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THE DANISH MILITARY MANUAL AND NEW WARS

- Applying a Human Security Approach

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Abstract

In 2016 the Danish defence got its first military manual presenting international law for Danish armed forces in international operations. The Danish military manual distinguish itself by including international law in general, and human rights law in particular, capturing a new development regarding the laws governing armed conflicts. The thesis draws upon the theory of human security to discuss the Danish military manual's approach to international law in the context of new wars. The thesis argues that in order to be able to address new wars the Danish manual needs to reflect a new legal approach focusing on the security of the individual, and therefore, the manual needs to apply human rights in a substantial and comprehensive manner. The thesis sets out to test two main issues: first, whether and how a human security approach could be applied in practise, examining the Danish military manual as an example of a tool, in which the approach could be incorporated. Second, the thesis, thereby, also includes an examination of whether the Danish manual does in fact adhere to a human security approach, in particular interesting because the manual is the first of its kind to include human rights law. The thesis concludes that while the manual provides a great starting point, it does not apply human rights law in a substantial and comprehensive manner, and therefore, does not adhere to a human security approach. The thesis suggests that Denmark, if it wants to continue to engage in new wars in the future, should secure a better application of the human security approach in the Danish military manual by adopting the three following policy recommendations:

- Incorporating a flexible human rights approach, especially to targeting and detention
- Including a due-diligence tool for vetting potential cooperation partners
- Insisting on an expanded extraterritorial application of human rights obligations

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List of Abbreviations

ACHR	American Convention of Human Rights
AO	Advisory Opinion
AP I	Protocol I Additional to the Geneva Conventions
AP II	Protocol II Additional to the Geneva Conventions
ATT	Arms Trade Treaty
CA1	Article 1 Common to the Four Geneva Conventions
CA3	Article 3 Common to the Four Geneva Conventions
CCF	Continuous Combat Function
CIL	Customary International Law
DPH	Direct Participation in Hostilities
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
GC I, II, III, IV	Geneva Convention I, II, III, IV
HRL	Human Rights Law
IAC	International Armed Conflict
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
ICL	International Criminal Law
ICCPR	International Covenant on Civil and Political Rights
ILC	International Law Commission
ISAF	International Stabilisation Force Afghanistan
ISIS	Islamic State of Iraq and Syria
LOAC	Laws of Armed Conflict
NIAC	Non-International Armed Conflict
OEF	Operation Enduring Freedom
POW	Prisoner of war
RoE	Rules of Engagement
UDHR	Universal Declaration of Human Rights

1. Introduction

With the passing of decision B37 in the Danish parliament on the 13th December 2001, the Danish defence would for the first time since 1864 be involved in a war with a large number of ground forces. Not as part of a peacekeeping mission, as in the 1990's former Yugoslavia, but as an active part in an armed conflict. The December decision authorised the Danish defence to participate in the American-led 'Operation Enduring Freedom' (OEF) to fight Taliban and Al-Qaeda in Afghanistan. Less than a month later Denmark also decided to contribute to the UN-authorised International Stabilisation Force Afghanistan (ISAF). Notably is the two different types of military engagement decision B37 describes, as a part of the American led coalition (to begin with, the two different types of engagement were, however, to a large degree divided between OEF and ISAF[1]): "the strategy for the coalition's military operations is expected to entail the *neutralization of the Al-Qaeda and the Taliban forces in Afghanistan* as well as the establishment of a *secure environment for the Afghan Interim Authority and the humanitarian effort*."[2] Thus, the Danish military would be expected to participate in regular fighting alongside tasks more related to the creation of a stable and secure transition phase. Furthermore, the Danish government promised to deliver:

"A comprehensive Danish aid package, that includes a humanitarian, a rebuilding as well as a military contribution, which will clearly signal to the world that Denmark is ready to support the international effort against terrorism. The government thereby intends to supplement the military contribution with a significant humanitarian contribution at so far 110 million Danish Kroner in 2002 as well as yearly contribution up to 100 million Danish Kroner for the next 4-5 years for the rebuilding of Afghanistan."[3]

The promise of a humanitarian contribution for 4-5 years (Afghanistan is in fact still one of the largest recipients of Danish development aid in the world[4]) showed that Denmark was not only committed to secure the transition phase, but also the rebuilding of Afghanistan in the long run. However, the question is how the military and the humanitarian contribution fit

[1] Henrik Breitenbauch, *Uendelig Krig?,* 2015, 97-99.
[2] Folketinget, *B 37 (som fremsat): Forslag til folketingsbeslutning om dansk militær deltagelse i den internationale indsats mod terrornetværk i Afghanistan*, 13 December 2001 (available at: http://webarkiv.ft.dk/Samling/20012/beslutningsforslag_som_fremsat/B37.htm). Translated from Danish. Emphasis added.
[3] *Ibid*. Translated from Danish.
[4] The Danish Ministry of Foreign Affairs, "Denmark in Afghanistan: Danida", *(available at:* http://afghanistan.um.dk/en/Danida/).

together. This type of military engagement, called stabilisation, entails both the re-establishment of security and a new, stable and legitimate authority in order to succeed. Therefore, stabilisation is: "never purely militarily, because it must be the beginning of peace, however, it is neither purely civilian, because it must be the end of war."[5] Clearly, the Danish government was aware that creating a stable and legitimate authority in Afghanistan required more than bullets and bombs. However, as it turned out, there seemed to be a lack of understanding - from the whole coalition - that fighting Al-Qaeda and Taliban, essentially, was the same as rebuilding the country, i.e. it did not make sense to separate the two.[6] Creating a stable and legitimate authority is a prerequisite to avoid the mobilisation necessary for organisations like Al-Qaeda and Taliban, and stabilisation operations should, therefore, create alternatives to armed resistance, not feed them. While this does not mean that stabilisation operations are freed from the use of force, they must incorporate a focus on how military conduct is connected to the overall goal of creating stability. Thereby, an increased focus on the military's legitimacy is required, and therefore, Denmark's adherence to the rules governing armed conflicts, primarily international humanitarian law (IHL), but also human rights law (HRL) is central to whether Denmark can achieve the goals it sets out to. This only becomes more paramount because Denmark's military engagement in such conflicts as Afghanistan, Iraq, and Libya, is not a matter of the nation's immediate survival, but rather wars of choice to secure respect for human rights and western values. Therefore, the Danish defence's actions are measured to a higher standard of legitimacy.[7] While there are other more pragmatic political reasons for Danish military activism, such as to obtain increased influence with our alliance partners, which play an equally important role when discussing Danish military activism in political terms, this is not the focus for the thesis.[8] Instances during the wars in Afghanistan and Iraq made it clear that the American-led coalition was not fully aware of the potential damage, the flouting of legal norms could create for the legitimacy of the operations. The American cases like the Abu Ghraib scandal in Iraq, the conditions of Guantanamo, the use of methods as waterboarding, and general reports of torture, caused much damage to the legitimacy of 'the war on terror', both at home and abroad. Denmark has also struggled with problematic cases (albeit in another scale than the

[5] Breitenbauch, *supra* note 1, 11. Translated from Danish.
[6] Breitenbauch, *supra* note 1, 97-99.
[7] Anders Henriksen, *Jura som strategi og Danmark i krig,* in: Kristian Søby Kristensen (ed.), Danmark i krig. Demokrati, politik og strategi i den militære aktivisme*,* 2013, 134-135.
[8] See a discussion of Danish military activism in Anders Wivel, *Danmarks militære aktivisme*, in: Kristian Søby Kristensen (ed.), Danmark i krig. Demokrati, politik og strategi i den militære aktivisme*,* 2013.

US), for instance the Hommel-case from 2004, in which Danish officers were recalled to Denmark after allegations of humiliating treatment of Iraqi prisoners during interrogations. Such situations created a fear among Danish politicians and within the Danish defence for taking prisoners, and led to what has later been dubbed the 'brite-finte' (the British-trick), in which Denmark, in order to avoid legal controversies, left the taking of prisoners to the UK. That a so-called 'brite-finte' was a strategy applied by the Danish defence, was established based on public access to documents composed by the 'Iraqi Task Force', mandated by then Minister of Defence to investigate the handling of prisoners in Iraq. The task force was later included in the Danish Iraq-Afghanistan commission, however the commission was closed in 2015, before it could finish its work.[9] The Hommel case, and the following decision to leave the responsibility of detainees to others, is illustrative of two important points. First, that Denmark was unprepared for the legal challenges it would be facing in international operations, which left the Danish soldiers on the ground poorly equipped to tackle the situation.[10] Second, that Denmark quickly realised its own inadequacy regarding the legal preparation for the battlefield, and more importantly, realised that cases as the Hommel-case were extremely damaging to the legitimacy of Danish operations abroad. Still, rather than trying to address the issues up front, a tactic to circumvent them was for a long time chosen.

In 2010 a decision to create a more solid legal base for the Danish military engagement abroad by creating a Danish military manual was taken by the parties behind the Danish defence agreement.[11] The completed manual was published in September 2016 by the Danish Ministry of Defence together with the Danish Defence Commando, and the introduction, written by The Danish Chief of Defence, reflects a determination to engage with the difficult legal issues Denmark had faced earlier: "the manual takes it starting point from a thorough investigation of the Defence's experiences throughout the last 15-20 years, and sets the frame for the future handling of a long list of difficult questions the Defence has been confronted

[9] Charlotte Aagaard, "Forsvaret underviste bevidst soldater i at undgå fangeansvar", *Dagbladet Information*, 23 May 2016 (available at: https://www.information.dk/indland/2016/05/forsvaret-underviste-bevidst-soldater-undgaa-fangeansvar); Henriksen, *supra* note 7, 142.
[10] Henriksen, *supra* note 7, 143.
[11] The Danish Government (Venstre (the Liberal Party), the Liberal Alliance and the Conservatives) and the Social Democrats, the Danish People's Party and the Social-Liberal Party, *Defence Agreement 2018-2023*, 2018, 1 (available at: http://www.fmn.dk/temaer/forsvarsforlig/Documents/danish-defence-agreement-2018-2023-pdfa.pdf).

with in the period."[12] With the publication of the manual, Denmark, thereby, seemed to acknowledge that engaging in stabilisation operations around the world requires an enlarged focus on the legal obligations the defence is working under. What makes the Danish manual especially interesting is that it does not only include obligations under international humanitarian law, but also obligations under human rights law. Thus, the manual makes giant strides compared to other military manuals on the acknowledgement of the importance of human rights in international operations. The manual draws especially on case law from the European Court of Human Rights (ECtHR). The Court has been very active in the discussion of human rights' applicability in armed conflicts; however, there are still many unresolved issues and general uncertainties in the jurisprudence.[13] Thereby, the Danish manual seems like a serious attempt to comply with international norms (even though they might be in flux), in order to move the debate forward. Furthermore, given that the human rights regime focuses on the rights of the individual, it also indicates an acknowledgement that stabilisation missions requires an increased focus on the protection of the individual. Meanwhile, some experts and scholars have criticised the manual for spending too much time on repeating uncontroversial legal norms, instead of providing serious and much needed solutions to the difficult questions Danish armed forces has been faced with. [14]

The incorporation of human rights in the new Danish military manual, however, still fits well with Mary Kaldor and Christine Chinkin's theory on the right to be protected in armed conflicts, what they call a human security approach. In their book entitled *International Law and New Wars* they present the argument that contemporary wars are no longer like their predecessors. 'New wars' entail a change in the underlying logic of war, no longer characterised by battles between conflicting parties, but instead mutual enterprises, in which the warring parties have more to gain by keeping the conflict alive than to end it. Therefore, there is a need to change the way these wars are addressed, and this, especially, includes a

[12] Jes Rynkeby Knudsen (ed.), *Militærmanual: om folkeret for danske væbnede styrker i internationale operationer*, 2016, 6.
[13] See for instance a discussion of these by Marko Milanovic, *European Court decides Al-Skeini and Al-Jedda*, Blog of the European Journal of International Law, 7 July 2011 (available at: https://www.ejiltalk.org/european-court-decides-al-skeini-and-al-jedda/).
[14] Amnesty International Denmark, Høringssvar over udkast til Militærmanual om Folkeret i Internationale Militære Operationer, 7 Marts 2016, 1 (available at: https://hoeringsportalen.dk/Hearing/Details/59198); Ulrik Dahlin og Charlotte Aagard "Kritikere: Militærmanual viger uden om fange spørgsmålet," *Information*, 7 September 2016 (available at: https://www.information.dk/indland/2016/09/kritikere-militaermanual-viger-uden-fangespoergsmaalet).

change in the legal conduct of warfare. Kaldor and Chinkin presents two main arguments for why a new response to contemporary conflicts is needed. First and foremost, they recast armed conflicts as a humanitarian catastrophe and a massive violation of human rights, and require the response to reflect that.[15] This means that IHL is no longer the best possible legal regime to regulate armed conflicts, because IHL tacitly legitimises armed conflict, and is more concerned with state security than the security of the people. Instead, Kaldor and Chinkin suggest an increased role of HRL during armed conflict, because it is a legal regime focused on the security of the individual. Their second argument springs from the reality on the ground. Pointing to Afghanistan, Iraq and Libya, they argue that western interventions have been counterproductive, and the "victories" non-sustainable, why there needs to be a change in how foreign states intervene in new wars. Kaldor and Chinkin suggests applying the law as a part of a strategy that increases the possibility to end new wars, provided that it is a legal regime that places the protection of the individual forefront.[16] Their two-folded argumentation represents a mutually reinforcing ethical and strategic dimension that cannot be separated, because it is in the renewed focus on human security that the law governing armed conflict can regain its legitimacy. Kaldor and Chinkin talks about a gap between legality and legitimacy, caused by both inherent challenges to IHL as well as challenges especially connected to the new methods in warfare, and argue that an increased focus on human rights during armed conflicts will help closing this gap. Central to Kaldor and Chinkin's theory is that it merges ends with means i.e. if intervening powers wishes to end armed conflicts and install legitimate authorities, they have to use means commensurable with this goal. The human security approach to interventions is related to the Danish stabilisation interventions in both Afghanistan and Iraq, as well as the current fight against ISIS in Iraq and Syria. These wars entail many of the characteristics of new wars, and as seen above, Denmark recognises that as an intervening power, their objective is, just as much as fighting the enemies, to stabilise and help to pave the way for a stable and legitimate authority. Kaldor and Chinkin redirects attention to the conduct of warfare, but they do not develop more substantial changes to the legal regime other than arguing for a better inclusion of human rights. Thereby, they do not present any guidelines for how a human security approach can be applied in practise.

[15] Christine Chinkin and Mary Kaldor, *International Law and New Wars,* 2017, 33.
[16] Chinkin and Kaldor, *supra* note 15*,* 533-534.

The thesis wishes to investigate the new Danish military manual on the basis of Kaldor and Chinkin's human security approach. Thereby, it also sets out to develop Kaldor and Chinkin's normative theory to a more practical theory applicable to the conduct of a state's armed forces. Even though Denmark does no longer carry out large-scale military operation abroad as in Afghanistan and Iraq, it is still engaged in a variety of stabilisation missions around the world,[17] and with the new defence agreement 2018-2023 the Armed Forces' ability and capacity for international operations and international stabilisation efforts,[18] has been strengthened further. Furthermore, it was recently made clear by the Danish Minister of Defence that Denmark still plans to use its military to promote stability and human rights abroad.[19] We argue that the Danish military manual is an excellent starting point for Denmark to review its approach to armed conflict. Being the first of its kind to include human rights law, the manual contains a possibility to actually change the conduct of warfare. However, it is no guarantee for an effective incorporation of a human security approach, in fact this requires a comprehensive application of human rights. The thesis proposes an ambitious agenda for the Danish military manual, one that goes beyond the manual's purpose of strengthening the education in and the application of IHL. Meanwhile, the manual seems to be satisfied with a more conventional approach to the laws governing Danish international operations and a rather superficial application of human rights law that will not significantly change how Danish armed forces addresses the challenges of new wars. In order to discuss the conflict between the manual, as it stands, and its potential for applying a human security approach, the thesis will be divided into four chapters:

The first chapter will elaborate on the theory of new wars, and how we address them. It will start by examining what the new wars theory entail, if new wars really are new, and how they fit with international humanitarian law. The thesis will use the theory of Kaldor and Chinkin on new wars and international law, as the foundation for the discussion, and conclude that in order to address new wars (and end them) intervening states will need to focus more on the legitimacy of their own engagement. This entails applying a human security approach, in

[17] Forsvaret, "Aktuel opgaveløsning", updated 1 November 2018 (available at: https://www2.forsvaret.dk/viden-om/opgaver/kort/Pages/kort-over-opgaver.aspx).
[18] The Danish Government (Venstre (the Liberal Party), the Liberal Alliance and the Conservatives) and the Social Democrats, the Danish People's Party and the Social-Liberal Party, *Defence Agreement 2018-2023,* 2018, 1 (available at: http://www.fmn.dk/temaer/forsvarsforlig/Documents/danish-defence-agreement-2018-2023-pdfa.pdf).
[19] Claus Hjort Frederiksen, "Green Desert-sagen", Forsvarsministeriet, 5 June 2018 (available at: http://www.fmn.dk/nyheder/Pages/green-desert-sagen.aspx).

which human rights law is the predominant legal regime governing the conduct in armed conflicts.

The second chapter will look into the challenges of applying a human rights regime to armed conflicts, and how these challenges can be solved. The chapter will commence with an introduction to the differences between IHL and HRL, and provide a brief overview of the human rights regime, its obligations and limitations. Subsequently, it will present three main questions, which need to be answered in order to apply HRL in armed conflicts: Whether HRL applies, when HRL applies, and how HRL applies? Whether HRL applies during armed conflicts can be established rather easily, and therefore, most time will be dedicated to the second and the third. The section on when HRL applies will be divided into two parts. First part concerns the scope of the extraterritorial applicability of human rights treaties, and it is concluded that human rights apply outside the territory of a state if the state has territorial or personal jurisdiction. The second part concerns the debate on the interplay between IHL and HRL, and it is concluded that both regimes can apply simultaneously, however, not in what way. Therefore, the last question will address how HRL and IHL can be applied to armed conflicts in a mutually reinforcing way. The section will present a practical guideline for this, based on the argument that the determination of which legal regime that governs a given situation during an armed conflict, is dependent on which of the two regimes that provides the most explicit rule designed for the situation.

The third chapter will look into the Danish manual's application of human rights and the possibility of an incorporation of a human security approach. The chapter is divided into two main parts. The first part outlines the Danish military manual's overall implementation of HRL. This includes an analysis of the manual's purpose, and its interpretation of both extraterritorial applicability and the interplay between HRL and IHL. By the end of the first part, the analysis can conclude that the manual proposes extraterritorial applicability on an exceptional basis if there is territorial or personal jurisdiction, that IHL and HRL should be merged in a harmonic manner, in which the intensity of hostilities and the amount of control is relevant, and that human rights play an enhanced role in Non-International Armed Conflicts (NIACs). However, the manual omits to propose a model for how a harmonic interplay should look. The second part, therefore, has two objectives 1) to test the manuals own guidelines for the inclusion of human rights 2) to test if the manual adopts a human security approach. This is done based on an analysis of two specific rules: targeting and

detention. The question of state complicity is included in the analysis of detention. The chapter concludes that the manual neither follows its own proposed guidelines, nor does it adhere to a human security approach.

The fourth and final chapter will discuss how the manual can be improved to better incorporate a human security approach. The chapter will present a different take on targeting, detention and complicit responsibility. Furthermore, it wishes to propose another interpretation of extraterritorial jurisdiction. The chapter, therefore, outlines three main policy recommendations. First, that the manual incorporates a flexible human rights approach, in which the decisive measure for determining what legal regime is the primary framework governing a given situation, is dependent on what regime provides the most explicit rule designed for the situation. Second, that the manual includes a due-diligence tool for vetting potential future cooperation partners, in order to ensure that Danish forces engaged in new wars do not end up cooperating with partners violating international law. Third and last, that the manual adopts an expanded interpretation of extraterritorial jurisdiction in which human rights are not only applied on an exceptional basis.

1.1. An Interdisciplinary Approach

The thesis is interdisciplinary in that it draws on both international security politics and international law. Furthermore, the thesis includes an ethical dimension, not as an analytical framework, but as considerations and questions that will inform the thesis. The three academic fields are all evident in the thesis' main theoretical framework, Mary Kaldor and Christine Chinkin's human security approach. The starting point for the thesis is the Danish military activism in a security context of Kaldor's new wars, however, this frame is used to zoom in on the legal ramifications of Danish military engagement. International law, thereby, becomes the centre-point for the thesis, and especially throughout the analysis, we apply a legal method to discuss the manual's provisions. However, we are not only interested in concluding whether the manual applies a reasonable interpretation of international law, but also whether the interpretation will prepare Danish soldiers better when facing difficult legal questions in international operations, and whether that adds to Danish success in its international interventions. Success here is understood as to whether Danish interventions are helpful when it comes to ending new wars. Our argument is that law can be utilised as a strategic tool in military engagements and increase the chances of success. This argument is

clearly related to the concept of 'lawfare', developed by Charles J. Dunlap. Dunlap defines lawfare as: "a method of warfare where law is used as a means of realizing a military objective."[20] Dunlap developed the concept based on what he saw, as US opponents' manipulation of the law "to gain political leverage by portraying U.S. forces as insensitive to LOAC [the laws of armed conflict] and human rights."[21] Thereby, rather than using military means to defeat the US, he argues that opponents try to de-legitimise US military engagement in order to undermine support for the military. We agree that legal obligations in military engagements are a way to generate legitimacy as intervening power. However, to Dunlap, lawfare is almost described as the application of an unfair strategy that uses cheap tricks to undermine the US and other intervention powers. We would be inclined to see it the other way around, i.e. that the intervening powers all too readily puts themselves in a position where it simply becomes too easy to de-legitimise their military engagement. Our argument is that military forces should rather increase their focus on how to ensure that their actions are perceived as legitimate, and that this is done better through a new legal approach i.e. a human security approach, focusing more on the protection of the individual. The thesis, thereby, apply both political and judicial argumentation.

1.1.1. Legal Instruments and Legal Method

The thesis looks to the Statute of the International Court of Justice (ICJ) for its legal sources and applies primarily: 1) International conventions, 2) international custom as evidence of a general practice accepted as law, 3) general principles of law, and secondly, 4) judicial decisions and the writing of scholars.[22] International humanitarian law, mainly the Geneva Conventions and their Additional Protocols,[23] and human rights law, mainly the European

[20] Charles J. Dunlap,"Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts", Duke Law School, 29 November 2001, 4. *(*available at: https://people.duke.edu/~pfeaver/dunlap.pdf).
[21] Charles J. Dunlap, "Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts", Duke Law School, 29 November 2001, 5. *(*available at: https://people.duke.edu/~pfeaver/dunlap.pdf).
[22] *Statute of the International Court of Justice*, San Francisco, 18 April 1946, art. 38 (available at: https://www.icj-cij.org/en/statute).
[23] *Geneva Conventions I-IV*, Geneva, 12 August 1949, (available at: https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions) [Hereinafter GC I, GC II, GC III, GC IV respectively]; *Additional Protocol I-II*, 8 June 1977 (available at: https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions) [Hereinafter AP I, AP II respectively].

Convention on Human Rights,[24] are the primary treaty instruments applied in the thesis. The International Committee of the Red Cross' (ICRC) study on customary international humanitarian law[25] is included to support claims of customary law. Case law from the International Court of Justice and the European Court of Human Rights as well as authoritative legal documents as interpretation guides by the ECtHR and the Human Rights Council (HRC), and guidelines from the ICRC and the ILC are included to help interpret the treaties. Furthermore, a number of writings by legal scholars are included when relevant.

The thesis applies the general rules of interpretation as prescribed by the Vienna Convention on the Law of Treaties, and all treaties will be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[26] A central question for the application of law in the thesis is how to decide between two conflicting norms, more particularly between rules provided by IHL and HRL, respectively. The legal framework will discuss the standard technique of legal reasoning *lex specialis derogat lege generali,* however, as illustrated in the legal framework, we reach the same conclusion as the International Law Commission, namely that: "no general, context-independent answers can be given to such questions. In this sense, the lex specialis maxim cannot be meaningfully codified."[27] Instead, we suggest an approach, where the rule most explicitly designed for the situation is the one that applies.

1.2. Empirical Choices

1.2.1. The Danish Military Manual

With the 2010-2014 Danish defence agreement, adopted by a broad coalition comprised of seven out of eight political parties in the Danish parliament, it was decided to develop the first Danish military manual ever. The stated purpose was to strengthen the education in and the application of the international humanitarian law and the laws of armed conflict further. For three years a task force under the Danish Defence Command worked on the draft manual

[24] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, 4 November 1950 (available at https://www.echr.coe.int/Documents/Convention_ENG.pdf) [Hereinafter ECHR].
[25] *Customary Law Study*, International Committee of the Red Cross, December 2018.
[26] *Vienna Convention on the Law of Treaties*, Vienna, 23 May 1969, *United Nations Treaty Series*, vol. 1155, art. 31 (available at: https://www.refworld.org/docid/3ae6b3a10.html).
[27] UN General Assembly, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law - Report of the Study Group of the International Law Commission*, UN Doc. A/CN.4/L.682, 13 April 2006, para. 119.

and was responsible for a special steering committee chaired by the Chief of Operational Staff with representatives from Ministry of Defence, Ministry for Foreign Affairs, Ministry of Justice, the Army, the Royal Danish Navy, The Royal Danish Air Force, the Royal Danish Defence College and the Defence Command.[28] The result was an approximately 700-pages military manual, published on 2. September 2016 by the Danish Ministry of Defence together with the Defence Commando. The manual covers all international law applicable to Danish forces during international operations in times of both war and peace. Situations that, based upon experience, has required special attention has been given more consideration.[29]

A national military manual generally serves two purposes: to provide guidance on the obligations required by the laws of armed conflict for the given state and its military, and to provide insight into how a given state interpret the laws of armed conflict to other states and academics. In order to fulfil the first purpose it is important that a military manual ensures a consistency on all levels of the military (strategically, tactically and operationally), and while the manual might not be intended for every soldier on the ground, its substance should be reflected in both the formulation of directives, rules of engagement as well as the 'soldiers card'.[30] Insofar as the second purpose, it raises a question of the status of the manual: is it considered to be an authoritative state interpretation signed of by central administration, or merely an internal policy developed by bureaucrats? The most interesting manuals are of course the ones that can be used to derive state practice and *opinio juris* from, as they, thereby, add to: "international custom, as evidence of a general practice accepted as law."[31] ICRC has for instance made extensive use of military manuals in their study of customary IHL. However, this approach has also been criticised, for example by the legal counsel of the US department of state.[32] Because a military manual can be used to conclude how a given state interpret the law, it requires careful work to conclude one, and states will need to consider how their interpretations reflect their legal approach to armed conflicts. Therefore, military manuals are a good place to look into the developments of international law in armed

[28] Knudsen (ed.), *supra* note 12..
[29] Knudsen (ed.), *supra* note 12, 22-23.
[30] Charles Garraway, *Military Manuals operational law and the regulatory framework of the armed forces,* in: Nobuo Hayashi (ed.), National military manuals on the law of armed conflict, 2nd edition 2010, 52-53.
[31] ICJ Statute, art. 38 (1)(b); Garraway, *supra* note 30*,* 46.
[32] U.S. Department of State,"Initial response of U.S. to ICRC study on Customary International Humanitarian Law with Illustrative Comments", 3 November 2006 (available at: http://www.state.gov/s/l/2006/98860.htm).

conflicts. The thesis consider the Danish military manual as an authoritative interpretation, as it is signed by central administration (the Ministry of Defence), and therefore, it considers the manual as an official Danish interpretation of the laws governing Danish armed forces in international operations.

