneky." *German Law Journal* 8, no. 9 (2007): 871–878.

[105] Ibid, at 878.

least may, be met by classifying terrorism as 'war' – or, in the terminology of contemporary international law, as 'armed conflict'. … The result – or, for some, the aim – of such a classification as an armed conflict would be the application of the law of armed conflict..."[106] Merely branding the fight against terror as the "war on terror" does not render it armed conflict. Individual components of this overall fight will need to qualify as armed conflicts in order for IHL to apply to them. When particular terrorist actions or counterterror measures reach the threshold of violence where they qualify as armed conflict, IHL will apply to these. Terrorism and the "war on terror" must therefore be divided into different components. To some of these, IAC laws will apply; to some, NIAC laws; while to many situations IHL will not be applicable at all.[107]

The problem is that in practice these components are not so easily separable. Terrorism and insurgency today have become entangled, with terrorist acts often part of or linked to broader armed conflicts.[108] It has become more difficult to identify specific differences between "organised armed groups", which are regulated by IHL, and "terror groups".[109] This speaks to the challenges of determining to which acts respective parts of IHL might apply. Terrorism and counter-terrorism is an area where the blurring lines between IACs, NIACs and "non-conflicts" become highly evident. The consequences of such uncertainty can be significant, with confusion in law creating gaps where there is little consensus about what regulation – if any – should apply. Such gaps are used as justification for legally dubious acts, adding further lawlessness to already troubled situations. It seems that international terrorism has begun to merge with new wars, not least of all because they utilise some of the same strategies. PSerhaps this forms part of new wars, or perhaps a new stage after them. What is evident is that the "war on terror" has reduced all categories. And in these reductions, women get lost even further, as the world's focus is held by the amorphous ever-shifting battle against male terrorists.

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106 Sassoli, supra note 69, at 1.

107 Ibid.

108 Gasser, Hans-Peter. "Acts of Terror, 'Terrorism' and International Humanitarian Law." *International Review of the Red Cross* 84, no. 847 (2002): 547–570.

109 The definition of terrorism is unsettled in international law. Even the SC Resolutions that address terrorism do not provide a definition of terrorism. For example, SC Res 373 (2001) and SC Res 1624 (2005) talk about combating terrorism and the risks posed by terrorism, but do not define the actions that fall under the term's ambit. Terrorism is understood to be a tactic that certain armed groups adopt, rendering them to be labelled as terrorist groups. However, the label "terrorism" is frequently assigned because of political considerations – with significant consequences. African governments have labelled certain armed groups as terror groups to get international support in fighting them. Illustrating the erratic way in which these titles are allocated, in 2007 Uganda's LRA made it onto the US State Department terrorist list (as "other designated organizations"), along with ex-FAR (Forces Armées Rwandaises), the former military of Rwanda – both quintessential "organised armed groups", rather than the types of groups commonly understood to be terror groups. Piombo, Jessica. *Terrorism and U.S. Counter-Terrorism Programs in Africa: An Overview*. Centre for Contemporary Conflict, 2007.

5.5 The merging of the laws of IAC and NIAC

In recent years there has been a move towards extending the more comprehensive body of law applicable to IACs, to NIACs, or at least towards reducing the substantive differences between the rules applying to each. This move has occurred through a number of means, including through the jurisprudence of the ICL tribunals and developments in IHRL. This move has also been evident in the development of customary international law.

When considering this, it is important to acknowledge the institutions that shape international law and to consider their roles and agendas. The ICTY in *Tadic* had an interest in interpreting IACs and NIACs in the way it did, as doing so allowed them to deal with the matters before them. Those working with human rights treaties have an interest in broadening their application to provide the most comprehensive coverage to the most people. Even CIL's developments are interpreted through a particular lens; the ICRC, which compiled a treatise on customary IHL, had an interest in arguing that many of the laws pertaining to IACs also pertained to NIACs, as this furthered their humanitarian goals.

5.5.1 Customary international humanitarian law

In terms of CIL, as demonstrated through state practice and *opinio juris*, many of the laws that in the IHL treaties pertained only to IACs, are now also applicable in NIACs, having attained the status of CIL for NIACs too. If treaty provisions become CIL, they become binding even on parties who are not signatories to the treaties.[110][111]

In 2005, the ICRC produced a study laying out those rules that they believe to be customary international humanitarian law.[112] The study concluded that 131 out of the 161 rules identified as customary IHL (almost 81% of the rules) were applicable to both IACs and NIACs. Emily Crawford explains: "… the study suggests that, where gaps exist in Protocol II … state practice has filled in these gaps, creating rules that are parallel to those contained in Protocol I. … The overarching finding of the ICRC study is that there is a more uniform approach to the regulation of conduct in all armed conflict than had been

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[110] Mack, supra note 25.

[111] Treaties are relevant to determining the extent of CIL as they can help to ascertain how states view particular international law rules. In the North Sea Continental Shelf case, the ICJ considered the degree of ratification of a treaty relevant in ascertaining whether a law has reached the status of CIL. Drafting treaties is important in focusing international legal opinions. The Continental Shelf case noted that, "…multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them." *Continental Shelf Case (Libyan Arab Jamahiriya v. Malta)*, *ICJ,* 1985, pp. 29–30, § 27.

[112] Henckaerts, Jean-Marie. "Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict." *International Review of the Red Cross* 87, no. 857 (2005): 175–212.

previously thought."[113] While many regard this study as being a good indication of the current state of CIL, this has been contested – among other things, because it reflects the view of the ICRC but does not reflect reservations of states, commentators and academics.[114]

International courts have also confirmed this development in customary IHL. In 1986, the ICJ affirmed that the provisions of CA3 now reflect CIL.[115] In *Tadic* the ICTY discussed the idea that CIL has extended the law to further cover NIACs, with the tribunal explaining that the emergence of rules governing internal conflict had happened at two levels, treaty law and customary law – with these two bodies mutually supporting and supplementing each other. The Tribunal confirmed that as a result of the interplay between these two sets of rules, some treaty rules have gradually become part of CIL.[116]

5.5.2 International criminal law

The international criminal tribunals have played a key role in bringing the IAC and NIAC laws closer together. In the *Tadic* Interlocutory Appeal decision, the ICTY illustrated the means by which these bodies of law were merging, and how the increased regulation of NIACs was occurring through treaties, CIL, state practice, declarations and resolutions. However, the court cautioned that despite this increased merging, the legal distinction between IACs and NIACs remains, and there are limits to the extent that the laws governing IACs apply to NIACs. The Court noted that, "Two particular limitations may be noted: (i) only a number of rules and principles governing IACs have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts."[117] Some have been critical of the ICTY's approach. Schmitt notes that, "Unfortunately, the distinction between "law-finding" and "law-making" has occasionally been blurred. … the tribunal's incorporation of such rules neglects the fact that, for reasons outlined above, states, the sole "law-makers in international law" have intentionally crafted a far narrower legal regime for non-international armed conflicts."[118]

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113 Crawford, supra note 20, at 456.
114 Mastorodimos, supra note 52.
115 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Merits), (Nicaragua v United States),* ICJ, 1986.
116 *The Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY, IT-94-1-AR722 1995, para 98.
117 Ibid, para 126.
118 Schmitt, Michael. "Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance." *Virginia Journal of International Law* 50 (2010): 795–839, at 819–820.

The ICC's Rome Statute has also played a role in bringing these bodies of law closer. In Art 8(2)(c) and (e) it explicitly identified those crimes that apply in NIACs. When doing so, it took many of the crimes that had previously only applied to IACs and rendered them applicable to NIACs for the purposes of that law. That being said, the Rome Statute too retained the legal divide between IACs and NIACs, still reserving certain crimes for IACs and others for NIACs.

5.5.3 International human rights law

IHRL and IHL operate simultaneously in conflicts and are complementary legal regimes. When both apply to a particular matter, IHL is *lex specialis,* meaning that as the more specific body regulating the situation, it takes precedence.[119] IHRL fills in some of the substantive gaps in IHL's regulation of NIACs, by guaranteeing at least a certain level of protections to those in NIACs. It guarantees people's human rights and ensures certain safeguards, including procedural safeguards in the case of violations. Some of the protections provided by IHRL are similar to those provided by IHL in IACs.

The two bodies of law developed in parallel following World War Two. Around that time, there began the move, described above, towards some IHL rules being applied in NIACs. The second development was the formation of IHRL, concerned with the ways states treated their citizens. IHRL began to break down the firm shield that state sovereignty had held against international law regulating internal matters.[120] While these developments worked in the same direction, "they advanced on parallel tracks; different personalities were involved in the projects of IHL and IHRL and represented different State interests. In drafting the treaties in the two fields, no serious consideration was given to the relationship between the two branches of law, IHL and IHRL."[121] Today there is a great deal of discussion about the interrelationship between these bodies,[122] yet there remain numerous unresolved issues about how these bodies work together in practice.[123]

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[119] Para 105, *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* ICJ Rep 226, 1996. Alston, Philip, Academy of European Law, and New York University. Center for Human Rights and Global Justice. *Non-State Actors and Human Rights*. Collected Courses of the Academy of European Law ; XIII/3. Oxford ; New York: Oxford University Press, 2005.
[120] Kretzmer, supra note 17.
[121] Ibid, at 10.
[122] See for example, Alston, supra note 119, and Doswald-Beck, Louise and Vité, Sylvain. "International Humanitarian Law and Human Rights Law." *International Review of the Red Cross* 293 (1993).
[123] The ICJ discussed this relationship in the following judgements, *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 (§25); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] 43 ILM 1009 at § 106-113; and *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* [2006] 45 ILM 271 at §216.

There are problems with relying too heavily on IHRL to regulate NIACs. One problem is that IHRL does not create the same obligations on non-state actors as on states. While IHRL does seem to be moving further in the direction of binding non-state actors, its primary focus remains the regulation of states.[124] Another problem is that certain parts of IHRL can be derogated from in times of conflict.[125] In addition, as Watkin explains, "… international humanitarian law differs from human rights law in its requirement to interface with "military necessity". At the heart of military necessity is the goal of the submission of the enemy at the earliest possible moment with the least possible expenditure of personnel and resources. … In balancing these two concepts the requirement to distinguish between those who can participate in armed conflict and those who are to be protected from its dangers is perhaps its most fundamental tenet."[126] With its differing set of priorities, IHRL is ill equipped to manage this difficult balance.

5.5.4 Should the IAC/NIAC divide be retained?

The above sections have demonstrated how IACs and NIACs are beginning to merge both factually and in terms of the laws applicable to them. This merging, the many problems with the IAC/NIAC divide, and the evident problems with the regulation of NIACs have led some to question whether the IAC/NIAC divide should be removed and a uniform law apply to all armed conflicts.

There are those who support this divide. Its key value, they argue, derives from the fact that IACs and NIACs are inherently different. For one thing, the relationship between a state and its subjects cannot be compared to a state's international relations. While it is highly exceptional for states to employ force against other states, this is more commonly used against their own citizens – in everyday law enforcement and in quelling riots and disturbances.[127] The relationships between parties to IACs and NIACs are also different; states are regarded as equals on the international playing field, with conflicts between them considered conflicts amongst equals. In contrast, NIACs are seen as fought between non-equals.[128] While one can assume that states are able to fulfil the comprehensive obligations of IAC IHL, non-state groups might have less capacity to do this – and the IAC rules

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124 Clapham, Andrew. "Human Rights Obligations of Non-State Actors in Conflict Situations." *International Review of the Red Cross* 88, no. 863 (2006): 491–523.

125 Derogation clauses can be found in Article 4 of the International Covenant on Civil and Political Rights and Article 15 of the European Convention on Human Rights.

126 Watkin, Kenneth, *Combatants, Unprivileged Belligerents and Conflicts in the 21st Century*, Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge, January 27–29, 2003, Programme on Humanitarian Policy and Conflict Research at Harvard University, at 2.

127 Moir, Lindsay, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002.

128 Odermatt, supra note 67.

would be inappropriate in situations where fighters were not actually able to meet these.[129] A different line of argument is that the IAC rules are unsuited to regulating NIACs as the methods of fighting NIACs differ to those envisaged by IAC IHL – many NIACs are resisted by states using methods more akin to law enforcement, counter-terrorism or riot control, making the IAC laws inappropriate for regulating these.[130]

However, a growing voice is calling for the IAC/NIAC divide to be removed. Critics argue that this divide is arbitrary and artificial and that in many situations it frustrates IHL's humanitarian goals.[131] One of the key arguments for its abolishment relates to how difficult it can be to actually make this distinction in modern conflicts. Particularly at the start of conflict – a point which in itself might be unclear – due to the poor intelligence available or unequal access to information, it may be challenging for parties to make this classification, and hence to know which body of law to apply. The fact that even academics and tribunals struggle with classifying conflicts after the fact, speaks to how difficult this can be for commanders in the heat of battle.[132] It is problematic that important regulatory consequences flow from a classification that is so hard to make.

Another problem with this distinction is that it creates room for discretion, which can be used politically. States will choose interpretations that work best for their needs.[133] Crawford explains: "The promotion of gradations of humanitarian protection will always leave open the possibility of favouring the lowest permissible level of treatment."[134] As an example, states might argue situations are NIACs, in order to not have to provide enemy fighters with POW status – an approach used by the USA in its "war on terror". The divide in the law then becomes less about making a legal determination and more about using the law as a tool to achieve political and other objectives. The problems with discretion are compounded by the fact that there is no central organ or arbiter to make authoritative decisions about this during times of conflict.

Another argument for abolishing this divide is that it creates "double standards of conduct" that are unacceptable from a humanitarian perspective. Victims' needs are similar regardless of whether a conflict is IAC or NIAC.[135] The ICTY in *Tadic* echoed this sentiment, stating that, "…in the area of armed conflict the distinction between interstate

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129 Ibid.
130 Ibid.
131 Bartels, supra note 2.
132 Mastorodimos, supra note 52.
133 Vite, supra note 50.
134 Crawford, supra note 20, at 464.
135 Mastorodimos, supra note 52.

wars and civil wars is losing its value as far as human being are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a sovereign State?"[136] It also seems unfair to prosecute those who commit certain acts in IACs, while not prosecuting those who commit the same acts in NIACs. Finally, having different categories of conflict, with different rules applying, negatively affects compliance with the law.

While some argue that the divide between IACs and NIACs should be removed, others argue that more categories should be added – for example, adding "transnational conflicts" as a distinct legal category.[137] It is unclear how this might work in practice; whether a new protocol, treaty, or a treaty amendment would be required, or how this might be framed. Of course, if new categories are being created, consideration should also be given to situations that do not meet the threshold for "armed conflict" – increasingly important given the prevalence of low-level situations with sporadic outbursts in new wars – and to if and how these could be regulated by IHL.

The reasons for abolishing the IAC/NIAC divide are compelling, with a range of humanitarian and practical reasons why this split is counter-productive. Among the many evident problems is that the divide results in reduced protections for civilian women – particularly those in NIACs. Be it because women are "protected" by the problematically weak laws of NIACs, or because the complex IACs/NIACs divide encourages non-compliance, the end result is the same: lesser protection for women embroiled in conflict. Women get lost in IHL's distinctions. Layers of legal complexity conceal their experiences. The IAC/NIAC divide provides another layer by which women are lost, hidden by the technicalities in the law – a compelling reason to strive to simplify and remove these complexities. However, despite the reasons for merging these laws, the categorisation remains, bringing significant consequences and ultimately affecting the principle of distinction.

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[136] *The Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY, IT-94-1-AR722 1995, at para. 97.
[137] Bartels, supra note 2.

5.6 IAC/NIAC and the principle of distinction

The IAC/NIAC divide results in a weakened principle of distinction. The version of the principle contained in the NIAC laws is sparse and problematic – with no privileged category of "combatant" and a reliance on the murky area of direct participation. The fact that a uniform, simple and clear distinction between "civilians" and "combatants" does not apply to all conflicts weakens the principle, detracting from its powerful and comprehensive appeal.

However, despite the IAC/NIAC divide working to weaken the principle, the principle is also a key factor standing in the way of a harmonised law. Crawford argues that many of the substantive principles that would make up a uniform law are already in place, through CIL, treaty law and other sources. When viewed together, these provide a blanket of protection in NIACs that is substantively quite similar to protections in IACs. The problem, she argues, comes with the principle of distinction. Those particular rules of CIL that remain applicable *only* in IACs and that have no correlates in NIACs are those relating to the principle of distinction – and, more specifically, to combatant and POW status and combatant immunity. States have been highly resistant to granting combatant status to those fighting against them in NIACs, to date refusing to do so. Crawford explains that, "… if the distinction between types of conflict were ever to be dropped, the matter of how the 'privileged/unprivileged' combatant demarcation could be resolved becomes pivotal. Before a uniform law of armed conflict can be created, a uniform approach to participants in armed conflicts will also need to be resolved. The question is how this is to be achieved."[138]

Suggestions have been put forward about how to get around the law's unequal treatment of fighters. Jinks argues that there is an emergent "protective parity" applicable to all fighters – those who are recognised as combatants and those who are not – that results from the convergence of protections for combatants and civilians.[139] This has created a net of basic, fundamental protections that are nearly as comprehensive as POW status.[140] Another approach is to argue that "unlawful combatants" – *all* non-state armed actors in NIACs – are protected under GC4, which deals with the protection of civilians. In terms of this approach, a textual reading of the GCs suggests that those who are not protected by GC3 (protecting combatants) would automatically be covered by GC4.[141] This approach feels

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[138] Crawford, supra note 20, at 459.
[139] Jinks, Derek. "Protective Parity and the Laws of War." *Notre Dame Law Review* 79 (2004).
[140] This 'net' of protections come from GC 4, CA3, Article 75 of AP1, Art 4 and 6 of AP2.
[141] Crawford, supra note 20.

intuitively problematic, as civilian protections were by their very nature created to protect those *not* fighting or posing a threat to parties to a conflict. Including unlawful combatants in this group may result in weakened protections for true (non-fighting) civilians. Nevertheless, regardless of how one gets to that point, the fact that all fighters are covered by some legal protections helps to get some way around the barrier the principle of distinction presents to a unified law. If the substantive protections are *de facto* there anyway, then the differences presented by the principle of distinction may not be as significant a stumbling block as Crawford makes out. The 'blanket of protective schemes' therefore lays the basis for equivalent protections for all – and ultimately for a unified law for IACs and NIACs.[142]

The IAC/NIAC divide affects the principle of distinction, and the principle acts as an obstacle for the removal of the IAC/NIAC divide. It is therefore at this juncture that solutions to the problems affecting both distinctions might be found. If the laws pertaining to NIACs were replaced with a unified law, the principle of distinction might operate better. In turn, addressing some of the problems with the principle of distinction may remove an obstacle and pave the way for a unified law.

The labelling and classifying of conflicts is political, with classifications often made to support parties' goals. It is also gendered in that much of the violence that most affects women does not contribute to determinations of whether situations constitute "armed conflict" or whether they are IAC or NIAC. Women experience similar violence in war and in peace, and the transition between these states, from women's perspectives, is often no more then a continuum, where the types and intensity of violence vary, yet remain constant in nature.[143]

The divide between IACs and NIACs is problematic. The mix of state interests, politics and simultaneously rigid and ambiguous laws work together to create an area fraught with challenges. New wars have put this divide to the test, clearly exposing its flaws. If the IAC/NIAC divide, such a central axiom in the law, cannot be applied to the dominant conflicts of today without displaying such strain, this speaks to another way in which IHL is no longer suitable to regulate modern conflicts.

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142 Ibid.
143 Cockburn, supra note 73.

6. Applying the Law

This chapter examines how the principle of distinction is applied with respect to women and conflict in Africa. The principle is applied to women participating in various ways in African conflicts, seeking to determine how different women would be categorised; if they'd be combatants or civilians, and whether the roles they typically play would constitute direct participation.

For the purposes of this chapter, women are divided into three groups: women in state armed forces, women in non-state armed groups, and women contributing to armed movements from within civilian populations. As chapter 3 described, participation in conflict is fluid, and in practice women often move between these groups or straddle them. A woman may start off supporting an armed movement as a civilian, before gradually increasing her involvement and becoming a member over time. While recognising this fluidity, these categories have been used in this application of the law as they each illustrate issues relevant to this discussion.

There are different reasons that the principle of distinction is applied in practice. The primary reason is to determine who can and cannot be targeted. The other function is to ascertain the status of actors; determining whether they are combatants, entitled to the privileges that come with that status, whether they are civilians, or even unlawful combatants. The principle of distinction is also applied post-conflict by courts and tribunals, assessing whether there were violations of the principle that constituted crimes deserving of punishment. Such classifications are carried out at different times, in differing circumstances, by different actors. These can yield quite differing results; a judge in a tribunal will be provided with more facts and legal analysis than a soldier in combat, and will have the benefit of a holistic view of the conflict and hindsight – not to mention a differing political climate and interests. Recognising how external factors can affect classification results, this chapter will seek to identify the *most* correct interpretations – those that might be made were an optimum amount of information available – despite the fact that in practice this is seldom the case. Doing so best allows us to assess the definitions and parameters of the law.

In practice the principle of distinction is seldom applied to women. Women largely go unnoticed. Even those who are actively involved with armed groups are frequently overlooked; their contributions are ignored, or they are looked at as 'wives' rather than

'soldiers'. Academic writing and tribunal judgements seldom categorise female actors. For the most part, women are not considered, unless considering them serves a particular agenda. Women are however targeted in conflict for strategic reasons. But this is seldom done in terms of an application of the principle of distinction – rather, when targeting or not targeting women, the law hardly comes into it at all.