In the thesis, the Danish Military manual is applied as both a legal tool, demonstrating Denmark's interpretation of applicable international law during international military operations, and as a strategic tool, being a part of Denmark's military strategy. The thesis understands strategy, as a three-legged stool comprised of objectives, concepts and resources.[33] Objectives are the goals of an engagement, and they have to be clear in order to formulate a successful strategy. The resources can be both military capabilities, as well as diplomatic or humanitarian resources, and the concepts are the way the resources are applied in order to reach the objectives. The argument is that in international military operations, the Danish military manual could be one of the concepts guiding how to apply the military resources in the best possible way. Thereby, it becomes a part of the strategy. The Danish manual is not only a tool restricting the soldiers' actions on the ground, but a concept ensuring that they are utilised in the most efficient way. The human security approach places a focus on the means with which intervening powers fight new wars: if the means are not perceived as legitimate, the intervening power lose legitimacy, and thereby, also the possibility of supporting a legitimate ending of the war. Furthermore, when the thesis cites the manual, it will be in our own translation, because the manual has not yet been translated to English.

1.2.2. Consultation Responses

On the 20 January 2016, a draft of the Danish military manual was sent to a shortlist of selected and relevant army personnel organizations, universities and NGOs for a review before the final approval of the manual. All of who are leading Danish actors working with the legal aspects of armed conflict.[34] In the almost 7 weeks it was open for review, the task

[33] Arthur F. Lykke, "Defining Military Strategy", *Military Review,* vol. 77, no. 1 (1997), 183.
[34] Forsvarsministeriet, "Høring over udkast til dansk militærmanual om folkeret i internationale militære operationer", 20 January 2016, (available at *https://prodstoragehoeringspo.blob.core.windows.net/49157eb3-7d40-4bd0-8d94-f2da20c67a9b/H%C3%B8ringsbrev%20-%20udkast%20til%20dansk%20milit%C3%A6rmanual%20[DOK465650].pdf*); Forsvarsministeriet, "Militærmanual i høring", 20 January 2016*, (available at*: http://www.fmn.dk/nyheder/Pages/militaermanual-i-hoering.aspx).

force behind the military manual received twelve responses with comments and advise, from here on referred to as the consultation responses.[35] Initially, the consultation responses served as an inspiration to continue with the manual as the main empirical data of the thesis, as the responses highlights both positive aspects of the manual, as well as specific disputed interpretations. The consultation responses were of course written as comments to the draft edition of the manual, however, the statements, which have been included in our analysis, are all valid for the final edition of the manual as well. In our selection of statements, the determining factor has been, either that it touches upon the manuals incorporation of human rights in general or its interpretation of targeting, detention and complicit responsibility. The consultation responses from the army personnel organisations do neither of the two, and thus, the responses that the thesis in the end draws upon are the following:

Jacques Hartmann, senior lecturer at University of Dundee, Scotland, and PhD from Cambridge University. He teaches both international law and security, and human rights, and has experience as a legal advisor for the Danish Ministry of Foreign Affairs.[36]

Anders Henriksen and Jens Elo Rytter, respectively professor MSO and professor (both PhD) at Centre for International Law, Conflict and Crisis at Copenhagen University. Henriksen specialises in international law, in particular international humanitarian law (both *jus ad bellum* and *jus in bello*), where Rytter is specialized in constitutional law and human rights law.[37]

Frederik Harhoff, Dr.jur. and professor in international law at Southern University of Denmark. Previously appointed as ad Litem Judge (non-permanent judge) at the International Criminal Tribunal for the Former Yugoslavia.[38]

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[35] Høringsportalen, "Høring over udkast til dansk militærmanual om folkeret i internationale militære operationer" (available at: https://hoeringsportalen.dk/Hearing/Details/59198).
[36] University of Dundee, "Staff: Jacques Hartmann", (available at https://www.dundee.ac.uk/law/staff/profile/jacques-hartmann.php).
[37] Københavns Universitet, "Anders Henriksen", (available at: https://jura.ku.dk/cilcc/dansk/ansatte/?pure=da%2Fpersons%2Fanders-henriksen(1b05df7a-83b6-4cf8-a12d-d8aa4e81832b)%2Fcv.html); Københavns Universitet, "Jens Elo Rytter", (available at: https://jura.ku.dk/english/staff/research/?pure=en%2Fpersons%2Fjens-elo-rytter(1a98db77-6eb7-42af-8b39-a8c82ead12cb)%2Fcv.html).
[38] Southern University of Denmark, "Frederik Harhoff", (available at: http://findresearcher.sdu.dk/portal/da/persons/frederik-harhoff(03003b82-4b66-4da4-8cba-50ce179cb294).html)

Peter Vedel Kessing, senior researcher and PhD at Danish Institute for Human Rights and lecturer in law at Copenhagen University. Former head of the International Law Department at the Danish Red Cross and worked as a judge in a Danish district court.[39] His response represents the Danish Institute for Human Rights.

The two last consultation responses of the Danish Red Cross and Amnesty International Denmark are only signed by the organisations. The Danish Red Cross is a national subdivision under the largest humanitarian organisation in world - the International Committee of the Red Cross. Amnesty International Denmark, is also a subdivision of global humanitarian organisation Amnesty International.

As the Danish military manual is a rather new publication, the existing literature is very limited. Here the consultation responses have been able to provide a unique insight into how the manual has been received by relevant organisations and academics. Furthermore, when the thesis cites the consultation responses, it will be in our own translation, because the responses do not exist in English.

1.2.3. Interviews

Very early in the thesis process, we conducted four interviews focusing on the Danish military manual's capacity as a tool/handbook for Danish soldiers, as well as possible challenges with the manual and with Denmark's application of IHL and HRL in general. The four interviewees was Kenneth Øhlenschlæger Buhl, working with IHL and human rights at the Danish Defense College, Lars Plum, at the time working at the Danish Military Prosecutor General, Helene Højfeldt, working at the Danish Ministry of Defence and part of the team working with the implementation of manual, and Peter Vedel Kessing, working with human rights in armed conflicts at Danish Institute for Human Rights (Kessing is also included as one of the writers of a consultation response). The four interviews were done before the framework for the thesis was established, and therefore they have not been incorporated into the analysis. Still, the interviews have formed our understanding of the Danish legal approach to armed conflicts. The interviews have contributed to our understanding of the military manual, and the role it can play not only as a legal tool, but also a strategic one. Especially, the interview conducted with Helene Højfeldt resulted in

[39] Institut for Menneskerettigheder, "Peter Vedel Kessing", *(*available at https://menneskeret.dk/personer/peter-vedel-kessing).

information, reflected throughout the thesis. For example, that the Danish Ministry of Defence was well aware of the fact that the Danish military manual, was the first of its kind to include human rights. She also pointed out that the manual would be updated regularly, and that an English translation was on the way.

1.3. Theoretical Choices

The theoretical foundation for the thesis is Mary Kaldor and Christine Chinkin's book *International Law and New Wars* (2017).[40] However, the book builds heavily on Mary Kaldor's previous work *New and Old Wars* (2012),[41] and so does the thesis. In *Old and New Wars,* Kaldor presents her new war theory, and in the book by her and Chinkin they add the perspective of international law, and propose a solution to new wars they call human security. The approach includes solutions to new war challenges of both *jus ad bellum, jus in bello,* and what they call *jus post bellum,* however, this thesis focus on the *jus in bello* part, in which they conclude that human rights must be applied as the predominant regime. They also suggest that international criminal law should play an increased role, however, given that the thesis looks at the Danish military manual, international criminal law is only included in a very limited manner (in the discussion regarding complicit responsibility). Kaldor and Chinkin do not explain, how their human security approach should be put into practise. Thus, in order to apply the argument of Kaldor and Chinkin to the Danish military manual, the thesis includes Daragh Murray's book *Practitioners' Guide to Human Rights Law in Armed Conflicts* (2016)[42] and Marco Sassòli's chapter *The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts* (2011) in book Orna Ben-Naftali's (ed.) book *International Humanitarian Law and International Human Rights Law*.[43] Murray and Sassòli both propose a more comprehensive way to implement human rights in armed conflicts. Thus, the theoretical framework applied in the thesis' is a combination of Kaldor and Chinkin's argument, and Murray and Sassòli's framework for how the argument could be applied. The thesis, therefore, tests whether the Danish military manual applies the human security approach, while also suggesting a method for applying such an approach.

[40] Chinkin and Kaldor, *supra* note 15.
[41] Mary Kaldor, New *and Old Wars,* 3rd edition, 2012.
[42] Daragh Murray, *Practitioners' Guide to Human Rights Law in Armed Conflicts*, 2016.
[43] Marco Sassòli, *The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts*, in: Orna Ben-Naftali (ed.), International Humanitarian Law and International Human Rights Law, 2011.

2. New Wars and International Humanitarian Law

This chapter will address new wars, and the legal regime governing them. The first section of the chapter will, therefore, start out by introducing Mary Kaldor's new war concept, and briefly discuss her arguments for why contemporary conflicts are essentially different from previous wars, as well as a critique of her theory. This is the basis for our discussion of IHL and will be reflected throughout the thesis. The second section of the chapter will very briefly discuss the history of IHL, and especially, its four core principles, as well as the difference between international and non-international armed conflicts (conflicts between states and conflicts including non-state actors, respectively). The difference between IACs and NIACs is essential for the new wars discussion, as these are characterised by their inclusion of non-state actors, and therefore, will be regulated by the legal framework of NIACs. Given that the inclusion of non-state actors in IHL has not been easy, this chapter will quickly outline some fundamental issues regarding the rules regulating NIACs, before it moves on to discuss the challenges for IHL in regulating armed conflicts in general, and new wars in particular. Last, the chapter will present Mary Kaldor and Christine Chinkin's human security approach, as a solution to how the challenges of new wars should be addressed.

2.1. New Wars

One of the most remarkable changes in modern warfare is the decline in the number of interstate conflicts. The Uppsala Conflict Data Program (UCDP) concludes that the number of interstate conflicts has been low since 1946, and especially since 2000. Instead, most conflicts of today are characterized as intrastate i.e. conflicts between a state and a non-state actor taking place within the territory of a state, or internationalized intrastate i.e. intrastate conflicts in which one or more external state contribute with troops.[44] However, this is not the only change. The president of the International Committee for the Red Cross has described contemporary wars like this: "we have entered an era in which armed conflicts are greater in complexity and numbers of actors, longer in duration, wider in their regional impact, broader in tactics and weapons used and, above all, more atrocious in the human suffering they cause."[45] But what have caused these changes? And is he describing a completely new type of armed conflicts? Several scholars have developed theories on contemporary conflicts, and

[44] Marie Allansson, Erik Melander and Lotta Themnér, "Organized violence, 1989–2016," Journal of Peace Research, vol. 54 no. 4 (2017), 576.
[45] Peter Maurer, "International conference: opening address by ICRC president", International Committee of the Red Cross, 8 December 2015 (available at: https://www.icrc.org/en/document/international-conference-opening-address-icrc-president).

the debate has resulted in a range of different conceptualizations, for example: 'hybrid wars', 'wars among the people', 'wars of the third kind', 'post-modern wars' as well as 'new wars'.[46] Some theories claim that contemporary conflicts are essentially different from previous, while others argue that it is only the means and methods that have changed. The thesis wishes to advance the theory of Mary Kaldor on new wars for a couple of reasons. First and foremost, because she has developed a comprehensive theoretical framework to analyse new wars, secondly, because she has also developed a framework for how to end these new wars, and thirdly, because it involves a change in the legal regime governing new wars. The last two are primarily developed in Mary Kaldor and Christine Chinkin's book *International Law and New Wars* from 2017. Their ideas spring from Kaldor's description of new wars as essentially different from old because the underlying logic of war has changed. The next section will, therefore, begin with an introduction to the new wars theory, including a discussion of whether they are really new.

2.1.1. Defining New Wars

Mary Kaldor first developed the new wars theory in her book *New and Old Wars* from 1999, re-issued in an updated version two times, latest in 2012. The thesis refers to the 2012 edition, as well as Mary Kaldor and Christine Chinkin's *International Law and New Wars* from 2017.

Kaldor argues that organised violence has fundamentally changed, because of the emergence of the modern globalised era. Globalisation has challenged the state's monopoly on violence on two fronts: from above with military integration in supranational institutions, and from below by criminals and paramilitary groups. With the erosion of the state's monopoly on violence, the types of organised violence that is occurring today is fundamentally different than from the type experienced in earlier eras. Thus, Kaldor defines new wars as a blurry mix of three dimensions: war, understood as "violence between states or organized political groups for political motives", organized crime, understood as "violence undertaken by privately organized groups for private purposes, usually financial gain", and large-scale violations of human rights, understood as "violence undertaken by states or politically

[46] Frank G. Hoffman, *Conflict in the 21st Century: The Rise of Hybrid Wars,* 2007; Rupert Smith, *Utility of Force - The Art of War in the Modern World*, 2006; Edward Rice, *Wars of the Third Kind: Conflict in Underdeveloped Countries*, 1990; Chris Hables Gray, *Postmodern War: The New Politics of Conflict,* 1997; Kaldor, *supra* note 41.

organized groups against individuals." She sticks to the term 'war' to highlight that there continues to be a political nature to this new type of organized violence.[47] New wars are characterised by changes in, especially, four different areas: goals and identities, tactics, actors, and forms of finance. The goals of new wars are no longer to obtain geo-political power, or to advance a political idea (communism, democracy), rather they are about identity politics, understood as a claim to power based on a specific identity – for example ethnicity, religion or language. New wars are about getting access to the state, and identity has proven useful to base a claim to power on. Thereby, identities are constructed through new wars as well as kept by new wars.[48] Second, with the changing goals of new wars, the tactics also changes: New wars are not about winning territory and defeating the enemy's army, but about winning *political* control of territory.[49] Therefore, in new wars, battles in the classic sense, in which two opposing factions face each other, are rare, and instead violence tends to be mainly directed towards civilians. Goals are achieved through political control of territory, and violence is used to generate fear and intimidate the population in order to gain such control. Therefore, forced displacement of opponents is also a widespread tactic.[50] This is also why violence in new wars is mainly directed towards civilians, because it is a mechanism of fear, and thus, control. Third, actors of new wars, besides regular armed forces recruited by states through conscription or payment, are also new. These actors include paramilitary groups, warlords, jihadists, terrorists, mercenaries, private security contractors and criminal groups, in other words, a border crossing, loose and fluid network of state and non-state actors.[51] Last, new wars differ from old wars in that they are financed by other methods. Instead of being mostly financed by taxation and state loans, creating a war economy deeply impacting the economy of the state, new war economy is decentralized from the state, and at the same time open to the global economy. Methods of financing in new wars are among other things looting and pillage, extortion and demands for protection money, stealing of humanitarian aid, kidnapping and hostage-taking, as well as various kinds of organized crime, e.g. smuggling and trafficking of oil, diamonds, antiquities, drugs and humans.[52] Together, all these characteristics amount to a change in the underlying logic of war. Wars have become a social system where resources are allocated through violence, and

[47] Kaldor, *supra* note 41, 1-2.
[48] Chinkin and Kaldor, *supra* note 15, 8-11.
[49] Chinkin and Kaldor, *supra* note 15, 14.
[50] Chinkin and Kaldor, *supra* note 15, 13-14.
[51] Chinkin and Kaldor, *supra* note 15, 11-13.
[52] Chinkin and Kaldor, *supra* note 15, 16-17.

where the actors benefit from the disorder and the anarchy that arise with the system. They benefit economically by the decentralised war economy and politically in the construction of identities to gain access to power. This is also why new wars tend to be protracted - the actors simply do not see the benefit of ending them. Thereby, new wars become a social system, in which it does not matter whether you win or you lose, what Kaldor calls 'war as a mutual enterprise.'[53] This is crucial, because it might mean that not only fighting have changed in new wars, but also winning in new wars, and Kaldor's point is exactly that if we continue to think of wars in conventional terms, we won't be able to effectively end them.[54]

2.1.2. Are New Wars New?

Kaldor's new wars are defined in opposition to old wars. Old wars, she argue, were political contests of wills, which could be both interstate clashes, involving battles between regular armed forces, as well as anti-colonial civil wars in the second half of the 20th century. Clausewitz was the primary theorist of old wars, and in his book *On War* from 1832, he defines war as a continuation of politics, just with other means.[55] Political communities often entail disagreements, and when these disagreements cannot be resolved peacefully, they evolve into war. However, the escalation of the use of force does not change the fact that the core of the dispute is political. Thus, Clausewitz argues that wars are "nothing but a duel on an extensive scale"[56] and "an act of violence intended to compel our opponent to fulfil our will".[57] In wars, the way to compel an opponent's will is to disarm and defeat him, and thus, violence becomes the means to win what he calls the 'clash of the wills'.[58] However, if new wars are mutual enterprises, it does not make sense to talk about them as political contests of will, because the warring parties have a vested interested in the continuation of war, not to compel each other to fulfil their will.

Kaldor's thesis has been criticized for overplaying the developments in contemporary conflicts, and labelling them new, while they are merely repeating old war patterns. However, she talks about new and old wars as ideal types, which means that they are not necessarily a

[53] Chinkin and Kaldor, *supra* note 15, 18.
[54] Chinkin and Kaldor, *supra* note 15, 7.
[55] Carl von Clausewitz, *On War,* 1832, Book I, Ch. I.
[56] *ibid.*
[57] *ibid.*
[58] *ibid.*

contrast in historical experiences.[59] Many of the features of new wars, as described above, could be found in the wars she characterise has old wars as well. Rather, what her theory of new wars implies is a change in the way we understand war, and therefore, also the way we address them.[60] She does not wish to argue that we can not see a return of old war logic, as for instance in the growing tensions between the West and Russia. However, our failure to deal with new wars might risk expedite their return.[61] Therefore, for instance, whether the claim that civilians tend to be more exposed and endangered in new wars can be proven statistically, is less important than finding better ways to protect civilians. This underlines that in order to effectively end new wars states need to stop thinking about them in conventional terms.[62]

Other scholars have argued that while contemporary wars might have changed in means and methods, the underlying logic of war is still the same. One of the them, Frederik G. Hoffman, has developed the term 'hybrid wars', which defines wars as a hybrid between "conventional capabilities, irregular tactics and formation, terrorist acts including indiscriminate violence and coercion, and criminal disorder"[63] conducted by a mix of states and non-state actors. He argues that the change in means, methods and actors, does not make 'hybrid war' inconsistent with Clausewitz' theory, who recognised that every age would have its own conceptualisation of war. He also argues that while globalisation admittedly has made war more dangerous, war is nevertheless still a contest of the wills.[64]

In another definition of contemporary warfare, 'war amongst the people', put forward by Rupert Smith, war is no longer a means to destroy the opponent, but to change his intentions. Some of the characteristics, which make war amongst the people different from earlier wars, or industrial wars as Smith calls them, are that they have different strategies, objectives and logics. Where industrial wars were about superiority towards the opponent in order to win the trial of strength, war amongst the people is about smart strategies to win the clash of the wills. Smith furthermore underlines that one of the key trends of war amongst the people, are that they, as the name implies, often take place amongst the people and not necessarily

[59] Kaldor, *In defense of New Wars,* 2013, 13.
[60] Kaldor, *In defense of New Wars,* 2013, 3-4.
[61] Kaldor, *supra* note 41, 6.
[62] Chinkin and Kaldor, *supra* note 15, 7.
[63] Hoffman, *supra* note 46, 14-15.
[64] Hoffman, *supra* note 46, 11.

between conventional armies. He too emphasises that civilians are increasingly becoming the target of contemporary wars. Smith, thereby, recognise some of the same developments as Kaldor, however, the objective of a war is still to win, whether it be by strength or strategy, and thus, he also adheres to a Clausewitzian conceptualization of the nature of war.[65]

Kaldor underlines the difference between a Clausewitzian understanding of wars and her own, because she wishes to propose a new and different approach to address armed conflicts of today. This, among other things, includes a change in the legal approach to armed conflicts. The new approach includes a change on three different levels: the resort to war i.e. *jus ad bellum*, the conduct of war i.e. *jus in bello*, and the ending of war i.e. *jus post bellum*. Kaldor's solution requires legitimacy on all three levels. This thesis will focus on *jus in bello*, however, especially *jus post bellum*, will also inform the thesis, as it is closely connected to the *jus in bello* part because legitimacy in ends requires legitimacy in means.

2.2. The Laws of War

The legal regime of the laws of war entails two different paradigms that compliment each other by regulating the two different aspects of war: *jus ad bellum,* determining when it is legal to go to war, and *jus in bello*, determining what is legal during war. As of today, the term *war* has largely been replaced with the term *armed conflicts*, as there is no need for war to be declared, before neither of the two legal regimes applies. *Jus in bello* is separated from *jus ad bellum,* in that sense that it applies to armed conflicts regardless of whether the war in itself, is legal or not. Therefore, the parties of armed conflict always have to adhere to the *jus in bello* rules. As this thesis is not concerned with the justifications for going to war, but rather the conduct of war, the rest of the section will focus on *jus in bello.*

2.2.1. International Humanitarian Law: the Balance of Necessity and Humanity

The first modern example of codification of the rules regulating the conduct of warfare is the Lieber Code from 1863,[66] regulating the Union forces in the American Civil War.[67] Building on the Lieber Code, the Hague Conventions of 1899 and 1907[68], were the first multilateral

[65] Rupert Smith, "The Utility of Force", RSA Journal, vol. 153, no. 5526 (2006), 1.
[66] *Instructions for the Government of Armies of the United States in the Field (Lieber Code)*, 24 April 1863 (available at: https://ihl-databases.icrc.org/ihl/INTRO/110).
[67] Nils Melzer, *International Humanitarian Law: a comprehensive introduction,* 2016, 35.
[68] *Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land,* The Hague, 29 July 1899 (available at: https://ihl-

treaties addressing the conduct of hostilities, and following the horrors of both first and second world war, the four Geneva Conventions from 1949, set out to protect the wounded and sick, shipwrecked, prisoners of war, and civilians.[69] The Geneva Conventions have become the bedrock, in what we today talk about under the common name of international humanitarian law, which, for instance, also includes the Additional Protocols of the Geneva Conventions and weapon treaties such as the 1980 Convention on Certain Conventional Weapons or the 2008 Convention on Cluster Munitions.[70] IHL is a legal regime, which accepts that war is inevitable, but also that the law can mitigate the consequences. IHL is at its core a balance between the concepts of *military necessity* and *humanity*.[71] Balancing military necessity and humanity illustrates the conflicting interests at stake when engaging in armed conflict: on one hand the overarching goal for any state is to defeat the enemy with all possible means and methods, but on the other hand states also have a responsibility to protect their own citizens. To accommodate this dilemma, a common set of rules for waging wars, places restrictions on means and methods according to a humanitarian standard.[72] Military necessity is described in the Lieber Code from 1863 as: "those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war."[73] Thereby, the code concludes two things: firstly that measures taken must at all times have a clear nexus with, and be vital to, the overall goal of the war, and secondly, that war must not be waged unrestricted, but according to the law. This notion is affirmed after the Second World War in for instance the Hostage Case, part of the Subsequent Nuremberg Trials: "destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces (…) military necessity or expediency does not justify a violation of positive rules."[74] The judgement rejected the German generals on trial and their doctrine of

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databases.icrc.org/ihl/INTRO/150?OpenDocument); *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, The Hague, 18 October 1907 (available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=4D47F92DF3966A7EC12563CD002D6788&action=openDocument).

[69] GC I-IV, *supra* note 23.

[70] Melzer, *supra* note 67, 21.

[71] Melzer, *supra* note 67, 17-18.

[72] Michael N. Schmitt, "Military necessity and humanity in international humanitarian law: preserving the delicate balance", Virginia Journal of International Law, Vol. 50, No. 4, (2010), 2-3.

[73] *Instructions for the Government of Armies of the United States in the Field (Lieber Code)*, 24 April 1863, article 14 (available at: https://ihl-databases.icrc.org/ihl/INTRO/110).

[74] *United States v. List (The Hostage Case)*, Trial Judgement, Nuremberg Military Tribunal 5, Case No. 7, 19 Februar 1948.

'Kriegsraison', which allowed extreme military necessity to set aside the law.[75] But not only positive law sets out restrictions on military actions. In the Martens Clause from the 1899 Hague Convention the state signatories, had to accept that the Convention would not be able to cover everything, and thus, they agreed that their actions would also be guided by the "usages established between civilized nations, from the laws of humanity and the requirements of the public conscience."[76] While the Martens Clause has been confirmed numerous times,[77] there is no agreed interpretation regarding its status. Some have argued that it merely confirms the existence of customary law, while others have argued it forms a principle on its own.[78] Nevertheless the Clause proves that even though an action is not explicitly prohibited by IHL, it cannot automatically be assumed that it is thereby permitted.[79] To conclude, IHL places restraints on what has previously been considered to lay beyond the rule of law, as Cicero famously put it: "silent enim leges inter arma" ('in times of war the laws are silent').[80] The balance of military necessity and humanity permeates IHL and becomes evident in two of the core principles of IHL, distinction and proportionality.

2.2.1.1. Distinction

Distinction is an absolute cornerstone of IHL as it prescribes legitimate and illegitimate targets during armed conflicts. It is the first rule listed in the International Committee of the Red Cross' (ICRC) customary law study: "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."[81] Thereby, IHL establishes two kinds of categories combatants and civilians, and thus, the principle of distinction can only be enforced via a definition of respectively civilians and combatants. Combatants are considered to be all members of the armed forces (except medical and religious personnel) of a party to a conflict. To be a combatant is a privilege (the combatant's privilege), in that a combatant has

[75] Schmitt, *supra* note 72, 2.
[76] Rupert Ticehurst, "The Martens Clause and the Laws of Armed Conflict", *International Review of the Red Cross*, no. 317, (1997) (available at: https://www.icrc.org/en/doc/resources/documents/article/other/57jnhy.htm)
[77] GC I, *supra* note 23, Art. 63; GC II, *supra* note 23, Art. 62; GC III, *supra* note 23, Art. 142; GC IV, *supra* note 23, Art. 158; AP I, *supra* note 23, Art. 1(2); AP II, *supra* note 23, Preamble.
[78] Rupert Ticehurst, "The Martens Clause and the Laws of Armed Conflict", *International Review of the Red Cross*, no. 317, (1997) (available at: https://www.icrc.org/en/doc/resources/documents/article/other/57jnhy.htm).
[79] Melzer, *supra* note 60, 25.
[80] Marcus Tullius Cicero, "Pro Milone", Oxford Cambridge and RSA, 52 BC (available at: https://www.ocr.org.uk/Images/297901-set-text-guide-cicero-pro-milone-handbook.pdf).
[81] *Customary Law Study*, International Committee of the Red Cross, December 2018, rule 1.

the *right* to participate directly in hostilities.[82] The right to participate means that, opposite during times of peace it is in times of war lawful to carry weapons and to use them. Combatants are thus immune to prosecution for lawful acts of war. However, by utilising this right the combatant also loses the protection that is afforded to civilians. Equally civilians who take up weapons loses the protection that follows the principle of distinction "for such time as they take a direct part in hostilities."[83]

2.2.1.2. Proportionality

Where the principle of distinction specifically outlaws any attacks directed on civilians (or civilian objects), the principle of proportionality accepts that even when attacks are directed at combatants (or military objects), there will be situations, in which incidental harm to civilians cannot be avoided. However, the principle of proportionality underlines that "launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited."[84] Thereby, one must look at the proportionality between the concrete and direct military advantage anticipated, and the expected damage an attack might cause. Like the principle of distinction legalises killing of people taking active part in the hostilities, proportionality allows for the legal killing of civilians as collateral damage. This is, while being an unfortunate side effect, still an accepted part of IHL.