6.1 Women in regular state armed forces

"For me it was my own choice. When the 'garde civile' started, they were wearing uniforms. What I liked about them was the way they dressed, and the way they walked/marched. The dignity. They say it is a bad job, but when I joined I realised it is not a bad job, it is a good job. It gives you a good education." Female sergeant, Integrated Armed Forces, Democratic Republic of Congo.[1]

6.1.1 Women in regular armed forces/armies

Women in regular armed forces are the simplest group to apply the principle of distinction to. In terms of the law, members of state armies are presumed to be combatants.[2] They gain their combatant status from mere membership of armed forces, rather than from the roles that they play within these. This means that even the cook or cleaner in an army is classified combatant. This rule applies to everyone; men, women – even children[3] (although this is qualified by the laws prohibiting child recruitment). Membership of armed forces is expressed by formal integration into army units or command structures, as well as by uniforms, insignia and equipment.[4]

Despite the presumption of combatancy, armed forces *can* have both combatant and non-combatant members. Non-combatant status is the exception, occurring in limited circumstances. This is regulated by domestic law, with internal legislation required to render members of state armies non-combatants. As such it is a legal pronouncement, rather than an individual's roles, that render them non-combatants. States have limited discretion in this regard – this must be done in accordance with international law.[5] Importantly, those designated non-combatants may not be authorised to directly participate

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[1] Baaz, Maria Eriksson, and Stern, Maria. "Making Sense of Violence: Voices of Soldiers in the Congo (DRC)." *The Journal of Modern African Studies* 46, no. 01 (2008): 57–86.

[2] Medical and religious personnel are the exceptions to the rule that grants combatant status to members of state armed forces, because they are understood to enjoy the right to neutrality.

[3] Fleck, Dieter. The Handbook of Humanitarian Law in Armed Conflicts, Oxford University Press, Second Edition, 2008, at 87.

[4] "Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law." *International Review of the Red Cross* 90, no. 872 (2009): 991–1047.

[5] Fleck, supra note 3.

in hostilities. So, for example, a person who works with weapon systems cannot be designated non-combatant.[6]

Most state armies still exclude women from active combat. In Africa, only Eritrea allows women into combat. South Africa allows women into 'other military roles' (like fighter pilots or artillery officers) while all other African armies bar women from combat.[7] Depending on the specifics of their domestic laws, (non-combat) women in these national armies might be declared non-combatants. However, where no such legislative declaration exists, which is generally the case, these women would be classified combatants. As such, they would be entitled to all combatant privileges and obligations, including POW status, the right to participate in hostilities and the obligation to wear uniforms. They could also be the lawful targets of attack for the duration of their enlistment.

Article 50 of AP1 defines "civilians" negatively – as those *not* listed within the various categories of combatants. Non-combatant members of armed forces *do* fall within one of categories of combatant (they are members of the armed forces of a party to a conflict – Art 4(1) GC3 and Art 43(1) AP1). Therefore, non-combatant members of armed forces, while not classified as combatants, are also not civilians – and are therefore not covered by the prohibition on attacking civilians. Those attacking state armies need not distinguish between their combatant and non-combatant members, and the fact that there are non-combatant army personnel present at a military base does not mean those attacking need to take precautionary measures to avoid them – as they would if there were civilians present.[8] In IACs, non-combatant members of state armed forces are entitled to POW status on capture.

An important group to consider in the African context are women who *accompany* state armies but are not actually *members* of the armed forces. In Africa this takes many guises: from sex workers who live and work on or alongside military bases, to the women who follow armies providing services, selling goods and benefitting from the economic opportunities and relative security being near these forces may bring. Those who *accompany* armed forces have the primary status of civilians.[9] As such, they may not be targets of attack and do not have the right to participate in hostilities. However, if captured in an IAC, they might be entitled to POW status. Article 4(4) GC3 which lists the categories of

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[6] Ibid.
[7] Fisher, Max. "Map: Which Countries Allow Women in Front-Line Combat Roles?" *Washington Post*. January 25, 2013.
[8] Fleck, supra note 3.
[9] Ibid.

persons entitled to POW status, includes, "Persons who accompany the armed forces without actually being members thereof … provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model."[10] Armies therefore need to decide and act on this. However, in practice, in Africa the women who accompany armed forces often do so informally, ignored by armed forces, and not given any authorisation, recognition or identification cards. Hence often they might not be eligible for POW protection.

Determining the status of women in state armies in NIACs is more difficult. The NIAC laws do not provide for "combatant status", even for members of state armies. GC3 and AP2 do not mention combatancy or POW status. Rather, CA3 and AP2 talk of "armed forces" – a term not defined in the NIAC laws. There is controversy about whether members of state armed forces in NIACs are in fact combatants. The Interpretive Guidance notes that it is generally accepted that members of state armed forces in NIACs are *not* civilians.[11] According to the ICRC's non-binding customary IHL study, in NIACs members of state armed forces are considered combatants for the purposes of the principle of distinction and can therefore be targeted.[12] As POW status does not exist in NIACs, even members of state armed forces do not receive POW privileges – discussed further in chapter 7. Therefore, in NIACs, army women do not have civilian status, yet they might also not have combatant status. They receive some of the effects of combatant status, yet not all. This begins to illustrate the complicated web that IHL weaves in NIACs.

6.1.2 Women in irregular armed forces, "belonging to" a state party

In determining the status of *irregular* armed groups in IACs (military groups that are not part of the regular state army), the first consideration is whether an armed group "belongs to" a state party to a conflict. If it does, then it can be considered part of state armed forces, and its members can potentially be classified combatants.[13] Where an armed group's conduct can be said to be attributable to a state under the international law of state responsibility, then it *belongs to* that state party. The degree of control required is not settled in international law. The Interpretive Guidance argues that belonging to a state party requires a *de facto* relationship between the armed group and the state party. This

[10] Article 4(4) GC3.
[11] Interpretive Guidance, supra note 4.
[12] Rule 1 and 3, Henckaerts, Jean-Marie. "Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict." *International Review of the Red Cross* 87, no. 857 (2005): 175–212.
[13] If a non-state armed group in an IAC does not "belong to" a state party to the conflict, then in terms of the Geneva Conventions, its members would be classified as civilians. One should, however, note that that such an armed group might still be regarded as a party to a separate NIAC occurring concurrently. Were that the case, the NIAC laws would be used to determine their status.

relationship can be officially declared, formed by tacit agreement, or inferred by conduct that makes it clear that a group is fighting for that state party. What is essential is that the group conduct hostilities *on behalf of* and *with agreement of* the state party.[14] As examples, in the on-going fighting between Rwanda and DRC, rebel groups operating within both countries, have been controlled by – or at least accused of being controlled by – the opposing states.

Where irregular groups fight on behalf of state parties to a conflict, their *members* – including the women of the group – may be combatants. The next thing that must be ascertained is whether particular individuals are in fact *members*. Unlike in regular armies, membership of irregular groups is not governed by domestic law. The Interpretive Guidance suggests that membership of irregular state armed forces must be determined using the same functional criteria used to determine membership in non-state armed groups. Membership, they say, requires "continuous combat function".[15] Women and the continuous combat function standard are discussed in the section that follows, which demonstrates how most women in African groups would fail to meet this standard. Membership is a tricky concept; in addition to being a concept in law, this is also a social concept, denoting commonly shared goals. However this social concept is in itself gendered, with women often not conceived as being true active "members" of groups. This mix of legal and social language goes further towards undermining certainty.

Those women who qualify as *members* of *irregular* groups *belonging to* a state may be combatants if they meet the GC combatancy requirements (Article 4, GC3). In terms of these, they need to be subordinate to responsible command, to have a fixed distinctive emblem, to carry their arms openly, have a certain level of organisation or discipline and act in accordance with IHL. Where groups do meet these requirements, their members would be entitled to combatant status and to the full set of privileges and obligations that come with that. However, most African irregular groups would fail to meet these stringent requirements; fighters often do not wear uniforms or emblems, they are ill disciplined, they do not have proper command structures, and they frequently and routinely violate IHL. This being the case, their members would not receive combatant status. Of course this conclusion is based on certain premises that underlie our understanding of the law; including about what a proper command structure is, or what would be recognised as a legitimate uniform.

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[14] Interpretive Guidance, supra note 4.
[15] Part 2, A ii 3b, Interpretive Guidance, supra note 4.

Irregular groups *belonging to* states also take part in NIACs. As there is no combatant status in NIACs, the relevant issue would not be the classification of these groups, as much as the consequences of individual's actions within these. If a woman was *directly participating* in such a group, she could be targeted at the time of her participation. An example of female involvement in irregular groups can be seen with the Janjaweed – translated as "devil on horseback" – the Sudanese militia operating in Darfur with the backing of Omar al-Bashir's government. The "Hakama" are Sudanese female traditional singers who praise male fighters with their singing and ululating. The Hakama can often be found alongside the Janjaweed. They have been said to cheer on the men during Janjaweed attacks, uttering racial insults as Janjaweed rape local women. The Hakama also reportedly participate in looting.[16] As such, they are "participating" in alternative ways, which would not constitute direct participation. It feels problematic that the law allows no room to recognise and incorporate such types of participation – with these women being treated by the law much as other civilians would be.

6.2 Women in non-state armed groups

"We carried ammo to the front line. When they brought water we would wash clothes. We cooked for them, and we made hot water and bathed the wounded. One man took me. I didn't want to be his 'wife'. He forced me. He had three other wives my age." (Liberia)[17]

In terms of IHL, outside of IACs and state armed forces, there are no combatants. When dealing with non-state groups, the principle of distinction's focus is therefore placed not on categorisations, but on the actions of individuals and the consequences flowing from these actions. When civilians directly participate in hostilities, they lose their immunity from attack for the duration of that participation. So the critical question when considering non-state armed actors is whether their specific actions constitute direct participation. There are a number of steps involved in determining this.

In order to qualify as direct participation in hostilities, an action must take place in the context of *hostilities*. This requirement stands in the way of many armed actions in Africa constituting direct participation. The concept of *hostilities* is linked to *armed conflict* – meaning that actions taken in situations that do not meet the threshold for armed conflict cannot qualify as direct participation. As described in the previous chapter, much armed

[16] *Sudan: Darfur: Rape as a Weapon of War: Sexual Violence and Its Consequences.* Amnesty International, July 18, 2004.
[17] Sengupta, Kim. "Girl Soldiers: The Forgotten Victims of War." *The Independent.* 25 April 2005.

activity in Africa derives from low-level rebel activity that continues for years, seldom or only sporadically rising to the level of armed conflict. The DRC provides a good example of this. Since the singing of a peace accord and the official ending of conflict in 2003, violence has continued, with numerous rebel groups remaining active in the country. There have been a few flare-ups that could be said to have reached the level of armed conflict, such as the 2012–2013 rebellion of rebel group M23. However most rebel activity during this time has not reached the armed conflict threshold, meaning that armed actions taken within these would not constitute direct participation. An evident problem is that situations are fluid, changing with time. It is unclear how parties on the ground are supposed to know the exact moment that a situation passes the threshold into hostilities, rendering actions to be direct participation. It is widely acknowledged that direct participation assessments take into consideration individual's movements. However, it is often not recognised how the fluidity in a broader situation can also effect direct participation determinations – as can political pressures that might influence armed conflict threshold determinations.

Even during armed conflict, not all violent conduct is considered *part of* hostilities. Actions can only qualify as direct participation if those acts are part of the conduct of war – or put differently, if they are carried out by a party to a conflict in the furtherance of conflict goals.[18] In practice, it is often hard to tell who the parties to a conflict are, and which of their acts are in furtherance of conflict goals. In new wars, a range of actors operate with diverse motivations, blending criminality and hostilities in ways that make it difficult to decipher which acts are part of the conflict and which are not. Sudan's Janjaweed and Murahaleen militias conducted violent slave raids during the conflicts in South Sudan and Darfur, and thousands were abducted and sold as slaves. Were these 'acts of conflict' that would render them direct participation? The militias made money from the sale of slaves, suggesting they were criminal enterprises. Yet on the other hand the raids in which abductions took place were integral components of the armed conflict and were politically driven. Effectively, the raids served dual goals.

Taking this further, if the kidnapping raids could be classified as direct participation, could the same be said of the other tasks involved in selling the slave victims? What of those who fed the victims, or transported and sold the slaves – actions without which the trading of slaves would not be possible? Which of the different actions that make up a criminal enterprise can constitute direct participation when carried out by armed groups? If the goal of criminal activity is to earn funds to keep an armed struggle going, does that render the

[18] Interpretive Guidance, supra note 4.

crime part of the conduct of war? Is the determining factor what the money was needed for? A similar question can be asked about pillaging of mineral fields by armed groups: must one distinguish when rebels are doing this to pay for the continuation of a rebellion, or when they are doing it purely for the purposes of profit? The reality is that crime by armed groups is often committed for both reasons – and even where it is done to keep rebellion going, this in itself is often done to extend the time in which pillaging for profit can occur. There are no clear answers to these questions – yet these reveal some of the problems in trying to apply this law in new wars.

If this hurdle is passed and it is found that actions are taken in the context of hostilities, then one must determine whether individual actions constitute direct participation. Chapter 2 described the conflicting interpretations of "direct participation". The ICRC has attempted to clarify these in its Interpretive Guidance – although its requirements are by no means accepted by all.[19] According to the Interpretive Guidance three requirements must be met for an act to constitute direct participation. First, the act must be likely to adversely affect the military operations or capacity of a party to the conflict, or alternatively to inflict death, injury or destruction on persons or objects protected against direct attack (threshold of harm); second, there must be a direct causal link between the act and the harm likely to result from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); and third, the act must be specifically designed to cause the harm, in support of one party to the conflict to the detriment of another (belligerent nexus).[20] In practice, these three requirements are interlinked and blend into one another. While these might make sense in theory, when applied to the new wars, some problems become evident.

"Our only motive to exist was killing. That is the only thing that we thought about ... I burned houses, captured people, I carried looted properties. I was responsible for tying people, and killing. I was not too good at shooting, but I was an expert in burning houses. This was less risky." (girl soldier, Sierra Leone)[21]

In some conflicts in Africa women have been actively involved in fighting. They have taken part in attacks, shooting, killing and military raids – acts that clearly constitute direct participation. Women have also been involved in attacks against civilians; killing, maiming, facilitating rapes and amputating civilian limbs. According to the Interpretive Guidance, although not directed at a party to a conflict, attacks levelled (direct causation) against

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[19] Schmitt, Michael. "Deconstructing Direct Participation in Hostilities: The Constitutive Elements." *New York University International Law and Politics* 42, no. 3 (2010): 697–740.
[20] Interpretive Guidance, supra note 4.
[21] Denov, Myriam. *Child Soldiers: Sierra Leone's Revolutionary United Front*. Cambridge: Cambridge University Press, 2010, at 111.

civilians, that reach a certain gravity threshold (threshold of harm) can constitute direct participation. However, the belligerent nexus requirement poses a problem. Many acts of harm against civilians are not designed to cause harm in support of one party to the conflict to the detriment of another. The Interpretive Guidance is silent on how to deal with this. Yet this is an important question in new wars, where harming civilians is frequently a central strategy, but not one designed to harm warring parties in the traditional sense. This problem reveals how the Interpretive Guidance's requirements are geared at certain types of military objectives, while new wars are often directed in wholly different ways.

Consider a recent example; in 2014, Nigerian Islamist Group Boko Haram kidnapped over 200 girls from the city of Chibuk, many of whom were reportedly sold or trafficked into marriages. So too, in March 2015, 506 women and children were reportedly abducted from the town of Damasak. There have been numerous other violent acts committed against civilians in northeast Nigeria, as well as other large-scale abductions. Would these actions constitute direct participation in hostilities? The preliminary questions are whether Boko Haram is involved in armed conflict, of what type, and against whom? Boko Haram seems to be fighting the Nigerian government – in addition to all Nigerian civilians who do not hold the extreme Islamist beliefs that they do. Boko Haram have conducted recent attacks in Cameroon, Chad and Niger, suggesting they are also fighting neighbouring governments and populations, adding an international element to what was formerly an internal war. Boko Haram's declaration of an Islamic caliphate raises interesting questions about internationalising – a topic for a different discussion. In considering their actions, it seems the threshold of harm and direct causation elements are easily met. However, in considering the belligerent nexus requirement, the abduction of the schoolgirls did not seem to be aimed at supporting one party to the conflict to the detriment of the other – this was not an overtly military task, it was not targeted at a fighting enemy, and could therefore not have had the effect of weakening government or any other parties' capacity to fight. However, the actions did seem to be intrinsically connected to the "goals" of the conflict. "Boko Haram" in Hausa means "Western education is a sin". Abducting girls from school could be said to be central to the group's message and mandate. Their general conflict seems to be less about defeating an enemy than about defeating an idea or way of life – in which case, kidnapping girls could be argued to be highly relevant to this.

This raises the related issue of military necessity – a problematic concept in new wars. Historically, where tactics have been shown to be militarily effective or central to achieving

warring parties' goals, the law has tended to be more permissive of them, justified by IHL's "necessity" principle. But, this concept too is challenged by the differing goals and aims of new wars. In these, the *aims* of conflict might not be to *defeat* an enemy and *win* a war, but rather to harm, kill or displace civilians or, even, to keep girls out of school. If a conflicting party's goal is to harm civilians, or if harming civilians does truly facilitate a group's aims in terms of the new war's strategy, does this make targeting civilians acceptable in terms of military necessity? If the *enemy* in new wars is a particular ethnic group – rather than a group of fighters – can members of that civilian group be considered military objectives? These questions reveal how the traditional notions underpinning the IHL system – those supporting a military notion of conflict goals – make little sense in light of the aims and tactics of new wars.

Many African women are involved in roles that do not require the perpetration of violence. Describing the lives of women in South Sudan's conflict, Stone explains that, "*In many respects, women's daily routines during the war mirrored those of peacetime; they collected water and firewood, prepared food, cared for children and sustained the daily necessities of life. However, in addition, they also carried food, ammunition and medication to the frontlines, and would return with wounded combatants who they cared for, or had to bury if they did not survive. One of the most important roles for women was to clear up after a battle, and gather resources for their comrades. Ammunition stocks took priority, and several women interviewed claimed to have carried up to 50 kilograms of ammunition from the scenes of raids.*"[22]

Tasks like collecting firewood and water, preparing food and looking after armed group bases would not constitute direct participation – despite how important these might be to the subsistence of armed groups. These are *not* designed to cause harm (threshold of harm) to the opposing side's military capacity (belligerent nexus), and there is no direct causal link (direct causation) between their roles and the harm caused to the other side.

Harder to classify are those tasks performed by women that are more closely related to the waging of war, like carrying supplies and ammunition to the frontlines. It seems that often women play roles in preparation for, or following from an attack – with the actual attacks carried out by men. Chapter 2 explained how acts *in preparation for* attacks can constitute direct participation if they have a 'military nature'. This narrow notion of military nature seems problematic if one considers what it actually takes to carry off successful military

[22] Stone, Lydia, 'We Were all Soldiers': Female Combatants in South Sudan's Civil War, in Bubenzer, Friederike, and Stern, Orly. *Hope, Pain & Patience: The Lives of Women in South Sudan*. Jacana Media, 2012, at 34.

operations today – 'non-military' preparatory components, or rather, those actions that are not physical, violent or kinetic, can be far more critical to the success of an attack and can render it much more deadly. Understandings of the military versus non-military nature of acts derive from an establishment view of conflict, one that is ill suited to the realities of modern warfare. The Commentaries excluded preparatory acts like recruiting and training from being considered direct participation[23] – also problematic, in that providing in-depth training on how to use particular weapons systems seems like a quintessentially military task, and one that is certainly within the ambit of combatants in state armies. The ICRC's Interpretive Guidance weighs in on preparatory acts, stating that such acts – for example, carrying or preparing ammunition – would not constitute direct participation unless they were being specifically prepared for a precise attack, so that the tailored preparation formed an integral part of that specific attack.[24] So if women were carrying ammunition to the frontline in order that it would be available for general use, this would not qualify as direct participation, but if they were carrying ammunition to a specified location, in order that it would be used in a particular attack, this might quality. In terms of the Interpretive Guidance's approach, if training was conducted for a specific attack and formed an integral part of a planned attack, it could be argued to be direct participation after all.

"She received military training and was selected to be a bodyguard of the senior commander and his captive "wife." She was trained in the use of and carried a two-pistol grip machine gun. The commander would move under her cover when he went out into the field and during fighting. She was also responsible for watching over the commander and his captive "wife" when back at the compound. Additionally, she served as a night security guard in the compound on alert for any attacks..." (RUF, Sierra Leone)[25]

Women acting as guards generally; guarding group's bases, or guarding specific individuals, would not be directly participating. However, women acting as guards might be directly participating if they were keeping guard as part of a specific attack, and the guarding formed an integral part thereof. If a woman were guarding a specific individual – as in the quote above – and he was directly participating in an attack, an argument could be made that she was directly participating too. Of course, a counter-argument could also be made that a bodyguard does not become a direct participant just because the person being guarded takes part in an attack. There is no clarity about which of these positions is legally correct. Acts like caring for the wounded and carrying wounded from the fighting front,

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[23] Queguiner, Francois. "Direct Participation in Hostilities Under International Humanitarian Law." *Program on Humanitarian Policy and Conflict Research at Harvard University* (2003).
[24] Part 2 V 2 a, Interpretive Guidance, supra note 4.
[25] McKay, Susan, and Mazurana, Dyan. *Where Are the Girls? Girls in Fighting Forces in Northern Uganda, Sierra Leone and Mozambique: Their Lives During and After War*. Rights & Democracy, 2004, at 92.

often performed by women, do not constitute direct participation – although, notably, it is an IHL obligation to care for war wounded.[26] Clearing up battlegrounds and burying the dead also do not qualify, despite the fact that these might be standard armed group functions – although in limited cases one could conceivably argue that clearing-up is a part of a coordinated military operation of which that specific act constitutes an integral part.

While these nuances are helpful in theory, it is difficult to see how armed actors in Africa could make these distinctions in practice. For example, if enemies see women in opposing armed groups carrying bundles of ammunition, how could they be expected to know whether these bundles were being carried generally to or from an area of fighting, or if the ammunition was being carried to a specific planned attack?

What becomes clear in applying the law to women in Africa is that most of the tasks that women typically play for armed groups do not meet accepted understandings of direct participation. Women's participation takes different forms to that of men, forms that tend to be removed from the military focused, kinetic notions underlying current understanding of direct participation. This application of the law demonstrates the male bias underlying the concept, a concept that was crafted to encompass those roles held by men.

Those women who are classified as directly participating can be targeted for the duration of their direct participation. Again, this is simpler in theory than practice. Women in armed groups might be allocated a range of assignments, some of which constitute direct participation and some of which do not. It is hard to see how those in opposing groups could be expected to know who is en route to what task and when different assignments begin and end. Consider members of armed groups living on a secluded base in "the bush", where all individuals work on a range of tasks, both combat and non-combat. It would be near impossible for enemy fighters to determine the starts and ends of their activities. It is not clear that the distinctions IHL expects one to make even exist in the planning and execution of actions. There is evident fluidity in new wars fighting, with attacks frequently not planned and organised in the way IHL anticipates – and not having formal starting and ending moments.

To deal with these problems, the Interpretive Guidance proposes focusing on group membership rather than on specific individual actions. In terms of its approach, to determine whether people can be targeted, one must determine if they hold "continuous

[26] Art 12 and 15, GC1, Art 12 and Art 18 GC2, Art 16 GC4, Art 10 AP 1.

combat functions". To do this, one must determine whether a women's direct participation is *occasional*, in which case she would be a civilian and would lose her protection from attack for just the duration of her participation, or continuous, in which case she would lose her protection for the duration of her membership in the armed group. Applying this to women in Africa raises many questions. What percentage of a woman's time would need to be spent fighting to achieve continuous combat function? Could women whose normal tasks include a mix of both duties relating to battle and other support and domestic duties ever have continuous combat functions? There are no clear answers to these questions. In framing its continuous combat function approach, the Interpretive Guidance foresees a clear separation between a movement and its armed wing.[27] However, this too would not work in all African contexts. While this might make sense with certain liberation parties, like Apartheid South Africa's African National Congress and its armed wing, Umkhonto we Sizwe, it does not hold true with more integrated political secessionist movements. In its fight against Sudan, the SPLA/M's "Army" and "Movement" were one and the same, with all in the population getting involved in any ways that they could.

Adding to the problems with continuous combat function is that when it comes to gender, this gets us no further than a direct participation assessment. Continuous combat function uses the same classifications, which are blind to gender roles and insensitive to the ways women participate in conflict. African armed groups rely heavily on traditional gender roles in the functioning of their groups. Merely enquiring about individuals' functions, while ignoring the ways gender roles play out in these groups, is a blunt mechanism for separating women into targetable and non-targetable units. In applying IHL, one is trying to manipulate African roles into technical Western classifications, with results that are often unsatisfactory in practice.

6.3 Participation by those within the civilian population

"The evidence demonstrates that abducted civilians were used to perform a multiplicity of critical tasks for the troops. Both in Bombali District and Freetown, abducted civilians were used to carry food, military supplies and ammunition. At 'Colonel Eddie Town', abductees were used to harvest rice crops, the main source of food. At Lunsar, civilians were abducted specifically to help guide the troops as they moved at night. … More generally, the large number of abducted civilians gave the impression to the local population that the troops enjoyed greater support than they actually did."[28] (Special Court for Sierra Leone, Brima Trial Judgement)

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[27] Part 2, II, 3 a, Interpretive Guidance, supra note 4.
[28] *The Prosecutor vs Alex Tamba Brima Bazzy Kamara Santigie Borbor Kanu*. SCSL-04-16-T, 2008, at para 1821.

Many non-state armed groups are reliant on support from civilians, who provide them with food, resources and shelter, as well as ad hoc labour. Sometimes this support is provided voluntarily and sometimes civilians are forced to provide this. Here, individuals are not absorbed into armed groups, but rather play roles on a more ad hoc or isolated basis – although as has been explained, the line with armed group membership tends to blur. For the most part this support would not constitute direct participation.

There are, however, times when contributions by civilians may reach a stage where they could be said to constitute direct participation. For example, a civilian woman might be forced to carry ammunition to a specific site for an armed group to use in a particular planned attack, with the moving of the ammunition being a critical component of that attack. As with the participation in armed groups, the voluntary or coerced nature of this action would not affect its classification – discussed in the next chapter.

The problem is that while most civilian actions do *not* constitute direct participation, those in opposing groups may be unwilling to ignore those contributions. In particular, lesser-resourced groups in asymmetrical conflicts may feel they do not have the luxury of ignoring those contributing to their enemies' efforts. They may also wish to discourage further support for their enemies by civilian populations – as such, targeting civilians who support their opponents, regardless of the fact that this is disallowed by the law. The fact that IHL does not provide a means to lawfully deal with the support provided by civilian populations, might therefore encourage violations of the law. Conversely, the narrow interpretation of direct participation, which excludes participating civilians from being targeted, might encourage armed groups to use civilians in certain roles, knowing they will be immune from attack[29], which creates a perverse incentive for armed groups to embroil more civilians in conflict. While a narrow interpretation of direct participation might appear to be protective of women, in putting many outside the realm of lawful targeting this may ultimately lead to more dangerous situations for all women. Of course, this is not to say that the clear solution is to broaden the law, allowing a wider group to be targeted – clearly that comes with its own set of problems.

It is evident that world-over civilian women have been targeted for their participation in conflict – participation that often does not meet the level of direct participation. "Women

[29] Schmitt, Michael. "'Direct Participation in Hostilities' and 21st Century Armed Conflict." In *Crisis Management and Humanitarian Protection: Festschrift Fur*, 505–29. Fischer, Horst Berlin: BWV, 2004.

Under Siege", which collates information about women in the Syrian conflict, tells of one woman detained, raped and tortured at a checkpoint, charged with "being from a neighborhood which had rebelled against the regime".[30] Another Syrian women was imprisoned, tortured and sexually abused for 8 months for putting up revolutionary posters,[31] while yet another was detained for nursing wounded rebels.[32] It is clear that just because women are not "directly participating" does not mean they are left alone. Men, too, are targeted for actions that do not meet the standard of direct participation. For example, the Pentagon has included on its "target list" Afghani drug traffickers with ties to the Taliban, as they argue the drug money helps to finance Taliban's operations.[33] The legality of this is dubious, demonstrating a set of rules that are not consistently followed in practice – even by those in government regimes.

There is currently much academic discussion about how IHL should deal with increased civilians on the battle space. As with much literature on IHL, this tends to focus on a particular type of civilian involvement, in a particular type of conflict – most notably male private civilian contractors in the conflicts USA are involved in in Iraq and Afghanistan.[34] The IHL literature scarcely considers different types of civilian involvement, like that of African women contributing to new wars. Conclusions about private civilian contractors do not always translate to the disempowered, exploited and coerced civilian women embroiled in African conflicts.

6.4 Conclusions from applying the law

In applying the law to these groups, I was struck by how difficult it was to make these classifications. Often it is altogether unclear how the law should be applied. In many situations, convincing arguments could be made that actions are direct participation, or that they are not, leaving little in the way of legal clarity – problematic given the grave consequences of a direct participation label. The law is complex, often vague, with competing interpretations that sometimes lead to wholly different results. The law is also

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30 "Women Under Siege, Documenting Sexualized Violence in Syria, Woman Describes Multiple Rapes at Idlib Checkpoint." *Crowdmap*. https://womenundersiegesyria.crowdmap.com/reports/view/254.

31 "Women Under Siege, Woman, 25, Tells Vanity Fair of Sexual Abuse in Multiple Detention Centers." *Crowdmap*. https://womenundersiegesyria.crowdmap.com/reports/view/237.

32 "Women Under Siege, Former Prisoner Gives Account of Torture and Rape in Hama Detention Center." *Crowdmap*. https://womenundersiegesyria.crowdmap.com/reports/view/150.

33 Risen, James. "U.S. to Hunt Down Afghan Drug Lords Tied to Taliban." *The New York Times*, August 10, 2009.

34 See, Carmola, Kateri. *Private Security Contractors and New Wars: Risk, Law, and Ethics*. Contemporary Security Studies. Routledge, 2010. Cameron, Lindsey. "Private Military Companies: Their Status Under International Humanitarian Law and its Impact on their Regulation." *International Review of the Red Cross* 88, no. 863 (2006): 573–98. Faite, Alexandre. "Involvement of Private Contractors in Armed Conflict: Implications under International Humanitarian Law." *Defence Studies*, 2004.

highly nuanced, with minor differences in actions or circumstances changing legal classifications completely.

The facts to which the law is applied are also unclear. IHL is applied in the "fog of war". The conflict arena is messy, often characterised by a lack of clear ascertainable information. Those applying IHL in battle do so in moments of stress and danger. In addition to obscuring facts, conflict also distorts perceptions. People in war label and hate their enemies. Enemies become dehumanised. Soldiers feel this too, perhaps even more acutely.[35] It is incorrect to assume that soldiers *can* make wholly rational decisions in conflict, unaffected by the sentiments and circumstances around them.

Distinction is not a science. While the principle is inherently legalistic, reality is not legalistic at all. In practice, events, people and actions rarely break down into the neat categories proposed by the law. As such, applications of IHL require manipulating facts to fit rigid legal categories. Judgment calls need to be made and lines need to be drawn in cases where people could reasonably fit into more than one category. What is evident is that in many cases the distinctions the law requires are not ones that can actually be made in practice. In the new wars context, the rules of IHL are often unworkable or highly impractical.

The difficulties in applying this law are acute in Africa, where armed actors often still rely on relatively unsophisticated intelligence methods. The conflicts currently fought by Western powers tend to use sophisticated surveillance and intelligence technology, like unmanned combat aerial vehicles (drones), which allow them to ascertain specific details about the enemy, and hence facilitate their making the distinctions required by the law. Of course, these technologies bring a host of different problems.[36] In contrast, in many African conflicts, assessments are still made in crude ways, relying on what actors can personally see or ascertain in a curtailed environment. This means it is seldom possible for those outside of armed groups to ascertain with any level of clarity, what different individuals within them are doing and when. It appears that the interpretations of direct participation seem better suited to counter-terror or targeted killing type situations, where a good deal of specific intelligence is collected about each individual target, rather than to the

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[35] Brough, Michael. "Dehumanization of the Enemy and the Moral Equality of Soldiers." In *Rethinking the Just War Tradition*, 149, 2007.

[36] For a discussion about the types of issues that the principle of distinction confronts in more technologically sophisticated settings, see Schmitt, supra note 24. Wagner, Markus. "Autonomy in the Battlespace: Independently Operating Weapon Systems and the Law of Armed Conflict." In *International Humanitarian Law and the Changing Technology of War*, Leiden: Nijhoff, 2013, 99–122.

types of fighting found in Africa's new wars, where armed groups clash with other groups with little intelligence collected about specific participants.

Adding to the problem is the fact that those subject to IHL are generally fighters, who often have little, if any, understanding of IHL.[37] While resource-rich armies might have legal advisors providing on-the-moment legal advice, for other armed actors this is not the case. The problem is amplified in African countries, where fighters are likely to be uneducated, often illiterate and therefore little versed in the nuances of this highly complex law. If academics, judges and specialised experts can hardly work out how people should be classified in difficult cases, how can we expect scarcely educated and trained fighters to? It seems a failing that the law does not properly cater for use by those it is intended for – fighters whose actions are to be regulated by it.

Another evident problem is that the factors leading to women being perceived as "combatants" on the ground in Africa, often differ substantially to those laid out by the principle of distinction. In some African groups, women are considered combatants even where they do not fight, while in others women are not seen as combatants, even when actively involved in fighting.[38] South Sudan's SPLA recruited females throughout the war. However quite early on in the war an SPLA decision was made to keep women away from frontline combat and to restrict them to support duties. Despite this, thousands of women continued to be recruited as combatants, and at times were promoted to high ranks within the movement. They were considered by others within the SPLA to be combatants, and they considered themselves as such – and importantly, they were considered by the enemy to be combatants and targeted as such.[39] In contrast, the LRA's abducted girls took part in active fighting. Despite this they were seen as "wives", not as "combatants". Even the Ugandan government and the militaries fighting the LRA recognised these women were not normal combatants, making efforts to rescue them, rather than to target them. One of the often-stated difficulties in fighting the LRA was the known presence of so many children and women, who, despite fighting, were understood to not be combatants.

What becomes clear is that the labelling of female fighters on the ground takes many variations – most of which veer from the notions of IHL. This disjuncture between the

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[37] For information about training of armed forces on IHL see, Roberts, David. "Training the Armed Forces to Respect International Humanitarian Law: The Perspective of the ICRC Delegate to the Armed and Security Forces of South Asia." *International Review of the Red Cross* 319 (1997).

[38] Verhey, Beth, "Reaching the Girls, Study on Girls Associated with Armed Forces and Groups in the Democratic Republic of Congo", Save the Children UK, CARE, IFESH and IRC, 2004.

[39] Stone, supra note 22.

legal classifications and local perceptions can be problematic. For one thing, those conducting targeting are expected to use criteria that differ from the ways in which they understand the facts on the ground. This means that fighters might be legally prohibited from targeting those who they understand to be combatants participating actively against them. This is likely to negatively impact on adherence with the law.

The question of how local perceptions can or should be utilised in distinction classifications is difficult. It is clearly important to have universal rules that apply in the same way to people in all conflicts. Allowing for too much regional or circumstantial variation would make for an unpredictable, unworkable law. Perhaps the real problem is that IHL's definitions and classifications are so removed from the realities of today's conflicts – in Africa and more broadly – that they fail to provide a workably broad regulation. Perhaps, rather than the answer being that local specifications should be taken into account, a generalised law is required – but one that is more reflective of real participation in conflict, and better suited to accommodating new and alternative modes of participation, including those of women.

When drafted, the principle of distinction was anticipated to be applied to particular contexts and to particular types of actors. When one applies the law to "atypical" examples (like conflicts in Africa) and "atypical" actors (like female participants) – all of which are in fact highly typical today – this reveals the fault lines and inconsistencies in the law, shedding light on the law's inadequacy for use in these contexts. The next chapter answers the central questions posed in this thesis; does the principle of distinction actually operate to protect and serve women in the context of new wars? And if not, what is it actually achieving?

7. Does the Principle of Distinction Serve Women in Modern Conflict?

Does the principle of distinction in its current formulation serve women in conflict, or does it fail to do so, even putting women at increased risk? This chapter draws together the findings and discussions from earlier chapters, looking to see what they reveal about the principle and its application to women in African new wars.

The previous chapter demonstrated how few women fit into the legal fold as combatants or direct participants in hostilities. The narrow wording of the laws and their accepted interpretations effectively exclude many women from being recognised as combatants or direct participants, even where women are actively engaged in armed movements. The results for women are mixed. One the one hand, this operates to provide many women with legal protection from attack; if women are not classified combatants or direct participants, then they may not be targeted in attack. However, there are also negative consequences for women that stem from this – effects that are indirect and more difficult to identify.

The chapter considers these effects, examining the many ways in which the principle impacts on women: positive and negative, direct and indirect, evident and implied. It will consider the principle's effects in a range of areas: the way it perpetuates stereotypes, how it governs targeting, its relationship with voluntariness, its failure to protect women from those within their own groups, the treatment of female prisoners, and the principle's effects post-conflict. Finally, the chapter considers the broader questions this thesis raises: does the principle of distinction serve and protect women? If it fails women, what does this tell us about the principle's adequacy to perform its role in Africa's new wars?

7.1 The principle of distinction's impacts on women

7.1.1 The principle of distinction perpetuates stereotypes of women and victimhood

The law's failure to adequately incorporate female participation as combatancy or direct participation affects the ways in which society understands the contributions of women to armed struggles. The law plays a part in shaping perceptions of reality, while societal

perceptions in turn influence how things are regulated, in mutually reinforcing processes.[1] Where laws portray women in certain ways, this entrenches expectations about how women *should* be and *should* act, reinforcing gender roles rather than challenging them.

A framing of the principle that prevents women from being recognised as combatants or direct participants perpetuates the view that women are not active participants in conflict – instead, promoting the notion that women are victims. This portrayal of women as victims in turn works to conceal the active roles that women play. Even when the facts on the ground lie in stark contrast to these notions – even when women are actively participating in armed movements – this law creates an additional barrier to this participation being seen and recognised. Of course, stereotypes about women do not stem solely from the law. These are already prevalent in society, derived from patriarchal norms and deeply entrenched societal beliefs. However, the law plays a part in furthering existing stereotypes, normalising them, formalising them, justifying them, and providing them with a perceived legal "stamp of approval".

There are negative consequences to the law's entrenching perceptions about women as victims of conflict; for one thing, this promotes further victimisation of women – both from within and without armed groups. Conceptualisations that paint women as victims of war tacitly allow for, or normalise, the further victimisation of women. A perception that women are not "real" combatants can contribute to women being discriminated against and mistreated by their male peers within armed groups. This also contributes to women being seen as the "spoils of war" to be used and abused at victors' wills.

Of course, painting women as victims, as the law does, can also be beneficial to them. Chapter 4 described the humanitarian world's preference for protecting "women and children", the victims of war. Women are frequently encouraged to present themselves as victims, as doing so can work to their benefit. Arguing for the removal of the "victim" label should be done with caution, as this can also be harmful to the women one is trying to protect. This being said, the benefits of being framed as victim are not consistently conferred. Sometimes, at the exact moments when women most need to be recognised as victims and protected as such, the opposite occurs. As an example, families and

[1] Kinsella, Helen. "Securing the Civilian: Sex and Gender in the Laws of War." Boston Consortium on Gender, Security and Human Rights, 2004. Nguyen, Athena. The Influence of Gender Stereotyping on International Humanitarian Law, 2010, available at http://works.bepress.com/athena_nguyen/1.

communities of abducted women returning from armed groups frequently do not treat them as victims, instead blaming them, rejecting them and further victimising them.[2]

Most women embroiled in conflict are in some ways "victims" of war. Even those who are actively involved in the waging of war often have stories of immense suffering, coercive circumstances and exploitation – stories that could certainly be portrayed using a victim lens. However, this lens serves to obscure other facets of women's experiences. While it is important to highlight the victimising facets of women's experiences, solely doing so runs the risk of relegating women to "… voiceless victims, often devoid of agency, moral conscience, and economic potential."[3] Coulter points out how few writers manage to move away from notions of female combatants as victims, in part because of the sexual victimisation they face. She attempts to present a more layered account of Sierra Leone's female fighters, "Whatever their personal circumstances, they grew from girls to women during a period of intense and sometimes extreme social change. While many definitely did what they could to flee the war zone, some took the opportunity to loot and fight in the destructive trail of the various fighting forces. During the decade-long war, most of them also fell in love, some married, others divorced, and most had children."[4]

Providing a more nuanced account of women in war lies at the heart of the SC's Women, Peace and Security Agenda. In addition to considering women as victims of conflict and exploring the protections they require, the Resolutions – and in particular the later Resolutions – also include other representations of women, as actors and agents.[5] Otto explains that, "This shift from victim to valued contributor disturbs not only the traditional narrative of women's weakness and vulnerability, and their need for (male/state/military) protection, but is also disruptive of the gendered ways of thinking that have served to legitimate armed conflict (as 'manly') and silence alternative ways of thinking (as feminine or 'wimpish')."[6] However, while taking important steps in this direction, the SC Resolutions have been inconsistent in this regard and ultimately have not gone far enough.

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[2] Coulter, Chris. "Female Fighters in the Sierra Leone War: Challenging the Assumptions?" *Feminist Review* 88, no. 1 (2008): 54–73.
[3] Denov, Myriam. *Girls in Fighting Forces: Moving Beyond Victimhood.* A Summary of the Research Findings on Girls and Armed Conflict from CIDA's Child Protection Research Fund, 2007, at 2.
[4] Coulter, supra note 2, at 55.
[5] Pratt, Nicola, and Richter-Devroe, Sophie. "Critically Examining UNSCR 1325 on Women, Peace and Security." *International Feminist Journal of Politics* 13, no. 4 (2011): 489–503.
[6] Otto, Dianne. "The Exile of Inclusion: Reflections on Gender Issues in International Law Over the Last Decade." *The Melbourne Journal of International Law* 10 (2009): 11–26.