2.2.2. Non-International Armed Conflicts

IHL is mainly intended to regulate International Armed Conflicts (IACs), however, the Geneva Conventions also includes NIACs albeit only in a single article, restated in all four GC's, namely, Common Article 3 (CA 3). CA 3 prescribes a minimum of standards that must be adhered to in all armed conflicts not of an international character. What separates the legal regimes is that in NIACs at least one party to the conflict must be a non-state actor. The CA 3 was the first time a multilateral treaty addressed conflicts including non-state actors - an obvious challenge to the state-centred international legal system in itself. In 1977, two protocols additional to the Geneva Conventions were concluded: Additional Protocol I (AP I) to strengthen protection of civilians, and Additional Protocol II (AP II), to specifically

[82] AP I, *supra* note 23, art. 43(2).
[83] Customary Law Study, International Committee of the Red Cross, December 2018, rule 6.
[84] Customary Law Study, International Committee of the Red Cross, December 2018, rule 14.

address NIACs. Thereby, AP II became the first international treaty exclusively addressing situations of conflicts not of an international character.[85] At the diplomatic conference from 1974-1977, in which the two protocols were concluded, some delegates actually favoured a single additional protocol, addressing both IACs and NIACs to avoid a "selective humanitarianism", while others again did not see the need for an additional protocol addressing NIACs at all. Those against a protocol dedicated to NIACs argued that the inclusion of armed conflicts of self-determination in AP I,[86] and thereby, the elevation of their status to that of an international character, meant that all other armed conflicts taking place within the sovereignty of a territory of a state was an internal matter not in need of international regulation.[87] This view expresses the fundamental concern states have when it comes to international law: laws vis-a-vis other states based on reciprocity is much easier to accept than laws regulating the affairs between states and their citizens. Furthermore, the application of IHL to situations of non-international armed conflicts would be a tacit accept of non-state actors' resort to violence, something states normally prefer to treat as crimes.[88] The result of the conference was a compromise which let to a much shorter and simpler version of AP II than first proposed, and some very significant states are still not parties to the AP II, here amongst the US, Israel, India, and Pakistan.[89] The challenges in the application of IHL to NIACs are still very present, and two of the most fundamental considers the classification of NIACs and the categorisation in NIACs.

2.2.2.1. The Classification of NIACs

It is difficult to determine when a non-international armed conflict actually exists, i.e. when a situation within a state moves from being regulated through a domestic law-enforcement regime to a conflict regulated through IHL. Thus, it is a question of when a situation reaches a threshold of violence that amounts to a NIAC, triggering the application of IHL. Defining a threshold is complicated, and even the two treaty sources - CA 3 and AP II - have different

[85] International Committee of the Red Cross, "The Geneva Conventions of 1949 and their Additional Protocols", 1 January 2014 (available at: https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols).
[86] AP I, *supra* note 23, art. 1(4).
[87] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, 2012, 102.
[88] David Kretzmer, "Rethinking the application of IHL in Non-International Armed Conflicts", *Israel Law Review*, vol. 42, no. 1, 2009, 21.
[89] International Committee of the Red Cross, "Protocol 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" (available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475)

definitions. CA 3 applies "in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties",[90] but gives no further definition of an armed conflict. In the *Tadic* case, the International Criminal Tribunal of the Former Yugoslavia (ICTY) provided a more specific interpretation of NIACs, as situations where there is: "*protracted armed violence* between governmental authorities and *organised* armed groups or between such groups within the State."[91] These principles 'protracted armed violence' and 'organisation' have also been adopted by the International Criminal Court to determine NIACs.[92] Remaining is how 'protracted armed violence' and 'organisation' are to be defined. The level of organisation is what separates an armed group, able to conduct concerted military operations, from individuals gathered in riots and other forms of unorganised violence,[93] and organisation is considered a defining element throughout the Geneva Conventions and their Additional Protocols, in which both GC III article 4(A)2, AP I, article 43(1) and AP II, Art. 1(1) talks about organised armed groups/units. Referring back to the *Tadic* case, the ICTY elaborated on the level of organisation needed in order to become a party to an armed conflict in *The Prosecutor* v. *Ramush Haradinaj et al*. The criteria, presented by the ICTY, counts among others: the existence of a command structure as well as disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, as well as its ability to plan, coordinate and carry out military operations.[94] Regarding the interpretation of 'protracted armed violence', the ICTY has applied the level of intensity, to distinguish between internal disturbances that can be addressed through policing, and conflicts in which the violence reach a level that triggers the application of IHL.[95] In *The Prosecutor* v. *Ramush Haradinaj et al*, the factors applied to assess the intensity of a conflict were among others: the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones.[96]

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[90] GC I-IV, *supra* note 23.
[91] *The Prosecutor v. Dusko Tadic,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, International Criminal Tribunal of the former Yugoslavia, 2 October 1995, para. 70.
[92] The Rome Statute of the International Criminal Court, 1998, art. 8(2)(f).
[93] Melzer, *supra* note 60, 69.
[94] *The Prosecutor v. Ramush Haradinaj et al.,* Trial Chamber I, Judgment, International Criminal Tribunal of the former Yugoslavia, IT-04-84-T3 April 2008. para. 60.
[95] Melzer, *supra* note 60, 70.
[96] *The Prosecutor* v. *Ramush Haradinaj et al.*, *supra* note 94, para. 49.

The scope of applicability of AP II is more restrictive than CA 3, and therefore AP II cannot be used to define NIACs in generic terms.[97] The protocol applies only to armed conflicts involving a contracting state party and only on the territory of that party, opposite CA 3, which also applies to armed conflicts entirely between non-state actors.[98] Furthermore, AP II has detailed requirements to an 'armed group', namely that it be organised, under responsible command, and exercising a certain degree of control over a territory that allows the group to carry out sustained and concerted military operations and to implement this protocol.[99] That AP II has a higher threshold than CA 3 is also a result of the difficult negotiations during its conclusion, and the participating states' reluctance to expand international law to cover what had previously been considered an internal matter.[100]

However, while the above treaty law and jurisprudence provides some guidance as to when the threshold of a NIAC is met, it is still very much a matter of interpretation, exposing the classification to a large degree of politicisation, in which actors can adjust their strategy accordingly.[101] As discussed above, the negotiations of AP II seemed to imply that states would go a long way to avoid substantial application of IHL to non-international armed conflicts, because it would complicate matters and require them to restrict their means and measures when handling such conflicts. However, for some time now, this assumption does no longer seem to be valid. States actually seem to prefer to apply IHL because it gives them wider possibilities than domestic law-enforcement when it comes to the use of force.[102] In for instance the *Hassan v. UK* case before the European Court of Human Rights, UK argued that its conduct was subject to the requirements of international humanitarian law and thereby not human rights law.[103] One of the most central points is that states are not required to afford non-state actors the combatant's immunity for prosecution nor the status of Prisoner of War (POW) if apprehended in NIACs. This will elaborated in the following.

[97] Melzer, *supra* note 60, 68.
[98] Melzer, *supra* note 60, 67-68.
[99] AP II, *supra* note 23, art. 1.
[100] Melzer, *supra* note 60, 69.
[101] Andrew J. Carswell, "Classifying the conflict: a soldier's dilemma", *International Review of the Red Cross,* vol. 91 no. 873 (2009), 152.
[102] David Kretzmer, *supra* note 88, 22-23.
[103] *Hassan v. the United Kingdom*, Judgement, European Court of Human Rights, 16 September 2014, para. 76.

2.2.2.2. Membership of non-state organised armed group

Combatants in IACs are members of the state's armed forces and, as described above, have the combatant privilege. However, in NIACs there are no combatant privilege for non-state actors, as this would have required states to accept the legitimate right to form an armed group and the legality of carrying weapons and use them. Not very appealing to sovereign states which are defined by their monopoly on violence. Actually, one of the most fundamental issues in NIACs is the discussion of what it means to be a member of an armed group, while not being granted combatant's privilege. Meanwhile, that members of armed groups are not combatants, does not mean that they are merely civilians taking direct part in hostilities, because, as seen above, NIACs take place between 'organised armed groups'. Merely concluding that members of organised armed groups were civilians taking direct participation in hostilities and therefore only eligible to attack during such time, would in general undermine the concept of distinction in NIACs. ICRC Commentary to AP II also concludes, "those who belong to armed forces or armed groups may be attacked at any time."[104] However, the conventions do not elaborate on how to characterise the individual member of an organised armed group. In 2010 ICRC published a guidance on direct participation in hostilities, in which it concludes that "the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities (hereafter: "continuous combat function")."[105] By this definition, ICRC proposes to determine membership on function, instead of status as in IACs, and thereby, to recognize a category of people in conflicts that are more than "just" civilians sporadically taking up arms. The result is that when assuming a continuous combat function, and thereby, membership of an armed group, the individual will lose protection against direct attacks. [106] It is not an acknowledgement of the legality of being a member of an armed group, i.e. they will still be liable to prosecution for illegal acts under national law.

As seen above, applying IHL to NIACs include a number of issues, and the framework for this category of conflict is both rather simple and undeveloped. The issues are all applicable

[104] *AP II, Commentary of 1987, Protection of the Civilian Population,* International Committee of the Red Cross, 1987, art. 4789.
[105] *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law,* International Committee of the Red Cross, May, 2010, 33.
[106] *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law,* International Committee of the Red Cross*,* May 2010, 73.

to new wars, given that they often entail non-state actors. The next section will look further into the challenges, which arises when applying IHL to new wars.

2.3. New Wars and Legal Challenges

Kaldor and Chinkin highlights a number of issues arising from applying IHL to the context of new wars. The issues are inherent in the core purpose of the regime. IHL builds on the premise that war is unavoidable and the role of the regime is to mitigate the harm. Thereby, IHL serves a two-fold purpose: "providing an operating code for those engaged in armed conflict and protective guarantees for those caught up in conflict."[107] The fundamental problem is that IHL entails an acceptance of war as something, which is unavoidable, an acceptance that tacitly creates a legitimization of war. IHL is not concerned with the justification for going to war, but aims to provide a toolbox to successfully carry out war, without causing too much damage. This creates a number of problems. First, the distinction principle creates a hierarchy of lives i.e. some lives are more valued than others for the different parties to the conflict. Such a hierarchy is in stark contrast to the concept of humanity, in which all human lives are of equal worth. [108] Secondly, the core principles of IHL undermine humanity when legalising the killing of civilians. The legal regime measures military necessity, proportionality and unnecessary suffering against military advantage, but it still legitimizes violence.[109] These issues are aggravated in the context of new wars.[110]

The first key issue when applying IHL to new wars is that the deliberate targeting of civilians increasingly challenges the protection of civilians, as it undermines the concept of legitimate 'military targets'.[111] A second issue is the fact that the IAC-NIAC framework of IHL is too rigid when it comes to new wars which are defined as a blurry and border crossing mix of war, organized violence and large-scale violations of human rights involving both state and non-state actors. The IHL framework is simply too narrow for the complexities of new wars. A third issue is the already challenged determination of the level of violence amounting to a NIAC. In new wars, it is in particular challenging because of the asymmetry between the attacks of governmental forces and non-governmental forces, which is problematic in regards to both requirements of intensity and organisation. Could violence, for example, extent to an

[107] Chinkin and Kaldor, *supra* note 15, 254.
[108] Chinkin and Kaldor, *supra* note 15, 255-256.
[109] Chinkin and Kaldor, *supra* note 15, 256-258.
[110] Chinkin and Kaldor, *supra* note 15, 254.
[111] Chinkin and Kaldor, *supra* note 15, 262.

armed conflict if a group of multiple non-governmental forces without organized leadership or coordination between them attacked a state with a sufficient intensity.[112] A last issue, proposed by Kaldor and Chinkin, is that the elasticity and imprecision of core IHL concepts as distinction, necessity and proportionality becomes an even bigger challenge than already, in the context of new wars. With the principle of distinction, the essence is to separate and distinct between those who are civilians and those who are combatants. In new wars, where there is no combatant-status, the members of non-state armed groups looks like civilians and take advantage of this in order to make the distinction even more difficult. In regards to the concepts of necessity and proportionality it becomes even more challenging in new wars, as methods of conducting warfare has changed. As the adversary is often living and hiding among civilians or using them as human shields in new wars, it makes it impossible to target them without also killing civilians. IHL provides the possibility of killing civilians as collateral damage as long as it is proportionate, but this raises the issues of measuring and defining, when killing civilians is so. This has never been easy, however, when distinction between enemies and civilians becomes more difficult, so becomes the application of the principle of proportionality.[113]

The above issues means that IHL is increasingly challenged in regulating armed conflicts. The framework is filled with various inadequacies both when it comes to the application and interpretation of the law, which undermines its effectiveness, and these are aggravated in a new war context. Therefore, the next section will propose another legal approach that can address the above issues better.

2.3.1. A Human Security Approach

As concluded, an alternative legal approach applicable to new wars is needed. There are two ways to go in order to develop another legal framework for armed conflict that can address the issues: developing a completely new legal system, or including other legal regimes in the regulation of armed conflicts. The next section will briefly present the two directions, and argue that the latter is the most realistic approach. It will further elaborate on what such an approach would entail. Lastly, it will introduce the approach in relation to. Lastly, it will introduce the approach in relation to the concepts of civilian, enemy, and winning, all challenged in new wars.

[112] Chinkin and Kaldor, *supra* note 15, 242-245.
[113] Chinkin and Kaldor, *supra* note 15, 248-254.

The first possibility would entail a whole new law-making process: either a revision of the IHL regime in its entirety or the conclusion of a new Additional Protocol addressing the inadequacies of the law.[114] In such a process, the issues with the limited two-part-system of classifying conflicts, and the disputed core concepts could be addressed. However, this would be a lengthy, controversial and risky process, with a good chance that the new product would actually run counter to the purpose and lower the bar for protection even further.

The second alternative is an approach that applies other legal regimes, i.e. human rights law and international criminal law (ICL), building on humanitarian principles to complement international humanitarian law.[115] HRL is not limited by concepts such as military necessity. Furthermore, the concept of proportionality is under HRL more limiting and restrictive in regards to legitimising the use of force.[116] Kaldor and Chinkin argue that all war is essentially a violation of human rights, and therefore, HRL should be the predominant regime. They do not argue for a complete replacement of IHL, but that it should be clarified and retained.[117] The real challenge, thereby, becomes how to implement HRL in connection with IHL, so that it will enhance security in general. Kaldor and Chinkin's overall argument is that there needs to be a renewed focus on 'human security', a security regime that puts the protection of the individual in centre:

"Human Security would mean, in international law terms, representative and accountable international authority for the use of force, the recasting of war as a humanitarian catastrophe and a massive violation of human rights, the recasting of self-defence as scaled-up self-defence of individuals not states, and the application of human rights law, as well as IHL, to any use of force (or to put it another way, the use of force within the constraints of rights-based policing rather than military type rules of engagement)."[118]

Thereby, Kaldor and Chinkin requires a complete shift in the way in which we think of war, and the rules regulating it. It should be underlined again that we will focus on the last part of the above that include the application of HRL.

[114] Chinkin and Kaldor, *supra* note 15, 264.
[115] Chinkin and Kaldor, *supra* note 15, 264-265.
[116] Chinkin and Kaldor, *supra* note 15, 269.
[117] Chinkin and Kaldor, *supra* note 15, 230-31.
[118] Chinkin and Kaldor, *supra* note 15, 33.

2.3.2. Civilians, Enemies and Winning

As argued throughout the chapter, new wars are essentially different from old wars, and this requires a rethinking of the legal regime governing war. To rethink the legal regime, three separate, but highly interrelated issues should be addressed: civilians and enemies, as well as how wars are won. This section will outline why a new understanding of these three concepts is needed in order to address new wars and apply a human security approach. The concepts will be evident in the way we address the legal challenges of new wars throughout the thesis.

2.3.2.1. Civilians

IHL is based on distinction between legal and illegal targets: military objects and combatants are legal targets civilians and their objects are not. But in new wars, civilians are increasingly becoming a target, and therefore, IHL is easily undermined, as it creates a hierarchy of lives, in which killings of civilians can actually be legitimised as a result of collateral damage. This is because humanity is always weighted against military necessity. What makes IHL especially challenged in addressing new wars is that because they are 'wars of mutual enterprise' military necessity is harder to define. When new wars are not only about the defeat of an enemy, but also about restoring a legitimate form of governance, can civilian losses then be justified? Kaldor and Chinkin argue that all wars should be seen as a violation of human rights, and thus, we need to rethink the protection of civilians, not as something relative to military necessity, but to something absolute. The protection of civilians is highly dependent on how we define 'the enemy', exactly because distinction in new wars is difficult. Thus, we also need to have the absolute protection of civilians in mind when looking at legitimate military targets.

2.3.2.2. Enemies

In new wars where the state's monopoly on violence is challenged, violence becomes difficult to contain. The enemy is no longer just the army of the opposing state, but a fluid network of state and non-state actors with various structure and composition from war to war. This raises a number of challenges for the law governing armed conflict, and as described above (2.3.), one of the core challenges is that there is actually no category in NIAC's containing 'the enemy'. The question then becomes whether they are just civilians taking up arms or members of an armed group? Without a definition, the principle of distinction risk being undermined. In new wars, the enemy is, therefore, not easy to define, and thus, neither

to handle. The inclusion of human rights provided by the human security approach can help address the enemy. By applying a law-enforcement regime to, for example, the use of force in armed conflicts, there is no need to define an enemy category based on status. Instead, the situation determines the use of force needed to apprehend an enemy. If the person is posing a threat to others, it can of course be necessary to target and kill, but in most cases it can be sufficient to arrest. Applying law-enforcement rules to the conduct of warfare when possible will increase the legitimacy of the intervening power, especially because it entails treating all people (regardless of their status under IHL) with respect, dignity and humanity.

2.3.2.3. Winning

The new forms of violence in new wars, requires a change in mind-set of those engaged in these wars. Kaldor and Chinkin argue, that the reality is, that the existing methods of war, do not work. Because new wars are a mutual enterprise for the conflicting parties, their interest in the continuation of the fighting changes the premise for those trying to end it. So, as an outside state intervening in a new war, winning the war actually requires ending the mutual enterprise. This demands something different than merely defeating the enemy with hard military means or settling issues between the conflicting parties temporarily in a peace agreement.[119] What it requires, is that the states engaging in new wars understand and adhere to the idea that new wars have a different logic, and therefore, need a different solution - or more specifically a human security solution. This entails a construction of a legitimate authority at all levels - locally, national, regional and international, because it removes the incitement to continue the mutual enterprise. Therefore, if a foreign state wants to help to construct a legitimate authority, it must also be seen as a legitimate actor on the ground. The human security approach, thus, proposes a legal regime that focuses on a human centred form of legitimacy.[120] Thus, this does not mean that a state could never intervene with the use of force in situations of humanitarian emergency, but that it would have to be under a much tighter set of rules governing the engagement, focused on minimising all loss of life, enhancing protection of civilians, and where possible, arresting rather than killing the enemies.[121]

[119] Chinkin and Kaldor, *supra* note 15, 533.
[120] Chinkin and Kaldor, *supra* note 15, 545-546.
[121] Chinkin and Kaldor, *supra* note 15, 539.

2.4. Partial Conclusion

As this chapter has shown, the new war theory is not so much about describing actual wars, rather it is about describing tendencies that amount to a change in the underlying logic of wars. War as a mutual enterprise problematise the old war logic, in which war is a political contest of wills that requires the defeat of the enemy. It require more to win new wars, or rather to end them, namely, a construction of a legitimate authority on all levels: locally, national, regional and international. This entails an increased focus on the legitimacy of the intervening power and their conduct of warfare, i.e. the *jus in bello* regime. Furthermore, all war is a violation of human rights and the regime governing warfare should, therefore, focus on the protection of the individual i.e. the human security. The shift to a human security approach entails that the protection of individuals is placed at the centre, and therefore, the human security approach entails that international humanitarian law is enforced with human rights law.

3. New Wars and Human Rights Law

In the last chapter, we concluded that in order to have a legal framework, which can provide legitimacy and protection of individuals in new wars, human rights law must be applied as the predominant regime. However, the application of human rights law to armed conflict presents several challenges, which this chapter will discuss. After presenting the main differences between human rights law and international humanitarian law, the chapter will include a brief introduction to human rights law, its treaties and monitoring mechanisms, as well as the obligations and limitations it entails. Following this, the chapter will try to answer three questions, following from the application of the human rights law regime to situations of armed conflict. First, whether human rights even apply to armed conflicts. Second, when human rights apply, including both the issue of extraterritorial applicability as well as its relationship with international humanitarian law. Last, the chapter will discuss how international humanitarian law and human rights law can be applied to situations of armed conflict in a mutually reinforcing way. The ideas of Daragh Murray and Marco Sassòli will be used to present a guideline for how the interplay between the two regimes should look like in situations of armed conflict.

3.1. The Differences Between Human Rights Law and International Humanitarian Law

The legal regime of international human rights law is fundamentally different from the international humanitarian law regime, and even though, they both share the same fundamental idea of protecting and securing human dignity, they have fundamentally different purposes.[122] Where the purpose of international humanitarian law is to govern the conduct of hostilities and minimise human suffering, the purpose of human rights law is to protect citizens from possible power abuse by the state, as well as to obligate the state to ensure certain rights of its citizens.[123] Another key difference is that IHL is fundamentally regulating the relations between states and their armed forces in the context of armed conflict, where HRL is regulating the relationship between a state and the individuals under the jurisdiction of this state.[124] IHL is, furthermore, a balance between military necessity and humanity, where HRL does not reflect military necessity at all. This means that the HRL regime provides a must stricter interpretation of the use of force, resulting in a better

[122] Røde Kors, *Den humanitære folkeret*, 2015, 83.
[123] Murray, *supra* note 42, 13.
[124] Røde Kors, *supra* note 122, 83.

protection of the individual.[125] A last key difference worth mentioning is that HRL is applicable to all individuals under the jurisdiction of a state, and explicitly prohibits any discrimination in this regard, ensuring equal protection for all. In contrast IHL is fundamentally discriminative, as it only applies to particular groups e.g. combatants or civilians, and in order to be protected under IHL, an individual needs to belong to such a group, either by status or function.[126] Some of the above differences are often used to argue that the two regimes are not supposed to be merged, and especially that HRL has no relevance during armed conflicts. However, as discussed in the previous chapter there are good reasons for arguing that HRL should actually play an increased role regulating armed conflicts. Admittedly, mending the differences between the two regimes is not easy.

3.2. Human Rights Law

Before identifying the challenges that the application of HRL in armed conflicts proposes, the thesis will briefly establish a few basic but important characteristics of HRL. First, a brief overview of the establishment of human rights as a international legal regime, and of the treaties and monitoring mechanisms, which are applied throughout the thesis, followed by a short introduction to both the obligations and limitations that the regime includes.

3.2.1. Treaties and Compliance Mechanisms

The human rights regime is, as international law in general, a complex and diverse matter defined by numerous of treaties, customs and soft law instruments. The notion of human rights is believed to have its basis in natural law, and is reflected in, for example, the American Declaration of Independence, the French Declaration of the Rights of Man and of the Citizen, and other legal documents entailing constitutional guarantees or civil liberties.[127] The universal and international character of modern human rights, as we understand them today, however, emerged as a response to the atrocities of the Second World War. Especially the inclusion of human rights articles in the United Nations Charter in 1945 and the Universal Declaration of Human Rights (UDHR) in 1948 are today acknowledged as the starting point

[125] Peter Vedel Kessing, *The Use of Soft Law in Regulating Armed Conflict: From Jus in Bello to 'Soft Law in Bello'?,* in: Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds.), Tracing the Roles of Soft Law in Human Rights, 2016, 130-131.
[126] Røde Kors, *supra* note 122, 84.
[127] Murray, *supra* note 42, 18.

for modern human rights law.[128] Article 1 of the UN Charter established that protecting human rights was included as one of the UN's purposes, where article 56 requires all Member States of the UN "to take joint and separate action in cooperation with the Organization"[129] to achieve this purpose. The formation of the Commission for Human Rights, was such a joint action, and resulted in the drafting of the UDHR a couple of years later.[130] The Declaration is acknowledged as the first time representatives with different legal and cultural backgrounds from the whole world came together to codify fundamental human rights, which ought to be universally protected.[131] It is not a treaty, and therefore, not legally binding on its own, however, it is considered a cornerstone of the UN, and many of the rights listed in the Declaration is also considered to be customary international law (CIL).[132] Most of these fundamental rights are also included in the existing human rights treaties which varies from those covering an overall spectrum of rights, e.g. the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[133] from 1950 and the American Convention on Human Rights (ACHR)[134] from 1969, to those concerned with specific rights or specific groups e.g. the International Covenants on Civil and Political Rights (ICCPR)[135] from 1966, and the UN's Conventions on Genocide from 1948, Discrimination Against Women from 1979, and Torture from 1984.[136] There are several compliance mechanisms monitoring the adherence to human rights by states. Some of the UN mechanisms include the Human Rights Council (replacing the Commission for Human Rights in 2006) and the Office of the High Commissioner for Human Rights. Additionally, compliance with the human rights treaties are often governed by human rights courts, providing a forum where individuals can bring claims against states for violations of their human rights. The European Court of Human Rights is acknowledge to be one of the most effective of the human rights

[128] UN General Assembly resolution 217 A, *The Universal Declaration of Human Rights*, UN Doc. A/810, 10 December 1948 [Hereinafter UDHR].
[129] *The Charter of the United Nations*, San Fransisco 26 June 1945, art. 56 (available at: https://www.icj-cij.org/en/charter-of-the-united-nations).
[130] Murray, *supra* note 42, 20-21.
[131] UDHR, *supra* note 128.
[132] Murray, *supra* note 42, 21.
[133] ECHR, *supra* note 24.
[134] *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, Costa Rica, 22 November 1969 (available at: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf) [Hereinafter ACHR].
[135] UN General Assembly resolution 2200 A, *International Covenants on Civil and Political Rights,* U.N. Doc. A/6316, 16 December 1966 (available at: https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx) [Hereinafter ICCPR].
[136] International Committee of the Red Cross, "Recent Developments of the Interplay between IHL and IHRL", 12 June 2017, (available at: https://www.icrc.org/en/document/recent-developments-interplay-between-ihl-and-ihrl).

courts, as its judgements are legally binding to the state parties of the ECHR.[137] Other courts connected to prominent human rights treaties, are the International Court of Justice, which together with the HRC governs the ICCPR, and the Inter-American Court of Human Rights (IACtHR) which together with the Inter-American Commission of Human Rights (IACHR) governs the ACHR.[138]

3.2.2. Human Rights Obligations

The obligations included in human rights law are, as described above, obligations for the state. There are three different types of obligation that a state can have towards an individual under its jurisdiction: an obligation to respect, an obligation to protect, and an obligation to fulfil. The obligation to respect entails that states guarantee a society where there is respect for the human rights of individuals and groups under the state's jurisdiction. Therefore, the state has to make sure that its organs, agents, and structures are in consistency with the law.[139] This is understood as a negative obligation, as it places a duty on the state to refrain from any actions that could be in violation of human rights. Most of the convention-based rights are framed in this way.[140] The obligation to protect entails that the state actively prevents other individuals or groups from violating the human rights of other parties under its jurisdictions. The key word here being actively, as it therefore requires agents of the state to intervene, if a third party is violating human rights of individuals or groups under the states jurisdiction, and the agents are in a position to prevent it. The obligations to fulfil entails that the state takes the necessary measures to ensure that all individuals within its jurisdiction has access to the human rights listed in the treaties and documents, that the state is a party to.[141] The obligations to protect and fulfil, are opposed to the first, positive obligations, as they place a duty on the state to take active measures in order to safeguard the protection of human rights.[142]

[137] Murray, *supra* note 42, 15-16.
[138] Murray, *supra* note 42, 24.
[139] Murray, *supra* note 42, 18.
[140] The Council of Europe, "Some Definitions", (available at: https://www.coe.int/en/web/echr-toolkit/definitions).
[141] Murray, *supra* note 42, 19.
[142] The Council of Europe, "Some Definitions", (available at: https://www.coe.int/en/web/echr-toolkit/definitions).