For example, the Resolutions fail to deal with the structural factors, including poverty, that prevent women from truly being agents with transformational capacity.[7]

Humanitarian discourse seems to have an inability to hold on to the fact that victim, agent and perpetrator can co-exist in the same person. The field is laden with ideas about the dichotomy between victim and perpetrator – and the adjunct lack of agency for victims. However, this polarised binary position is inadequate to describe the lived experiences of female combatants.[8] Female combatants provide a striking illustration of the duality of victim and perpetrator. To get any real sense of the experiences of women participating in African conflicts, notions of victimhood, perpetration and agency must be considered together. For one thing, where one finds violence *by* women, one often finds violence *against* women. The two go hand in hand. Women perpetrate violence, yet are themselves subject to violence. Some women assert their power by becoming involved in hostilities. By becoming a perpetrator, a woman can escape being, or feeling like, a victim, providing some perceived sense of control over her life. Carrying a gun can provide some security and can prevent women becoming victims of further violence. Sometimes women exercise their agency by being cruel towards others. Female combatants' violence against civilians can be perceived as a form of revenge – only redirected, as women have no scope to level revenge against those who have actually harmed them.[9]

Being a victim is often portrayed as synonymous with a lack of agency. However, even within situations of immense victimisation, women retain agency. In the most constrained circumstances, women have some choice about how to act and some space for negotiation. Of course, one should not overstate this; their choices are constrained due to their circumstances, due to poverty, and due to the fact that they are women. The choice between dying, experiencing continuous violence, or fighting is not much of a choice. Coulter acknowledges that, "…even with a gun in hand, my informants' choices were circumscribed – by convention, tradition, morality, religion, family, or fear – in ways that were different from men's."[10] However, within these constrained spaces, women can still navigate how they wish to act, employing a range of strategies. Denov explains, "Girls in fighting forces made conscious attempts to protect themselves and negotiate their security during their time with the armed group. … Such attempts to negotiate their safety were done through a variety of means including the use of small arms, through 'marriages' to

[7] Shepherd, Laura. "Sex, Security and Superhero(in)es: From 1325 to 1820 and Beyond." *International Feminist Journal of Politics* 13, no. 4 (2011): 504–21.
[8] Coulter, supra note 2,
[9] Ibid.
[10] Ibid, at 68.

powerful commanders, through the perpetration of severe acts of violence, through subtle and bold acts of resistance."[11]

Female combatants blend elements of victimhood and perpetration in striking and complex ways. This nuanced picture is far removed from that which underlies the principle of distinction – where the dichotomy between combatant/civilian or those directly participating/not leaves no room for complex combinations. The principle of distinction assumes a single identity – fighter or not fighter. In contrast, women assume numerous identities, identities for which the law's binaries leave no room.

7.1.2 Voluntariness

Voluntariness and consent are central themes in feminist thought. Voluntariness is not addressed by the principle of distinction. There is no requirement that in order to qualify as a combatant or direct participant one needs to be acting voluntarily. In fact, many state armies have compulsory enlistment, something that has never been framed as problematic in IHL. Those forcibly recruited into armies and armed groups are classified in the same ways as those who act voluntarily.

The threat of state conscription is a real fear for many – and there can be terrible consequences for those who refuse to enlist, including death and imprisonment. Forced conscription by states can be as violent and harmful as that by non-state actors – sometimes made worse because recruits cannot seek state protection. As an example, Eritrea has mandatory national service, including for women. Although by decree this should be limited to 18 months, in practice this is often prolonged indefinitely, keeping youth in perpetual bondage. Conscripts are paid under $30 a month, are poorly fed – often to the point of emaciation, and female conscripts have reportedly been sexually abused by commanders. Human Rights Watch estimates an average 1,500 Eritreans flee the country each month to escape conscription, with border guards having orders to shoot-to-kill escapees.[12]

There are, however, differentiating factors between state conscription and involuntary recruitment by armed groups. In both the international system and domestically, states are perceived as having authority to demand conscription. State authority legitimises military

[11] Denov, supra note 3, at 12.
[12] *World Report 2013: Eritrea.* Human Rights Watch. http://www.hrw.org/world-report/2013/country-chapters/eritrea.

command.[13] Non-state groups do not have state sanctioned authority, giving their recruitment a different position in the law. While voluntariness may not be a factor for the principle of distinction, this does not mean that forced recruitment by non-state actors is legally permitted. Abducting women into armed groups violates various laws, including prohibitions on recruiting children (when abductees are underage) and domestic laws against kidnapping, rape and violence. It is therefore not that forced recruitment is ignored by law – rather, questions of voluntariness are merely disregarded by the principle of distinction. However, as the principle is the law's primary legal mechanism for protection in conflict, this seems to be a problem.

There is something troubling about withholding the principle of distinction's protections from those acting entirely against their will, often in such extreme cruel circumstances. In IHL failing to make any provision for even extreme degrees of compulsion and for the possibility of differential treatment for those in these situations, it shows itself to be blind to the nuances of participation and consent in new wars. Of course, distinction is not only there to protect – rather, the laws aim to strike a balance between the needs of military actors and humanitarian concerns. That those who are forced to participate can still be lawful targets is understood to be a necessary consequence of this balance. However, it feels like an unsuitable balance has been struck. As Sjoberg notes, the distinction between civilian and combatant does, "not take into account the complexities of consent, human interdependence, and political choice in a way that allows true distinction between 'those who ought to be held liable for the war' and 'those who ought not be liable for the war.'"[14]

While the law is clear on the fact that voluntariness is not a factor in determining combatancy or direct participation, there have been recent inroads in this area, suggesting this area of law might be developing. *Voluntariness* comes up in discussions about human shields – those who stand in the way of legitimate targets in order to prevent attacks on them. In the literature on human shields,[15] a legal distinction is made between voluntary and involuntary human shields. Schmitt argues that if people wilfully put themselves in the way of military targets to avert attacks, their actions might constitute direct participation.[16]

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[13] Britt, Jason. "Unwilling Warriors: An Examination of the Power to Conscript in Peacetime." *Northwestern Journal of Law and Social Policy* 4, no. 3 (2009): 400–423.

[14] Sjoberg, Laura. *The Paradox of Double Effect: How Feminism Can Save the Immunity Principle*. Boston Consortium on Gender, Security and Human Rights, 2006.

[15] See for example, Lyall, Rewi. "Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States." *Melbourne Journal of International Law* 9 (2008): 313–33. De Belle, Stéphanie Bouchié. "Chained to Cannons or Wearing Targets on Their T-Shirts: Human Shields in International Humanitarian Law." *International Review of the Red Cross* 90, no. 872 (2008): 883–906.

[16] Schmitt, Michael. "Human Shields in International Humanitarian Law." *Columbia Journal of Transnational Law* 47 (2009): 292–338. Lyall, Rewi, Ibid.

As voluntary shields take positive steps to frustrate actions that would contribute to military goals, they are affecting them in direct causal ways. Intent is therefore key; one is only a voluntary shield if it is one's explicit *intent* to *frustrate* a military operation – those merely electing to remain in dangerous places are not human shields.[17] A different view is that human shields are not directly participating as their actions do not meet a qualitative threshold – they are not *doing* enough. Merely getting in the way by creating moral pause on the part of an attacker is not enough to constitute an action.[18]

Those used as shields tend to be those seen as dispensable, generally those with subordinate positions in society, like women. On the Women Under Siege website, a women recounts that, *"I saw maybe 100 women stripped naked and used as human shields, forced to walk on all sides of the army tanks during the fighting. When their tanks rolled back into the Alawite neighborhood, the women disappeared with them."*[19] Another women she said she saw, *"a column of 10 to 15 women walking in front of Assad's tanks*", *"They made the women walk in front of the tanks first to use them as shields. They passed a resistance area and then stripped them and raped them and killed them… the girls being raped were screaming 'God, we have nobody but you.' No one could help them."*[20] The framing of some people as 'shields' underscores the importance of recognition of participants in conflict. Those whose contributions are recognised and valued are labelled direct participants or combatants. Those who are undervalued and perceived as dispensable are labelled shields. The law's labelling reveals what its system values – and with its labelling, the law entrenches these values. This speaks to why it is important that women also be recognised as combatants and direct participants by IHL; the alternative to recognising women's participation, is having them viewed as dispensable. Gender inequality plays out in both the differing roles, as well as the different framing of these roles.

The Interpretive Guidance briefly touches on voluntariness in the context of direct participation. When discussing the "belligerent nexus" requirement for direct participation, the Interpretive Guidance confirms that, "…belligerent nexus is generally not influenced by factors such as personal distress or preference, or by the mental ability or willingness of persons to assume responsibility for their conduct. Accordingly, even civilians forced to directly participate in hostilities or children below the lawful recruitment age may lose

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[17] Ibid.
[18] Queguiner, Jean-François. "Precautions Under the Law Governing the Conduct of Hostilities." *International Review of the Red Cross* 88, no. 864 (2006): 793–821.
[19] "Women Under Siege, Woman Says She Witnessed Women Stripped and Used as Human Shields." *Crowdmap*. https://womenundersiegesyria.crowdmap.com/reports/view/235.
[20] "Women Under Siege, Woman Tells Toronto Star Women Were Raped and Used as Human Shields in Homs." *Crowdmap*. https://womenundersiegesyria.crowdmap.com/reports/view/182.

protection against attack."[21] However, it goes on to say that in exceptional circumstances, such as where persons are "completely deprived of their physical freedom of action (e.g. when they are involuntary human shields physically coerced into providing cover in close combat)", the person's mental state *could* affect the belligerent nexus. It notes, "Civilians in such extreme circumstances cannot be regarded as performing an action (i.e. doing something) in any meaningful sense and, therefore, remain protected against direct attack despite the belligerent nexus of the military operation in which they are being instrumentalized."[22] By bringing up such extreme circumstances, one might argue a door is being opened for further development in this direction.

Voluntariness also comes up in the literature on child soldiers. The ICC's Lubanga decision considers voluntariness in relation to child (boy and girl) combatants in the DRC. Radhika Coomaraswamy, the UN Special Representative for Children and Armed Conflict, testified to the ICC that when it comes to children, it can be difficult to distinguish enlistment (voluntary recruitment) and conscription (recruitment with elements of compulsion). Children often join groups 'voluntarily' as they are orphans seeking a means of survival, lacking any other viable options, support or role models. She noted that, "… the line between voluntary and forced recruitment is therefore not only legally irrelevant but practically superficial in the context of children in armed conflict."[23] When considering the vulnerable positions of women in African societies and their lack of alternative viable options, especially when left without the societally sanctioned protection of men, many of the arguments made in relation to children could apply to them just as well. Of course saying this risks infantilising women by categorising them with children, something already done all too often. However, thinking about children opens up room for the fact that there is scope for differential treatment of certain fighters, which takes into consideration their circumstances – an idea that could prove useful for women.

Sinha puts forward an interesting approach to dealing with child combatants.[24] He proposes a category of "victimised combatants" or "super-privileged combatants" who are entitled to special treatment. This concept, he claims, is implicitly located in IHL. "The conventions treat combatants as participants in armed conflict who deserve special

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[21] Part 2 V 3 b, "Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law." *International Review of the Red Cross* 90, no. 872 (2009): 991–1047.
[22] Ibid.
[23] Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict Submitted in application of Rule 103 of the Rules of Procedure and Evidence, Annex A, para 14. *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v Thomas Lubanga Dyilo*, No: ICC-01/04-01/06, at 280.
[24] Sinha, Alex. "Child Soldiers as Super-Privileged Combatants." *The International Journal of Human Rights* 17, no. 4 (2013): 584–603.

treatment when they suffer harm. The first two conventions concern wounded or sick armed forces (in the field and at sea, respectively), while the third addresses captured combatants. … These conventions effectively outline rules for treating combatants with additional care when they are especially vulnerable – once they have become victims of illness, injury or capture. It seems, however, that if there is a class of combatants who are victims in virtue of being combatants in the first place, they might be entitled to special consideration above and beyond what is guaranteed to the standard soldier."[25] According to Sinha's model, certain vulnerable combatants – in the case of his discussion, child combatants – would be *presumed* to be victimised, and as such would be entitled to "super-privileges". These super-privileges could be as follows: Firstly, these combatants would need to be subdued using minimal force and be given the opportunity to surrender in cases where other combatants might not be. Secondly, when captured, different rules would apply to their detention. They should not be detained for the entire duration of the conflict, but rather, should have an option of early repatriation and unification with their family, or if held, they should be held in a manner more akin to being a ward of a state. Effectively, they should be treated as victims rather than POWs. Whereas regular combatants must meet certain requirements for POW status, victimised combatants would receive privileges regardless of their actions.[26]

Although Sinha's proposal was formulated for child soldiers, this could prove useful for other fighters too – including forcibly recruited women. Sinha notes that, "If coercion into service is the morally relevant criterion for earning super privileges, then some adults will warrant such privileges too."[27] Of course there would be challenges in applying this to adults. For one thing, children, merely by virtue of being under 18, are understood to be unable to consent and therefore to be victimised. At least with younger children, one can tell they are children just by looking at them (although this might be less certain with teenagers). When dealing with adult women, it is harder to tell on sight if they are coerced, necessitating more of an examination into their actions and narratives – making it harder to use a presumption of victimisation. Another problem is that a system like this could further entrench stereotypes about women as victimised.

It seems as though a door is opening around the issue of voluntariness, with the idea being raised – albeit in very limited circumstances – that this could be a relevant factor for the principle of distinction. It is difficult to know what part this *should* play. While it feels

[25] Ibid, at 587.
[26] Ibid.
[27] Ibid, at 587-588.

problematic for the principle to ignore consent altogether, locating an appropriate role is fraught with difficulty. It would be unfair to propose that mandatory army conscripts may be targeted, while those forcibly recruited by non-state armed groups many not be. The way in which voluntariness could be taken into account in the principle of distinction might be an interesting area of future research.

Complicating any moves to integrate voluntariness into the law is the fact that the distinction between *voluntary* and *involuntary* recruitment is often far from clear. Coercive circumstances and curtailed choices can prevent genuine consent. Women who '*voluntarily*' enter armed groups often do so as they have few viable alternative – life outside the group in a war-riddled country might be the more dangerous and onerous option. Women might *choose* to be armed group wives, as the alternative is to be sexually available to all armed group men. The SCSL's Brima Appeals Chamber reflected this, stating that, "…the relative benefits that victims of forced marriage received from the perpetrators neither signifies consent to the forced conjugal association, nor does it vitiate the criminal nature of the perpetrator's conduct given the environment of violence and coercion in which these events took place."[28] The ICC's definition of rape[29] also acknowledges that coercive circumstance may remove consent. In Akeyesu, the ICTR explained that, "… coercive circumstances need not be evidenced by a show of physical force. … coercion may be inherent in certain circumstances, such as armed conflict…"[30]

What is clear is that there exist degrees and nuances of consent. Some women wholeheartedly wish to participate in conflict; others are forced using extreme brutality – and then there are grey areas in between. Some join armed groups thinking they are signing up for particular experiences, which then turn out to be very different – not dissimilar to victims of human trafficking. A complex picture emerges; while women's choices are constrained by circumstances, these remain choices nevertheless. Where women have choices, these tend to still be constrained. Coercion and voluntariness present as binaries – however in practice these blur. The problem with the principle of distinction's approach of focusing purely on individual action is that it misses out on all of this.

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[28] *The Prosecutor v. Brima*, Case No. SCSL-2004-16-T, Appeals Judgment, 2008, at para 190.
[29] Contained in the Elements of Crime Annex of the Rome Statute.
[30] *The Prosecutor v. Brima*, supra note 28, at para 688.

"*On reaching Kabala one rebel deflowered me that very night. He was rough. He hurt me, and when I tried to fight he slapped me on my face and tied my mouth, so that I couldn't shout." (girl, abducted by RUF, Sierra Leone).*[31]

Voluntary and involuntary participation in conflict are intrinsically tied with sexual activity. This connection is at times so clear that it is formalised, with female combatants labelled "wives" instead of soldiers, denoting the centrality of their sexual roles to their armed group mandate. The experiences of female "combatants" or armed group "wives" are not wholly dissimilar to the experiences of those held in "sexual slavery" in other contexts. If one looks at descriptions of "rape camps" in Bosnia, described in ICTY cases like Kunarac, Kovac and Vukovic[32] (the "rape camp case"), the experiences of women held in sexual slavery overlap with accounts of female combatancy in Africa. Across the conflict literature one can find the labels: "female combatants"; "women associated with armed groups"; "sex slaves"; "forced wives" or "rape victims". Yet these are not clear distinct categories and there is much evident overlap between them. Legal analysis separates them, dealing with each discretely, disregarding the overlaps. Most women involved with armed groups fall somewhere along this continuum, once again speaking to legal categorisations that do not operate effectively in practice. These categories are challenged further in Africa. For example, the concept of "forced marriage" can be tricky in the context of traditional structures, where marriages are never selected by individuals alone. The SCSL Appeals Chamber was the first court to recognise forced marriage as a separate crime – distinct from sexual slavery. However, this distinction is criticised because the crime of forced marriage is largely indistinguishable, other than by a declarative act (actors declaring the relationship to be marriage). The 'distinct elements' of forced marriage provided by the Appeals Chamber resorted to stereotypical tasks attached to marriage. For the crimes of sexual slavery and enslavement these same acts were characterised as proof of forced labour.[33]

It is worth noting that it is not only women who experience involuntary exploitation in conflict. Sexual exploitation and abuse of men has been recorded in numerous cases, including the ICTY's *Tadic* decision. The forms by which men are exploited – and sexually exploited – differ, yet the underlying presence of a lack of voluntariness and of circumstances of coercion remain. These factors are not unique to women in war.

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[31] Bangura, Barbara. *Returning the Girls Home: Reintegration and Resocialisation of Abducted and Ex-Girl Soldiers. A Case Study from Sierra Leone, West Africa.* West Africa Network for Peace Building, 2002, at 3-4.

[32] *The Prosecutor v Dragoljub Kunarac Radomir Kovac and Zoran Vukovic*, ICTY, IT-96-23-T & IT-96-23/1-T, 2001.

[33] Gong-Gershowitz, Jennifer. "Forced Marriage: A 'New' Crime Against Humanity?" *Northwestern Journal of International Human Rights* 8, no. 1, Article 3 (2009): 53–76.

One cannot separate women's participation in conflict, sex and a lack of consent. However, as with other aspects of women's participation, IHL overlooks these connections, disregarding considerations of voluntariness and never addressing the coercive, victimising and abusive circumstances surrounding women's participation in hostilities. The laws of distinction are purportedly premised on a distinction between those who pose a threat and are deserving of targeting, and those who do not. This premise falls flat when considering women in African conflicts; embroiled involuntarily and abusively, and little deserving of being targets of attack.

7.1.3 Women, targeting and the principle of distinction

"In March 1994, a faction called the Armed Islamic Group issued a statement classifying all unveiled women who appear in public as potential military targets. To punctuate this threat, gunmen on a motorbike shot and killed two unveiled high school female students who were standing at the bus station waiting to go home." [34]

Gender can have lethal consequences. Women and men are targeted differently in conflict – and often for different reasons. More men in conflict are killed, both in battle, where greater numbers of men tend to be active fighters, as well as off the battlefield.[35] Jones notes, "That the gender-selective mass killing and "disappearance" of males, especially "battle-age" males, remains a pervasive feature of contemporary conflict is not open to dispute. Indeed, its frequency across cultures and conflict types marks it as a possibly *definitional* element of contemporary warfare, state terrorism, mob violence, and paramilitary brigandage:"[36] There are institutional, political and cultural reasons for targeting men. Killing men can give an enemy a more secure hold over an area – once the men are lost, women and children have fewer means of returning or revolting. Sometimes men are killed for revenge.[37] Men are also targeted due to a perception that all men are fighters, potential fighters, or even the fighters of future generations.[38] Notably, those doing the targeting are also primarily men.

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[34] Coomaraswamy, Radhika. *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*. United Nations, Commission on Human Rights, Fifty-fourth Session, 1998.

[35] For example, there is evidence from countries ranging from Bosnia, East Timor and Kosovo of men being rounded up and executed. Daniel Vangroenweghe, an anthropologist in Congo in the 1970s found demographic evidence that many men had been killed in punitive raids, or worked to death as rubber slaves. Even the Rwandan genocide, where all Tutsis were targeted, saw far more men killed. It is estimated that 70% of the Rwandan population today are women.

[36] Jones, Adam. "Gendercide and Genocide." *Journal of Genocide Research* 2, no. 2 (2000): 185–211, at 189.

[37] Ibid.

[38] Carpenter. Charli. "'Women and Children First': Gender, Norms, and Humanitarian Evacuation in the Balkans 1991–95." *International Organization* 57, no. 4 (2003): 661–694.

There are forms of targeting more commonly directed at women.[39] A number of new wars have seen extreme levels of sexual violence used systematically as a "weapon of war". This varies in type – from rape to sexual slavery, to forced marriage, to rape as an instrument of genocide. It also varies in intensity, scale and motive.[40] Related ways that women are attacked include; deliberate infection with HIV, recording acts of sexual violence for the production of pornography, sexual mutilation, medical experimentation on reproductive organs, forced cohabitation, forced impregnation, forced abortion, enforced sterilisation, strip-searching, forced public nudity, sexual humiliation, trafficking in women and enforced prostitution.[41]

There are other types of attacks that, while not specifically targeted at women – or even at civilian populations – have particularly harsh effects on women, or gender-specific consequences. For example, military strikes that lead to population displacement, the destruction or expropriation of homes, and the destruction of property can bear particular tolls on women, who are vulnerable to certain dangers when without shelter. Actions leading to food shortages, or the withholding of humanitarian assistance, acutely affect women, as women tend to be the ones primarily responsible for feeding children.[42] The destruction of the environment also affects women greatly, as in Africa women tend to be responsible for growing or gathering food[43] – with 80 per cent of food on the continent cultivated by women.[44]

Women are targeted for different reasons to men. Attacking women is a cheap and effective way of destabilising entire populations. Although most victims of wartime rape are women, the wider social impact is experienced by both genders.[45] Women's bodies are tied up with the identity and prestige of a community.[46] Attacks on women are carried out to undermine family structures and hence to destabilise whole communities.[47] Sometimes women are targeted as a means of communicating with and punishing men. In cultures

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[39] There have been few documented cases of women being cordoned off and killed while their men were kept alive. Where women are killed in conflict, this tends to be done in situations where the whole population is being targeted to be killed. Jones, supra note 36.

[40] Bastick, Megan, Grimm, Karin, and Kunz, Rahel. "Sexual Violence in Armed Conflict, Global Overview and Implications for the Security Sector." Geneva Centre for the Democratic Control of Armed Forces, 2007.

[41] Bennoune, Karima. "'Do We Need New International Law to Protect Women in Armed Conflict?'" *Case Western Reserve Journal of International Law* 38 (2006): 363–391.

[42] Ibid.

[43] Turpin, Jennifer. "Many Faces, Women Confronting War." In *The Women and War Reader, Lois Ann Lorentzen and Jennifer Turpin*. New York University Press, 1998.