3.2.3. Limitations to Human Rights

The human rights regime is universal in character, however, it does entail some limitations. The regime encompasses a careful balance between, on one hand, the respect for individual rights and freedoms, and on the other, the legitimate security needs of individuals. Therefore, human rights treaties contain both some absolute rights, as well as rights which can be limited.[143] Overall, human rights law can be subjected to limitations in three different manners. First, rights can be inherently qualified, meaning that they are not violated unless the action in question is arbitrary. An example is article 6 (1) of the ICCPR, which provides that "every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[144] Second, human rights can include certain restrictions for specific circumstances, often in regard to classic freedoms as freedom of expression, freedom of assembly or freedom of thought and religion. In the ECHR, all of these freedoms allow for restrictions if they "are prescribed by law and are necessary in a democratic society in the interests of national security or public safety."[145] The third kind of limitation is the inclusion of so-called 'derogation-clauses'. The ECHR, the ICCPR and the ACHR all contain such clauses.[146] The clauses allow for states to take measures of derogation from their treaty obligations, i.e. to restrict or disregard certain rights, which are not absolute, in situations of genuine emergency. Looking to the European Convention on Human Rights, it provides that:

"In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."[147]

Thus, a State party to the ECHR can derogate from certain rights in situations of war or other public emergencies, if the derogation is strictly required and if the derogation is not inconsistent with other obligations. Some rights are, however, non-derogable: the right to life under article 2 (however importantly, deaths resulting from lawful acts of war are excepted from this), the prohibition of torture under article 3, the prohibition of slavery and servitude

[143] Louise Doswald-Beck, Human Rights in Times of Conflict and Terrorism, 2011, 68.
[144] ICCPR, *supra* note 135, art. 6 (1).
[145] ECHR, *supra* note 24, art. 9 (2), art. 10 (2), and art. 11 (2).
[146] ECHR, *supra* note 24, art. 15; ICCPR, *supra* note 135, art. 4; ACHR, *supra* note 134, art. 27.
[147] ECHR, *supra* note 24, art 15 (1).

under article 4 (1), and the right to no be punished without law under article 7. A last criterion under the ECHRs derogation-clause is that the State party is obliged to fully inform the Secretary General of the Council of Europe of the measures it has taken, the reasons therefore, and the moment they cease to apply.[148]

3.3. Applying Human Rights Law in Armed Conflict

Three questions arise when it comes to applying human rights law in armed conflicts: First, given the differences between IHL and HRL described above, *whether* HRL applies at all, second, if it does, *when* does it then apply, and third, when it applies, *how* does it apply. The first two questions have been thoroughly addressed by both case law and scholars, and there is, at least in a European context, more or less consensus on the solutions to whether HRL applies and when. However, the last question of how is less settled, and the thesis will naturally spend more time discussing this. However, to do so, we first need two look into the debates of the whether and when. The latter will be examined by answering two sub-questions of human rights application in armed conflict: the application outside a state's territory (extraterritorial applicability) and the simultaneous application with IHL (the *lex specialis* debate). The examination of extraterritorial applicability is specifically relevant in this thesis, as the analysis will be based on the Danish Military Manual, specifying the rules Danish soldiers operate under in *international* operations.

3.3.1. Whether Human Rights Law Applies in Armed Conflict

The human rights treaties do not specify when and under which situations their provisions apply. However, some wording within the treaties supports their continued application in all times - peace as well as war.[149] In for instance the European Convention of Human Rights, article 15 allows the parties to derogate from some of the obligations listed in the ECHR during situations of war or other public emergencies,[150] thereby insinuating that the treaty obligations as they stand without derogation, is applicable during these times. The International Court of Justice addressed the relationship for the first time in its advisory opinion from 1996 concerning the threat and use of nuclear weapons. The ICJ writes:

[148] ECHR, *supra* note 24, art. 15 (2)-(3).
[149] Doswald-Beck, *supra* note 143, 5.
[150] ECHR, *supra* note 24, art. 15.

"(...) the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities." [151]

Thus, the Court clearly underlines that HRL is also applicable in armed conflict (unless explicitly derogated from), but dependent on IHL, because of its status as *lex specialis* during armed conflicts. This will be elaborated later in the section (3.2.2). In *Hassan v. UK* (2014) the European Court of Human Rights followed ICJ's example, and rejected UK's claim that IHL as *lex specialis* meant that UK's obligations under the ECHR would not be activated, instead the ECtHR confirmed that the ECHR continues to apply during armed conflicts.[152] To sum up, it is generally accepted that HRL is applicable in armed conflict, however, under certain preconditions. A debate concerning when, and under exactly which preconditions, HRL applies remain. Accordingly, the next session will go into the nature of the relationship between the two regimes, hereunder the question of which regime prevails over the other. Meanwhile, before that, it is necessary to settle another debate. Because human rights treaties were not developed as interstate treaties, but as intrastate treaties governing the relationship between a state and its citizens, some states have argued that their human rights obligations do not prevail outside their own territory. This is, however, a question of the interpretation of jurisdiction, which the next section will discuss.

[151] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, International Court of Justice, 8 July 1996, para. 25.
[152] *Hassan v. the United Kingdom*, Judgement, European Court of Human Rights, 16 September 2014, para. 77.

3.2.2. When Human Rights Law Applies to Armed Conflict

This section will examine two main issues that have dominated the debate about when HRL apply to situations of armed conflict: extraterritorial applicability and the interplay between HRL and IHL.

3.2.2.1. Extraterritorial Applicability

Most of the human rights treaties specify their application under state jurisdiction, however, the wording often varies. In the European Convention on Human Rights article 1 the treaty provides that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."[153] This, however, raises the question of what the term 'within their jurisdiction' implies. The ICCPR article 2 (1) is a little more specific, as it states that the parties to the Covenant "(...) undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."[154] Still, the ICCPR does not elaborate further on how it understands 'individuals subject to its jurisdiction'. The ACHR article 1 (1) is similar to the two, providing that states that are parties to the treaty are obliged "to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms".[155]

Thus, no definition of what jurisdiction entails is given in any of the three major human rights treaties. The question of extraterritorial applicability has, however, been specifically addressed by several different treaty bodies.[156] In case law concerning the ICCPR, the ECHR, and the ACHR the same conclusion has more or less been reached, namely, that a state can also have jurisdiction in situations outside its own national territory.[157] However, it should be mentioned that some states, do not recognize exterritorial applicability, and thus, the argument is still subject to extensive debate. The US has for instance been arguing against a human rights responsibility outside of their own territory, based on an interpretation of article

[153] ECHR, *supra* note 24, art. 1.
[154] ICCPR, *supra* note 135, art 2 (1).
[155] ACHR, supra note 134, art. 1 (1).
[156] Ralph Wilde, *The Spatial Test in Certain Human Rights Treaties*, in: Roberta Arnold and Noëlle Quénivets (eds.), International Humanitarian Law and Human Rights Law - Towards a New Merger in International Law, 2008, 136.
[157] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ, 2004, para. 107-111; *Lopez Burgos v. Uruguay,* Communication No. R.12/52, Supp. No. 40, at 176, UN Doc. A/36/40, Human Rights Committee, 29 July 1981, para. 12; *Loizidou v. Turkey*, Application No. 15318/89, Merits, Reports 1996-VI, [Grand Chamber], European Court of Human Rights, 12 December 1996, para. 52; *Coard et Al. v. United States,* Report N. 109/99 - Case 10.951, Inter-American Commission on Human Rights, 29 September 1999, para. 37.

2 of the ICCPR, where only individuals within the territory of a state party and subject to its jurisdiction is under their protection of human rights. The key question is whether 'within the territory' is decisive, or just one of two criteria. Following this, the US can claim that it does not have any human rights obligations towards the individuals contained in the Guantanamo prison, because it is on the sovereign territory of Cuba.[158] The case law concerning the ICCPR, does not seem to apply the same line of interpretation as the US. Both the ICJ in its *the Wall* Advisory Opinion and the Human Rights Committee in its Communication No. R.12/52 on *Lopez Burgos v. Uruguay*, concluded that the wording of article 2 (1) of the Covenant does not imply that the State in question cannot be held accountable for violations outside its territory.[159] As for the ECHR, the ECtHRs conclusion in its preliminary objections of the *Loizidou v. Turkey* case from 1995 is even stricter. The Court concludes that jurisdiction is not limited to national territory, and more specifically that a State also may be hold responsible in situations:

"When as a consequence of military action - whether lawful or unlawful - it exercises *effective control o*f an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration".[160]

In the case of *Öcalan v. Turkey* from 2005, the ECtHR, furthermore, argued that it also has jurisdiction in situations where an individual is under 'effective authority' of a state, even though the situation takes place outside the given state's territory.[161] In a guide on the interpretation of ECHR article 1 by the ECtHR, published as part of a series of case law guides, the Court underscores its position and concludes that there are two primary ways in which a State can exercise jurisdiction outside its own borders: 1) on the basis of control exercised over a person (ratione personae i.e. personal jurisdiction); and 2) on the basis of

[158] Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy,* 2011, 55-58.
[159] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, International Court of Justice, 9 July 2004, para 107-111; *Lopez Burgos v. Uruguay,* Communication No. R.12/52, Supp. No. 40, at 176, UN Doc. A/36/40, Human Rights Committee, 29 July 1981, para. 12.
[160] *Loizidou v Turkey,* Judgement on the Preliminary Objections, European Court of Human Rights, 23 March 1995, para. 62.
[161] *Öcalan v. Turkey*, Judgement, European Court of Human Rights, 12 May 2005, para. 91.

control exercised over a foreign territory (ratione loci i.e. territorial jurisdiction).[162] However, the guide also reiterates that a state's jurisdiction within the meaning of article 1 is primarily territorial,[163] and thereby, extraterritorial jurisdiction only applies as an exception.

'Effective Control' and 'Effective Authority'

Following ECtHRs interpretation guide, the ECHR applies extraterritorially in situations where a state exercises 'effective control' over an area or 'effective authority' over an individual, and the next question, thereby, becomes how to define effective control and authority. The Court has also evaluated this matter in several different cases, which in its interpretation guide to article 1, is divided into different contexts, some more relevant to a situation of armed conflict than others. In the context of an armed conflict, situations where the evaluation of effective control over another state's territory is relevant, are for example situations in which the state actively exercises control through complete or partial military occupation, through support to an insurgency or civil war, or through an installation or assistance to an installation of a separatist regime, not yet recognized as a sovereign state.[164] The Court has argued that 'effective control' is determined after two criteria. First and primarily, the amount of soldiers on the ground in the territory in question,[165] and second, the amount of military, economic and political support, the state in question exercises over the subordinate local administration to provide influence and control.[166] Thus, what determines whether HRL applies to a situation extraterritorially due to effective control is the number of boots on the ground as well as the amount of influence exercised over local authorities.

When it comes to situations relevant for the evaluation of 'effective authority', the Court argues that it can be due to both the exercise of another state's sovereign authority with its

[162] *Guide on Article 1 of the European Convention on Human Rights. Obligation to respect human rights – Concepts of "jurisdiction" and imputability*, European Court of Human Rights, 31 August 2018, para. 16.
[163] *Guide on Article 1 of the European Convention on Human Rights. Obligation to respect human rights – Concepts of "jurisdiction" and imputability*, European Court of Human Rights, 31 August 2018, para. 11.
[164] *Guide on Article 1 of the European Convention on Human Rights. Obligation to respect human rights – Concepts of "jurisdiction" and imputability*, European Court of Human Rights, 31 August 2018, paras. 29-32.
[165] *Loizidou v Turkey,* Judgement, European Court of Human Rights, 18 December 1996, para. 56; European Court of Human Rights, *Ilaşcu and Others v. Moldova and Russia,* Judgement, para. 314 & 387.
[166] *Al-Skeini and Others v. the United Kingdom*, Judgement, European Court of Human Rights, 7 July 2011, paras. 138-139.

agreement, or it can be due to the use of force by a state's agents operating outside its territory.[167] In the first scenario, the 'effective authority' is given through the consent, invitation or acquiescence of the local administration, and defined as the exercise of all or some of the public powers, which would in normal circumstances be exercised by the administration giving the consent.[168] In the second scenario, the state has 'effective authority' given the fact that it uses force to bring an individual under the control of its authorities. The circumstances can vary, but a typical example of such a situation is when an individual is taken into custody by a state outside its territory, What determines 'effective authority' is then the fact that the state holds control over the individual, not whether it holds control over territory, buildings, aircrafts or ships in the given situation. It is therefore, the exercise of physical power and control which is the determining factor of 'effective authority.'[169]

3.2.2.2. The interplay between IHL and HRL

As concluded in section 3.3.1. HRL applies during armed conflicts, and thus, the remaining issue is then to determine when it applies in relation to IHL. The two legal regimes touch upon many of the same situations, and HRL provides a great amount of the same protection that IHL provides, sometimes identical and sometimes with rules that are more detailed.[170] However, in other cases, and this is where it becomes more tricky, the regimes are in total opposition. For example is the right to life a non-derogable right in the human rights treaties, whereas under IHL killing is legalised in cases where an individual has combatant status or directly participates in the hostilities. The ICJ's AO on *Nuclear Weapons* touches upon exactly this issue, and concludes that as both regimes are applicable to the situation, what is an arbitrary deprivation of life must be determined by the applicable *lex specialis.* Thus, ICJ refers to the notion of *lex specialis derogat legi generali,* meaning that law specially tailored to a specific situation will prevail over generally applicable law.[171] The most common interpretation of *lex specialis* is that in situations of armed conflict, the specially tailored law

[167] *Guide on Article 1 of the European Convention on Human Rights. Obligation to respect human rights – Concepts of "jurisdiction" and imputability*, European Court of Human Rights, 31 August 2018, paras. 21-28.
[168] *Banković and Others v. Belgium and Others*, Decision as to the admissibility, European Court of Human Rights, 12 December 2001, para. 71.
[169] *Al-Skeini and Others v. the United Kingdom*, Judgement, European Court of Human Rights, 7 July 2011, para. 136.
[170] Doswald-Beck, *Supra* note 143, 122.
[171] Conor McCarthy, *Legal Conclusion or Interpretative Process? Lex Specialis and the Applicability of International Human Rights Standards,* in: Roberta Arnold and Noëlle Quénivets (eds.) International Humanitarian Law and Human Rights Law - Towards a New Merger in International Law, 2008, 101.

to govern armed conflict will always be IHL. However, it is not as simple. In its Advisory Opinion *The Wall* from 2004 concerning Israel's long-term belligerent occupation of the West Bank, the ICJ elaborated further on its view on *lex specialis*:

"(…) As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law."[172]

Thus, the ICJ argues that the interplay between the two regimes can take three forms. In some situations IHL will prevail, in others HRL, and then there will be situations in which both regimes might be relevant[173] - the most interesting is of course the third, given that it accepts the co-existence of IHL and HRL. The Court elaborates that in the last mentioned scenario, it will take both HRL and, as *lex specialis*, IHL, into consideration, thus proposing that HRL is applicable alongside IHL, even though the latter might take a *lex specialis* role.[174] This interpretation can be found in the ICJ Judgement of the *Case Concerning Armed Activities on the Territory of the Congo* from 2005. Here the ICJ quotes its own *The Wall* Advisory Opinion, and concludes that both the IHL and HRL regime must be taken into consideration, but omits a reference to the *lex specialis* principle, as well as to give more specific guidance as to when and where each body of law will be applicable.[175] As for the ECtHR, it directly comments on the simultaneous application of the two regimes for the first time in its 2014 *Hassan v. the United Kingdom* case. In this case, the UK was faced with a charge of an arbitrary deprivation of liberty (article 5 of the ECHR) in the context of an international armed conflict. Being that the UK did not derogate from its obligations under article 5, the Court decided to go into relationship between HRL and IHL. The European Court refers to the ICJ's *the Wall* AO and the *Armed Activities* judgement, and argues that the ECHR should

[172] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, International Court of Justice, 9 July 2004, para. 106.
[173] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ, 2004, para. 106.
[174] McCarthy, *supra* note 171, 102.
[175] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, International Court of Justice, 19 December 2005, para. 216.

be interpreted and applied "in a manner which is consistent with the framework under international law delineated by the International Court of Justice".[176] The ECtHR, thus, confirms that the safeguards provided by the ECHR continues to apply in a situation of armed conflict, however, given that IHL provides sufficient rules regarding detention in international armed conflicts, the ECHR is interpreted in the light of those rules. Therefore the court can declare the complaints admissible (because ECHR continues to apply), however the court in the end holds that there has been no violation of article 5.[177]

To sum up, both ICJ and ECHR confirms that the two regimes can apply simultaneously, however, none of them provide a clear guidance on how the interplay between the two regimes might actually function in practise. The next section will discuss this.

3.2.3. How Human Rights Law Applies to Armed Conflicts: Rethinking the Legal Framework

Whereas the above sections can answer the question on whether and when HRL applies in a fairly conclusive way through case law (however, this does not mean that the conclusions are not disputed), the final question regarding the interplay of HRL and IHL is more difficult. The starting point for our thesis is Kaldor and Chinkin's theory on human security because it combines the theory of new wars with an analysis of why and how the contemporary legal regime for armed conflicts is challenged, and concludes that the human rights regime should play a larger role. However, Kaldor and Chinkin does not develop a more coherent theory on how this role should unfold, and therefore, this section will discuss two different, but mutually reinforcing, theories on this provided by Daragh Murray and Marco Sassòli.

3.2.3.1. Daragh Murray's Framework

Daragh Murray's book *Practitioners' Guide to Human Rights Law in Armed Conflict*[178] from 2016 presents a framework for applying HRL during armed conflicts. The starting point for the book is that the relationship between IHL and HRL is not simply determined by *lex specialis,* but that*:* "both bodies of law remain applicable and are capable of informing the

[176] *Hassan v. the United Kingdom*, Judgement, European Court of Human Rights, 16 September 2014, para. 102.
[177] *Hassan v. the United Kingdom*, Judgement, European Court of Human Rights, 16 September 2014, paras. 103-104; 111.
[178] Murray, *supra* note 42.

legal regulation of a situation."[179] Murray concludes that case law from ECHR, ICJ and HRC clearly indicates that both bodies of law can be applied during armed conflicts, albeit in a constant dialogue with each other, and thus, it is possible to talk about situations in which IHL takes primacy and situations in which HRL takes primacy. This, however, does not mean that the other legal regime will cease to apply, but that it will apply in the context of the primary regime. Concluding what regime is the primary framework in a given situation must be determined "in light of the existence of explicit rules which are designed for the situation under consideration."[180] Thus, how a situation should be regulated is decided by an *explicit rule* and whether that *rule is designed for the situation*. Explicit rules are determined by the existence of primarily treaty law, and secondary customary law, however, the application of customs might be less clear. Whether the rule is designed for the situation is determined after a number of relevant factors: whether the situation is an IAC, a NIAC or a belligerent occupation, whether the situation involves active fighting, what the status or activity of the involved individuals are, and at what level the state exercises control. In situations where rules are in direct conflict, the rule, which is most closely designed for the given situation, will decide the primary framework.[181] From this, Murray presents two different frameworks to guide practitioners on how to apply the two legal regimes simultaneously: the 'active hostilities' and the 'security operations' framework. The 'active hostilities' framework governs situations of regular fighting which IHL was developed to regulate from the beginning, whereas 'security operations' framework governs situations taking place during an armed conflict, however, not involving regular fighting. These situations require that the use of force be applied within the constraints of a law enforcement regime. In situations of active hostilities, IHL is therefore the primary framework because it provides the most explicit rules designed for the situation, where in situations of security operations, HRL provides the most explicit rules designed for the situation, and will, thus, be the primary framework. In Murray's proposed model, an armed conflict does not exclude HRL, instead what is decisive for the application of law, is the specific situation during an armed conflict. This means that even during an armed conflict, security operations governed by HRL may be carried out. Murray explains:

[179] Murray, supra note 42, 83.
[180] Murray, *supra* note 42, *8*8.
[181] Murray, *supra* note 42, 89.

"The 'security operations' framework, applying as it does to situations in which the factual circumstances of 'active hostilities' are not applicable, requires that the State concerned exercises a level of control sufficient to conduct law enforcement operations within a conflict situation."[182]

Thus, the crux of the matter here is the level of control within a conflict situation, because if it is possible to conduct law enforcement operations, the situation is actually more closely resembling one which HRL was designed to regulate. The active hostilities framework is rather self-explanatory as this covers situations, which IHL was developed to regulate exactly because of the lack of control exercised by the state.

The model also reflects a more nuanced approach to the divide between IACs and NIACs, in that it takes the more coherent and detailed regulations developed for IACs into account. The existing treaty-based IHL governing NIACs is limited, and even though there does exist customary law in this field, there are issues of uncertainty as to how well-established the law is, for example, in regards to targeting and internment.[183] Thereby "the 'active hostilities' framework regulates all conflict-related issues in international armed conflict,"[184] meaning that the non-conflict related issues in both IACs and NIACs are regulated by the 'security operations' framework. However, in NIACs, also situations that are related to the conflict can be regulated by the 'security operations' framework, even situations of low-intensity fighting. This is exactly because in "the absence of explicit law of armed conflict rules designed for non-international armed conflict, the influence of international human rights law is greater."[185] Furthermore, Murray argues that NIACs are not just NIACs, but that they differ on a wide scale between situations just reaching above the criteria prescribed by CA 3 which could in fact be addressed effectively through law enforcement, to situations of large scale conflict, in which the lack of control renders such measures almost impossible.

Murray underlines that whether or not a situation is regulated through the primary framework of 'active hostilities', it will also be informed by the secondary framework of 'security operations' and vice versa. A factor relevant when determining the influence of the secondary

[182] Murray, *supra* note 42, 91.
[183] Murray, *supra* note 42, 95.
[184] Murray, *supra* note 42, 92.
[185] Murray, *supra* note 42, 94.

framework is whether the rules of the primary framework are clear and explicit. If they are, the secondary framework will naturally be less relevant, however, there can be situations (especially in NIACs) in which a more close examination is necessary. Murray present three possible ways in which the relation between IHL and HRL, regardless of which is the primary or secondary framework, can take form. The two legal regimes can interfere as complementary, as potentially conflicting, or on issues where IHL is silent.[186] Where complementary, the secondary framework is likely to be significant, where potentially conflicting the primary framework will be significant, and when IHL is silent, the secondary framework must be applied in the context of the primary.[187]

3.2.3.2. Marco Sassòli's Framework

Marco Sassòli also considers the interplay between IHL and HRL, and like Kaldor and Chinkin, he relates the discussion to what he calls 'new' types of armed conflicts, a term that in his article covers asymmetric conflicts, 'the war on terror', conflicts in failed states, and UN peace operations. However, Sassòli shrinks from calling them new because, as he argues, in relation to the question of applicability of existing law, any given situation will require interpretation, and thus, per definition all situations will be 'new'.[188] That being said he does recognize some common features, which distinguish 'new conflicts' from what he calls the 'archetypical wars' that IHL was originally developed for, and these issues are then discussed in relation to the application of IHL and HRL. He argues that the *lex specialis* principle might be a useful tool to help guide the interpretation, but as argued before, it does not provide sufficient guidance for the interplay. Rather, he argues that the principle only determines which rule will prevail in a particular situation, and thus, that all situations must be analysed individually. There are several factors, which are important when determining what rule that is special in relation to a specific situation. If a situation has two applicable rules, the rule that applies, is the one, which has the largest 'common contact surface area' with the situation i.e. the one best suited for the 'systemic context'.[189] This requires that the rule address a problem explicitly. To be able to apply this notion in practise, he draws up 6 possible and different ways, in which the rules under IHL and HRL can relate to each other, and with a specific focus on issues that will be of more importance during 'new' types of conflicts. Sassòli

[186] Murray, *supra* note 42, 101-103.
[187] Murray, *supra* note 42, 106-7.
[188] Sassòli, *supra* note 43, 9.
[189] Sassòli, *supra* note 43, 19-20.

underscores that the lines between the neighbouring categories in his framework might sometimes be a bit blurry.