[44] Vickers 1991, in Ibid.

[45] Bastick, supra note 40.

[46] Rajagopalan, Swarna. "Gender Violence, Conflict, Internal Displacement and Peacebuilding." *Peace Prints: South Asian Journal of Peacebuilding* 3, no. 1 (2010).

[47] Barrow, Amy. "UN Security Council Resolutions 1325 and 1820: Constructing Gender in Armed Conflict and International Humanitarian Law." *International Review of the Red Cross* 92, no. 877 (2010): 221–234.

where men are seen to be the protectors, targeting women can be a deep blow to them. Brownmiller notes that, "The act that is played out upon [the rape victim] is a message passed between men – vivid proof of victory for one and loss and defeat for the other."[48] Rape is also used to achieve military aims, including terrorising populations or encouraging them to comply. Rape might be used as part of an advance military offensive to clear civilians from an area before an attack. It is also used as retribution for the actions or intentions of relatives and community members. Sometimes women are targeted because they themselves are participating in or supporting armed movements. Rape is a cheap weapon – always affordable for resource-pushed groups.[49] The reasons and methods of targeting women vary, yet what is clear is that specific calculations lead to women being targeted in attack. IHL makes no provision for this, treating all targeting in the same way, assuming it all plays out the same way that the targeting of men does.

In terms of the principle of distinction, belligerents are prohibited from *attacking* civilians. Slightly different wording for this is used in the different conventions. Article 48, AP 1 states that parties, "… *shall direct their operations* only against military objectives." Article 13(2), AP2 states that, "The civilian population as such, as well as individual civilians, *shall not be the object of attack*." The question is, what actions are actually barred by this prohibition? Is it just the killing of civilians that is prohibited, or does this also incorporate causing other forms of harm against civilians? Does the principle of distinction adequately incorporate and prohibit the distinct forms of targeting that tend to be geared towards women in conflict?

To determine what actions are included in the principle's prohibition, the first port of call is the concept of "attack" – mentioned above in AP2. "Attack" is an important threshold term in the law, and various restrictions and prohibitions are triggered when something qualifies as such.[50] The term "attack" is used in both *jus ad bellum* and *jus in bello*, functioning differently in these two bodies, having distinct purposes and meanings in each.[51] In IHL, Article 49(1), AP1 defines attacks as "acts of violence against the adversary, whether in offence or in defence." While attacks are often framed as negative, they can also have a positive bent, like attacks made in terms of the Responsibility To Protect. There is an

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[48] Brownmiller, Susan. *Against Our Will: Men, Women and Rape*. Paw Prints, 2008.
[49] See, Wood, Elisabeth. "Variation in Sexual Violence During War." *Politics & Society* 34, no. 3 (2006): 307–342. Bastick et al, supra note 40.
[50] For more information about the differing uses of these terms in the different bodies of law, see Schmitt, Michael. "'Attack' as a Term of Art in International Law: The Cyber Operations Context." In *2012 4th International Conference on Cyber Conflict*. Tallinn, 2012.
[51] Ibid.

evident binary between positive humanitarian attacks and the negative attacks described below.

In AP1 the principle of distinction is framed in terms of "military operations" rather than "attacks". However, not all military operations directed at civilians are included in the prohibition. The principle of distinction does not prohibit military operations that have no physical consequences for civilians. Schmitt explains that, "…longstanding State practice demonstrates that non-destructive psychological operations directed at the civilian population, such as dropping leaflets, broadcasting to the enemy population, or even jamming enemy public broadcasts, are lawful as long as no physical consequences attend them."[52] Others emphasise the *physical nature* of prohibited actions. Bothe and Solf note that, "…the term 'acts of violence' denotes physical force. Thus, the concept of 'attacks' does not include dissemination of propaganda, embargoes, or other non-physical means of psychological or economic warfare."[53]

While the above reveals that not *all* military operations against civilians are prohibited by the principle, there is authority for the fact that more is prohibited than just the killing of civilians. The 2013 Tallinn Manual on the International Law Applicable to Cyber Warfare, in defining cyber-attacks, notes that, "… it is, in light of the law of armed conflict's underlying humanitarian purpose, reasonable to extend the definition to serious illness and severe mental suffering that are tantamount to injury…"[54] Also in the cyber warfare context, Schmitt notes that, "Attacks can be redefined as operations that result in, or if unsuccessful were originally expected to result in, death or injury of individuals or destruction or damage of objects. The notion of injury includes illness that might result from a cyber operation, as in the case of attacking a water treatment plant in order to contaminate drinking water. It is also sensible, based for example on the prohibition of terror attacks and starvation, to extend the concept to acts producing serious suffering not otherwise justified by the notion of military necessity."[55] Schmitt therefore includes a psychological element – one that is confirmed by the ICRC's study on customary IHL, which in Rule 2, describing the principle of distinction, states that, "Acts or threats of

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[52] Ibid, at 289.
[53] Bothe, Michael, Partsch, Karl, and Solf, Waldemar. *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*. Martinus Nijhoff Publishers, 1982, at 289.
[54] Schmitt, Michael, and NATO Cooperative Cyber Defence Centre of Excellence. *Tallinn Manual on the International Law Applicable to Cyber Warfare: Prepared by the International Group of Experts at the Invitation of the NATO Cooperative Cyber Defence Centre of Excellence*. Cambridge: Cambridge University Press, 2013, at 108.
[55] Ibid, at 291.

violence the primary purpose of which is to spread terror among the civilian population are prohibited."[56]

When considering women, a question to ask is, does the principle of distinction's prohibition on attacking civilians incorporate a prohibition on using sexual violence against them? If rape is used as a "weapon" in war, does the principle of distinction extend to prohibiting the use of that "weapon" against civilians? Sexual violence is prohibited by other parts of IHL,[57] making this question of more academic than practical importance. However, it still merits asking; is raping civilian women a violation of the principle of distinction?

From a humanitarian perspective, it seems unfair to exclude sexual violence from the prohibition on attack, given the physical and psychological harm it causes women. Sexual violence can result in the death of its victims; many conflicts where rape has been systematically used, particularly in Africa, have occurred in countries with high HIV rates and critical shortages in health and treatment facilities.[58] HIV levels are particularly high amongst combatants,[59] the ones using the "weapon" of rape. In certain conflicts there has been documented evidence of rapes being committed with the purpose of spreading HIV to victims. In Rwanda, HIV Positive Hutus purposely tried to infect Tutsi women with HIV as a tool of genocide,[60] resulting in staggering numbers of infections and deaths following the genocide. It would seem incongruous to exclude this potentially deadly act from the principle of distinction's prohibition, while other acts that lead to death are included. It would also make little sense that acts that may not be committed against lawful targets (combatants) would be permitted against civilians. In terms of IHL there are clear limitations on the types of attacks permitted against lawful targets – one can kill combatants, but cannot subject them to unnecessary suffering,[61] with raping combatants seen as violating this rule.

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[56] Henckaerts, Jean-Marie. "Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict." *International Review of the Red Cross* 87, no. 857 (2005): 175–212.

[57] Art 75(2)(b) AP1, Article 4(2)(e) AP2, Article 27 GC4. In addition, ICTR Statute Article 4(e) and Statute of the Special Court for Sierra Leone, Article 3(e).

[58] There is data to support the fact that there is a link between sexual violence and HIV infection at the individual level. El-Bushra, Judy. *How Should We Understand Sexual Violence and HIV/AIDS in Conflict Contexts?* AIDS, Security and Conflict Initiative (ACSI) Report no. 17, 2008.

[59] It is estimated that HIV prevalence rates in militaries are two to five times higher than in general populations. McInnes, Colin, "HIV, AIDS and Conflict in Africa: Why Isn't It (Even) Worse?" Paper for Annual Conference of the International Studies Associate, 2009.

[60] Rehn Elisabeth, and Sirleaf, Ellen Johnson, "Women, War and Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-building", UNIFEM, 2002.

[61] The Interpretive Guidance, in Recommendation IX, which deals with 'restraints on the use of force in direct attack', writes that even where people may be attacked, there are restrictions. "…the kind and degree of forces which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances." Interpretive Guidance supra note 21, at 996.

However, despite the logical and humanitarian appeal of reading a prohibition against sexual violence into the ambit of the principle of distinction, there is no consensus that this is actually included. Gardam argues that it is difficult to find evidence that civilian immunity, at any part of its development, was supposed to include protection from rape – simply put, women were of peripheral concern in the process of devising protections for non-combatants.[62] Gardam notes that the rationale usually provided for the law not including certain actions within its ambit, is the demands of military necessity. Military necessity, she argues, should be wholly irrelevant to outlawing rape in conflict.[63]

Troublingly, it is not clear that military necessity is wholly irrelevant in the context of rape. There is ample documentation of the fact that sexual violence can in fact be an effective tool for armed groups to use to achieve their aims, such as forcing compliance or encouraging populations to flee.[64] One could argue that for poorly resourced groups, like many of those found in Africa, who lack other viable means of attaining their objectives, it is *militarily necessary* for them to utilise sexual violence as a tool, given how cheap and readily available this is and how effective it can be in achieving certain goals. Does the demonstrated utility of sexual violence open up room for military necessity to be used as a justification for it? Or conversely, is the outright prohibition of rape in IHL, despite its effectiveness, a sign that military necessity is being given less weight? The military necessity problem is not particular to rape – there are many other harmful actions that are central to the strategies used by fighters in new wars. Where these are shown to be effective and necessary for this type of warfare, should these be justified in terms of military necessity? Chapter 6 above described some of the problems with the concept of military necessity in new wars.

What of the indirect harms that affect women in particularly acute ways? Are the actions that cause these harms adequately encompassed by the principle of distinction? Sjoberg explains that, "A precision-guided missile targeted to hit a power-producing plant will not immediately kill very many civilians, but those who depend on that power source will experience long-term effects. … precision-targeting industries in an enemy territory may have long-term economic or health effects which amount to or surpass the harm that could

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[62] Gardam, Judith. "Gender and Non-Combatant Immunity." *Transnational Law & Contemporary Problems* 3 (1993): 345–370.

[63] Ibid.

[64] See for example, Enloe, Cynthia. *Manoeuvres the International Politics of Militarizing Women's Lives*. Berkeley, California: University of California Press, 2000. Wood, supra note 49. Trabucchi, Eugenia. "Rape Warfare and International Humanitarian Law." *Human Architecture: Journal of the Sociology of Self-Knowledge* 6, no. 4 (2008): 39–48.

be caused by the direct targeting of civilians in war."[65] A reading of the law suggests that it is unlikely that *indirect* attacks such as these are incorporated in distinction's prohibition on attacking civilians. The principle does not prohibit strikes that *only* result in longer-term consequences – effects that women really suffer from. Rather, the principle's focus is on immediate injury and death – harms more likely to be suffered by men. Unless attacks also have short-term consequences, these would not be covered by the principle's prohibition – even where the scale of the long-term harm is more significant.[66] That only physical attacks with immediate kinetic effects are prohibited by the principle is problematic, revealing how the principle ignores the real nature of harm caused to civilians in conflict. This also reveals how the principle ignores the harms more strongly affecting women, while prioritising those that are suffered by men.

What would be preferable is a principle that takes cognisance of the real effects of actions – short and long-term, direct and indirect – prohibiting all of those which have harmful effects for civilians, not just those that fill technical requirements. One approach might be to rely more heavily on the concept of *harm* in establishing whether actions are prohibited by the principle.[67] However, harm itself is a difficult concept and identifying "harmful effects" can lead to further challenges. Lieblich notes that, "… while positive IHL is unequivocal about the need prevent or at least minimize civilian harm, it does not tell us – beyond the obvious – what this harm is. How far, temporally, is harm measured? Where does the causal chain of harm end? To what extent does harm transcend the purely physical into the economical and emotional?"[68] Feminists discuss harm in the context of reparations – arguing that reparations programmes, like distinction, do not adequately encompass the types of harms women actually suffer.[69] As an example, the South African reparations programme was criticised for "exclusion of the structural social and economic violence which imperiled day-to-day subsistence under apartheid. As women have traditionally been responsible for subsistence (food, care, and shelter), the exclusion of these harms rendered women's experiences of apartheid less visible."[70] In some reparations contexts, women have requested compensation for loss of income due to the death of a

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[65] Sjoberg, supra note 14, at 4.
[66] Ibid.
[67] There is precedent in international law for relying heavily on the idea of harm. The concept of harm is found in a number of international conventions, including the 1948 Genocide Convention, the Declaration for the Elimination of Violence Against Women, the 1948 Convention Against Torture, among others.
[68] Lieblich, Eliav. *Beyond Life and Limb: Exploring Incidental Mental Harm Under International Humanitarian Law*. SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, June 10, 2013, at 3.
[69] Renard Painter, Genevieve. "Thinking Past Rights: Towards Feminist Theories of Reparations." *Windsor Yearbook of Access to Justice* 2 (2011). King, Jamesina. "Gender and Reparations in Sierra Leone: The Wounds of War Remain Open." In *What Happened To the Women? Gender and Reparations for Human Rights Violations*, 247–83. International Centre for Transitional Justice, 2006.
[70] Renard Painter, Ibid, at 10.

breadwinner[71] – an example of the types of harm women really feel, and, as such, the types of harm that should be incorporated in the principle of distinction's prohibition.[72]

7.1.4 The principle of distinction fails to protect women from those in their own groups

"They taught us the history of our country, starting from colonial slavery, and they told us we should hate whites. We slept in large rooms, the men and women together. We were raped by the boys. I can't even count how many times by how many different men. If we complained to the camp commander, we were beaten and they would call us sell-outs to the MDC."[73] *(Zimbabwe)*

Threats to women in new wars do not only come from the enemy. As this thesis has described, women in armed groups are vulnerable to attacks by those within their own groups. Talking about child combatants in the ICC's Lubanga decision, Judge Odio Benito acknowledged these risks: "Children are protected from child recruitment not only because they can be at risk for being a potential target to the "enemy" but also because they will be at risk from their "own" armed group who has recruited them and will subject these children to brutal trainings, torture and ill-treatment, sexual violence and other activities and living conditions that are incompatible and in violation to these children's fundamental rights."[74] The same holds true for adult women in armed groups. Women complaining about this might be deemed traitorous or unpatriotic and said to be undermining war efforts and unit cohesion.

The principle of distinction is outward looking, concerned with how people treat their enemies. It seeks to protect from threats deriving from enemies in war. The principle does not look inwards. It does not acknowledge that women face dangers from their own sides, and does not protect women from these threats – or from any other threats that do not derive from "enemy fighters". The principle is partially blind, ignoring the fact that women require protection within their own groups. The principle therefore provides only partial legal protection, failing to protect women from *all* sources of danger in conflict.

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[71] Goldblatt, Beth. "Evaluating the Gender Content of Reparations: Lessons from South Africa." In *What Happened To the Women? Gender and Reparations for Human Rights Violations*, 48–91, 2006.
[72] See also, "Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation," 2007. Decision Establishing the Principles and Procedures to be Applied to Reparations. Situation in the Democratic Republic of the Congo in the case of the Prosecutor v Thomas Lubanga Dyilo, No: ICC-01/04-01/06, Trial Chamber 1 (2012).
[73] Meldrum, Andrew. "Mugabe's Youth Militias 'Raping Women Held Captive in Camps.'" *The Guardian*, March 18, 2003.
[74] *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v Thomas Lubanga Dyilo*, No: ICC-01/04-01/06, Dissenting judgement (2012), at para 19.

One can respond that it is not IHL or the principle of distinction's place to protect women from internal threats. IHL was explicitly created to protect people from *enemy* actions in hostilities, with its narrow focus being one of its strengths. Accordingly, there should be more appropriate legal mechanisms by which women are protected from those on their own sides.

The problem is that there are no legal mechanisms that can properly protect women from those in their own groups. Human rights law, while possibly applicable, cannot fulfil this role, as it is targeted primarily at states and is difficult to enforce against non-state armed actors.[75] Human rights law's application is also limited in armed conflicts and IHL, as the *lex specialis,* would take precedence in the regulation of armed group behaviour. Domestic law systems that regulate crime and public safety tend to break down in conflict – if for no other reason than that police, courts and enforcement mechanisms break down. Domestic law is also almost impossible to enforce against those in non-state armed groups. There is therefore no law that is adequately fills this gap in the principle of distinction's reach.

7.1.5 Prisoner of war status and women

One of the key combatant privileges is POW status. POW status was designed to play an incentivising role in the IHL system; in exchange for abiding by IHL and physically distinguishing themselves as combatants, fighters would be rewarded with protection and a certain level of treatment on capture. The continued relevance of POW status in new wars – as both a fact and an incentive for compliance with IHL – is questionable. POW status pertains only to IACs. So too, POW status only accrues to fighters "belonging to" state parties to a conflict, while in new wars a high proportion of fighters fight for non-state groups in NIACs.

Just because the NIAC conventions do not provide for POW status, does not mean prisoners are not taken in these conflicts. Tuck explains that, "Detention by armed groups is neither infrequent nor, necessarily, small-scale. … Just as 'armed groups are characterised by their great diversity', so too are their dealings with detainees. The extent, frequency, and location of detention differ, as do the infrastructure, expertise, and financial resources available for the administration of detention. Some armed groups expressly recognize the humanitarian entitlements of detainees and regulate the conduct of their members

[75] Alston, Philip, Academy of European Law, and New York University. Center for Human Rights and Global Justice. *Non-State Actors and Human Rights*. Collected Courses of the Academy of European Law ; XIII/3. Oxford ; New York: Oxford University Press, 2005.

accordingly, while others do not."[76] Notably, there are certain features that are particular to detention by non-state armed groups, often arising from the clandestine, informal and hidden nature of detention in these conflicts. Tuck explains further: "Perhaps most peculiar to armed groups is a tendency to detain persons in undisclosed, remote locales, without standard detention infrastructure. This is a logical consequence of waging war against better-resourced states, in which the armed group's survival is dependent upon clandestine operations. For the detainees, the implications are a dearth of essential items/services, an absence of family contact, frequent transfers, exposure to harsh climatic variables, and so forth."[77] Detention by non-state groups is often labelled differently, being framed as taking hostages or as detention as a form of targeting.

There are problems with the laws governing detention *by* non-state groups. The minimal standards in the NIAC laws do not provide adequate regulation, with rules about detention conditions, transfers and procedural safeguards either absent or lacking any level of specificity.[78] Human rights law can provide some guidance, guaranteeing the rights of detainees to certain standards of treatment. However, human rights law is not satisfactory as a regulating mechanism for non-state armed actors. Effectively, at this point we are left with no one body of law that can adequately regulate detention in NIACs.

The status of detainees *from* non-state armed groups, and the question of the law applicable to them, has been the topic of much controversy in recent years. Most prominently, this has come up in the context of Guantanamo Bay and the detention of Taliban and other fighters in Afghanistan and Iraq.[79] Detention in new wars has become tangled up with questions about detention of terrorists.[80] In *Serdar Mohammed v. Ministry of Defense*, considering the detention of Taliban commanders in Afghanistan, the United Kingdom's High Court of Justice confirmed that IHL does not *authorise* detention in NIACs, as neither CA3 nor AP2 contain provisions empowering parties to detain prisoners. The court explained that CA3 and AP2 are purely humanitarian in purpose, aimed at securing fundamental guarantees. They therefore guarantee minimum standards of treatment to

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[76] Tuck, David. "Detention by Armed Groups: Overcoming Challenges to Humanitarian Action." *International Review of the Red Cross* 93, no. 888 (2011): 759–782, at 761.
[77] Ibid, at 764.
[78] Ibid.
[79] Moore, Catherine. "The United States, International Humanitarian Law and the Prisoners at Guantanamo Bay." *The International Journal of Human Rights* 7, no. 2 (2003): 1–27. Arai-Takahashi, Yutaka. "Disentangling Legal Quagmires: The Legal Characterisation of the Armed Conflicts in Afghanistan since 6/7 October 2001 and the Question of Prisoner of War Status." *Yearbook of International Humanitarian Law* 5 (2002): 61–105.
[80] Macken, Claire. *Counter-Terrorism and the Detention of Suspected Terrorists: Preventive Detention and International Human Rights Law*. Routledge Research in Terrorism and Law. Routledge, 2011. Cassel, Douglass. "Pretrial and Preventive Detention of Suspected Terrorists: Options and Constraints under International Law." *The Journal of Criminal Law and Criminology*, no. 3 (2008): 811–852.

those detained – while not actually providing legal authority for actors to detain. Detention *may* be lawful under the law of the state on whose territory the conflict is being fought, or it may be wholly unlawful, but regardless, the NIAC conventions set out minimum standards of treatment to be provided to those detained.[81] The lack of clear law guiding detention in NIACs has allowed for differing and often contradictory interpretations in recent years. Goodman points to the problems with the USA's approach to this: "… policymakers and advocates of U.S. practices improperly conflated two classes of individuals subject to detention: civilians who directly participate in hostilities ("unlawful combatants") and civilians who have not directly participated but nevertheless pose a security threat. … commentators on both sides have also improperly equated rules governing two coercive measures: administrative detention and military tribunals."[82]

It is interesting to consider who prisoners in new wars might be. In new wars, entire population groups are seen to be "enemies". Fighters and non-fighters might be detained together, with little distinction made between those participating and those not participating. In conflicts from Bosnia to Rwanda, civilians have been interned merely for belonging to ethnic or other groups. This is not permitted by IHL. GC4 (Art 5, 27, 41–43, and 78) permits the detention or internment of civilians *if* they pose a security threat – even where there is no evidence that they have directly participated in hostilities; a principle that also applies in NIACs. For each detainee a specific determination is required that they pose a threat to that state's security,[83] otherwise they may not be detained. However, this rule is challenged by the differing notion of "enemy" in new wars, and is frequently disregarded in these conflicts.