Sassòli's framework expands on ICJ's 3 possibilities as laid out in its advisory opinion on *the wall,* in which the first situation is one where IHL deals with questions not covered by HRL, meaning that IHL has certain rules that can not be deduced from human rights treaties.[190] Thereby, this is what ICJ describes as an issue that is *exclusively* a matter of international humanitarian law.[191] Secondly, Sassòli also points to the opposite situation, i.e. what ICJ describes as issues that are *exclusively* a matter of human rights law.[192] Sassòli argues that when IHL has no rules on a specific issue, and HRL does, the latter is obviously *lex specialis,* even during an armed conflict. As an example, he points to the right to freedom of expression, in which IHL does not provide any rules to protect during for instance occupation or in NIACs. Sassòli argues that this silence cannot just lead to the abolishment of such rights, and thus, they must instead be governed exclusively by HRL. In the context of new wars, this notion is particularly interesting when questioning what degree of force is admissible against civilians who do not take direct participation in the hostilities. Sassóli argues that IHL does not provide any specific rules concerning this, only that direct attacks against civilians are of course prohibited. Thereby, situations in which civilians commit crimes or disturb public order might require police operations, and these will be governed not by IHL, but HRL. In new types of conflicts this is especially poignant, as they will often include a mix of situations that bounce back and forth between military operations and police operations that simply enforce the law or re-establish public order.[193]

Expanding on the third possibility the ICJ points to, i.e. matters in which both IHL and HRL are relevant, Sassòli argues that it can be elaborated to four different forms. First, situations in which IHL prevails over an applicable rule of HRL, more specifically situations where both legal regimes might present relevant rules, but where the systemic context dictates that the IHL-rule will prevail. Again, referring to new types of conflicts, Sassoli points to the difference between internment of prisoners of war (POWs) and internment of persons who

[190] Sassòli, *supra* note 43, 20.
[191] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ, 2004 p 136, para. 106.
[192] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ, 2004 p 136, para. 106.
[193] Sassòli, *supra note 43*, 22-23.

are not POWs, and who, therefore, do not benefit from the rights and protections granted from this status. Insofar as POWs, IHL will prevail over the right to judicial procedures that is given by HRL, because of the context of their combatant status. However, this analogy cannot be applied to the internment of persons without POW-status, as they do not benefit from a status that carries with it a detailed regime of protections. Therefore, the systemic context would not allow IHL to prevail in such a situation.[194] Second, situations in which IHL specify a rule of HRL more precisely. Sassòli argues that there are many cases in which one could say that IHL translates human rights into rules of behaviour for belligerents in the context of armed conflicts. For example, in the prohibition of arbitrary detention and arbitrary deprivation of life under HRL. Here, in the situation of an armed conflict, IHL determines what is arbitrary, e.g. disproportionate loss of civilian lives could be an arbitrary deprivation of life. Thus, Sassòli is very much in line with the ICJ's AO on nuclear weapons. However, Sassòli argues that there are also situations, where IHL cannot specify a rule of HRL, e.g. the deprivation of life in a police operation directed against civilians or the justification of the detention of a person in a NIAC.[195] Thus, the third type of situation is the opposite of the above, more specifically when HRL as *lex specialis* specifies or interprets a rule of IHL that is ill defined. An example of a situation where HRL can specify a rule under IHL is in CA 3, where it is prohibited to pass a sentence without "the judicial guarantees, which are recognized as indispensable by civilized peoples."[196] However, CA 3 does not prescribe what these judicial guarantees consist of, and therefore, HRL can inform the rule. However, a challenge with this approach is to ensure that the decisions of the human rights bodies are also applicable during armed conflicts, even though the decisions were not issued in this context.[197] Fourth and last, is situations in which HRL has revised a rule of IHL. The continued development of the human rights regime subsequent to the formation of the GCs in 1949, allows for the possibility that some human rights might have come to prevail over the IHL-rules. For instance, it might be possible to argue that a decision to intern civilians for imperative reasons of security must be under review with much shorter intervals than originally required by IHL.[198]

[194] Sassòli, *supra* note 43, 20-21.
[195] Sassòli, *supra* note 43, 21.
[196] GC I-IV, *supra* note 23, Common Article 3.
[197] Sassòli, *supra* note 43, 21-22.
[198] Sassòli, *supra* note 43, 22.

3.3. Partial Conclusion

In the previous chapter we argued, based on the theory presented by Mary Kaldor and Christine Chinkin, that in order to end new wars, a human security approach, underscoring the importance of human rights, must be applied. This chapter recognise that human rights law was not specifically intended to govern situations of armed conflicts, however, this does not mean that it has no relevance in armed conflict. In fact, based on the universal character of the human rights treaties (and their inclusion of derogation-clauses), as well as existing case law (from ICJ and ECHR), the chapter can conclude that human rights do apply in situations of armed conflict. The chapter furthermore concludes that states are not only obliged to secure human rights on their own territory, but also to secure human rights of the people within their jurisdiction abroad. Thereby, states have an extraterritorial responsibility when they have either effective control over a given territory i.e. territorial jurisdiction or effective authority over a given individual i.e. personal jurisdiction. However, that human rights law also applies in armed conflict, does not mean that IHL cease to, and thus, the chapter puts forward a framework for how to merge the two regimes. Daragh Murray and Marco Sassòli both argue for applying a less rigid *lex specialis* approach, in which all situations of armed conflicts is automatically governed by IHL, and instead, they propose a more context specific analysis in which both IHL and HRL can inform the situation. The determining factor is the context of the rules in relation to the situation i.e. what Murray defines as the existence of explicit rules designed for the situation. What they both propose is a more practical approach to the application of law - to ask which regime that is best suited to address the given situation. Thereby, Murray and Sassòli puts forward a way to implement Kaldor and Chinkin's human security approach, and it is with the 'toolbox' they provide, the following chapter will analyse the Danish military manual.

4. The Danish Military Manual, Human Rights and New Wars

The previous chapters have shown that in order to address the challenges of new wars including especially distinction between civilians and enemies, as well as in order to be able to end new wars, a human security approach must be applied. In *jus in bello* this requires a merge between IHL and HRL. This chapter will try to determine whether the Danish military manual has effectively incorporated HRL, and thus, is capable of addressing the challenges of new wars. The analysis will through the lenses of Murray and Sassoli, who both provide a 'toolbox' for how to apply HRL in situations of armed conflict, discuss the manual's application of HRL. The chapter will commence with an outline of the manual's overall implementation of human rights, including its interpretations of extraterritorial applicability and the interplay with IHL. In the following section, the chapter will look into the manuals interpretation of two main actions of warfare, namely, killing and capturing of the enemy, and whether these are in accordance with a human security approach. Lastly, the chapter will conclude whether, the manual as it stands, can enhance the Danish armed forces' ability to address the challenges of new wars.

4.1. The Overall Implementation of Human Rights Law in the Danish Military Manual

In order to be able to better understand the manuals overall implementation of human rights, this section will commence with an analysis of the manual's purpose, followed by the manuals take on human rights applicability in armed conflicts, including its interpretation of both extraterritorial applicability and the interplay between HRL and IHL.

4.1.1. The Purpose of the Danish Military Manual

The Danish military manual is developed to guide the Danish defence in the international law applicable to international military operations. As it is 700-pages long, it is not meant for every soldier's pocket, but rather a framework for the education of Danish armed forces as well as the application of the law. Its subtitle *on International Law for Danish Armed Forces in International Military Operations,*[199] sets the manual out from the beginning, because it refers to international law in general, and not only the law applicable in armed conflicts. International law governs interaction between sovereign states, and covers subjects as different as the environment, the sea and the outer-space as well as international crimes,

[199] Knudsen (ed.), *supra* note 12, 22.

human rights and of course the conduct of hostilities. The manual could have been restricted to only include international humanitarian law which is the legal regime developed specifically to regulate armed conflicts, however, in the introduction, the manual make it clear that it is not only meant for military deployment to armed conflicts, but also operations in peacetime.[200] Thereby, the manual clearly cannot rely on IHL alone. In chapter 3 entitled *An overview of the applicable international law in missions*, the manual outlines the international law relevant for Danish armed forces' deployment in different scenarios. Apart from giving an introduction to international law in military operations, the manual also explains that a couple of specific questions, that over the years have required special attention will be addressed. One of them is the question of the applicability of human rights.[201]

But why did Denmark chose to make a military manual, which is more inclusive in terms of both legal regimes and situations, instead of one specifically applicable for armed conflict? Other countries military manuals, as for example the US' 'Law of War Manual' (2015), the UK's 'The Joint Service Manual of the Law of Armed Conflict' (2004), and Norway's 'Manual in International Humanitarian Law,' (2013),[202] are evidently just about armed conflict situations, and do not include other regimes than IHL. It looks as if the Danish manual wishes to be more ambitious than its counterparts, and the inclusion of international law in general, and human rights law in particular is in fact a novelty, which could imply an effort to grapple with the complexities of new wars. It is also an indication of the changes in the tasks the military traditionally has held, and it especially reflects the international stabilisation operations Denmark participates in which require a more comprehensive approach as described in the introduction.

[200] Knudsen (ed.), *supra* note 12, 23.
[201] Knudsen (ed.), *supra* note 12, 64.
[202] The U.S. Department of Defence, *Law of War Manual*, 2nd edition, 31 May 2016 (available at: https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190); The UK Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflic*t, 1 July 2004, (available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf); Forsvarsdepartement, *Manual i krigens folkerett*, 19 March 2013, (available at: https://brage.bibsys.no/xmlui/bitstream/id/201436/manual%20krigens%20folkerett.pdf).

4.1.2. The Danish Military Manual and Human Rights Law

In chapter 3, the manual states, "human rights and their applicability in military operations is an issue which during the last years has incurred great attention in the debate on international law."[203] Thus, the manual recognise the on-going debate, elaborated in the previous chapters, and by being the first military manual to actually include human rights it feeds into this. In the 14-pages long section on human rights within chapter 3, the manual immediately sets out that it will only address human rights in a superficial manner, both in a general manner in chapter 3, as well as throughout the manual when it is relevant given specific contexts.[204] In its consultation response, Amnesty International Denmark concludes, "the manual's overall assessment of human rights is short, superficial and generic."[205] Peter Vedel Kessing from the Danish Institute for Human Rights agrees in his response:

"The section seems - even more in the light of the amount of pages the manual spends on describing various standards in the international humanitarian law - in particular short, and gives only a very limited guidance to selected human rights standards and their possible operational impact."[206]

He adds that especially the section on *particular relevant, fundamental human rights* as well as the description of when derogation or limitations to human rights standards are allowed is short and sometimes not even entirely correct or adequate. In the final and public version of the manual, the section on human rights has, however, not been further elaborated, except for the part on derogation, where the manual has incorporated Kessing's suggestions. The corrections entail an elaboration of the meaning of derogation, comprising a clarification of the possibility of limiting some rights in specific situations, e.g. when the security of the state is threatened.[207] In the revised version of the manual, the list of the particular relevant, fundamental human rights has however not been updated. The list includes the same rights with the same assessment of their meaning and possible limitations with only very few

[203] Knudsen (ed.), *supra* note 12, 65.
[204] Knudsen (ed.), *supra* note 12, 81.
[205] Amnesty International Denmark, *Høringssvar over udkast til Militærmanual om Folkeret i Internationale Militære Operationer*, 7 Marts 2016, 3 (available at: https://hoeringsportalen.dk/Hearing/Details/59198).
[206] Peter Vedel Kessing, *Høring over udkast til Militærmanual om Folkeret i Internationale Militære Operationer*, 7 March 2016, 8 (available at: https://hoeringsportalen.dk/Hearing/Details/59198)
[207] Peter Vedel Kessing, *Bilag - Militærmanual version 2 DOK470877+IMR [DOK495261] (kommentarer i MM)*, 7 March 2016, 57 (available at: https://hoeringsportalen.dk/Hearing/Details/59198).

editions. The list includes among others 'the right to life comprising the prohibition of death penalty', 'the prohibition of torture or other cruel, inhuman, or degrading treatment or punishment' and 'the right to personal liberty and security'.[208] Chapter 3 of the manual also discusses the other two central points regarding the application of human rights, presented in section 3.2.2: the extraterritorial applicability and the interplay between HRL and IHL.

4.1.3. The Danish Military Manual and Extraterritorial Applicability

The Danish military manual's interpretation of extraterritorial applicability is based on case law from the ECtHR. The manual writes that a state's human rights obligations are primarily applicable within its own territory, but adds that in exceptional situations a state can also be obliged by HRL outside its own territory. In these situations, the manual argues that human rights obligations from the European Convention on Human Rights apply as a minimum in situations where a state outside its own territory "exercises physical effective control over individuals (personal jurisdiction), effective control over a territory (territorial jurisdiction), as well as when a state exercises public powers with the consent of the territorial state."[209] Thus, the manual accepts that its human rights obligations under the ECHR apply extraterritorially, and adopts the notion, proposed by the ECtHR interpretation guide on jurisdiction (see section 3.3.1.), in which states can have jurisdiction based on control exercised over a person (personal jurisdiction); or based on control exercised over a foreign territory (territorial jurisdiction). The manual's interpretation of effective control for the conclusion of territorial jurisdiction is defined primarily based on the magnitude of troops on the ground. Other relevant factors are whether the support to the local administration gives the foreign forces influence and control in the region.[210] The manual's interpretation of effective control for the conclusion of personal jurisdiction is defined as the physical and effective control over the individual.[211] The last type of jurisdiction presented by the manual, the one of public powers, is when a state exercises public powers, normally exercised by local administration, by consent or invitation.[212] This type of jurisdiction, is by the ECtHR also a matter of effective authority, and therefore, categorised as personal jurisdiction in the

[208] Knudsen (ed.), *supra* note 12, 89-94.
[209] Knudsen (ed.), *supra* note 12, 82.
[210] Knudsen (ed.), *supra* note 12, 83-84.
[211] Knudsen (ed.), *supra* note 12, 82-83.
[212] Knudsen (ed.), *supra* note 12, 84-85.

interpretation guide.[213] To sum-up, the military manual proposes three types of extraterritorial jurisdiction in which human rights obligations would apply for Danish armed forces abroad, where the ECtHR only proposes two, however, it is merely a matter of different categorisation, as public powers is also based on personal jurisdiction.

4.1.4. The Danish Military Manual and the Interplay Between Human Rights Law and International Humanitarian Law

The interpretation of the interplay between the two regimes is decisive for the application of HRL in situations of armed conflict. The manual sets out to identify the specific role it sees for human rights in armed conflict. Its starts out by stating that human rights are, in principle, applicable at all times, as the rights of people are not dependent on whether they live in situations of war or peace, even though the manual acknowledges that a situation of war naturally brings human rights under pressure. Much in line with what the thesis argues in section 3.3.1. The manual, thereafter, elaborates how it sees the interplay between IHL and HRL in situations of armed conflict. In a few situations the two regimes will be in conflict, for example with the right to life, but in a wide range of other situations, HRL will be able to complement IHL, for example with fundamental guaranties in situations of detention. The manual, furthermore, states, "to the extent that human rights apply outside Denmark's territories, the Danish armed forces, to the extent possible, must interpret the two regimes in the most harmonic way possible."[214] This interpretation is very much in line with the premise of the thesis - and the argument of Kaldor and Chinkin, Murray and Sassoli. The manual does not provide a guideline for how or when human rights are supposed to be implemented, besides that it ought to be in harmony with IHL, however, it does add two important facts, about the situations where human rights have a role to play. First, the manual argues, "the relatively simple regulation of NIACs implies that there are more issues which is regulated by customary law, or where human rights are ascribed a greater significance, than in the case of IACs."[215] Thus, the manual implies that HRL should play a more significant role in NIACs, but does not eliminate the possibility of HRL relevance in cases of IACs either. Second, the manual also writes that the application of human rights is affected by the amount of control exercised in a given situation:

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[213] *Guide on Article 1 of the European Convention on Human Rights. Obligation to respect human rights – Concepts of "jurisdiction" and imputability*, European Court of Human Rights, 31 August 2018, paras. 21-25.
[214] Knudsen (ed.), *supra* note 12, 88.
[215] Knudsen (ed.), *supra* note 12, 42.

"The intensity of the battle can change, and the amount of control with territories varies. Thus, it is not just a question of identifying the human rights relevant for a specific armed conflict when the first troop contribution is submitted to an international military operation, but also a question of doing it continuously."[216]

In his consultation response, Peter Vedel Kessing from the Danish Institute for Human Rights points out that this could imply that the manual acknowledges that in low-intensity situations, where the Danish armed forces have a greater amount of control over the territory, HRL can play a bigger role.[217] Thus, the manual's presentation of intensity and control, as tools for determining the relevance of human rights, has clear similarities with the theories developed by Murray and Sassòli (see 3.2.3). Murray argues that the role of human rights in specific situations is both a matter of the existence of an *explicit rule* and that the rule is *designed for the situation.* The latter is among other things determined after the intensity of the fighting, and the level of control exercised by the state in question. Murray argues that in situations characterised by low intensity fighting and a high level of control, what he calls security operations, HRL should be the primary legal framework and IHL the secondary. The manual does not elaborate further on the interplay between the two regimes, but states that the role of the human rights regime will be touched upon in the context of specific rules throughout the manual. Thereby, it is difficult to make any immediate conclusions on how the manual interprets the application of HRL. In another consultation response, professor in International Law, Frederik Harhoff, argues that the manual is unclear on what legal regimes govern what military operations, and adds that the manual would become more clear from including a guide on this, based on the characteristics of specific situations.[218]

To sum up, the manual presents three overall guidelines for its application of human rights: that the interplay of HRL and IHL should be incorporated in a harmonic way, that intensity and amount of control matters for the application of HRL, and finally, that HRL can play a significant role in NIACs. Furthermore, it concludes from the onset that human rights will be

[216] Knudsen (ed.), *supra* note 12, 88.
[217] Peter Vedel Kessing, *Høring over udkast til Militærmanual om Folkeret i Internationale Militære Operationer*, 7 March 2016, 8 (available at: https://hoeringsportalen.dk/Hearing/Details/59198).
[218] Frederik Harhoff, *Vedr.: Høring over udkast til dansk Militærmanual om folkeret i internationale militære operationer,* 6 March 2016, 5 (available at: https://hoeringsportalen.dk/Hearing/Details/59198).

applicable to the Danish armed forces abroad when they have personal and/or territorial control. However, it omits to provide a guideline on how the 'harmonic interplay' between HRL and IHL should work in practise. The three overall guidelines lay the groundwork for the manual, but as it does not give more specific guidance, the next sections will look into how the manual interprets the rules regulating targeting and detention, in order to uncover how it incorporates HRL.

4.2. The Danish Military Manual: Targeting and Detention

The manual promises that the role of human rights will be elaborated further, when relevant, in the context of specific rules throughout the manual. Therefore, in order to be able better understand the manuals implementation of human rights, the thesis will now turn to the rule-specific interpretations. The section will be divided into two parts, focusing on targeting and detention, respectively. The rules governing targeting and detention under IHL include a potential clash with HRL, and therefore, it is interesting to test the human security approach' merge of IHL and HRL in relation to these two areas. The sections will test both whether the manual follows its own three overall guidelines presented in previous sections, as well as how the interpretations relate to the guidelines proposed by Murray and Sassòli.

4.2.1. Targeting in New Wars: How to Define the Enemy as a Legal Target

The changing conditions for civilians and enemies in new wars are especially reflected in the process of determining who is a legitimate target, and the blurred lines between civilians and enemies, demands an extremely difficult, but important effort of the armed forces engaged in new wars. They need to make a qualified distinction between who has a right to protection and who does not. This section will discuss the Danish manuals approach to targeting. The legalisation of targeted killings is an essential part of IHL, as it allows for what would, under other circumstances, be murder. This is of course under the prerequisite that it is a legal target, i.e. that it is the enemy. As discussed, IHL is not very helpful when it comes to defining the enemy in NIACs, because the regime does not contain a combatant status. Therefore, in order to determine when targeting is legal, this section will commence with a discussion of the different categories that do exist in the treaty law for NIACs: civilians and civilians directly participating in hostilities. Most time will, however, be spend on the possibility of a third 'enemy category', that would look more like the combatants category in IACs, in that it allows for legal targeting throughout the entire armed conflict. The

differences between the US military manual's use of unprivileged belligerents and the Danish manual's use of ICRC's continuous combat function is used to illustrate the problems regarding targeting that arises in a new war context. Finally, the section will use the 'toolbox' proposed by Murray and Sassòli in order to identify another approach to targeting that is more in tune with the human security approach.

4.2.1.1. Civilians, Civilians Taking Direct Part in Hostilities and Enemies

As mentioned above, treaty IHL only distinguish between civilians and civilians directly participating in hostilities (DPH). Meanwhile, NIACs include organised armed groups, and therefore, not all individuals who take part in the conflict can be categorised as merely civilians taking direct participation in hostilities. The problem is that IHL neither defines what constitutes DPH, nor membership of an organised armed group, and thereby, distinction becomes very difficult. The ICRC's guidance on the notion of direct participation in hostilities, introduced in section 2.2.2, proposes to merge these two issues, and puts forward a way to define 1) which acts amounts to taking direct participation in hostilities, and 2) how to distinguish between civilians taking direct participation in hostilities on a spontaneous, sporadic, or unorganized basis, and members of organised armed groups.[219] The Danish Manual incorporates ICRC's guidance in both matters, and thus, the next sections will first provide a quick overview of what it means to lose protection for such time as there is direct participation, and then discuss what it means to lose protection as a member of an organised armed group, and thereby, become a legitimate target for the entire conflict, i.e. a way to define the enemy in new wars.

4.2.1.2. Civilians Taking Direct Part in Hostilities

Protection of civilians during armed conflict is a key concept of IHL, and thus, there must be clear instructions on when and how civilians can lose their afforded protection. The Danish military manual highlights 3 examples of situations, in which this has been especially difficult throughout Danish engagement in armed conflicts the last decades: 1) the use of civilian collaborators by Danish armed forces, 2) the use of force to fight crime or disturbances in occupied or controlled territories, and 3) the distinction between actions that amount to direct participation in hostilities and other more supporting actions, that does not

[219] *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law,* International Committee of the Red Cross, May 2010, 4.

have amount to DPH.[220] The 3 examples underline the difficulties for IHL in general, and for IHL in new wars in particular, because the understanding of civilians and their role in the armed conflicts are essentially different (see 2.3.2.). The first example questions what it means for civilians when they are solving tasks close to the battlefield. In Afghanistan and Iraq, Danish forces have, for example, had issues following its use of local interpreters. As it turned out, the interpreters that worked for the Danish armed forces later on filed for asylum in Denmark, because they no longer felt completely safe in their home countries. Thereby, the use of national collaborators in an otherwise civilian capacity as interpreters became complicated because they got involved in the armed conflict, and Denmark had to consider whether they had a responsibility towards them.[221] Second example points to the difficult line between illegal actions that are related to the armed conflict, and illegal actions that take place unrelated to the armed conflict. As we shall see later this is a very important division in the Danish military manual, because it determines when the Danish forces apply IHL, and when other sources of law might be relevant. Third example goes to the heart of what ICRC is trying to answer with its guidance on DPH, and thus, on the next pages the Danish manual outlines its approach to DPH. The manual presents three cumulative criteria that must be fulfilled in order for a specific act to qualify as direct participation. First, the act must reach the threshold of harm, second, the act must have a direct causation with the (expected) resulted harm, and third, there must be a belligerent nexus, i.e. the act must be in support of a party to the conflict and to the detriment of another.[222] While these criteria do provide a more specific guide, it still requires a lot of effort to make a qualified distinction, and the Danish manual also writes that qualified decisions will rest on a thorough gathering of intelligence.[223] With the incorporation of the three criteria the manual can now answer what actions that amounts to DPH, and thereby, the loss of protection for such time as the act is on-going. However, civilians will gain protection as soon as the act is concluded (which of course does not mean that the civilian could not be eligible for arrest and prosecution, if the act was criminal).[224] This entails that civilians can lose and gain their protection according to their

[220] Knudsen (ed.), *supra* note 12, 161.
[221] Nørgaard, Niels, "FAKTA: Sådan er tolkesagen forløbet", *Politiken,* 19 August 2013 (available at: https://politiken.dk/indland/politik/politikfakta/art5463249/FAKTA-S%C3%A5dan-er-tolkesagen-forl%C3%B8bet).
[222] Knudsen (ed.), supra note 12, 162; *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law,* International Committee of the Red Cross, May 2010, 46.
[223] Knudsen (ed.), *supra* note 12, 165.
[224] Knudsen (ed.), *supra* note 12, 166.

direct participation, labelled as the problem of the "revolving door". ICRC writes that this is an integral part of IHL, and not a malfunction,[225] however, it does seem to create a "loophole", because it creates the possibility of being farmer by day, and fighter by night, and makes it extremely difficult to legally target individuals who often take part in the armed conflict.[226] This, therefore, leaves us to the second problem the ICRC's guidelines tries to answer, namely, how to distinguish between civilians taking part in hostilities on a sporadic basis and the ones who do so on a more *continuous* basis.

4.2.1.3. Enemies: Unlawful Combatants or Members of a Non-State Organised Armed Group?

This section will trace how the Danish military manual defines membership of organised armed groups in NIACs, in order to determine when it is legal to directly target individual members. As the enemies in new wars are often non-state actors they are not considered combatants according to treaty law, and thus, there has been a tendency to leave them in a legal grey zone. Especially with the post-2001 war on terror this became a thorny issue, as the Bush administration introduced the term 'unlawful combatants' to cover all members of Taliban, Al Qaeda, or associated forces.[227] This meant, among other things, that targeted killings of suspected terrorists around the world became increasingly normal as a part of the war on terror.[228] In the US' Department of Defence Law of War Manual from 2015, unlawful combatants are renamed 'unprivileged belligerents', and of them the US military manual says: "the category of unprivileged belligerent may be understood as an implicit consequence of creating the classes of lawful combatants and peaceful civilians."[229] While it is not argued in the US manual how such a category of unprivileged belligerents has developed implicitly, the US manual refers to previous American definitions in the Military Commission Act of 2006, and the Ex Parte Quirin case from 1942, in which unlawful combatants was defined in relation to spies. Meanwhile, it is important to underline that there is no explicit mentioning

[225] *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law,* International Committee of the Red Cross*,* May 2010, 70.
[226] *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law,* International Committee of the Red Cross*,* May 2010, 72.
[227] The US 109th Congress, *Military Commission Act of 2006*, Public Law No: 109-366, 17 October 2006, para. 948a (available at: https://www.state.gov/documents/organization/150084.pdf).
[228] David Kretzmer, "Targeted killings of suspected terrorists: extra-judicial executions or legitimate means of defence?", *The European Journal of International Law,* vol. 16, no. 2, 2005, 171-173.
[229] The U.S. Department of Defence, *Law of War Manual*, 2nd edition, 31 May 2016, 103. See also 102. (available at: https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190).

of neither unlawful combatants or unprivileged belligerents in IHL treaty law.[230] The Danish military manual does not refer to unlawful combatants or unprivileged belligerents, moreover, it writes: "IHL does not recognize in-between categories. Either you are a civilian or you are a combatant."[231] Thereby, the Danish military manual applies a very different line of interpretation than the US manual. However, the Danish manual recognises that it is not possible to completely equate members of organised armed groups (MOAGs) with civilians, as this would mean that they were under the same protection as civilians, unless, and for such time only, they were directly participating in the armed conflict[232] (the revolving door problem described above). As mentioned, this does not seem as a viable solution. To determine what it means to be a MOAG in practise, the manual refers to ICRC's 'continuous combat function'[233] and writes: "the term is used to operationalise, what it means to be a MOAG to the effect that the member in question can be directly attacked *throughout the whole conflict.*"[234] This clearly highlights the importance of the concept of continuous combat function (CCF): it operationalises what it means to be a member of an organised armed group, and by that it legalises direct attacks throughout the whole conflict, not only for such time as there is direct participation in hostilities. Thereby, the problem of 'farmer by day, fighter by night' is better addressed. The Danish military manual interprets continuous combat function as:

"If a person, on a more continuous basis, takes part in the organised armed groups' activities, and among these regularly carries out tasks, that in isolation constitute direct participation in hostilities, the person will lose the protection granted to civilians for the period from the first participation and for such time until the person through a manifest action declare his or hers resignation from the group."[235]

Thus, the key to membership, and thereby, loss of protection throughout the whole conflict, is that you participate directly in hostilities on a regular basis. Applying the notion of the continuous combat function enables Danish armed forces to better target its enemies in NIACs. The ICRC guidance is not a text of legally binding nature, but as the title indicates,

[230] Melzer, *supra* note 60, 17-18.
[231] Knudsen (ed.), *supra* note 12, 160.
[232] Knudsen (ed.), *supra* note 12, 174.
[233] *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law,* International Committee of the Red Cross*,* May 2010, 33.
[234] Knudsen (ed.), *supra* note 12,175. Emphasis added.
[235] Knudsen (ed.), *supra* note 12, 176.

merely a guide.[236] However, there is always a chance that it will develop into customary law if states incorporate the guidance in their practice and legal argumentation, especially with the absence of any other authoritative guidance on the subject. The US does, however, not recognise significant parts of ICRC's guidance, in its Law of War Manual*:*

"Similarly, although parts of the ICRC's interpretive guidance on the meaning of direct participation in hostilities are consistent with customary international law, the United States has not accepted significant parts of the ICRC's interpretive guidance as accurately reflecting customary international law."[237]

The ICRC guidance has also been heavily criticised, in particular from some of the experts who participated in the process leading to the formation of the guidance.[238] This is also reflected in the disclaimer from ICRC's introduction, underscoring that the guidance "does not necessarily reflect a unanimous view or majority opinion of the experts."[239] However, the consistent reference to the guidance in the Danish military manual signals an acknowledgement of ICRC's interpretation of DPH and CCF, and furthermore, that the manual sees this interpretation as a sound way forward in NIACs. The continuous combat function is a way to address the lack of status in NIACs and the blurred line between civilians and enemies in new wars, however, the question is whether it makes distinction easier, and thereby, enables the military to make better decisions when targeting in new wars. The next section will discuss this in relation to human rights law and will draw on Murray and Sassòli's theoretical framework to do so.

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[236] *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law,* International Committee of the Red Cross*,* May 2010, 6.
[237] Department of Defence, *Laws of War Manual*, 2nd edition, 2016, 227.
[238] Kenneth Watkin, "Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in the Hostilities" Interpretive Guidance", *New York University Journal of International Law and Politics*, vol. 42 (2010); Michael N. Schmitt, "Deconstructing Direct Participation in Hostilities: The Constitutive Elements", *New York University Journal of International Law and Politics*, vol. 42 (2010); Bill Boothby, "And for Such Time as: The Time Dimension to Direct Participation in Hostilities", *New York University Journal of International Law and Politics*, vol. 42 (2010); W. Hays Parks, "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*, vol. 42 (2010).
[239] *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law,* ICRC May, 2010, 9.

Targeting and the Use of Force in NIACs: the Interplay between IHL and HRL

The manual's inclusion of the continuous combat function in order to determine, in which cases it will be legal to target and kill an individual for the duration of the whole conflict, is neither based on treaty nor customary law. Following the conclusions from both Sassòli and Murray (3.2.3.), the decisive matter, when determining what legal regime should be the primary framework to govern a specific situation, is whether there exists an explicit rule designed for the situation. However, the absence of an explicit combatant status in NIACs means that no explicit rule for the situations exists. Murray argues that because of this, human rights law plays an increased role when it comes to the use of force in NIACs.[240] The Danish manual does not seem to agree with him:

"International Humanitarian Law addresses the rules on attacks on military targets and the legality of collateral damage rather detailed. Even though human rights include specific rights that can be relevant when military targets is selected and attacked (among these the right to life and the right to private life), it will from the onset be the special regulation by IHL that find its use. In situations in which both sets of rules contain relevant regulation, it will often be compatible in regards to content. The specific obligations in this chapter are thus solely based on international humanitarian law."[241]

In order to apply HRL, the question is whether it provides a more explicit rule designed for the situation. The right to life is the most relevant human right in relation to targeting, and the European Convention on Human Rights article 2 states, "everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."[242] The right to life ranks as one of the most fundamental provisions in the ECHR, and is defined as a non-derogable right under article 15 (see 3.2.3.).[243] Meanwhile, article 15 also writes: "except in respect of deaths resulting from lawful acts of war." Thus, targeting and killing in armed conflict does not seem to be in violation of article 2, if lawful.[244] Section 3.7

[240] Murray, *supra* note 42, 114.
[241] Knudsen (ed.), *supra* note 12, 276.
[242] ECHR, *supra* note 24*,* art. 2.
[243] *Guide on Article 2 of the European Convention on Human Rights - Right to Life*, European Court of Human Rights, 31 august 2018, para. 2; ECHR, *supra* note 24*,* art. 15 (2)..
[244] Murray, *supra* note 42, 119.

entitled *The use of force in international military operations* in the Danish military manual reaches the same conclusion:

"Military operations, that take place in armed conflict, is regulated by IHL. Among other things, this entail that combatants can take direct participation in fighting, including attack the opponent's armed forces. **Such use of force, that takes place within the frames of IHL, is thus not arbitrarily in relation to article 2 of the ECHR.**"[245]

The above quotation does not comment on the relation between IACs and NIACs, and thereby, simply concludes that all situations that can be defined as armed conflicts relieves the Danish forces from an article 2 responsibility (of course under the prerequisite that the use of force does not violate IHL). The right to life under article 2 applies only when the Danish "armed forces apply lethal armed force against civilians in situations that are not directly related to the armed conflict."[246] Thereby, the manual only accepts article 2 responsibilities in relation to civilians and in situations not related to the armed conflict. The manual describes in details how the use of force must comply with the ECHR article 2 in military operations outside an armed conflict (reflecting the manuals application in peacetime as well).[247]

However, according to Murray, determining which legal regime that applies is about the character of the situation in which an operation is undertaken in. The two frameworks 'active hostilities' and 'security operations', presented in section 3.2.33, is decisive. Thus, if the Danish forces exercise a level of control that makes it possible to conduct a law-enforcement operation the 'security operations' framework applies, i.e. HRL, should be the primary legal regime governing the situation. The 'active hostilities' framework only applies in situations where there is either a sustained and concerted fighting, or a lack of effective territorial control. As the two regimes are mutually replaceable, the 'security operations' framework, therefore, applies to all other situations, including those of low-intensity fighting. The level of control is important, as it determines whether the Danish forces have another feasible option than the use of force. For example, in a case where a MOAG is sleeping in a house i.e. not a situation of active fighting, and where the Danish forces would have control over the

[245] Knudsen (ed.), *supra* note 12, 124.
[246] *ibid.*
[247] Knudsen (ed.), *supra* note 12, 124-128.

situation, the operation will fall within the 'security operations' framework. In such situations, HRL is therefore the legal regime most closely *designed* to regulate targeting in NIACs. Sassòli points to the same requirements as Murray, i.e. that it depends on the situation any given military operation is conducted within. Some operations will resemble situations for which IHL provides the most specific rule designed for the situation, and others will resemble situations where HRL does. Thereby, Sassòli advises that a flexible approach to targeting are applied and writes: "if a government could effect an arrest (of individuals or groups) without being overly concerned about interference by other rebels in that operation, then it has sufficient control over the place to make IHRL prevail as *lex specialis.*"[248] The Danish military manual does not seem to apply such a flexible approach when it comes to the use of force, because MOAGs are generally considered to be liable to attack in the same way as combatants are in IACs. The US' Law of War Manual comments on exactly this, in article 5.8.2.1 '*persons belonging to hostile, non-state armed groups'*:

"The U.S. approach has generally been to refrain from classifying those belonging to non-State armed groups as "civilians" to whom this rule [the continuous combat function] would apply. The U.S. approach has been to treat the status of belonging to a hostile, non-State armed group as a separate basis upon which a person is liable to attack, apart from whether he or she has taken a direct part in hostilities. Either approach may yield the same result: members of hostile, non-State armed groups may be made the object of attack unless they are placed *hors de combat*."[249]

Thereby, the US concludes that even though civilians who take direct participation in the hostilities on a continuous basis, i.e. MOAGs in the Danish manual, are defined by a function and not a status, the result is the same, namely, that IHL provides states with expansive possibilities when it comes to targeting non-state actors.

4.2.1.4 Preliminary Conclusion on Targeting

The Danish manual apply a very different legal reasoning than the US, because membership of an armed organised group is based on function, in which there has to be proof that the

[248] Sassòli, *supra* note 43, 27.
[249] The U.S. Department of Defence, *Law of War Manual*, 2nd edition, 31 May 2016, 228 (available at: https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190).

individual is continuously taking direct participation in hostilities, and not status. The application of the continuous combat function, gives Danish soldiers a tool to address the challenge of legally defining the enemy in new wars, and thereby, the manual somewhat clarifies the IHL framework for NIACs. The continuous combat function is an approach which demands careful calculation and evidence before any action is taken, and thus, in principle, offers a better protection against arbitrary killings than the US approach, in which membership is based on a separate status. The continuous combat function, thereby, share similarities with the law-enforcement regime, because it require proof of an actual action. However, the manual still applies an approach to targeting where IHL is *lex specialis*, and therefore, it does not apply a human security approach. The Danish manual actually promises to include human rights more in NIACs because the legal framework is weaker, but does not seem to apply this reasoning, when it comes to targeting. We argue that situations can occur where the inclusion of human rights, more specifically the right to life, should also be considered. Murray and Sassòli's approach, in which the specific situation is considered, is better suited to address new wars. The section does not wish to argue that there are no situations of NIACs, in which targeting and killing could not be considered completely legitimate, however, it wishes to make the case that in situations where it is possible to apply a security operations framework i.e. HRL, rather than an active hostilities framework i.e. IHL, even though it might not be strictly legally required, it is more sound way forward in regards to ending the conflict in the long run.

4.2.2. Detention of the Enemy in New Wars

This section will zoom in on chapter 12 in Danish military manual entitled *Detainees in custody of Danish armed forces* in order to clarify how Denmark interprets legal issues depriving from the taking of prisoners, something that has caused significant problems for Danish military in past operations. It was the lack of clear legal guidelines for detaining prisoners that led Denmark to avoid taking prisoners, and bypass the issue by applying the "brite-finte". Therefore, it is expectable that chapter 12 on detention provides thorough guidelines for Danish armed forces regarding the taking of prisoners in order avoid future legal issues. The section will commence with an elaboration of the measures the manual prescribes for taking prisoners in the context of armed conflict, especially in NIACs. Then, the section will look into the Danish interpretation of the highly debated precautionary measure of internment, and lastly, the section will consider the manual's take on Danish responsibility when cooperating with foreign forces.

Besides killing, capturing and detaining enemies are some of the most essential measures during armed conflict, however, the law governing detention in NIACs has been one of the most debated areas of IHL the last decade. Two ambitious initiatives have been taken to address this: the initiative by the Danish government labelled *The Copenhagen Process on the Handling of Detainees in International Military Operations* from 2007,[250] and the ICRC initiative *Strengthening Legal Protection for Persons Deprived of their Liberty in Non-International Armed Conflict* from 2011.[251] Whereas the Copenhagen Process was concluded in 2012 with a non-binding instrument of principles and guidelines, the ICRC initiative is still on-going. A 2015 resolution affirmed the mandate to continue ICRC's process with the purpose of producing more concrete and implementable non-legally binding outcomes which could strengthen IHL in regards to protections for persons deprived of their liberty in armed conflicts in general, and in NIACs in particular.[252] The existing rules governing detention in NIACs is, especially in comparison to the detailed IAC framework, weak. This is especially true, in regard to the question of deciding who can be detained. In IACs, the Geneva Conventions clearly prescribes two types of individuals who can be detained: combatants, who upon capture become prisoners of war (POWs),[253] and under certain circumstances, civilians.[254] However, in NIACs, there is no combatant status, and thus, who can be detained is determined based on function instead of status, which also means that all detainees in NIACs are, in principle, civilians. This leads to two main issues, where the lack of clear rules on detention in NIACs is evident. First is, the determination of when, i.e. on what grounds, and second is, the determination of how, i.e. following which procedures, a person can be deprived of their liberty during an armed conflict. In IACs, the POW status means that the enemy may be deprived of his or hers liberty without criminal charges, as a preventative security measure, until the end of the hostilities.[255] The law also provides that civilians may be detained, however, only for imperative reasons of security, and only if absolutely

[250] *The Copenhagen Process on the Handling of Detainees in International Military Operations*, Copenhagen, 19 October 2012 (available at: http://um.dk/da/Udenrigspolitik/folkeretten/folkeretten-a/magtanvendelse-og-den-humanitaere-folkeret)
[251] International Committee of the Red Cross, *Strengthening Legal Protection for Persons deprived of their Liberty in relation to Non-International Armed Conflict: Regional Consultations 2012-13,* Background Paper, 1-2 (available at https://www.icrc.org/en/doc/assets/files/2013/strengthening-legal-protection-detention-consultations-2012-2013-icrc.pdf).
[252] International Committee of the Red Cross, *Strengthening international humanitarian law protecting persons deprived of their liberty*, resolution 32IC/15/R1, 8-10 december 2015, paras. 8-9.
[253] GC III, *supra* note 23, art. 4.
[254] GC IV, *supra* note 23, art. 42, 78.
[255] GC III, *supra* note 23, art. 21.

necessary.[256] In NIACs, the only existing IHL treaty law governing detention is article 5 of AP II. The article prescribes a list of provisions, which "shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."[257] Thus, the article does not provide rules governing the grounds or procedures for depriving a person of their liberty. However, the wording of the article is usually interpreted to allow for the possibility of both detention and internment in NIACs.[258] Rule 99 of the ICRC customary law study confirms this when it concludes that deprivation of liberty is prohibited in NIACs if it is arbitrary.[259] Thus, IHL of NIACs only contains a negative definition of detention and no explicit authorisation. The essential difference between NIACs and IACs is the lack of reciprocity. Because the rights of other states will not be engaged in NIACs there is a pre-existing legal system (domestic law), which is fully applicable to the situation. Thus, opposite IACs, a domestic legal framework is sufficient to regulate detention in NIACs.[260] However, the Danish military manual's interpretation is a bit different. The next section will elaborate on, first, the grounds on which the manual determines detention in NIAC as legal (security risk and criminal offenses), and second, the manuals presentation of the procedural rights of the detained in such a situation. Last, the section will seek to conclude whether and how HRL could strengthen the manuals approach to detention.

4.2.2.1. The Danish Military Manual: Detention in NIACs

The Danish military manual prescribes two grounds for when deprivation of an individual's liberty in a NIAC is legal. First, "civilians who constitute a security risk, and who is detained on the basis of safety considerations",[261] and second, "civilians who is suspected of criminal offenses and is detained with the purpose of criminal prosecution."[262] Thereby, the line between civilians, criminals, and enemies is blurry. Civilians detained for safety considerations have not yet committed a crime, but pose a significant security threat. Civilians detained with the purpose of criminal prosecution has done something defined as

[256] GC IV, *supra* note 23, art. 42, 78.
[257] AP II, *supra* note 23, art. 5 (1).
[258] AP II, *supra* note 23, art. 5 (1)
[259] *Customary Law Study*, International Committee of the Red Cross, December 2018, rule 99.
[260] Dapo Akande and Lawrence Hill-Cawthorne, "Locating the Legal Basis for Detention in Non-International Armed Conflicts: A Rejoinder to Aurel Sari", *Blog of the European Journal of International Law*, 2 July 2014, (available at: https://www.ejiltalk.org/locating-the-legal-basis-for-detention-in-non-international-armed-conflicts-a-rejoinder-to-aurel-sari/)
[261] Knudsen (ed.), *supra* note 12, 464.
[262] *ibid*.

unlawful under domestic law, either with no relation to the conflict e.g. stealing, or with a relation to the conflict e.g. participating in warfare without a combatant-status. The legal regime governing civilians who is deprived of their liberty based on a criminal offenses - whether with or without relation to the conflict - is HRL in both IACs and NIACs, and this part will not be elaborated further here. Instead, the analysis will focus on detention based on safety considerations also referred to as security detention, administrative detention, or as here, internment.

The grounds of internment in NIACs

The Danish military manual prescribes that in NIACs the internment of civilians is legal when they pose a qualified security risk: "on the territory where the conflict is taking place when there is an absolute requisite with regard to the security of the state in question or other states".[263] Thus, internment of civilians is a detention carried out to prevent future activity.[264] In IACs the legality of internment is provided for in the GC IV in regards to two situations - during occupation and on a states own territory. The military manual concludes that the legal basis for internment of civilians in NIACs exists in AP II article 5, because the provisions, as elaborated above, contains a definition of what treatment is prohibited under internment, and thus, it entails an implicit authorisation of internment. Furthermore, the manual argues that because CA 3 implicitly allows targeting of those taking an active part in hostilities i.e. the enemy, detaining and interning them, which seems as a less intrusive measure, must therefore also be an appropriate possibility.[265] Moreover, the manual argues that internment of civilians for security reasons in NIACs are generally accepted as customary IHL. The sources it uses as references for this claim is, for example, rule 128 of the ICRC customary law study, rule 12 of the Copenhagen Process, and extracts from reports and resolutions from the ICRC process of strengthening IHL protecting persons deprived of their liberty.[266] However, the ICRC customary law rule 128, concerning the release and return of persons deprived of their liberty, only mentions the internment of civilian internees in relation to IACs. It states that "civilian internees must be released as soon as the reasons which necessitated internment no longer exist, but at the latest as soon as possible after the close of active hostilities",[267] but does not in any way indicate that this rule should also apply in NIACs. It does state that in

[263] Knudsen (ed.), *supra* note 12, 473.
[264] Murray, *supra* note 42, 189.
[265] Knudsen (ed.), *supra* note 12, 476-477.
[266] Knudsen (ed.), *supra* note 12, 476.
[267] *Customary Law Study*, International Committee of the Red Cross, December 2018, rule 128.

NIACs persons who have been deprived of their liberty must be released as soon as the reasons for the deprivation of liberty has ceased to exist,[268] but this seems like a vague argumentation for the existence of customary law concerning the internment of civilians. Rule 12 of the Copenhagen Process explicitly refers to internment based on security reasons. The rule states:

"A detainee whose liberty has been deprived for security reasons is to, in addition to a prompt initial review, have the decision to detain reconsidered periodically by an impartial and objective authority that is authorised to determine the lawfulness and appropriateness of continued"[269]

Thus, the rule provides some procedural measures for those who have been detained for security reasons, however, it does not refer to either NIACs or IACs and does not provide any clarifications of what security reasons entail or who can be detained in the first place.[270] Several of the consultation responses has touched upon the manual's interpretation of security internment in NIACs, however, they disagree internally on whether the manual's interpretation is correct.[271] Jacques Hartmann argues that the interpretation is highly controversial, has been overruled by national courts, and is in opposition to the general interpretation of the ECtHR.[272] According to Jens Elo Rytter and Anders Henriksen there seems to be good arguments supporting the manual's conclusion, however, they also point to

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[268] *ibid.*
[269] *The Copenhagen Process on the Handling of Detainees in International Military Operations*, Copenhagen, 19 October 2012, rule 12 (available at: http://um.dk/da/Udenrigspolitik/folkeretten/folkeretten-a/magtanvendelse-og-den-humanitaere-folkeret)
[270] *ibid.*
[271] Jacques Hartmann, *Høring over udkast til dansk militærmanual om folkeret i internationale militære operationer,* 7. march 2016, 2 (available at: https://hoeringsportalen.dk/Hearing/Details/59198); Peter Vedel Kessing, *Høring over udkast til dansk militær manual om folkeret i internationale militære operationer,* 7 March 2016, 12-13 (available at: https://hoeringsportalen.dk/Hearing/Details/59198); Anders Henriksen and Jens Elo Rytter, *Høringssvar til udkast til Dansk Militærmanual,* 1 March 2016, 3 (available at: https://hoeringsportalen.dk/Hearing/Details/59198); Røde Kors, *Høringsvar til udkast til Dansk Militærmanual om folkeret i internationale militære operationer,* 7 March 2016, 12-13 (available at: https://hoeringsportalen.dk/Hearing/Details/59198).
[272] Jacques Hartmann, *Høring over udkast til dansk militærmanual om folkeret i internationale militære operationer,* 7. march 2016, 2 (available at: https://hoeringsportalen.dk/Hearing/Details/59198).

the fact that the ECtHR in *Hassan v. UK* allegedly concludes the opposite.[273] In the *Hassan v. UK* the ECtHR concludes (see 3.2.2.) that the ECHR's safeguards continues to apply during armed conflict, however, only in international armed conflicts:

"It can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers."[274]

Thereby, the Court underscores that its conclusions regarding civilians who pose a threat to security cannot be directly applied to cases of non-international armed conflicts, as the IHL framework for detention is much weaker here. Peter Vedel Kessing adds that the Danish manual's interpretation is, therefore, most likely in contrast to ECtHR case law, and seems to be in direct opposition to the manual's own guidelines of enhancing the incorporation of HRL in NIACs (see 4.1.).[275] The manual does actually touch upon the jurisprudence of the ECtHR in a footnote inserted after its claim that security internment is legal in NIACs. Here the manual writes that in spite of the Court's emphasis that its findings in *Hassan v. the UK* only was valid during IACS, the manual deems that there are "significant arguments strongly suggesting a legal basis to intern civilians during NIACs".[276]

The Procedures of Internment in NIACs

The Danish military manual argues that there are certain procedural obligations in relation to the internment of civilians for security reasons in NIACs. Hence, it prescribes that:

"The civilian who is interned for security reasons has a right to get the decision of internment tried, and decisions in appeal cases has to be settled within the shortest time frame possible. If

[273] Anders Henriksen and Jens Elo Rytter, *Høringssvar til udkast til Dansk Militærmanual,* 1 March 2016, 3 (available at: https://hoeringsportalen.dk/Hearing/Details/59198).
[274] *Hassan v. the United Kingdom*, Judgement, European Court of Human Rights, 16 September 2014, para. 102.
[275] Peter Vedel Kessing, *Høring over udkast til dansk militær manual om folkeret i internationale militære operationer,* 7 March 2016, 12-13 (available at: https://hoeringsportalen.dk/Hearing/Details/59198).
[276] Knudsen (ed.), *supra* note 12, 476.

the decision of internment is sustained, it has to be submitted regularly, if possible every sixth month, to a competent body for a renewed process."[277]

These rules, however, is not based on the existing treaty law governing NIACs, as neither AP II nor CA 3 elaborates on the procedural safeguards regulating internment. The manual refers instead to article 78 of GC IV, to customary IHL specifically rule 99 of the ICRC customary law study, and to rule nr. 12 of the Copenhagen Process.

Internment in NIACs: The Interplay between IHL and HRL

As shown above, the Danish military manual does not seem leave much room for HRL in its interpretation of the grounds and procedures of internment in NIAC. On the interplay between IHL and HRL in situations of internment, the Danish manual writes:

"This lack of clear rules affects the interplay between the human rights and the rules of international humanitarian law, as the specific rules, especially meant for armed conflict, displace the more general human rights rules, regarding for example the right to promptly be brought before a judge in order to try the reason for arrest. It is the special situation the state is in during armed conflict, which is decisive for the internment of civilians in NIACs. It dictates a model of internment inspired by the one applicable in IACs."[278]

Thus, the manual applies a strict *lex specialis* interpretation of IHL, in which the rules governing grounds and procedures of internment in NIACs are concluded primarily on the basis of IHL. Still, it does not completely discard HRL, but introduces four human rights inspired measures, which can be applied to improve the protection of individuals and avoid arbitrary deprivations of liberty. The measures are procedural guarantees and only applicable if the situation allows. Thus, the manual specifies that HRL does not necessarily cease to apply, even though IHL is *lex specialis*, but that HRL could be applied as a secondary framework in these situations.[279] However, the bottom line is, as also concluded in the *Hassan v. the UK* case, that even though IHL is definitely *lex specialis* when it comes to internment in IACs, the lack of legal norms for internment in NIACs, makes it harder to argue for the same application there. Therefore, the question is whether IHL is in fact the

[277] Knudsen (ed.), *supra* note 12, 477.
[278] *ibid*.
[279] Knudsen (ed.), *supra* note 12, 477-478.

primary framework.[280] Both Sassòli and Murray prescribes that the primary legal regime must be the one best suited to the systemic context i.e. the one presenting the most explicit rules designed for the situation (see 3.2.3.). Obviously, IHL does not present us with very explicit rules designed for this specific situation of internment in NIACs. Even though the rules presented in IHL for IACs might be explicit, they are not designed for the specific situation, as they are not meant for governing the detention of individuals based on function instead of status. Following Sassóli and Murray's argument, HRL should, thereby, play a bigger role than merely as an optional secondary framework, because the regime can provide more explicit rules designed for the situation.