POW protection presents itself as gender-neutral – a protective status applicable to men and women alike.[84] It is in fact highly gendered. Despite the recognition in IHL that there can be female POWs, vastly more men are detained in conflict. Of course, if one blurs the distinction between interment of POWs and the detention of "enemy" civilians in conflict, as tends to be blurred in new wars, then the numbers of women get higher. This illustrates how the way people are labelled or categorised affects our perceptions of their numbers.

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[81] *Serdar Mohammed v. Ministry of Defense*, EWHC 1369 (QB), 2014.

[82] Goodman, Ryan. "The Detention of Civilians in Armed Conflict." *The American Journal of International Law* 103, no. 1 (2009): 48–74, at 49.

[83] Ibid.

[84] The IHL conventions expressly provide for female POWs by including a number of special protections for female prisoners. For example, Article 25, GC3 provides for separate quarters for female POWs. Article 88 GC3 states that, "In no case may a woman prisoner of war be awarded or sentenced to a punishment more severe, or treated whilst undergoing punishment more severely, than a male member of the armed forces of the Detaining Power dealt with for a similar offence."

The punishments doled out to prisoners also take gendered forms. Male prisoners in conflict are more often subjected to beatings or torture and are more frequently killed.[85]

Female prisoners are more likely to be sexually violated. Sexual assaults of female prisoners in conflict have been documented around the world.[86] In Zimbabwe, from 2000, women who were known to be opponents of Mugabe's Zanu PF party were held in camps run by the youth militia, the Green Bombers, where they were subjected to extensive sexual violence.[87] The Women Under Siege website contains numerous documented reports of women involved with, or accused of being involved with, the Syrian opposition being detained and subjected to sexualised violence.[88] Forced prostitution has been another punishment for women detained in war. Asia's "comfort women" are the best-known example, with up to 200,000 women forced into sexual slavery by the Japanese military in World War Two. The Nazis too made female prisoners work in brothels to service forced labourers in the concentration camps, out of a notion that this would increase labourers' productivity. Brothels were opened in Nazi camps (staffed by non-Jewish inmates, for non-Jewish prisoners).[89] Here again, the line between those imprisoned for their participation in conflict, and those imprisoned for their group membership, blurs, with sexual exploitation happening across the spectrum. In the Bosnian war, Muslim women were detained and repeatedly raped in detention facilities dubbed as "rape camps". So too in Rwanda, Tutsi women were cordoned off at selected detention sites to be raped, as part of the commission of genocide.

There are, of course, exceptions to the gender particular forms of punishments described above. Female prisoners are also beaten, tortured and killed, and male detainees are raped. Storr notes that, "Twenty-one per cent of Sri Lankan males who were seen at a London torture treatment centre reported sexual abuse while in detention. In El Salvador, 76% of male political prisoners surveyed in the 1980s described at least one incidence of sexual torture. A study of 6,000 concentration-camp inmates in Sarajevo found that 80% of men reported having been raped."[90] More recently, and subject to much international attention, in Iraq's Abu Ghraib prison, American officials were accused of sexually assaulting male prisoners, raping and sexually violating them with objects including truncheons, wire and

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[85] Jones, supra note 36.
[86] See for example, "The Dark and Secret Dungeons of Iraq. Horror Stories of Female Prisoners." *Global Research*. Accessed December 10, 2013.
[87] Clifford, Cassandra. "Rape Camps in Zimbabwe." *Foreign Policy Association*, July 9, 2008. Wines, Michael. "Reports of Rape and Torture Inside Zimbabwean Militia." *The New York Times*, December 28, 2003.
[88] "Women Under Siege." *Crowdmap*. https://womenundersiegesyria.crowdmap.com/.
[89] Sommer, Robert. *Das KZ-Bordell: sexuelle Zwangsarbeit in nationalsozialistischen Konzentrationslagern* (The Concentration Camp Brothel), Paderborn: Schöningh, 2009.
[90] Storr, Will. "The Rape of Men: The Darkest Secret of War." *The Guardian*, July 17, 2011.

phosphorescent tubes. Female prisoners were raped in Abu Ghraib too. Of course, none of these "punishments" are permitted by IHL. POW status was designed to prevent combatants from continuing fighting – not to punish them for their acts.[91]

This thesis has argued that women are less likely to qualify as combatants and hence to receive protective POW status. As women are less likely to have POW protection, they are at increased risk of violence on capture, as enemies might be more willing to harm those who have not been conferred protected status. Interestingly, arguments about the treatment of female detainees are often used to try keep women out of combat roles. Debates about women in combat often centre on concerns about women being mistreated by enemies on capture, with arguments made that these risks are too high to justify allowing women into combat. However, this concern is questionable. Is there something inherently worse or less acceptable about *female* prisoners being mistreated? If there is, this almost certainly centres on sexual violence and on the concern that capturers cannot be trusted not to rape. This appears to rest on an assumption that enemies will respect rights of male prisoners more and will not rape them – an assumption not borne out by the facts. There is a reverse discrimination at play. Such arguments condone sending men into situations where they may be captured and tortured, while not sending women into the same situations. However, these arguments are also unfair towards women. Rhonda Cornum, an American soldier captured and sexually assaulted by Iraqi forces during the Gulf war, argues that, "Every 15 seconds in America, some woman is assaulted. Why are they worried about a woman getting assaulted once every 10 years in a war overseas? It's ridiculous … clearly it's an emotional argument they use (to argue that women should be kept away from the frontlines) because they can't think of a rational one."[92] At their essence, concerns about female prisoners are based on the notion that POWs – much like combatants – should be male, with women not fitting this picture.

7.1.6 Distinction and the post-conflict period

"Regardless of what a female non-combatant may have survived and whatever heroic acts of courage she may have committed, a woman is expected to devote her attention to the returning male 'war hero', and there is a tendency to minimize, if not outright deny, her war experience. The woman was not a fighter, and hence is not a hero."[93]

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[91] Dinstein, Yoram. The Conduct of Hostilities Under the Law of International Armed Conflict, Cambridge University Press, 2004.
[92] "A Woman's Burden", *Time*, March 28, 2003.
[93] Handrahan, Lori. "Conflict, Gender, Ethnicity and Post-Conflict Reconstruction." *Security Dialogue* 35, no. 4 (2004): 429–445, at 433.

Although IHL and the principle of distinction were created to regulate *during* conflict, they continue to have an effect once conflicts end. Here too the principle of distinction fails women. IHL focuses on periods of formal fighting and once the state of "armed conflict" terminates, IHL ceases to apply. This cessation of the operation of the law is based on the notion that threats of violence cease with the ending of conflict. Feminist analyses of post-conflict periods have shown this to be untrue.[94] Chapter 2 described how security remains a real concern for women following from conflict. Cease-fires and peace treaties may officially terminate hostilities, yet insecurity lingers. Violence against civilians remains a constant feature post-conflict – and a significant feature in women's lives.[95] The termination of IHL also rests on the assumption that post-conflict, domestic laws operate and can serve to protect people. This, too, is not the case, with it often taking years before legal systems and enforcement mechanisms are up and running. IHL therefore stops in its application at a time when women still require the law's protection.

Much of the violence committed against women post-conflict is domestic violence, committed by husbands and others, often traumatised by the events of war. One could argue that this type of violence would not fall under the rubric of IHL anyway. However, this argument fails to take into account the fact that domestic violence is exacerbated by conflict, with the heightened levels of domestic violence being intrinsically liked to war. Treating "private" violence as wholly separate to conflict-related activities is misleading. Arguing that separate laws must regulate these separate spheres fails to acknowledge the inter-connections between them.

The principle of distinction affects female fighters post-conflict. This thesis has argued that IHL's restrictive definitions shape the ways women's contributions to armed struggles are perceived by society, perpetuating the view that women are not actively involved in combat. This has a number of effects in the post-conflict period.

Where women are not labelled as combatants they are more likely to be excluded from DDR programmes. DDR programs are implemented as part of peace-making initiatives. They aim to demobilise combatants and facilitate their reintegration back into civilian life. In exchange for giving up their weapons and leaving armed group structures, former combatants are given "reintegration packages" consisting of money, goods, skills training and other assistance. This support can be critical for former combatants, who often leave

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[94] Ibid.

[95] Manjoo, Rashida, and McRaith, Calleigh. "Gender-Based Violence and Justice in Conflict and Post-Conflict Areas." *Cornell International Law Journal* 44 (2011): 11–31.

armed groups with no homes, no skills and nowhere to go. DDR programmes have traditionally focused on male combatants. Women have been excluded from several programmes and, where included, their specific needs have not been well addressed. The numbers of women going through DDR have been significantly lower than men. In Sierra Leone, between 1998 and 2002, 60,769 men went through DDR, while only 4,876 women took part. Put differently, women constituted 7.4 per cent of adults going through DDR, despite the fact that this percentage was significantly lower than the per centage of women serving in Sierra Leone's armed groups[96] – estimated by some as being up to 30 per cent. In the DRC, from to 2004, 1,718 boy soldiers went through DDR, while only 23 girls went through the program, despite the fact that those interviewed said between 30 and 40 per cent of those in the units were girls.[97]

Before starting a DDR program, planners decide who their 'target group' is and develop selection criteria for determining who belongs to this group. Women are often excluded because of the chosen admission criteria.[98] Some programs, like the one in Sierra Leone, determined that people needed to hand in weapons in order to be admitted to the programme. As many women had held non-fighting roles in the armed groups, for which they were not allocated weapons, they could not gain access to the programme.[99] In CAR, among other places, unit commanders were asked to list and name those in their units who would be admitted to DDR. Often commanders did not list the women in their units – sometimes out of blatant discrimination, but often because they considered them "wives" rather than "combatants", and therefore felt they were not worthy of the programme.[100] In CAR, towards the last phase of DDR, women were removed from the programme altogether. The explanation provided by a former employee was that the authorities did not find it "normal" for women to be combatants and therefore assumed the women must have been given their weapons by family members, rather than being real combatants.[101] These examples illustrate the problems that can arise from entrenching views that women are not *real* combatants. In recent years a number of DDR programmes have included women who perform support roles in armed groups – known in humanitarian circles as

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96 Lowiki, Jane, and Pilsbury, Allison, *Disarmament, Demobilisation and Reintegration, and Gender-based Violence in Sierra Leone*, excerpts from Precious Resources, Adolescents in the Reconstruction of Sierra Leone, Women's Commission for Refugee Women and Children, 1–19, (2002).

97 Verhey, Beth. *Reaching the Girls, Study on Girls Associated with Armed Forces and Groups in the Democratic Republic of Congo*, Save the Children UK, CARE, IFESH and IRC (2004).

98 Schroeder, Emily, *A Window of Opportunity in the Democratic Republic of the Congo: Incorporating a Gender Perspective in the Disarmament, Demobilization and Reintegration Process*, Centre for Security Sector Management, Peace Conflict & Development Issue, (2004).

99 Lowiki, Pilsbury, supra note 96.

100 Ibid.

101 Lamb, Guy, and Stern, Orly. *Assessing the Reintegration of Ex-Combatants in the Context of Instability and Informal Economies, The Cases of the Central African Republic, the Democratic Republic of Congo and South Sudan*. World Bank, Transitional Demobilization and Reintegration Program, 2011.

"women associated with armed forces" – within their programmes.[102] This has marked a shift from approaching DDR from a purely security lens (focused on removing armed fighters from fighting life), to a lens that recognises a broader group to be both deserving of and in need of support. This latter view would align with a move towards a less security-bound principle of distinction, one that takes into account who is deserving of protection.

The failure to acknowledge women's roles in conflict also contributes to women being excluded from peace negotiations, with negotiating positions being awarded to those seen to have contributed. Over the past 25 years, only one out of every 40 signatories to peace treaties has been female.[103] Castillo Diaz notes that, "… women represent a strikingly low number of negotiators ... Women's participation in negotiating delegations averaged less than 8 per cent in the 14 cases for which such information was available. Fewer than 3 per cent of signatories in the peace processes included in this sample were women, and women were absent from chief mediating roles in UN-brokered talks."[104] Problematically, when women are excluded from peace processes, the resultant treaties tend to ignore women's concerns. A UNIFEM study that reviewed the substantive provisions of 585 peace agreements from 102 peace processes since 1990 found that only 16 per cent of treaties (92 treaties) contained any reference to gender or women. This increased from 11 to 27 per cent following SC Res 1325. In only 7 treaties were the needs of female combatants in DDR mentioned and in only 4 was sexual violence recognised as a violation of ceasefire.[105] Peace agreements purport to be gender neutral, while making gendered assumptions and catering to men's needs. For example, agreements provide for reparations schemes for combatants, framed as "welfare for veterans", while ignoring others in the population who suffered, or participated in armed struggles in alternative ways. CEDAW General Recommendation 30 emphasises the importance of including women in peace processes, recommending that women and civil society organisations addressing women's issues should be included in all peace negotiations.[106] Similarly SC Res 1325 and the other Resolutions of the Women, Peace and Security Agenda also refer to the importance of including women in these processes.

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[102] Children and Women Associated with Armed Forces and Groups, Issue Paper, Second International Conference on DDR and Stability in Africa Kinshasa, Democratic Republic of Congo, 12-14 June 2007.
[103] Castillo Diaz, Pablo. "Women's Participation in Peace Negotiations: Connections between Presence and Influence." UNIFEM, 2010.
[104] Ibid, at 1.
[105] Ibid.
[106] General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations. CEDAW/C/GC/30, 2013.

Disregarding women's roles in conflicts also leads to women being denied political positions post-conflict, as these are frequently offered as "rewards" to those who have contributed best to struggles. Globally, women still only hold one in five political positions,[107] and these numbers are often particularly low in post-conflict states. The exception is when quotas are put in place. Rwanda, following its genocide, pushed for female equality and inclusion, putting in place a strict quota for women in politics. As a result, Rwanda now has the highest per centage of women parliamentarians in the world – as of 2014, there were 63.8 per cent women in the lower house and 38.5 per cent in the upper house. However, even when women are placed in political positions following conflict, they are often not given *real* power to exercise their roles, being placed as figureheads and not given the space to voice their positions.[108] Often placing women in leadership still does not result in real improved conditions for women. However, from an equality perspective, women's inclusion is imperative and the narrative of women's participation in conflict, influenced by IHL, plays a part in influencing this.

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It seems that, for women, both being branded combatant *and* not being branded combatant are problematic. If women are not recognised as combatants, they are excluded from benefits. On the other hand, where women are seen as combatants, they are stigmatised and marginalised. The principle of distinction sits in the middle of this, tacitly shaping the way in which women's contributions to conflicts are recognised and perceived – complicit in bringing this range of consequences; positive and negative, direct and indirect.

7.2 Does the principle of distinction serve women?

The above subsections have pointed to the many effects and failings the principle of distinction exhibits in relation to women. What is left is to question whether overall the principle in its current formulation is beneficial to and protective of women or, rather, whether it fails them. The sections above have illustrated that the answer is mixed. The fact that IHL excludes many of the roles that women play in conflict from qualifying as combatancy or direct participation keeps many women from being lawful targets of attack. Stereotypes about women as victims can have protective effects, leading to women being evacuated first and prioritised in protection initiatives. In terms of pure legal protection, women certainly gain from being classified civilians.

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[107] Lukatela, Ana. *Gender and Post-Conflict Governance: Understanding the Challenges*. UN Women, 2012.
[108] Arabi, Asha. "'In Power Without Power': Women in Politics and Leadership Positions in South Sudan." in Bubenzer, Friederike, and Stern, Orly. *Hope, Pain & Patience: The Lives of Women in South Sudan*. Jacana Media, 2012.

However, as this thesis has argued, there are also negative effects arising from this. The preceding sections described some of the negative effects for women flowing from the principle – effects that are indirect, frequently hidden and largely unacknowledged. Paradoxically, in providing larger numbers of women with legal protection from attack, the current application of the principle compromises women's social and political standing, exposing them to other sorts of threats.

Of course one must question the extent to which the negative effects described in the sections above can in fact be attributed to the principle of distinction. To what extent is it really the legal classification of women as civilians in IHL that results in women being stereotyped, victimised or barred from partaking in negotiations and political positions? Can one really attribute these to the principle of distinction? Many of these effects have nothing at all to do with the conduct of hostilities – that which IHL was created to regulate. Discrimination and stereotyping of women is deeply rooted and would persist even if the legal labels in IHL were framed differently.

While it is true that the principle is not solely responsible for these effects, it is important to take note of the part that the law does play. Even if it is just in a subtle, cumulative way, all of the influences that create, entrench or legitimise particular views of women play a part in perpetuating these. While IHL may not be solely to blame, and in fact may not even be a dominant cause of these consequences, to the extent that the law contributes at all, this bears noting, highlighting and addressing. While not seeking to overstate the role that the principle of distinction plays in entrenching societal norms and discrimination, this thesis seeks to illuminate the contributory role it plays. Only by doing this in each of the many forums where patriarchal views are given a voice will these norms begin to shift. It is also worth noting that the negative consequences flowing from the principle of distinction may not even be bad enough to merit suggesting the law be changed; it might be that the protective benefits to women flowing from the principle outweigh the harmful ones. However, even where the effects are minor and indirect, these are still important to recognise.

The problems with the principle of distinction are not restricted to gendered problems. There are numerous ways in which the principle is failing everyone. At its most basic, the principle of distinction fails to serve women simply by failing to operate effectively. With up to 90 per cent of conflict casualties today being civilians, many of these women, one can

see a principle in crisis. The broader problems with the principle have gendered dimensions that are important to recognise.

Having a law that is framed inappropriately has the potential to encourage non-compliance. Framing the law too narrowly, categorising women who are clearly taking part in war efforts as not being targetable participants, might contribute to a disregard for the law. Those fighting on the ground are frequently aware of the essential roles that women play in opposing armed groups, and of the fact that groups are reliant on these contributions to keep their efforts going. Fighters might be unwilling to ignore this – particularly those in weaker groups who may feel they do not have the luxury of not striking those who are integral to the maintenance of their enemies' forces. If the law does not allow fighters to lawfully target those whom they know to be acting against them, this can be a disincentive to abiding by IHL. Schmitt makes the argument that narrowly interpreting "direct participation", while expanding protection from attack to more people, actually increases the risk to the rest of civilians by encouraging non-compliance.[109] This argument applies well to women; not incorporating women who are actually participating into the law's fold puts greater numbers of civilian women at risk.

Some argue that IHL and the principle of distinction legitimate killing.[110] By allowing for certain people to be targeted and for certain levels of collateral damage, the law normalises killing, giving it a legal stamp of approval, thereby resulting in increased killing. If the law does in fact legitimise killing, women suffer from this; where collateral damage is allowed, greater numbers of women tend to be killed; where the law allows for the targeting of male fighters, women lose male family members on whom they are reliant. This calls into question the value of retaining such a principle in the law. Is a principle that legitimises violence an appropriate form of regulation? The unintended side effects of the principle are troubling – particularly given that the principle is failing to achieve what it is supposed to in the first place. If, on balance, IHL legitimises violence rather than preventing it, this would suggest it is not an appropriate means of regulating conflict.

One of the reasons for the principle's failings is the practical difficulty in applying this law, demonstrated in the previous chapter. Women get lost under the many layers of legal complication. In making a distinction assessment, actors must first decide whether a

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[109] Schmitt, Michael. "'Direct Participation in Hostilities' and 21st Century Armed Conflict." In *Crisis Management and Humanitarian Protection: Festschrift Fur*, 505–529. Fischer, Horst Berlin: BWV, 2004.
[110] Jochnick, Chris af, and Normand, Roger. "Legitimation of Violence: A Critical History of the Laws of War, The." *Harvard International Law Journal* 35 (1994): 49–95.

situation is IAC or NIAC, a choice laden with problems. They must also determine whether actors are under the control of a party to a conflict. Following that, they must determine if fighters are combatants, civilians, non-combatants or even unlawful combatants. If it is resolved that they are technically civilians, it then needs to be determined whether their actions constitute direct participation, also no simple feat. Under all of these layers of complication are women, who are already rendered invisible by society and stereotypes that conceal the ways in which they participate. These works hand in hand with the confusing, ambiguous law, to ensure that women remain hidden, hardly classified at all, and not adequately protected by the principle of distinction.

Even where the principle does apply its protective reach, the types of harm prohibited by it are too narrow to properly protect women. It is questionable whether the principle incorporates in its prohibitions sexual attacks or non-lethal attacks with long-term indirect consequences of which women often bear the brunt. In terms of substantive protection, the principle fails to extend far enough to protect women from the distinct types of harm they actually face in conflict.

The gendered problems with the principle of distinction provide a lens with which to view broader problems with the principle – those that apply to everyone. In the principle not standing up to gender analysis, this reveals deeper problems. For one thing, the fact that the principle does not adequately regulate women in conflict, suggests it might not function well for other 'challenging' groups – or groups of fighters that veer from those anticipated by the drafters. Considering African women reveals how the law functions badly when applied to those who are not European-uniformed-men. The gendered failings of the principle of distinction expose the biases in the law. They reveal the hierarchies and privileging implicit in IHL and way the law rests on these. This privileging reduces the effectiveness of the system. For one thing, it removes incentive for certain parties – those the law places in disadvantaged positions – to comply. If the law is privileging the stronger, then it is failing in what it purports to do – to protect the weaker.

The gendered problems expose how the principle contains categorisations that are not reflective of real conditions of conflict or of the actual ways in which people participate in hostilities. Regulation that is premised on inaccurate categories cannot optimally regulate. The effects of this can be significant. If the principle contains incoherent categories, this can be confusing for military actors. Given unworkable definitions of civilians and combatants, military actors may feel bound to conclude that more people are protected

civilians, a conclusion they might be unwilling to accept as this hampers their ability to achieve their goals. Alternatively, they might determine that larger numbers are combatants, in which case they would target them. Both of these lead to negative results, working against the goals of compliance and protection. The principle of distinction is legally incoherent; even assuming that fighters did apply the law in new wars, the principle is too uncertain for armed actors to properly use to regulate their actions.