The human rights treaties establish a number of important protections applicable for both detention and internment, first and foremost that the grounds and procedures for deprivation of liberty must be established by law and must not be arbitrary.[281] In article 5 (1), the ECHR lists the grounds, in which deprivation of liberty is not arbitrary, and the internment based on security reasons is not included in this list.[282] The other human rights treaties do not contain such a list. In its General Comment 35 to article 9 of the ICCPR regulating the deprivation of liberty, the Human Rights Committee specifically argues that the internment of civilians for security reasons might amount to an arbitrary deprivation of liberty, as the possible threat the individuals pose could be addressed by other effective measures including the criminal justice system. HRC elaborates that if, under the most exceptional circumstances, and based on a present, direct and imperative threat, an internment is invoked, there would be certain measures which the state would have to adhere to in order for it not to be arbitrary.[283] Thus, the evaluation of the arbitrariness is a matter of two things: whether the internment is an absolute requisite in regard to security which is also a prerequisite in the rules regulating IACs in the Geneva Conventions and in the Danish military manual, but also whether certain procedural guarantees are effectively applied in the situation. The procedural guarantees provided by the Danish military manual are, however, not aligned with those of HRL. From the procedural guarantees provided by HRL, especially two obligations should be

[280] Tilman Rodenhäuser, "Strengthening IHL protecting persons deprived of their liberty: Main aspects
of the consultations and discussions since 2011", *International Review of the Red Cross,* vol. 98, no. 903, (2016), 949-950.
[281] ECHR, *supra* note 24, art.5; ICCPR, *supra* note 135, art 9; ACHR, *supra* note 134, art. 7.
[282] ECHR, *supra* note 24, art. 5 (1).
[283] UN Human Rights Committee General Comment 35, *Article 9 (Liberty and security of person)*, UN Doc. CCPR/C/GC/35, 16. december 2014, paras. 15, 4-5.

highlighted: (i) that all individuals are to be promptly informed of the reasons for their internment, and (ii) that all individuals have the right to supervision of the lawfulness of detention, i.e. what is also known as *habeas corpus.* The obligation to (i) promptly inform of the reasons behind the internment is included in the ECHR, ICCPR and ACHR,[284] and has the purpose of ensuring that the individuals deprived of their liberty are in a position where they can effectively challenge the lawfulness of the detention or the internment. HRL prescribes that the information must be given in an understandable manner i.e. in a language which the detainee understands, and must entail the factual specifics to the reason behind the internment, e.g. the wrongful act and the identity of the alleged victim.[285] The obligation furthermore entails that the information is provided *promptly* upon the deprivation of liberty, however, as immediate communication may not always be possible, e.g. in situations where there is no available interpreter, this notion is flexible as long as it is kept at the absolute minimum.[286] The Danish military manual prescribes no direct obligations in this regard, however, it does, as presented above, give the possibility of applying extra protections, one of which being that information of the grounds for internment is provided in an understandable language. Thus, the manual applies IHL as the primary framework, and HRL as the secondary, and not in an adequate manner, as it does not entail the time perspective. The obligation to (ii) secure the right to supervision of lawfulness is also listed in all three human rights treaties with almost identical wording.[287] The purpose of the right to supervision of lawfulness is essentially to avoid detention without a legal basis i.e. arbitrary detention. It should be stressed that it is not an automatic procedure, but a right that everyone who is deprived of their liberty can invoke.[288] Clarifying whether the obligation is met demands a closer look at the three inherent elements of (a) time, (b) repetition of review, and (c) the judicial body. HRL prescribes that the decision, determining whether the detention or internment is lawful, must be taken without delay (in the ICCPR and IACHR) or speedily (in

[284] ECHR, *supra* note 24, art.5 (2); ICCPR, *supra* note 135, art 9 (2); ACHR, *supra* note 134, art. 7 (4).
[285] UN Human Rights Committee General Comment 35, *Article 9 (Liberty and security of person)*, UN Doc. CCPR/C/GC/35, 16. december 2014, paras. 25-26; ECtHR, *Guide on Article 5 of the Convention – Right to liberty and security*, European Court of Human Rights, 31. august 2018, paras. 139-140, 144-146, 150-151.
[286] Doswald-Beck, *supra* note 143, 266; UN Human Rights Committee General Comment 35, *Article 9 (Liberty and security of person)*, UN Doc. CCPR/C/GC/35, 16. december 2014, para. 27; ECtHR, *Guide on Article 5 of the Convention – Right to liberty and security*, European Court of Human Rights, 31. august 2018, paras. 142-143.
[287] ECHR, *supra* note 24, art.5 (4); ICCPR, *supra* note 135, art 9 (4); ACHR, *supra* note 134, art. 7 (6).
[288] Doswald-Beck, *supra* note 143*,* 270.

the ECHR) (a). This indicates a lesser urgency than if it was to be taken promptly, but still, that it must be carried out as soon as practicable which depends on the circumstances of each case, including for example the status of the authority taking the decision and the complexity of the proceedings. [289] The remedy of repeating review (b) lies implicit in *habeas corpus,* as the lawfulness of the detention is not necessarily standing after an initial review. Circumstances can change, facts can be uncovered, and the chance of the deprivation of liberty being arbitrary increases with the duration of the internment. However, HRL does not, like GC IV[290], prescribe a specific timeframe for review, still, the repetition of review must follow reasonable intervals.[291] Lastly, HRL provides that the decision must be taken by a court (c). However, it does not need to be a court per se, but a body of judicial character, possessing attributes of independence and impartiality in order to provide the appropriate procedural guarantee. This is important for the review of the internment to be effectively challenged.[292] The Danish military manual prescribes that in situations where a suspected enemy is interned for security reasons, he or she has a claim to have the decision of internment tried, that the decision (if upheld) must be submitted for renewed processing regularly - if possible every sixth month, that an appeal of this decision must be settled in shortest time possible, and that the processing should be conducted by a competent body. Thus, the manual acknowledges *habeas corpus,* however, instead of following the detailed and comprehensive HRL provisions outlined above, it makes its conclusions based on a patchwork of IAC rules, contested customary IHL and soft law. The manual therefore again applies IHL as the primary framework, and leaves HRL as the secondary. Even though, for example the obligation of regular renewed processing, seems stricter in the manuals interpretation, as it includes both an obligation and a timeframe, the limited legal substance behind this claim and the vague language, could make it complicated to follow for Danish soldiers on the ground. Instead of giving clear guidelines for how to avoid arbitrary detention, it raises new questions as: what does a submission for renewed processing entail, and what determines if the timeframe of sixth months is possible or not? Furthermore, for example the

[289] *Guide on Article 5 of the Convention – Right to liberty and security*, European Court of Human Rights, 31. august 2018, paras. 248, 254-255.
[290] GC IV, *supra* note 23, art. 43, 78; Murray, *supra* note 42, 195.
[291] UN Human Rights Committee General Comment 35, *Article 9 (Liberty and security of person)*, UN Doc. CCPR/C/GC/35, 16. december 2014, para. 43; ECtHR, *Guide on Article 5 of the Convention – Right to liberty and security*, European Court of Human Rights, 31. august 2018, para. 230.
[292] UN Human Rights Committee General Comment 35, *Article 9 (Liberty and security of person)*, UN Doc. CCPR/C/GC/35, 16. december 2014, para. 15; ECtHR, *Guide on Article 5 of the Convention – Right to liberty and security*, European Court of Human Rights, 31. august 2018, para 228.

total lack of specifying what a competent body entails, gives a higher risk of the internment being arbitrary. The manual also avoids specifying in what timeframe the initial decision must be taken, but only states that a potential appeal case must settled within the shortest time possible.

The Human Rights Council argues that, because of the high risk of internment being arbitrary in NIACs, it is even more important to apply the procedural measures presented by HRL. However, the manual provides limited and inadequate procedural obligations, and the application of human rights is presented as a possibility, if convenient, rather than an obligation. The overall problem is that the manual does not acknowledge that HRL should be applied as the primary framework, as both Sassoli and Murray in fact argue. Murray explicitly states that when it comes to detention for security reasons in NIACs, HRL provides the primary framework, and thus, internment is regulated within the security operations framework.[293] Sassoli agrees and develops the argument further. The procedural guarantees of IHL governing NIACs, he argues, is non-existent, whereas those of HRL are clear and well developed by jurisprudence. Thus, there is no doubt which regime that provides the most context specific rules. Adding to this, situations where a suspected enemy is deprived of his or her liberty and are subjected to detention or internment, are clearly situations where there is personal jurisdiction triggering the extraterritorial application of HRL. Therefore, Sassoli argues that the rules of HRL must prevail. They are more precise and more restrictive.[294]

4.2.2.2. Common Responsibility for Detention

As discussed in the introduction, detention has been an especially thorny issue for Denmark, and for some time it seemed like Denmark's solution was simply to avoid taking any prisoners and instead leave the job to its coalition partners (the so called 'brite-finte'). However, it was recently illustrated in, what has been labelled the 'Green Desert Case', that leaving the taking of prisoners to others does not entirely relieve Denmark of a responsibility. Operation Green Desert took place in 2004 when Danish forces supported Iraqi security forces in an area around the city of Basra in southern Iraq. More than 30 Iraqis were apprehended during the mission, and in 2011, 23 of them filed a complaint against the Danish Ministry of Defence for alleged mistreatment during the operation and the following detention. In June 2018 the Danish high court (Østre Landsret) decided that the Danish

[293] Murray, *supra* note 42, 189.
[294] Sassòli, *supra* note 43, 30.

government did have a responsibility towards the plaintiffs, because of the substantial character of the Danish support in Operation Green Desert. The decision was not taken on the basis of international law, but on the principles that govern the responsibilities of public authorities in national Danish law of torts, and therefore, the case does not offer any insight into the principles of international law governing responsibility in relation to others' actions, i.e. complicit responsibility. [295] Nevertheless, it would have been obvious for the Danish military manual to address when Denmark has a responsibility in relation to coalition partners. The crux of the matter is, to which degree Denmark is responsible for possible breaches of the law committed by its coalition partners. To the question of Danish responsibility when engaged with foreign units the Danish military manual writes: "when Danish units cooperate with foreign units, it does not generally entail, that detention conducted by the foreign units trigger a Danish responsibility,"[296] a pretty straightforward negation of Danish responsibility in situations similar to Operation Green Desert. In their consultation response, Anders Henriksen and Jens Elo Rytter comment on this and argue that the manual miss a broader discussion of responsibility for detention by cooperation partners in the manual, in particular in relation to the International Law Commission's 'Draft Articles on the Responsibility of States for International Wrongful Acts',[297] and its chapter 4 on complicit responsibility. They furthermore argue that the lack of engagement with this issue, is especially striking given the previous problems with Danish responsibility for detention in international operations (see introduction).[298] The manual does mention ILC's guidelines briefly in chapter 3 in an overview of international law, and concludes that the rules is of great importance for Denmark's responsibility in relation to complex, multinational military corporations.[299] Furthermore, in chapter 15 the manual elaborates on the division of responsibility and underlines that modern coalition and alliance operations make it especially

[295] Anders Henriksen, "Detainees in Iraq win damages from Denmark in High Court ruling", *Just Security*, 22 June 2018 (available at: https://www.justsecurity.org/58340/detainees-iraq-win-damages-denmark-high-court-ruling/).
[296] Knudsen (ed.), *supra* note 12, 450.
[297] International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10, 2001.
[298] Anders Henriksen and Jens Elo Rytter, *Høringssvar til udkast til Dansk Militærmanual,* 1 March 2016, 3 (available at: https://hoeringsportalen.dk/Hearing/Details/59198). For similar requests of clarification regarding complicit responsibility see as well: Amnesty International Denmark, *Høringssvar over udkast til Militærmanual om Folkeret i Internationale Militære Operationer*, 7 Marts 2016, 5, (available at: https://hoeringsportalen.dk/Hearing/Details/59198); Peter Vedel Kessing, *Høring over udkast til dansk militær manual om folkeret i internationale militære operationer,* 7 March 2016, 16 (available at: https://hoeringsportalen.dk/Hearing/Details/59198).
[299] Knudsen (ed.), *supra* note 12, 72.

relevant to take a closer look at the rules of state responsibility.[300] With these references to the ILC's Articles, and the explicit mentioning of their importance in relation to coalition and alliance operations, it can seem puzzling that the manual does not take the chance to discuss the rules on complicit responsibility when there is a concrete example of a situation, in which they seem extremely relevant. However, chapter 15 in the manual only mentions the rules on state responsibility in relation to "acts committed by another states military unit or police in situations in which the foreign units is *governed* by a Danish military unit or military leadership."[301] Thereby, the manual does not recognise responsibility in situations of mere cooperation, but only in situations where a foreign unit is governed by Denmark. However, in some situations this would be in contradiction with ILC's article 16 on aid or assistance in the commission of an internationally wrongful act:

"A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State."[302]

Given that article 16 talks about aid or assistance, Denmark could have a responsibility when cooperating with other states, of course only under the requisite that qualification (a) and (b) are also met. In regards to detention, this could for example be in a situation, in which Denmark assists in an operation, in which detainees is taken with the knowledge of a foreign unit mistreating them. It should be noted here that while ILC's Articles are not binding treaty-law, article 16 has been declared to reflect a customary rule by ICJ.[303]

4.2.2.3. Preliminary Conclusion on Detention and Complicit Responsibility

The Danish military manual is quite meticulous with its chapter on detention (almost 100 pages is reserved for the subject), which clearly reflects that it is a difficult legal issue, as well as an issue that Denmark has been particularly challenged by. However, the manual's strict interpretation of IHL as *lex specialis* means that the manual fails to meet its own

[300] Knudsen (ed.), *supra* note 12, 635.
[301] Knudsen (ed.), *supra* note 12, 635. Emphasis added.
[302] International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10, 2001, art. 16.
[303] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, International Court of Justice, 26 February 2007, para. 420.

promise of an enlarged incorporation of human rights in situations where the rules governing NIACs are weak. It might list some procedural guarantees meant to decrease the risk of an arbitrary detention, but these are all optional, and thus, the obligations which the Danish armed forces must adhere to derives primarily from IHL and not HRL. The manual had the possibility of addressing legal grey zones regarding detention, and by a more comprehensive inclusion of HRL, the manual could have decreased the possibility of arbitrary detentions. While acknowledging that the Danish manual's interpretation might not be legally wrong, the thesis argues that another interpretation might have served Danish interests better. Better protection and treatment during detention is essential, if Denmark is to been seen as a legitimate actor in new wars. Furthermore, in light of previous challenges with cooperation partners, the Danish military manual's disregard of complicit responsibility seems strange. Especially, as it does not include any other measures that could be taken in order to better prepare Danish forces to cooperate with partners who might not have a record of compliance with international law. Overall, the challenges of the blurred lines between civilians and enemies are not addressed in a redefining way, as the implementation of human rights might exist but unambiguously.

4.3. Partial Conclusion: Danish Military Manual and Legitimacy

Ending new wars does not only entail defeating the enemy, more important is constructing legitimate authorities that can address the reasons for engaging in the war in the first place. This demands a change in the mind-set of the foreign intervening states, including a shift in the legal regime applied from one that is primarily based on military necessity, proportionality and distinction, to a more human centred regime. A human security approach primarily entails that HRL becomes the predominant legal regime in armed conflicts, however, it does not entail a complete discard of IHL, but rather that the regime is clarified. The manual does try to clarify IHL in regards to the use of force with the inclusion of the continuous combat function, as well as it tries to outlines rules governing internment in NIACs. However, as seen in the analysis, these interpretations do not leave much room for a human security approach. We can conclude that the Danish military manual in general promises more than it delivers, and especially when it comes to the implementation of human rights. It promises to address its previous engagements, to include HR more in NIACs, that intensity and amount of control matters for the application of HRL, and that HRL and IHL are supposed to be merged in a harmonic manner. This all fits very well with Kaldor and

Chinkin's human security approach. However, the manual does none of the above in two key areas: targeting and detention. While it is problematic in itself that the manual puts forward some guidelines, which it then does not adhere to, it is also a missed chance to actually address some of the legal challenges that interventions in new wars pose. The manual, furthermore, disregard that Denmark can have a complicit responsibility in situations where Danish allies conduct detentions, and this is problematic as it seriously damages Denmark's own credibility and legitimacy if partners mistreat detainees. In the end, the manual spend a lot of pages repeating uncontroversial norms, instead of addressing the challenges which Danish soldiers previously have faced. Challenges, which will reoccur in future engagements and if not addressed properly, will hinder Denmark from carrying out legitimate interventions.

5. Applying Human Security in the Danish Military Manual

The analysis establishes that the Danish military manual is not effectively addressing the challenges of new wars, as it does not incorporate the human security approach, Kaldor and Chinkin proposes. By incorporating a focus on human security and human rights more comprehensively throughout the manual, it could have been a tool to secure a more legitimate use of force in Denmark's international operations. Legitimate use of force is a prerequisite to ending new wars, because the Danish forces have to represent the legitimate authority they are trying to promote. The next section will identify possible solutions to the insufficiencies of the manual highlighted by the analysis.

5.1. Providing a Flexible Human Rights Framework

The reason why, Kaldor and Chinkin argue that states engaging in interventions abroad need to change their mind-set and adhere to a human security approach, is because of their general conclusion that old methods of war, including the legal regime of IHL, is no longer sufficient to end new wars. This is because war is a violation of human rights as well as a mutual enterprise, requiring an increased focus on the protection of the individual for an ethical reason, but also for a strategic reason, as it will increase the legitimacy of the conduct of warfare. As the Danish military manual is a collection of the law applicable to Danish soldiers engaged in military operations outside Danish territories, it is an obvious starting point for an implementation of the human security approach for Denmark. The next section will elaborate on two interlinked issues that arise because the manual does not sufficiently implement a human security approach: 1) the manual leaves too much to the mission-specific rules of engagement, and 2) the manual outlines the applicable rules based on the IAC-NIAC-dichotomy, incompatible with both human rights implementation and the complexity of the network of actors in new wars. Subsequently, the section will propose three possible approaches that the manual could adopt, in order to better adhere to a human security approach.

5.1.1. Rules of Engagement

The manual is the framework for the development of the mission specific ‘rules of engagement’ (RoE) where the Danish defence sets out the directions on the admissible use of force for each mission, clarifying exactly what obligations the Danish soldiers must adhere to on the ground. It should be noted that the RoE always will be more specific than the military

manual, and thus, the legal obligations described in RoE will most likely be stricter than those of the manual.[304] Meanwhile, the military manual needs to set the bar of incorporation of human rights high, so that it will not be possible to have RoE, which are in conflict with the human security. Furthermore, because RoE's are not publicly available as the military manual, it is even more important that the manual apply a human security approach, because it can be of strong value for Denmark in its future interventions, and actually create legitimacy for the Danish defence on many levels. The military manual is the first of its kind in a Danish context, and the first of its kind internationally to include human rights as a part of the legal regime governing international operations. Therefore, it cannot be neglected that the choices made in such a manual could affect Denmark's legitimacy at other levels than locally in the conflict. At the national level, by proving to both politicians and people of Denmark that the Danish defence has learned from the legal challenges faced in the past, and will not engage in military operations in the future without thinking about human rights and the security of individuals on the ground. Also on the international level, the manual could make a significant difference. The manual is currently being translated to English and thereby Danish coalition partners can actually read the manual, including how it proposes that human rights can be applied. Denmark is, by being a first-mover, setting an example, that if followed by other states could have an effect on customary law governing armed conflict. Furthermore, it places Denmark in the spotlight, which gives an opportunity of actually feeding into the debate of human rights in armed conflict with a useful and innovative suggestion of how state should do this in practise. However, because of the incomplete application of human rights, the Danish military manual, as it stands, cannot sufficiently capitalize on these opportunities.

5.1.2. IAC-NIAC Dichotomy

Another problem arising from the Danish military manual's presentation of the rules governing armed conflict is that it does not address the problems inherent in IHL's split between international and non-international armed conflicts. The manual does actually promise to incorporate human rights in a harmonic manner, and argues that human rights can play an increased role, especially in NIACs, and in situations where the intensity of the violence is low and the amount of control is high (see 4.1.). However, as the analysis shows, the manual does not manage to deliver when it comes to targeting and internment. The reason is that there is a consistent lack of room for applying flexible and nuanced interpretations.

[304] Knudsen (ed.), *supra* note 12, 119-120.

This is apparent in the way the rules are outlined by the Danish military manual, as it follows the division initially presented with the Geneva Conventions between rules, which applies in IACs, and rules, which applies in NIACs. The key problem is that following the strict dichotomy of the framework of IACs and NIACs is simply too rigid when it comes to new wars, as it does not leave room for the complexities of these conflicts (see 2.3.). New wars can be hard to place in either one or the other, as they are a mix of both war, organized violence and large-scale violations of human rights, and involves both states and non-state actors. The Geneva Conventions were drafted at a time where states would rarely pursue military operations against non-state actors in the territory of other states, and thus, the purpose of the GC's was primarily to regulate the wars between states (and secondary to regulate internal wars), and not the complexities of wars, in which states and non-state actors are mixed up. The classification of these new wars as either IACs or NIACs has become the centre of much debate, because the legal frameworks governing the two types of conflict are of such different character. The debate is especially relevant for this thesis, because it gets further complicated when a third state's military forces, for example Danish forces, intervene in a war apparently categorized as a NIAC. It questions whether such an intervention changes the character of the conflict from being non-international to international, and how the law can distinguish between internationalised armed conflicts, and internal armed conflicts which are international to begin with.[305] It comes down to whether a war has to be categorised as either a NIAC or an IAC, or if it can be both, depending on which actor you are facing on the ground. The ICRC subscribes to the latter interpretation and proposes what they call a fragmented approach, "determining applicable IHL by examining each bilateral relationship between belligerents separately in light of the facts on the ground."[306] For example, the ICRC explains that in a conflict between a state (a) and a non-state actor, where two third party states - (b) and (c) - are intervening on each their side, the state (b) supporting the state (a) will have to adhere to a NIAC framework if they are facing the non-state actor, but an IAC framework if they are facing state (c). When Danish armed forces intervenes as a third party state, the dichotomy of IAC-NIAC, is therefore problematic, as it could mean that the Danish forces would constantly have to evaluate which of the two legal regimes (as well as the human rights regime) that would apply in a given situation.

[305] Chinkin and Kaldor, *supra* note 15, 242-245.
[306] Tristan Ferraro, "The ICRC's legal position on the notion of armed conflict involving foreign intervention and on determining the IHL applicable to this type of conflict", International Review of the Red Cross, vol. 97, no. 900, (2015), 1241.

5.1.3. A New Category of Armed Conflicts

One possible solution is to create of a new and third category of conflict, which can govern those new wars that do not fit into the existing IHL dichotomy of IAC-NIAC. This category would be governed by a whole new legal regime yet to be defined. The theory revolves around the argument that there is a gap in IHL concerning conflicts, which do not take place between only states (IACs) and neither within the territory of the state in question (NIACs). An example is the Danish engagement in 'Operation Inherent Resolve' fighting ISIS in Syria and Iraq - a cross border operation outside Danish territory, taking place between a state and a non-state actor.[307] One proposal of such a category is the 'Extra-State Armed Conflicts',[308] defined as "on-going hostilities between a state and a non-state actor that take place, at least in part, outside the territory of the state."[309] The new legal regime governing the extra-state armed conflicts should be both normative and flexible, and primarily informed by what already exists under IHL. One of the major issues with IHL as the governing framework of new wars, highlighted in the thesis, is that there is no combatant-status in NIACs. However, in extra-state armed conflict, situations where a state faces a non-state actor would be governed by the legal regime for NIACs.[310] Thus, in the case of 'Operation Inherent Resolve' the problems of fighting and detaining enemies would be exactly the same, as if the manual kept the IAC-NIAC dichotomy. In extra-state armed conflicts, HRL would apply, however, only under a strict interpretation of IHL as l*ex specialis*.[311] Therefore, the result would also be the same here, as the Danish manual already applies a framework, in which IHL is the primary framework, and HRL is the secondary. Thus, the 'Extra-State Armed Conflicts' - solution is filled with issues, which would not address the main insufficiencies of the manual. Two other problems with the approach is that it is highly contested whether IHL even creates the gap of extra-state conflicts, and that it would be hard to imagine states coming together in the formation of such a criteria. Most essential is, however, that it ceases to apply a human security approach. Therefore, the right solution for the Danish military manual is not to include a new category of extra-state armed conflict, if it should be able to address the overall challenges of new wars proposed by this thesis.

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[307] Forsvaret, "Operation Inherent Resolve", 3 December 2018 (available at: https://www2.forsvaret.dk/viden-om/udland/IRAK/Pages/defaultt.aspx).
[308] Roy S. Schondorf, "Extra-State Armed Conflicts: Is There a Need for a New Legal Regime", *New York University Journal of International Law and Politics*, vol. 37, no. 1 (2004), 1-6.
[309] Schondorf, *supra* note 308, 3.
[310] Schondorf, *supra* note 308, 75-76.
[311] Schondorf, *supra* note 308, 60-61.

5.1.4. Abandoning the Classification of Conflicts Altogether

Another solution, proposed to address the challenges of the existing IHL dichotomy of IAC-NIAC is to abandon the classification of conflicts altogether i.e. what is labelled the 'sovereign agency theory'. This theory proposes to simply apply the legal regime of international armed conflicts to all armed conflicts, as soon as a state deploy armed forces to conduct activities with the use of force.[312] The sovereign agency theory proposes to shift the focus "from what a state chooses to call a conflict, to the forces a state chooses to use to deal with a conflict".[313] The argument for applying the full legal regime covering IACs in all armed conflicts, is that it is both more extensive, detailed, and that it provides the best protections for the individuals affected by war.[314] Human rights law can be applied when appropriate, but the theory does not pay any further consideration to its application to its application.[315] The one major benefit from adopting such a solution in the Danish military manual would be that it would simplify and clarify the rules governing Danish armed forces when operating abroad. Including a combatant status would provide clear rules on the ground for who to target and who to detain. However, the approach also entails a couple of important problems. First, that the sovereign agency theory requires the acceptance of non-state actors right to fight in an armed conflict which would require Denmark to recognise actors, such as ISIS, as legitimate armed forces. Whereas it would address the lack of reciprocity in the NIAC framework, it is however highly unlikely that states could agree to such an approach. Second, the sovereign agency theory does not include a sufficient focus on human rights law, and therefore applying this solution to the Danish military manual is not in line with the human security approach either.

5.1.5. The Flexible Human Rights Approach: An Explicit Rule Designed for the Situation

The Danish military manual needs to apply an approach that allows for more flexibility, moving away from the existing IHL dichotomy of IAC-NIAC, but also adhering to the human security ideal. What is problematic about the military manual's adherence to the dichotomy of IAC-NIAC together with its *lex specialis* interpretation, is, that it does not leave

[312] Eric Talbot Jensen, *Reunifying the Law of Armed Conflict in COIN Operations Through a Sovereign Agency Theory,* in William Banks (ed.), Counterinsurgency Law: New Directions in Asymmetric Warfare, 2013, 2-4.
[313] Jensen, *supra* note 312, 3.
[314] Jensen, *supra* note 312, 12.
[315] Jensen, *supra* note 312, 6.

much room for flexibility. Essentially, because new wars include a wide range of situations, from large-scale active hostilities to small-scale law enforcement, and everything in between, a flexible approach would enable the Danish forces engaged in a new war to apply the rules most suitable for the specific situation they are facing. Therefore, the manual should be flexible enough in its approach to allow the most detailed rule, i.e. the most precise vis-à-vis the situation, to be decisive. The framework suggested by both Murray and Sassòli, is in fact an approach entailing both flexibility and the human security aspect. Murray's 'active hostilities'-'security operations' framework, presents a practical solution for how a merge between IHL and HRL can provide both the flexibility and the human rights focus, needed to address new wars effectively. To determine which framework should be applied to which situations, an analysis of how explicit the existing legal rules are, as well as if they are designed for the situation, should be conducted. Whether they are explicit is determined on the basis of, primarily, the existence of treaty law, and secondary, the existence of customary law. What is important here, is that what is designed for the situation, is not only decided on the basis of the classification between IAC-NIAC, but also whether the situation involves active fighting, what the status or activity of the involved individuals are, and what level of control the involved state exercises. Incorporated into the Danish military manual, as the analysis also illustrates, this framework would enable Danish soldiers to be much more nuanced in their application of international law when it comes to the two actions of targeting and detention/internment. As the framework emphasises the role of HRL, especially in situations where Danish forces has a high level of control, the approach will also ensure that the Danish military manual can fulfil the three overall guidelines it proposes regarding the incorporation of human rights in a harmonic manner, as well as allowing human rights to play an increased role, especially in situations of NIACs and when Danish forces have more control. Applying human rights to a greater extent is essentially what the human security approach demands of states intervening in new wars, as it would result in an engagement governed by a stricter legal regime, with a focus on minimising all loss of life, enhancing protection of civilians, and where possible, arresting rather than killing the enemies. Thus, incorporating Sassòli and Murray's ideas to the Danish military manual would result in the manual having both a flexible and human security focused approach to the conduct of armed conflicts. It would be more flexible, because it would apply the law in a more nuanced manner, guided not only by the dichotomy of IAC-NIAC, but by the details of the situations as well as the explicitness of the rule, and an enlarged human security focus, because situations of high control and explicit human rights rules would be governed as law

enforcement instead of armed conflict situations, applying a higher level of protection. However, there are admittedly also issues, which an implementation of their ideas into the manual would not be a solution to. A flexible human rights approach does not suggests abolishing IHL, and thus, naturally it will not be a resolution to the inherent issues of IHL with the core concepts of distinction, proportionality and military necessity. However, this was never the intention with the human security approach, as Kaldor and Chinkin themselves, do not propose that IHL should be abandoned. Neither do they argue that a human security approach will be the solution to all issues of new wars. However, incorporating Murray and Sassòli's approach would ensure that Denmark, when it intervenes, raises the bar for the protection of civilians and humane treatment of enemies in general, which would generate legitimacy both at the local level where the engagement takes place, at the national level in Denmark, and at an international level, and thus, help closing the gap between legality and legitimacy. A gap, that only a more ethical approach, can close. Furthermore, because HRL to a greater extent will be the predominant regime in this solution, the core concepts of IHL will also be less relevant. Thus, because the flexible human security approach will allow for HRL to be the predominant regime when the existence of explicit rules designed for the situation allows, and will use HRL (as the secondary regime) to clarify and strengthen the IHL (as the primary regime), when IHL presents the most explicit rule, this approach should be the solution the manual incorporates.

5.1.6. Policy Recommendation: Incorporating a Flexible Human Rights Approach

The thesis recommends that the Danish military manual incorporates a flexible human rights approach, entailing that it applies the most explicit rule designed to the situation, instead of following the strict dichotomy of IAC-NIAC. It should apply the approach to its interpretations, effectively in both chapter 3 within the section on human rights, and throughout the manual's outline of relevant rules. As highlighted by the thesis, it is in particular relevant for targeting and internment, which has challenged Danish soldiers in past military engagements.