IHL is based on numerous categories and binaries that underlie its norms and trigger the application of different rules. The law is applied differently in "IACs" and "NIACs", to "civilians" and "combatants", to "military objects" and "civilian objects". The very structure of the law rests on these binaries, with them being the basis for determining what actions are allowed or disallowed. While binaries underlie all areas of law, they seem particularly problematic in regulating conflict. Shany argues that IHL's problem is that its binary categorisations lack precision. They tend to be open-ended rather than clear categories. Ambiguous phrases such as like "direct participation in hostilities" or making an "effective contribution to military action" are common application triggers. This can lead to conflicting interpretations and uncertainty about if and when certain IHL rules apply – uncertainty that can have serious ramifications.[111] Exacerbating the problem is the fact that there are no independent decision-making bodies or procedures that can, in real-time, provide interpretations or adjudications of the law, meaning that conflicting interpretations are acted out and perpetuated.[112] The law's binaries are challenged by new wars, conflicts that inherently break down many of the distinctions the law is based on. Kaldor notes that in the context of new wars, "… the distinction between state and non-state, public and private, external and internal, economic and political, and even war and peace are breaking down. Moreover the break down of these binary distinctions is both a cause and a consequence of violence."[113]

Women get lost in IHL's binary categorisations, which are not reflective of reality and which ignore women's experiences. The principle of distinction rests on gendered distinctions, such as male-fighter/female-civilian, assuming clear-cut gender roles, when the roles played out in conflict are in fact quite mixed and fluid. This demonstrates how the principle's binaries are too simplistic to regulate the complexities of conflict, giving reason to question whether the principle is sufficiently robust to serve its intended purpose.

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111 Shany, Yuval. "Binary Law Meets Complex Reality: The Occupation of Gaza Debate." *Israel Law Review* 41 (2008): 68–86.
112 Ibid.
113 Kaldor, Mary. "In Defence of New Wars." *Stability* 2, no. 1 (2013), at 2.

Gender critique exposes other problematic binaries too. Voluntary/involuntary is shown to be too simplistic – both in the context of armed group recruitment and in the complexities of sexual consent. Women in conflict demonstrate the difficulties with the public/private divide; IHL regulates the public space, focusing on the military and those recognised as combatants, while largely ignoring participants who do not qualify as combatants and ignoring "private" violence, despite the fact that this might be caused or exacerbated by "public" conflict.

When considering women in African conflicts, new wars break down the binaries, at the same time that gender distinctions put them under pressure. Despite the problems with these binaries, the IHL system as it stands rests on these. Challenging these distinctions, challenges the very foundations the law rests on. Without the law's triggering binaries, there is no way of determining what rules apply when. We are therefore left with a body of law that is reliant on distinctions that are often not viable in modern conflict. The very structure of IHL is dependant on classifications that are sometimes impossible, sometimes invisible and often harmful.

This thesis concludes that while in form the principle is gender-neutral, in practice it is highly gendered, with the principle's gendered nature protecting men more than women. The principle of distinction is faulty for all and faulty particularly for women. It lets down both genders equally in certain ways, and women specifically in other ways. Of course many of the failings of the principle were not intentionally created to harm or prejudice women. Many were simply borne of a failure to consider women altogether. What we are left with is a law drafted without women in mind, which has some protective effects for women – ones that are of little effectiveness – as well as a range of negative side effects. Given all of these problems, the question that remains is what should be done about this.

What seems evident is that IHL does not really wish to prevent women being killed in conflict – certainly not to any greater extent than it wishes to allow parties to achieve military victory. Women's deaths are just a part of conflict, an often-acceptable trade-off for achieving other aims. The suffering of women is treated as part of the landscape of war. The principle of distinction as it operates today seems merely nominal, a token to show that IHL opposes harming women, yet not one that is strong or functional enough to prevent their actual harm.

8 Conclusions

This thesis has conducted a feminist critique of the principle of distinction both broadly, as well as in the specific context of African conflicts. Much has changed since the drafting of the IHL conventions. Conflicts have transformed; in the ways they are fought, in their inter/intra-state character, in the nature of the parties fighting and in the targeting of civilians. New wars – complex, chaotic and multifaceted – have become the norm. Among the many changes seen, have been shifts in the ways women participate, shifts that have mirrored the changes in women's status in society more generally. What we are left with is a set of laws too narrow to adequately encompass these changes in conflict, or the differing ways in which women participate.

This thesis has demonstrated the ways in which IHL prejudices women, neglecting their specific needs, concealing their experiences and painting women in stereotypical ways. However, the principle of distinction's failings are not restricted to gendered ones. The principle is in a state of crisis, tragically evidenced by the staggering number of civilians killed in new wars. Armed groups disregard IHL for a range of reasons – many of which have nothing to do with the wording and framing of the law. Some of the core tactics by which new wars are waged – ethnic cleansing, terrorising of civilians and targeted sexual violence – lie in direct conflict with IHL's rules, making it impossible for armed groups to fight this method of warfare within the bounds of the law. Given these chosen strategies, it seems unlikely that any law, no matter how it was framed, could curb these behaviours.

However, one does need to consider the role that IHL plays in this. States have created a regulatory system in which the majority of actors in today's conflicts – non-state armed actors – are in no ways incentivised to comply. They are disadvantaged by this system at every step of the way, giving them every reason to flout this body of law. Adding to the problems, this outdated regulatory body has been reduced to a fiction – a law laden with categorisations that scarcely resemble what is seen on the ground. Legal descriptions of combatants and direct participants look little like the actors seen in today's conflicts. The criteria aimed at distinguishing IACs and NIACs scarcely resemble the part internal, part transnational and part internationalised struggles we see raging across the globe. Even where armed actors have the will to adhere to the law, these problems make it confusing, difficult and sometimes outright impossible to follow and adhere to. IHL was designed for a different type of conflict, the type that was dominant when drafting the IHL conventions, a time where states fought states using armed and uniformed men. The principle of

distinction strains at the seams when applied to new wars. The many evident problems with the principle, both gendered and more general, reveal an untenable legal situation, and a law that is in every way failing to fulfil its goals. There seems to be a need for change.

This concluding chapter summarises the key arguments made in this thesis. It considers whether the problems with the principle speak to the need for legal change, and what such change might look like. It describes some of the potential means by which the legal status quo could be shifted, highlighting risks and pitfalls inherent in these approaches. It discusses the implications of this research, as well as potential avenues for future research.

8.1 Central themes and arguments

This research has questioned the principle of distinction's capacity to regulate and protect in new wars. A few themes have run through the research, working together to shed light on different aspects of this question. The first was that of women in armed conflict; the research sought to highlight the different ways in which women participate in conflict, their differing needs and experiences, as well as the gendered effects of IHL. The second theme related to new wars and to problems in regulating these, including the paucity of laws regulating NIACs, the problems created by the merging of IACs and NIACs, and challenges of compliance and incentives in these conflicts. The third theme related to Africa, a region where the bulk of the world's conflicts are taking place, yet which is underexplored in terms of legal analysis and which has historically contributed little to IHL's development. Through an exploration of these themes, this research has shone a spotlight on the principle of distinction and its application in modern conflicts, with particular respect to women.

The thesis questioned whether the principle of distinction serves women in modern day conflict, or whether it fails them, even putting women at greater risk or disadvantage. It questioned whether the principle is suitable to be applied to women participating in conflict, containing provisions that adequately encompass the roles played by women in new wars, or rather whether the laws are based on out-dated and incorrect perceptions of women's roles, failing to reflect the gendered reality in these conflicts and thereby failing to adequately regulate women's involvement and protection during hostilities.

This thesis argued that the narrow definitions in the principle of distinction effectively exclude women who actively participate in conflicts from falling within its ambit. Women in African conflicts participate differently to men – much as in other parts of the world.

The principle of distinction's terms were drafted with typical male participation in mind. The result is that few women fall within the legal definitions of combatancy and direct participation, even when women are actively involved in hostilities.

This has many effects for women – beneficial and harmful, direct and indirect, during conflict and post-conflict. The framing of the law can work to the benefit of some women, while prejudicing others. If women are excluded from definitions of combatancy and direct participation, then they are legally protected from being targets of attack, clearly advantageous to the women in question. However, less beneficial are some of indirect effects that stem from this. The narrowly framed law entrenches the view that men are fighters and women are not. This view is already prevalent in society, derived from patriarchal norms and societal stereotypes about female behaviour. Even when the facts on the ground lie in stark contrast to these notions – such as where women are actively and visibly taking part in armed movements – the law plays a role in concealing this, creating an additional barrier to women's contributions being recognised. The narrow framing of the law entrenches ideas about women perpetually being civilians and victims in war, in need of protection, lacking agency – and never actors, participants or agents. Conceptualisations that paint women as victims in turn tacitly allow for, or normalise, the further victimisation of women – by those within armed groups and those outside of them; by those on their "side" and by those from the enemy. Reinforcing stereotypes about male fighters also entrenches views about it being acceptable for men to fight, views that are highly problematic for societies.

The effects of the principle extend post-conflict too. Fighters are honoured in post-conflict states, pedestalled and rewarded with positions of influence and authority. Where women's contributions are not recognised, then women are not awarded these positions in post-conflict societies. They then tend to be excluded from peace negotiations, political positions, reparations programmes and demobilisation and reintegration assistance conferred on former combatants. Understandings derived in part from the principle of distinction therefore affect the post-conflict setting and shape post-war reconstruction in ways that are prejudicial to women. Male contributions are rewarded, so male interests become prioritised. Women's concerns are left off of the agenda, as those who did not participate are not deemed worthy of war's rewards.

As well as being prejudicial to women, the gendered problems with the law detract from the effectiveness of the principle more generally, and reveal deeper problems that diminish

the law's effectiveness. Laws that fail to take account of the diverse experiences of women miss the complexity of the situations they were designed to regulate. The fact that the law's categorisations do not make sense for women is revealing of the ways in which it fails to properly categorise and demarcate other aspects of conflict. Laws that are premised on inaccurate, outdated or unworkable categorisations cannot hope to properly regulate.

The law's relationship with gender also exposes the stereotypes implicit in the law, revealing how the law rests on these and how the law in turn perpetuates them. IHL's underlying assumption that women are innocent, passive or victims, leads to it ignoring those women who are not, failing to consider or properly regulate them, with the underlying assumptions making the law blind to those in alternative roles. Similar 'blind spots' can also be found elsewhere in the law – IHL is blind to alternative types of conflicts, to conflicts that merge the law's categorisations, to conflicts that do not look like those envisaged by the drafters. These blind spots reveal that the principle is not a robust one that can be applied generally. Gender analysis reveals the hierarchies implicit in the law – of which gender is only one. These hierarchies benefit some at the expense of others: men over women, combatants over civilians, state actors over non-state actors. Problematically, these hierarchies affect people's willingness to abide by the law. Armed actors are unlikely to be motivated by a system that is consistently and systemically prejudicial towards them.

This thesis has endeavoured to reveal what conflict *should* look like in terms of the vision underlying IHL. Without admitting to it, IHL provides a normative vision of conflict; one that is masculine and Eurocentric. Looking at *women* fighting in *African* conflicts puts the margins in the centre, providing a double challenge to the underlying normative visions of conflict and, in doing so, disrupting the layers of assumptions underlying IHL. "Africa", "women" and "new wars" are all atypical according to the constructions underlying IHL – despite the fact that these are in fact quite typical in conflict today. These lenses collapse the traditional pictures implicit in IHL, challenging the notions of what "normal" war and "typical" fighters should be. But if atypical examples push the regulatory system to the point of non-functioning, what is the continued use of this system?

IHL was directed at classic old wars. It strains at the seams when applied to new wars. New wars challenge IHL in a range of ways. For one thing, targeting civilians tends to be a key military strategy in new wars. The fact that the principle of distinction prohibits the targeting of civilians means it is prohibiting a central strategy of hostilities. IHL was

designed to strike a balance between military necessity and humanitarian concerns, prohibiting those actions of cruelty not *necessary* for the goal of military victory. However, where the law prohibits a central strategy of conflict, as it does in new wars, then it takes on an altogether different relationship with war fighting – one that actors are less likely to comply with. This is further complicated by the fact that "military victory" is frequently not a goal in new wars – sometimes the goal is just to keep hostilities going so that armed actors can continue to exploit the situation. New wars are often not IAC or NIAC, the fighters neither civilian nor combatant, and so much of what is seen in these fails to correspond with what IHL envisages. The same can be said for the recent conflicts relating to terrorism and counter-terror, which also push IHL beyond its comfortable operation. This mix of terror and insurgency we increasingly see evident creates similar challenges for the application of IHL.

More specifically than just new wars, this thesis has sought to illustrate how the laws do not make sense in Africa. People participate differently in African conflicts to the ways anticipated and required by IHL. There are stark differences in the ways men and women participate, differences influenced by the traditional gender roles prevalent across the continent. The continent has seen a prevalence of long-term, low-level armed situations, which do not meet the definitions of "armed conflict", IACs or NIACs. Adding to the problem is that many African conflicts are technologically unsophisticated, using little in the way of high-tech military intelligence, making the determinations required by IHL more difficult to make. These conflicts tend to be fought by little-educated fighters who are unlikely to be trained in the nuances of IHL. Even if fighters were trained in the nuances of the law, and had the military intelligence available, it would still be difficult to determine who is fighter and non-fighter, because of the ways these roles blend in practice. The situation is made more difficult by the fact that most African conflicts involve non-state armed groups, meaning one is dealing with the murky area of "direct participation". In Africa we are left with little-educated fighters with poor intelligence technology applying the murkiest part of the law in a context where the classifications are the most unclear – one can hardly be surprised the law does not function optimally in this context.

The problems with the principle of distinction must be looked at in the context of IHL more broadly. Distinction sits at the core of IHL, and problems with distinction expose problems with the broader body of law. IHL's principles are interrelated, meaning that problems with distinction affect the other core principles and vice versa. One cannot determine if acts violate proportionality if one cannot first ascertain who is a lawful target.

So too, if it is unclear whether a conflict is IAC or NIAC, then it is not clear what version of the principle of distinction to apply. If distinction, IHL's central protection mechanism, is failing, this brings not only the principle of distinction into question, but also IHL's capacity to fulfil its broader mandate – that of providing constraints and protection in conflict.

There are numerous problems with this law that are separate but interrelated. The law fails women in new wars, first and foremost because it is not functioning properly. However, in addition to the ways it fails everyone, it also fails women in specific ways. Those failings pertaining to everyone and those pertaining to women are interrelated. The organising principle of IHL assumes males as the primary actors. Bringing in women destabilises the entire construct of IHL. We are left with a destabilised law, operating in conflicts that by their very nature push IHL beyond its field of comfortable operation. That this law is unable to effectively operate should come as little surprise.

8.2 Rethinking the principle of distinction

The many failings described above suggest that the overall regulation of conflict – as well as many of the concepts within and underlying the law – need to be reconsidered. This section will highlight some of the specific areas that merit reconsideration, before moving on to the question of how this might actually be achieved. This thesis aims to explore the nature of a problem rather than determining its solution. This conclusion therefore does not provide specific recommendations as to how the law should be changed, on specific wording or processes – such recommendations fall beyond the scope of this work. Rather, this chapter highlights those areas where change seems to be required, before providing brief and general thoughts about possible approaches for doing this.

Our acceptance of the principle of distinction needs to be challenged. Is the principle of distinction really the best legal mechanism to apply in conflict? For years there has been blind acceptance of this principle and its central role in IHL, an acceptance that has made the international community complacent about the principle's failings. We should interrogate our assumption that the principle is capable of doing what it purports to do. As this thesis has demonstrated, the principle is impractical, complex, often out of touch with local realities, and, in many contexts, all but impossible to apply. How can we argue for the application of a principle that cannot be workably applied? In NIACs, where there is no civilian/combatant divide and all we are left with is "direct participation", does this concept even constitute an operational principle of distinction? We need to question if the

principle is serving any function in new wars. If it is not meeting its stated goals, what is it actually doing? Given how little it is achieving in these conflicts, would anything be different if we removed this principle altogether? Perhaps protection in conflict might be better served by replacing distinction with something else, or altering it in significant ways. These ideas need to be explored. If distinction is to continue being held up as the foundational core of IHL, then we need to continuously analyse it – and where it is failing, address these failures. The situation we have at the moment, of large-scale recognition of the principle's failings, yet what seems to be a despondent acceptance of these, is unacceptable given the grave consequences of having a body of law with a dysfunctional central protection mechanism regulating violent conflict.

IHL and the principle of distinction operate *during* armed conflict. This too needs to be challenged. The notion that IHL should apply only during active armed conflict, and that its importance and effects simply cease the moment a peace treaty is signed, is flawed. Both the effects of violence, and the effects of the law, seep over into non-conflict times. The idea of a set period of "armed conflict", with specific dangers that a narrowly tailored body of regulation can address, clearly does not function in new wars. In these, there might not be a single intense period of "armed conflict" but, rather, long-term, low-level situations with sporadic flare-ups that temporarily reach the level of armed conflict before receding again. Even during the quiet gaps, violence continues by other means, such as by targeted sexual violence against women. The "armed conflict" model means that in those 'quiet times', armed actors will not be regulated by IHL. Post conflict, too, instability persists and the dangers to women continue. CEDAW's General Comment 30 recognises that "…the transition from conflict to post-conflict is often not linear and can involve cessations of conflict and then slippages back into conflict – a cycle that can continue for long periods of time."[1] The threshold for the application of IHL therefore needs to be reconsidered. There is a need to find a mechanism to ensure that longer-term conflicts are regulated in their entirety, not just during flare-ups, ensuring there are no gaps in protection. Chosen triggers must ensure the law is operational at all times when civilians require protection, not just when technical requirements are met.

The other threshold too, the IAC/NIAC distinction, also needs to be interrogated. Chapter 5 argued for the eradication of this distinction – in part because it is often unworkable in new wars. There is already an evident movement towards merging these categories in law

[1] Para 4, General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations. CEDAW/C/GC/30, 2013.

and practice. However, as chapter 5 explained, removing the IAC/NIAC divide would necessitate rethinking the principle of distinction in NIACs. Until states are willing to concede that non-state fighters should have the recognition and privileges that come with combatancy, the two bodies of law cannot properly align. The principle of distinction therefore lies at the core of the IAC/NIAC problem, illustrating the inter-connected nature of the many problems of IHL.

Within the principle of distinction there are also concepts that need to be interrogated. Among these is the binary distinction between "civilian" and "combatant". Is this a valuable distinction to retain, or might there be an alternative indicator better suited to demarcating participation in modern conflict? If we believe this distinction retains merit, should the parameters of what is a civilian and a combatant be shifted? Perhaps most pressingly, thought needs to be given to if and how non-state actors can be better incorporated within this. What are the costs to the efficacy of the principle in failing to include them, given the dominance of non-state actors in new wars? In determining how narrowly or widely combatancy should be framed, a calculation must be made. If combatancy is framed too widely and un-uniformed, undisciplined, unorganised fighters are allowed to qualify, this leads to a blurring of combatant and civilian that can erode the principle and its stark, simple appeal. On the other hand, if combatancy is framed too narrowly, as in its current formulation, then many fighters are excluded from the fold, removing their incentive to comply with IHL, and ultimately detracting from the law's effectiveness. AP1 marked the start of a shift towards encouraging irregular participants to abide by the law by offering them combatant status. It seems the principle needs to shift further in this direction. As irregular fighters are today the norm, a law that does not properly incorporate them risks sliding into irrelevance.

Understandings of "direct participation" also need to be challenged. The problem is clear: if the term is framed narrowly, with fewer activities qualifying as direct participation, then more people are legally protected from attack. But, while a narrow interpretation appears to provide protection to a larger number, this can actually increase the risk to civilian populations, creating confusion and encouraging disrespect for the law – particularly by those threatened by the actions of those said to not be "directly participating". Wide definitions that allow more people to be targeted may ultimately increase the protection of civilians by promoting compliance.[2] Conversely, the exclusion of women by the narrow

[2] Schmitt, Michael. "'Direct Participation in Hostilities' and 21st Century Armed Conflict." In *Crisis Management and Humanitarian Protection: Festschrift Fur*, 505–29. Fischer, Horst Berlin: BWV, 2004.

understandings of direct participation may ultimately be harmful for women, leading to more civilian women being attacked. As such, there might be greater benefit in working towards a wider, more inclusive notion that better reflects the true ways in which people – including women – participate in new wars, and which incorporates more participating women into the fold.

The treatment of non-state armed groups in IHL also needs to be addressed. The ICRC's "continuous combat function" is a positive first step towards aligning the regulation of armed groups with the realities of modern conflict. However, continuous combat function has its limitations. Of particular relevance to this thesis is that it does not get one around the gendered problems inherent in the concept of "direct participation". Only those who 'continuously directly participate in hostilities' have a continuous combat function. Reliance on the direct participation standard here once again leads to the effective exclusion of women. The "continuous" part of the approach is promising, with continuous action being a useful way to determine membership, and one that is more likely to be inclusive of women than other methods might be – such as methods that require that formal criteria to be met or recognition by group leaders. However, the action standard, "direction participation", might be replaced with one that is more gender inclusive. There are other evident problems with the continuous combat function standard. When considering clashes between African armed groups, it seems unlikely that enemies would have access to the sort of detailed information required to know which members directly participate, when, and for whom this participation reaches the level of continuous combat function. Particularly given low levels of military intelligence technology in this context, this seems to be a largely unrealistic standard.

Another area where attention is required is the relationship between IHL and Africa. IHL was drafted with the European context in mind, with conflicts in the rest of the world – and particularly in Africa – scarcely being considered in the formation and development of the law. Many of IHL's rules make little sense in the African context. Given that today a sizeable number of the world's conflicts take place in Africa, this situation is untenable. The situation we have in Africa today, of large-scale violations and disregard of IHL, is not an acceptable status quo. Thought needs to be given to making IHL more workable on and inclusive of the African continent. Legal developments should not assume that people throughout the world participate in conflict in "Western" ways. They should not assume that all people have access to similar technology – be this for intelligence purposes or for targeting – or similar levels of training, or legal capacity that would allow them to deal with

complex regulation. In any further processes to amend or develop the laws, attention must be paid to ensuring African voices and concerns are included on a substantial level. Be they interpretive processes – like those conducted by the ICRC – or judicial processes at the international criminal tribunals, attention needs to be paid to ensuring developments are applicable in Africa and not just in contexts dominated by Western actors. Attention should be directed not only to the punitive aspects of African conflicts, like we see with the ICC, but also to its regulatory aspects. Including African actors in law-making processes would go a long way towards promoting goodwill towards the system, rather than alienating African actors, as the ICC has done. Failing to do this creates a danger of Africa effectively removing itself from the system.

8.3 The way forward

Deciding on the best direction for legal change is fraught with challenges. What should be done to further incorporate women into the principle of distinction? If women participate differently in conflict, should gender specific combatancy or direct participation requirements be created for women? Alternatively, should existing requirements be broadened in a gender-neutral way to further incorporate the types of roles played by women? In the narrow principle of distinction excluding women from definitions of combatancy and direct participation, this provides many with protection from attack, putting them outside the bounds of those who can be lawfully targeted. Despite the fact that the law may be unjust, prejudicial and indirectly harmful, there are clear legal benefits to women that stem from this. Attempts to make the principle's definitions wider, to further incorporate women into the fold, would also make more women eligible for targeting.

My view is that equality is paramount – even where this may lead to disadvantages for some women. The overall long-term harm to women of allowing inequality to persist merely because it happens to be beneficial to women in some situations is great. A commitment to gender equality demands and justifies certain short-terms harms to women. True gender equality will only arise when all situations of unfairness are tackled – even those that benefit women. In my view, a law that is more inclusive of women would be the better position, even if the result is that more women are deemed direct participants and hence legally eligible for attack. Many will disagree with this conclusion – it is one that is clearly counter-intuitive from a protection perspective.

Although most feminist scholars working in this area agree that there are problems with this body of law, not all agree that it merits amendment. A debate exists amongst feminist scholars about whether the provisions of IHL are inadequate – needing to be reconceptualised and revised (the "revisionist school") – or whether there are in fact sufficient protections for women in the law, with the main problems resulting from the lack of adherence and enforcement (the "enforcement school").[3] The ICRC's official position aligns with the enforcement school,[4] with proponents arguing that women have demonstrated resilience in conflict, showing that they do not require more tailored legal protections.[5] The revisionist school points to the limited capacity of gender-neutral law to achieve substantive equality given the inherently unequal conditions in conflict that are fuelled by gender inequality. They argue that if IHL does not recognise and address these inequalities, it reinforces discrimination against women.[6] The enforcement school responds to this by arguing that IHL is restricted in its goals, operating to serve a specific purpose under extreme circumstances – with its narrow focus being one of the reasons for its ability to operate. They claim that IHL was not designed to deal with systemic societal problems like gender inequality,[7] and that such criticisms of IHL are unfair as they disregard IHL's mandate and limits.

Even those who support the revisionist approach are aware of the dangers of reopening discussions on IHL's texts. Legal amendment brings the risks of new law that is worse from a gender and protection perspective, a danger feminist lawyers are acutely aware of. If legal amendment processes were set in motion, these would likely once again be dominated by men and male concerns, as IHL and international security remains a heavily male dominated field. The current political climate, with its fixation on state security, might lead to laws being codified that work to the detriment of individual protection.[8] Such a process might also open to question issues that are currently considered resolved. In addition, trying to amend the IHL conventions could undermine their legitimacy, at a time where IHL's legitimacy is already greatly challenged. Interfering with the well-established rules of IHL might therefore be counter-productive

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[3] See for example, Oosterveld, Valerie. "Feminist Debates on Civilian Women and International Humanitarian Law." *Windsor Yearbook of Access to Justice* 27 (2009): 385–402.
[4] Bennoune, Karima. "'Do We Need New International Law to Protect Women in Armed Conflict?'" *Case Western Reserve Journal of International Law* 38 (2006): 363–391.
[5] Lindsey, Charlotte. "Women Facing War." International Committee of the Red Cross, 2001.
[6] Krill, Françoise. "The Protection of Women in International Humanitarian Law." *International Review of the Red Cross* 249 (1985).
[7] Oosterveld, supra note 3.
[8] MacLaren, Malcolm, and Schwendimann, Felix. "An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law." *German Law Journal* 6, no. 9 (2005): 1217–42.

There are significant obstacles to changing international law. Processes of legal amendment are slow, political, context-driven and challenging in terms of achieving consensus. Developments in the law tend to be influenced by the powerful – normally male military actors from dominant countries. Negotiating treaties tends to be a long, difficult and highly political process. The drafting of the GCs took years of work – including a Preliminary Conference of National Red Cross Societies in 1945, a Conference of Government Experts in 1947, and finally, the International Conference of the Red Cross in Stockholm in 1948. The Diplomatic Conference itself, where the treaty text was finally agreed, took almost 4 months. Leading to the creation of the APs, the ICRC held consultations and conducted studies throughout the 1960s and 1970s. Four separate conferences of government experts and Red Cross representatives were held in 1971 and 1972 before the draft APs were finally drafted. These were presented to the Diplomatic Conference in 1974, which then held 4 sessions between 1974 and 1977, before finally accepting the APs.

Obtaining the state support required for adoption and ratification of treaties can be a tremendous challenge. Historically, states have been less willing to accept changes to the "means and methods of warfare" rules (Hague rules) than to humanitarian rules (Geneva rules). This is one reason the GCs were easier to negotiate than the APs, which focused more on means and methods. MacKinnon highlights the swift developments that can occur where there is political will. She points to the changes in IHL's interpretation evident since September 11th 2001 – including the increased willingness to treat non-state actors as states in order to invoke IHL and justify actions of self defence – as examples of the rapid legal developments that can occur where there is international support for this.[9] It is challenging to come up with changes that are workable and acceptable to all law-making parties. For legal changes to be accepted, they need to not skew the balance between military necessity and humanitarianism in a way that is unacceptable to states.[10] Proposals that veer too far in the humanitarian direction tend to be labelled naïve and pacifist and rejected by military personnel, who tend to be powerful voices within states. The consequences of having only some countries signing onto treaties is that this creates complex issues around successive treaties, with differing states having different legal obligations[11] – a far from optimal situation. Treaty changes need to allow for future changes in the nature of conflict, a task fraught with difficulty.

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[9] MacKinnon, Catharine. "Women's September 11th: Rethinking the International Law of Conflict." *Harvard International Law Journal* 47 (2006): 1–31.

[10] Schmitt, Michael. "Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance." *Virginia Journal of International Law* 50 (2010): 795–839.

[11] Article 30 - Application of Successive Treaties Relating to the Same Subject-Matter, United Nations Convention on the Law of Treaties, 23 May 1969, Entry into Force: 27 January 1980.

Given that so many actors in new wars are non-state actors, creating a law with increased legitimacy requires bringing non-state actors into the fold. In terms of process, this could mean including more non-state armed actors as negotiating parties.[12] Their views might be useful in addressing some problems described in this thesis, determining ways to incentivise non-state actors to abide by IHL and better incorporating their interests into treaties. It would clearly be impossible to attain participation and consent from all non-state armed actors as new groups are formed and dissolved all the time. However, bringing some possibly larger, longer-term groups into a process might be helpful and strategically prudent. The barrier to involving non-state groups is that states would likely be resistant to legitimating them by bringing them into such processes. However, working towards a less state-centric approach is critical if a new law is to be effective in regulating new wars.

An alternative to trying to alter existing IHL treaties, or creating a new general IHL treaty, would be creating a new Optional Protocol to the GCs, which deals with women in conflict. Such a protocol could address all aspects of the treatment of women and could deal with women in their various roles – as civilians, combatants, and the various shades in between. It might prove more acceptable to states – less risky and less politically fraught – to accept obligations specifically relating to women, rather than going into broader aspects of the means and methods of warfare.[13] It seems the international political climate might currently be supportive of this. There is clearly political traction on combatting sexual violence in conflict, evidenced by the British Foreign and Commonwealth Office's hosting the 2014 'Global Summit to End Sexual Violence in Conflict' in London and other high profile initiatives aimed at this. This traction could be utilised to address some of the broader issues facing women in war and to address some of the gendered problems relating to the principle of distinction.

Achieving treaty change – even a focused protocol for women – is difficult. As such, this is not a particularly promising route for remedying the problems raised in this thesis. Given these difficulties, most legal development is achieved through "soft law" measures, with changes made through shifting legal interpretations rather than by altering the word of the

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[12] Rondeau, Sophie. "Participation of Armed Groups in the Development of the Law Applicable to Armed Conflicts." *International Review of the Red Cross* 93, no. 883 (2011): 649–72. Herr, Stefanie. "Binding Non-State Armed Groups to International Humanitarian Law - Geneva Call and the Ban of Anti-Personnel Mines: Lessons from Sudan." Peace Research Institute Frankfurt, 2010.

[13] Gardam, Judith. "Women and the Law of Armed Conflict: Why the Silence?" *Intl Comp L Q* 46, no. October (1997): 55–80.

law.[14] Of course, as with treaty processes, soft law processes are also influenced by decision-makers, political dispositions and aligning circumstances. In addition, the results of these processes are often controversial and lack consensus or legitimacy, doing little to achieve legal clarity and certainty.

Soft law change was what the ICRC was attempting with its Interpretive Guidance. The Interpretive Guidance aimed to propose new interpretations of the principle of distinction – and, in particular, of direct participation – that would make the principle better suitable to regulating modern conflicts. However, there were some problems with the ICRC's approach. For one thing, the Interpretive Guidance deals primarily with certain types of modern conflicts, those relating to counter-terrorism and those that Western countries have been involved with in the Middle East. It does this while purporting to present solutions that would be applicable to all modern conflicts. However, the conflicts addressed in the Interpretive Guidance look little like new wars in Africa, and, as this thesis has argued, many of its provisions make little sense when applied in this context. The Interpretive Guidance therefore perpetuates a problem already seen in previous treaties – it extends its coverage to limited types of new conflicts, yet does not get around the problem of making the law applicable to *all* modern conflict. This is not to say that the Interpretive Guidance falls squarely back on "old wars" assumptions; in some ways it moves away from these, focusing, for example, on non-state actors as dominant players. Yet it does not go far enough towards creating a system capable of regulating new wars. Another problem is that the Interpretive Guidance's interpretations seem more suited to dealing with terrorism than classic armed groups. Its proposed means of determining who is directly participating seem better suited to counter-terrorism operations or to "targeted killings" – where a good deal of intelligence is collected about each target, who is carefully studied, tracked and surgically targeted – rather than to disorganised groups violently clashing with each other in Africa. In these latter conflicts it is often near impossible to determine the detailed facts the Interpretive Guidance requires to make its distinctions. A further problem is how controversial the Interpretive Guidance's interpretations have been. The cascade of criticism by leading scholars[15] reveals that it did not represent consensus on how IHL should be interpreted. This has detracted from the role it might have played in shifting the field.

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[14] Shaffer, Gregory, and Pollack, Mark. "Hard Versus Soft Law in International Security." *Boston College Law Review* 52, no. 4 (2011): 1147–1241. Cubie, Dug. "An Analysis of Soft Law Applicable to Humanitarian Assistance: Relative Normativity in Action?" *Journal of International Humanitarian Legal Studies* 2 (2011): 177–215.

[15] Goodman, Ryan, and Jinks, Derek. "The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: An Introduction to the Forum." *New York University International Law and Politics* 42 (2010): 637–640.

The Interpretive Guidance disregards women in much the same way as the existing IHL conventions do.[16] As with the conventions, the Interpretive Guidance's definitions exclude the roles that women typically play from its reach. This can be seen in the narrow, highly military-focused definitions proposed for "direct participation" and "continuous combat function". The Interpretive Guidance is yet another example of gender-neutral regulation that fails to adequately encompass the roles women play. The Interpretive Guidance does not help women any more than the IHL treaties did, rather perpetuating the gendered problems we saw before.

Instead of relying on IHL to assist women in conflict, other options lie in downplaying IHL and leaning more heavily on others areas of law and policy, including IHRL and ICL. Much of the interpretive work on IHL has been done through ICL, with the tribunals debating, interpreting and developing IHL's terms and phrases. Practitioners and scholars in the ICL field place great reliance on the part ICL can play in remedying IHL's problems. However, there are limits on the role ICL can play in remedying IHL and on the extent to which it should be relied on in this regard. ICL operates ex post facto, focusing on crime and punishment. It is not regulatory in its focus. While ICL may help to clarify concepts, it does not provide clear, binding provisions, capable of being used for regulation and able to achieve regulatory certainty. ICL provides judicial interpretation and is therefore subject to fluctuation – problematic if armed actors are to rely on its meanings. In fact, tasking courts briefed with interpreting international criminal law with defining IHL has the potential to create layers of confusion. ICL's work, particularly around gender, has been piecemeal. Its gender work to date has only taken it so far; while demonstrating the importance of integrating gender considerations, the tribunals have not shown how these considerations can be practically integrated into IHL.

IHRL provides some protection for those who do not fall within protected IHL categories, guaranteeing at least some minimal protection to those who are not eligible for IHL's more rigorous cover. IHRL can therefore be useful in filling protection gaps for those who 'fall through the cracks' of IHL categorisations. In recent years there has been increasing attention given to the interrelationship between IHRL and IHL, particularly in NIACs

[16] There are only two specific mentions of women in the Interpretive Guidance. These are both found in the footnotes, and refer to concrete illustrative examples that were provided during the expert meetings. The one example, provided during discussions on voluntary human shields, was of a woman "who shielded two fighters with her billowing robe, allowing them to shoot at their adversary from behind her" (p1024). The other, which came up in discussions about transmitting tactical information about an attack as a means of adversely affecting the military operations or capacity of a party to a conflict, was of a "civilian woman who repeatedly peeked into a building where troops had taken cover in order to indicate their position to the attacking enemy forces." (1018).

where the gaps are greater.[17] However, there are problems with relying too heavily on IHRL. This body of law is largely geared towards states. While there have been some inroads in this regard and increased recognition of the fact that non-state actors can be bound by human rights norms,[18] IHRL is still not optimally suited to nor designed for the regulation of non-state actors. IHRL also has gendered problems of its own – for example, it tends to entrench binary distinctions between the sexes and excludes men from women's rights instruments. In its structure, some human rights instruments focus on women, while others look at *all* people, thereby failing to incorporate women's concerns as general human concerns.[19]

While both IHRL and ICL do offer some promise for the development of IHL, there are also problems with the way these work together. The three bodies of law – IHL, IHRL and ICL – operate and have developed in silos. However, at the same time they interact, bleeding into, affecting and shaping each other. This separation and mixing are inconsistent, ad hoc and little understood – even by those working in these fields. Legal practitioners tend to specialise in one area, frequently having limited understanding of the others.

The final remaining approach is to rely on policy documents explaining IHL, targeted at practitioners and actors in the field, including humanitarian and military actors. Military manuals are key in the domestic practical application of IHL. Others policy areas have made some inroads with regards to gender and can provide models for how IHL policy documents could incorporate gendered understandings. As an example, in the area of refugee law, the 2002 UNHCR guidelines on gender-related persecution explicitly recognise nuances relating to female participation in conflict. Paragraph 33 reads: "The image of a political refugee as someone who is fleeing persecution for his or her direct involvement in political activity does not always correspond to the reality of the experiences of women in some societies. Women are less likely than their male counterparts to engage in high profile political activity and are more often involved in 'low level' political activities that reflect

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[17] Sasoli, Marco, and Olson, Laura. "The Relationship Between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts." *International Review of the Red Cross* 90, 871 (2008): 599–627. *International Humanitarian Law and International Human Rights Law: Pas de Deux*. The Collected Courses of the Academy of European Law, v. 19/1. Oxford University Press, 2011. Matthews, Hannah. "The Interaction Between International Human Rights Law and International Humanitarian Law: Seeking the Most Effective Protection for Civilians in Non-International Armed Conflicts." *The International Journal of Human Rights* 17, no. 5 (2013): 633–645.

[18] Alston, Philip, Academy of European Law, and New York University. Center for Human Rights and Global Justice. *Non-State Actors and Human Rights*. Collected Courses of the Academy of European Law ; XIII/3. Oxford ; New York: Oxford University Press, 2005.

[19] Rosenblum, Darren. "Unsex CEDAW, or What's Wrong With Women's Rights." *Pace Law Faculty Publications*, January 1, 2011. Dreyfus, Tom. "The 'Half-Invention' of Gender Identity in International Human Rights Law: From CEDAW to the Yogyakarta Principles." *Australian Feminist Law Journal* 37, no. 1 (2012): 33–50.

dominant gender roles. For example, a woman may work in nursing sick rebel soldiers, in the recruitment of sympathisers, or in the preparation and dissemination of leaflets. Women are also frequently attributed with political opinions of their family or male relatives, and subjected to persecution because of the activities of their male relatives."[20] IHL policy documents could try to incorporate understandings such as these, helping to a limited extent to get around the problems caused by IHL's blindness to gendered nuances.

8.4 Implications of this research

Exploring the gendered aspects of the principle of distinction and its application in new wars in Africa is important. It is important for women; for years the experiences of women in conflict have been silenced, lost to a male-dominated narrative. Women make up half of all people in conflict, making findings about women, law and war enormously important, particularly where these can be harnessed towards improving women's situations.

This work is also important more broadly. The principle of distinction is the law's central mechanism for the protection of civilians in conflict. The practical consequences of a failing mechanism are grim – escalating civilian deaths and a law unable to prevent it. Issues with the principle need to be continuously interrogated and problems addressed. By understanding the ways in which the law treats and fails women, we can better understand the true workings of this law. If the principle of distinction fails such a significant portion of the population, this gives insight as to how it fails others. Conversely, strategies to improve the law will be bettered by seeing that these adequately cover women in conflict; ensuring these are inclusive, relevant to real situations on the ground and capable of regulating 'different' groups. As conflicts change further and more unconventional groups become involved in the waging of war, this will become increasingly important.

Understandings from IHL seep into the general norms of a society, working to entrench stereotypes and promote unequal views that are ultimately harmful to women. Norms underlying the principle of distinction also affect understandings in the post-conflict period and shape post-conflict reconstruction and power allocation. It is important to identify and recognise the norms being relayed by law, much as this work has done, so that these can be addressed and countered.

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[20] Article 22, Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention And/or Its 1967 Protocol Relating to the Status of Refugees (HCR/GIP/02/01). *UNHCR*.

Despite this research focusing on one core principle of IHL, its reach is wider. Many of the challenges to the principle of distinction described above are common to IHL more broadly. The act of honing in on one core principle allows us to focus in greater detail than would have been possible had we been assessing the entire body of IHL. When examined through a gendered lens, the principle of distinction reveals issues that are relevant to the other core principles – proportionality and necessity – and to IHL as a whole. A study of the principle of distinction also reveals some problems pertaining to other bodies of laws. One does not only find the civilian/combatant distinction in IHL. It also comes into play in the "crimes against humanity" regime. If the civilian/combatant divide does not function in IHL, this speaks to how it might function when applied in that context too. ICL too is inherently affected by problems in IHL, while at the same time working to rectify these, so this study can provide insights useful for ICL too.

This research can serve as an entry point for further potential research. This conclusion chapter sets out some of the many elements of the law that would benefit from rethinking. Each of these are important areas for future research. This thesis has focused on the gendered aspects of the principle of distinction. Further research is also needed on the gendered workings of the other core principles; proportionality and necessity, and in particular, on how their gendered aspects play out in new wars and Africa. Such research might also examine the ways the core principles of IHL operate together in a gendered fashion, demonstrating the consequences for women of the interplay between these.

There is a need for further research about the role that IHL actually plays in new wars and the extent to which belligerents in these conflicts consider and have their actions shaped by IHL. Only by understanding why the law is followed or ignored, and what factors affect adherence, can we begin to work towards increased compliance. If the protection of women is one's ultimate goal, addressing the gendered problems can only take you so far – ultimately IHL can only protect if belligerents adhere to it. Work around IHL compliance in new wars is therefore critically required.

This conclusion chapter has described the difficulties in changing the legal status quo. Given the many demonstrable failings with the application of IHL in modern conflicts, it seems likely that at some point there will be a concerted effort to rework the law. This process is unlikely to come from feminist activists, but rather, from IHL practitioners more generally, those who on a daily basis witness the broader failings of this system. When such a process happens, it is hoped that the gendered insights provided in this thesis might be

considered and that this might play a part in illuminating the roles, experiences and needs of women, ensuring that these are incorporated into new law. It is hoped that the content and analysis in this thesis may some day help to achieve a more inclusive, more realistic and ultimately more effective body of law regulating conflict.

Reality informs law and law informs reality. The principle of distinction and its relationship to women provides an illustration of this at work. However, stronger than the influence of law, is the pull of the gradually changing positions of women in society. As women begin to play more dominant roles in all walks of life, this progression is mirrored in the fighting of conflicts. If the laws of war do not adapt to reflect this reality, they will be rendered irrelevant. Reassessing the principle of distinction through a gendered lens is therefore a crucial step required to bring IHL in line with the new realties of modern conflict and the realities of life for African women.

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