To sum up, the manual should:

- In chapter 3, elaborate on the challenges of merging HRL with IHL, and present the following guideline to how this can be done: If both legal regimes present applicable and potentially conflicting rules to the situation, the primary regime must be the one presenting a rule that is both: explicit and designed for the situation.

1) Whether a rule is explicit must be determined after primarily treaty law, and secondary customary law.
2) Whether a rule is designed for the situation must be determined after
    a) the existence of an IAC or NIAC,
    b) the inclusion of active fighting,
    c) the status or activity of the involved individuals
    d) the level of control exercised.

The manual should specify that when the primary framework is determined to be IHL or HRL, the other would automatically be the secondary.

- In relevant chapters, governing targeting and detention include a reference to the guidelines outlined in chapter 3, as well as a detailed overview over the rules under both regimes applicable here. The manual should also when possible give examples of complex situations, preferably based on previous experience, and illustrate how an analysis based on the guidelines would unfold, concluding whether the situation would demand IHL or HRL as its primary framework, and why.

5.2. A Common Responsibility to Avoid Violations of International Law During Armed Conflict

The analysis outlines the Danish military manual's approach to complicit responsibility and questions its avoidance of a more thorough discussion of the subject, especially given that misconduct by coalition partners has been a reoccurring issue for Denmark in its international operations. It is crucial when Denmark engages in international operations that it does not risk contributing to violations by working with the wrong partners, as this would create a huge challenge to Denmark's legitimacy as an intervening power. As argued (4.3.), this will create serious damage to Denmark's possible contribution to ending new wars. Therefore, along the lines of a human security approach, it is vital that Denmark not only ensures that Danish forces do not violate international law during armed conflicts, but also that its cooperation partners do not. This section will discuss how the matter of a common responsibility to avoid such violations could have been addressed in a more comprehensive way in the manual. The section will commence with a discussion of complicit responsibility under article 16 of the International Law Commission's 'Draft articles on Responsibility of States for Internationally Wrongful Acts' (ILC's draft articles). Next, it will compare this to

rules regulating the question of a common responsibility in HRL and IHL, and explore other treaty law as well as soft law (the Arms Trade Treaty and the Human Rights Due Diligence Policy), which propose preventive measure to address the question of a common responsibility. Preventive measures consist of an assessment of the potential cooperation partner before the partnership is agreed upon. The difference between ILC's Draft articles about proving complicity after an illegal act has been committed, i.e. placing a criminal responsibility, and the prior consideration to prevent such acts (entailed in both IHL, HRL, the ATT and the HRDDP), will be underlined. The point is, that such preventive measures will help Denmark avoid being complicit under article 16, because Danish armed forces on the background of a thorough assessment of partners, would substantially decrease the risk of cooperating with partners violating the law. It will also ensure that Denmark still respect a common responsibility to avoid violations of international law during armed conflicts.

5.2.1. State Complicity Under Article 16

As discussed, the Danish manual refers to the International Law Commission's 'Draft Articles on Responsibility of States for Internationally Wrongful Acts', however, the manual only recognise that Denmark holds responsibility for coalition partners actions, if they are governed by a Danish military unit. As explained, this could be in contradiction to article 16 of ILC's guidelines, and therefore, a couple of questions arise regarding the Danish manual's interpretation of the ILC's draft articles. In order to discuss these, a breakdown of the requirements of article 16 are necessary. There are four conditions that have to be met in order for Denmark to be complicit in an international wrongful act committed by another state: 1) aid or assistance to another state in the commission of an internationally wrongful act; 2) that the aid or assistance contributes to the commission of that act; 3) an intention to facilitate and/or knowledge of the circumstances of the internationally wrongful act; 4) that the recipient state's act would also be wrongful if committed by Denmark.[316] Whereas, the first and the last condition can be established rather easily in a situation in which Denmark aids or assists a foreign unit in an operation that entails misconduct of detainees by the foreign unit (e.g. torture, an act that would be wrongful also if Denmark had committed it), the second and the third are more difficult. Regarding the second, the degree of aid or

[316] International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10, 2001, art. 16 and commentary art. 1; Ryan Goodman and Miles Jackson, "State Responsibility for Assistance to Foreign Forces (aka How to Asses US-UK Support for the Saudi Ops in Yemen)", *Just Security*, 31 August 2016 (available at: https://www.justsecurity.org/32628/).

assistance needed in order to be complicit, is still an on-going debate: does it has to contribute significantly to the act, or will a minor contribution suffice. The third condition is probably the most difficult to interpret, and the ILC's own confusion does not help. In Article 16 the wording is "knowledge" of the act, however, ILC's commentary to the rule (also contained in ILC's draft articles) use not one, but two different terms. First, the commentary writes, "with a view to facilitating" the act, and later it declares that no responsibility can arise unless the assisting state "intended" to facilitate the act.[317] A simple knowledge of the act demands less than intention which implies a much more deliberate act by the assisting state, and thereby, requires more to prove, however, it might amount to the same thing if the degree of knowledge borders certainty.[318] Going back to the Danish military manual's interpretation, it seems puzzling that while it continuously refers to ILC's draft articles and underscores their usefulness in relation to coalition operations, it seems puzzling that no reference is made to them in relation to detention. Does the manual only consider the rules as soft law that it can apply when it sees fit? Or is it possible that Denmark does not recognize the second condition of article 16, i.e. a responsibility when Denmark's aid or assistance ends up contributing to a wrongful act? And/or does Denmark not imagine itself being in situations in which it would have knowledge of the misconduct of a partner? Or does Denmark interpret the third condition as 'intention' to facilitate the act (as proposed by ILC's commentary), and therefore, it can negate the possibility of situations of misconduct by partners when taking detainees, because Denmark would never intend for its assistance to contribute to misconduct? The Danish military manual does only consider detention in general, not detention entailing 'an internationally wrongful act'. However, it seems odd to even discuss Danish responsibility in relation to detention if not on that background. An explanation might be that the manual wishes to renounce responsibility of what happens to detainees after they have been taken, for example, in situations where Danish forces assist in an operation, in which detainees are taken and then later mistreated while in the custody of the foreign unit. In that case it would of course be harder to argue that Denmark would have knowledge of/intention to assist in an operation leading to a wrongful act. This interpretation could seem familiar to the aforementioned 'brite-finte', because it implies a lack of willingness to engage with the legal problems arising from taking detainees. The question regarding complicit

[317] International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10, 2001, art. 16, commentary art. 1, commentary art. 5.
[318] Ryan Goodman and Miles Jackson, "State Responsibility for Assistance to Foreign Forces (aka How to Asses US-UK Support for the Saudi Ops in Yemen)", *Just Security*, 31 August 2016 (available at: https://www.justsecurity.org/32628/).

responsibility, thereby, comes down to a matter of blissful ignorance, and whether that is a sound legal interpretation is also highly questionable. However, that may be, the manual would still have benefitted from a discussion of complicit responsibility and in particular an explanation for its rejection of it regarding detention. This would have made the Danish position on a controversial part of international law more clear, and possibly, answered some of the above questions.

5.2.2. Other Rules Regulating Common Responsibility During Armed Conflicts

Nevertheless, if Denmark does not wish to adhere to complicit responsibility when cooperating with partners, there are ways to avoid being in situations where the question of misconduct by coalition partners can arise in the first place, while still admitting to a common responsibility to uphold the law. Both HRL and IHL try to ensure a common responsibility to uphold the law. The European Convention of Human Rights does not only place negative obligations on states to *respect* human rights, but also positive obligations to *actively ensure* these rights for everyone within their jurisdiction. This means that the state, at least on national territory, has quite substantial responsibilities to prevent human rights violations by third parties.[319] For Danish soldiers in international operations, this however, only becomes relevant if they have extraterritorial jurisdiction (as discussed in section 3.2.2. and 4.1.3.), and therefore, there will also be cases where the ECHR does not apply. Under IHL, Common Article 1 (CA1) of the Geneva Conventions requires states to ensure that the Conventions (including CA 3 covering NIACs) are also respected by other states and non-state entities, regardless of their own involvement of the armed conflict. This is because the Conventions are of such fundamental importance, that every party has a legal interest in their observance. Thereby, the Conventions create obligations *erga omnes*, i.e. obligations towards all of its parties.[320] CA1 also includes positive obligations "to prevent violations of the conventions when there is a foreseeable risk that they will be committed,"[321] and furthermore, "the duty to ensure respect for the Geneva Conventions is particularly strong in the case of a partner in a joint operation."[322] IHL therefore provides elaborate rules for state responsibility, whereas

[319] Cornelius Wiesner, *Fighting together: legal challenges arising from misconduct by partners*, Royal Danish Defence College, April 2018, 5-6.
[320] *GC I, Commentary of 2016, Article 1: Respect for the Convention,* International Committee of the Red Cross, 2016, para. 119.
[321] *GC I, Commentary of 2016, Article 1: Respect for the Convention,* International Committee of the Red Cross, 2016, para. 164.
[322] *GC I, Commentary of 2016, Article 1: Respect for the Convention,* International Committee of the Red Cross, 2016, para. 167.

when it comes to the application of HRL abroad, there will be situations, in which there is no state responsibility to ensure the protection of human rights. Therefore the ILC's rules are important to fill the gap: "in other words, even if a state's IHRL obligations are not directly applicable, that state may nevertheless incur responsibility for contributing significant assistance to the commission of IHRL violations by a partner state in the field."[323] Other legal documents have been developed to address the potential responsibility arising from cooperation. The Arms Trade Treaty (ATT) (adopted in 2014), places a responsibility to assess before the transfer of arms, the potential risk for the arms being used in serious violations of IHL and HRL.[324] Thereby, the treaty places restrictions on the potential transfer of weapons to partners. A long the same lines, the UN Secretary-General's soft law document 'Human Rights Due Diligence Policy' (HRDDP) (2013), suggests that states conduct an assessment of the risks involved in providing support through UN peacekeeping operations. More specifically, it suggests an assessment of the risk of the recipient entity committing grave violations of international humanitarian law or human rights law.[325] While they are of course of different scope, both the ATT and the HRDDP adds obligations to actively and continuously assess the risk of violations of international law by potential cooperation partners.[326] The ATT and the HRDDP, therefore, works as preventive measures that places focus on the responsibility states have *before* they enter into a potential cooperation. In comparison to the ILC's draft rules, it entails an important difference. ILC's article 16 does not consider future violations, i.e. the knowledge element does not entail a 'should have known'-element. This means that: "responsibility attaches under Article 16 only if the unlawful act is in fact committed, whereas due diligence is a prior consideration, relevant to obligations with a prospective nature, such as the obligation to protect in IHRL or the obligation to prevent in IHL."[327] Therefore, due diligence adds another layer to the question of complicit responsibility, because it entails a responsibility to consider how one could become complicit in the future, and by reacting with due care, eventually avoiding a criminal

[323] Wiesner, *supra* note 319, 8-9.
[324] Arms Trade Treaty, New York, 2 April 2013, art. 6(3), (available at: https://thearmstradetreaty.org/hyper-images/file/ATT_English/ATT_English.pdf?templateId=137253).
[325] UN Secretary General, *Human Rights Due Diligence Policy on United Nations Support to Non-United Nations Security Forces*, UN Doc. A/67/775-S/2013/110, 5 March 2013., art. 2.
[326] Wiesner, *supra* note 319, 5-6.
[327] Harriet Moynihan, "Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism", November 2016, 15 (available at: https://www.chathamhouse.org/sites/default/files/publications/research/2016-11-11-aiding-assisting-challenges-armed-conflict-moynihan.pdf).

responsibility. Furthermore, because of the lack of jurisdiction regarding the protection of human rights in situations of foreign interventions, a legal gap on the ground might arise - and a tool like the HRDDP is a way to fill that legal gap before it arises.

That Denmark is still facing difficulties regarding cooperation with partners in international operations has recently been illustrated with the allegations of torture on the al-Asad Airbase in Iraq. Last year, Danish soldiers deployed to the base reported to the Danish Defence Command and to the American leadership on the base on their suspicion of abuse in a prison run by an Iraqi special force, Counter Terrorism Service, on the base. Internal documents have later shown that the Danish forces decided not to investigate their suspicion further, in order to avoid offending collaborators.[328] The Danish engagement in Iraq is mandated to "support Iraq's military effort against the terrorist organization ISIS and to assist the authorities in Iraq with the protection of the civilian population against serious violations,"[329] however, the above case raises the question, if that is consistent with working with a partner as Counter Terrorism Service. Can Denmark contribute to protecting a population from serious human rights violations, if it prioritises not offending its coalition partners over effectively investigating allegations of such violations? A due diligence tool would lay out guidelines that would help deciding which partners Danish armed forces can work with and which they cannot. Furthermore, it should not be confined to a single assessment before the decision on cooperation is made, but should be applied as a continued vetting process that will enable forces on the ground to react properly, if they become aware of potential violations.

5.2.3. Policy recommendation: due-diligence

The thesis recommends that the manual includes a due-diligence tool for vetting potential future cooperation partners/recipients of support.[330] A model for this could be based on the following four elements:[331]

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[328] Charlotte Aagaard, "Systematiske overgreb på fanger hver nat," *Dagbladet Information,* 28 June 2018 (available at: https://www.information.dk/udland/2017/06/systematiske-overgreb-paa-fanger-hver-nat).

[329] Folketinget, *B 122 Forslag til folketingsbeslutning om dansk militært bidrag til støtte for indsatsen i Irak*, 25 August 2014 (available at: https://www.ft.dk/samling/20131/beslutningsforslag/b122/index.htm). Translated from Danish.

[330] Likewise proposed by the Institute for Human Rights in: Institut for Menneskerettigheder, *Væbnet Konflikt 2015-16*, 2015, 46 (available at:

1) Identification of factual circumstances and legal background
   This part should consist of a thorough assessment of the potential partner and its obligations and how the partner understands those obligations under international law, its past practice and records of compliance with international law etc.
2) Identification of risks
   This part should consist of training officials to recognize the risks of assistance, among other things ensuring that structures are in place to enable reporting and that there is a procedure for concerns to be elevated to ministerial level.
3) Strategies to mitigate risks
   This part should enable Denmark to maintain a degree of control of its cooperation partner/its assistance and to pause or withdraw if conditions are not fulfilled. This could be done by developing policies that conditions the partnership/assistance.
4) Taking the final decision.

Furthermore the thesis wishes to propose a systematic and continuous assessment as long as the cooperation takes place. Thereby, it should be clarified more clearly in the military manual how Danish forces should react in case they become suspicious of violations of either IHL or HRL by partners on the ground.

5.3. Human Rights Abroad: Where to Draw the Line?

As shown in the analysis (4.1.3.) the Danish military manual adopts European Court of Human Rights' interpretation of article 1 of the ECHR to include extraterritorial jurisdiction on an exceptional basis when there is territorial or personal jurisdiction, but what about the situations that fall outside of this scope? The human security approach is characterised by a focus on the protection of the individual, and it is not concerned with borders. If Denmark participates in armed conflicts abroad, and thereby, have the potential to affect the lives of the people living there, why should Danish soldiers not have a responsibility to refrain from violating their human rights? This section will propose a way, in which the Danish military manual can accommodate such a responsibility

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https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/udgivelser/status/2015-16/delrapporter_med_issn/status_2015-16_delrapport_om_vaebnet_konflikt_-_issn.pdf).

[331] The model is proposed in: Harriet Moynihan, "Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism", November 2016, 39-44 (available at: https://www.chathamhouse.org/sites/default/files/publications/research/2016-11-11-aiding-assisting-challenges-armed-conflict-moynihan.pdf).

In section 3.3.1. the thesis presented the debate about article 1 of ECHR, and how the ECtHR has chosen to interpret state jurisdiction abroad relative to that. While the ECtHR does apply extraterritorial jurisdiction, it is only on an exceptional basis, meaning that article 1 of the convention primarily reflects the "ordinary and essentially territorial notion of jurisdiction."[332] Therefore, extraterritorial jurisdiction requires special justification in the particular circumstances in each case.[333] In *Bankovic and others v. Belgium and others,* the Court rejected a human rights responsibility for the killing of individuals by the NATO forces during the Kosovo war in 1999 on the basis of a rejection of extraterritorial jurisdiction,[334] whereas it admitted a responsibility for the killings of individuals in *Al-Skeini and Others v. the United Kingdom* on the basis of a confirmation of extraterritorial jurisdiction.[335] It should be noted that in *Al-Skeini*, the Court was not asked to address whether the killing was a violation of article 2 of the ECHR (the right to life) per se, but only to address a breach of article 2 on the basis of procedural guarantees.[336] Nevertheless, the conclusion that UK did hold a responsibility in relation to its obligations under ECHR, confirms HRL's applicability extraterritorially in the case. The remaining question is of course whether the Court would have applied a different reasoning had it been faced with a complaint regarding the actual deprivation of life under article 2. The Court rejected *Bankovic* based on the lack of 'effective control' and confirmed Al-Skeini based on the existence of 'effective authority'. The problem is that in both situations the intervening states do actually exercise enough control to kill the concerned individuals.[337] From a legal point of view the Court's interpretation of article 1 can be defended based on the two different models for when extraterritorial jurisdiction applies, but the thesis is not content with that. Rather it wishes to discuss whether this interpretation advances Danish objectives when engaged in new wars. The Court's conclusions question the universality of the human rights regime, and conflicts with a human security approach that

[332] *Banković and Others v. Belgium and Others*, Grand Chamber Decision as to the admissibility of Application no. 52207/99, European Court of Human Rights, 12 December 2001, para. 61.
[333] *Banković and Others v. Belgium and Others*, Grand Chamber Decision as to the admissibility of Application no. 52207/99, European Court of Human Rights, 12 December 2001, para. 61.
[334] *Banković and Others v. Belgium and Others*, Grand Chamber Decision as to the admissibility of Application no. 52207/99, European Court of Human Rights, 12 December 2001, para. 82.
[335] *Al-Skeini and Others v. the United Kingdom*, Judgement, European Court of Human Rights, 7 July 2011, para. 149.
[336] *Al-Skeini and Others v. the United Kingdom*, Judgement, European Court of Human Rights, 7 July 2011, para. 3.
[337] Marko Milanovic, "European Court Decides Al-Skeini and Al-Jedda," *Blog of the European Journal of International Law*, 7 July 2011 (available at: https://www.ejiltalk.org/european-court-decides-al-skeini-and-al-jedda/).

requires the intervening power to respect human rights and protect individuals. The following will present another interpretation better placed to answer to a new war development.

The question of the universality of the human rights regime has to be seen in relation to its effectiveness, i.e. it would be utopian to claim that all states had responsibilities vis-a-vis all individuals in the world at all times, and thus, the jurisdiction clauses of the human rights treaties place a limit, requiring that states who can effectively ensure the protection, do so. In the ECtHR's interpretation, in which the responsibility rests primarily within the territory, the responsible state is the sovereign residing within the given territory. But what if a foreign state could also realistically and effectively keep the human rights obligations? If we do not confine our interpretation of jurisdiction to that of territorial sovereignty, the way we look at operations abroad changes considerably. Take for instance Denmark's interventions in Afghanistan and Iraq, noticeable for the Afghan and Iraqi authorities' loss of control in some parts of the countries. In such situations, in which the national authorities are not able to ensure the human rights of its citizens, it makes sense to argue that the intervening powers will have an equal responsibility, if they can realistically keep that (and not only on an exceptional basis), i.e. if they have sufficient degree of control over a territory. An interpretation that does not consider a sovereign territorial claim as the primary notion of jurisdiction, but instead whether the state exercise enough control over a given territory to affect its inhabitants, will provide a better security for the individuals residing there. Furthermore, sovereignty is essentially the exercising of control over territory, not something that can be confined to a title.[338] This interpretation also means that the national authorities' responsibility only rests on their control over their territory, and thereby, there is, in principle, no difference between intra- and extraterritorial application of a human rights treaty.[339] Going back to the ECtHR's decisions in Bankovic and Al-Skeini, the intervening states had the ability to *respect* the lives of the applicants, however, they might not have had the ability *actively ensure* the lives of the applicants. Therefore, there needs to be a distinction between the negative and the positive obligations included in the ECHR (see 3.2.2.), i.e. between the ability to respect a life, and the ability to actively ensure/protect a life. This distinction is based on the difference between the ability to control the actions of your own and the ability to control the action of others: "when it comes to the negative obligation to respect human rights, no threshold criterion should apply because states can always control the actions of

[338] Milanovic, *supra* note 158, 61.
[339] Milanovic, *supra* note 158, 118.

their organs or agents."[340] However, the positive obligations will still be confined to an overall control of territory that makes it possible to also control the actions of others, and thereby, actively ensure human rights.[341]

This interpretation of article 1 of the ECHR will be in better conformity with the human security approach, as it places focus on the protection of the individual in the manuals international operations, and does not draw an arbitrary line between protection afforded at home and abroad. Furthermore, given that Denmark often engages in international operations on a mandate to ensure human rights abroad, Danish armed forces needs to be extra careful not to violate human rights, because the bar is simply higher for such operations. Therefore, an application of human rights, only in exceptional circumstances, seriously undermines Denmark's contribution to successfully carry out its overall objective in these engagements. Regardless of the mandate, the human security approach requires an enlarged focus on the protection of human rights in order to address new wars, which is equally incompatible with the exceptional application abroad.

5.3.1 Policy Recommendation: Expanded Extraterritorial Application of Human Rights

The thesis recommends that the manual does not only apply the European Convention of Human Rights extraterritorially under exceptional circumstances, but that it insists on the applicability of its negative obligations in international operations, regardless of the perceived control over territory or individuals.

To sum up, the thesis proposes that the manual:

- Apply the ECHR extraterritorially, not only on an exceptional basis, but that it insists on an obligation to *respect* the convention in international operations
- In situations, in which the Danish armed forces have the effective overall control of an area, also insist on an obligation to *actively secure or ensure* the convention in international operations

[340] Milanovic, *supra* note 158, 119.
[341] *ibid.*

6. Conclusion

When Denmark wants to sustain its ability to engage in new wars abroad, it has to be better prepared for the legal challenges it will face. This is crucial, not only for the Danish soldiers on the ground, but also because it is a vital part of Denmark's ability to contribute to installing a new and legitimate authority, and thereby, pave the war for an end to the war. Therefore, Denmark should change its legal approach governing international military operations to a human security approach, recognising that war is a violation of human rights, and therefore, the focus should be on the security of the individual. The Danish military manual, as both a legal and strategic tool, is an obvious starting point for the incorporation of such an approach. However, the thesis can conclude that the manual does not incorporate the necessary inclusion of human rights to adhere to a human security approach. Therefore, the thesis presents three policy-recommendations that the manual should incorporate to ensure that Danish armed forces are better prepared to address new wars.

A human security approach builds on an acknowledgement that new wars have a different logic than old wars, and therefore, need a different solution. Because new wars are mutual enterprises, the solution entails a construction of a legitimate authority at all levels - locally, national, regional and international - that can remove the warring parties' incitement to continue the war. Therefore, if intervening powers wish to contribute to ending the war and install legitimate authorities, they have to use means commensurable with this goal. This require a shift in the legal regime applied in armed conflicts, from one that is primarily based on international humanitarian law, to a regime that focuses more on the human security, namely, human rights law. Applying a human security approach in the Danish military manual would allow Denmark to continue to intervene in new wars, however, under a legal regime more focused on minimising all loss of life, enhancing protection of civilians, and where possible, arresting rather than killing the enemies.

The Danish military manual is the first of its kind to include human rights law. It concludes that Danish armed forces hold human rights obligations abroad when they have personal and/or territorial jurisdiction. The manual presents three overall guidelines for how the Danish soldiers should apply human rights in situations of armed conflict: the interplay between HRL and IHL should be carried out in a harmonic way, that intensity and amount of control matters for the application of HRL, and finally, that HRL can play a significant role in

NIACs. The manual, however, cease to include a more specific guidance on what a 'harmonic interplay' entails, and how the interplay is applied in practise, instead, it points out that it will apply human rights when necessary throughout the manual. While it would have been helpful if the manual was more specific on its application of human rights from the beginning, it is even more problematic that it does not apply the three overall guidelines to two essential rules: targeting and detention.

In the Danish military manual's interpretation of when targeting is legal, it applies an IHL-based reasoning where Danish armed forces, in order to know when and how individuals can be targeted, must be able to distinct between civilians, civilians directly participating in hostilities, and civilians directly participating in hostilities on a continuous basis. However, distinction between civilians and enemies is one of the main challenges of new wars, and even though the manual demands careful calculation and evidence, it still does not provide a solution to the distinction problem. Neither does the manual's interpretation of targeting follow its own three guidelines regarding the inclusion of human rights, even though situations where it is possible to apply HRL rather than IHL do exist during targeting situations in new wars. More or less the same can be said about the Danish military manual's interpretation of detention. Here the manual is also faced with a distinction problem, that it is not able to provide a solution to, and neither here does it follow its own guidelines for the role human rights have in the manual, but instead applies a strict interpretation of IHL as the primary framework. This is especially problematic, since the rules governing internment during NIACs, are weak. The manual does include human rights measures, but as these are all optional, HRL clearly becomes the secondary framework. Thereby, the manual fails to apply a human security approach to both targeting and detention.

The Danish military manual's disregard of complicit responsibility in detention is another clear example of a rule, where the manual has not incorporated a human security approach. If Denmark does not recognise a common responsibility to uphold the law during armed conflicts vis-a-vis its cooperation partners, it will seriously damage Denmark's own credibility.

In order to adhere to a human security approach, the Danish military manual will need a better implementation of human rights, than its current implementation in the two rules of targeting and detention. If these rules exemplify the manual's take on a 'harmonic' interplay,

it is difficult to see how it would help increasing the legitimacy of Danish forces in new wars. And when the manual not even follows its own guidelines to the application of human rights, it also risks undermining the legitimacy that the inclusion of human rights could have created. Furthermore, the challenges of distinction between civilians and enemies are not addressed in a redefining way. Overall, the manual's interpretations do not significantly alter Denmark's chances of contributing to ending the new wars.

The thesis concludes that the Danish military manual, because of its inclusion of human rights and its three overall guidelines to their role in armed conflict, is an excellent starting point for engaging in the debate about applying human rights to armed conflicts. The thesis, therefore, presents three policy-recommendations that the manual should include to better adhere to a human security approach, and thereby, increase the chances for Denmark to promote stability through legitimate and inclusive authorities in conflict-ridden countries.

- The manual needs to incorporate a flexible human rights approach, which entails that it applies the most explicit rule designed to the situation. It should incorporate the approach both as an overall guideline to how the interplay between HRL and IHL should be carried out, but also throughout its outline of relevant rules, in particular targeting and detention.
- The manual should include a due-diligence tool for vetting potential cooperation partners/recipients of support, so Denmark can avoid cooperating with lawbreakers.
- The manual should insist on the extraterritorial applicability of obligations to respect human rights regardless of the perceived control over territory or individuals, as well as obligations to actively ensure human rights in situations where the Danish force have the effective overall control of an area.

7. Perspectives

The incorporation of the three policy recommendations proposed by the thesis in the Danish military manual, would require significant changes of the Danish defence. First and foremost it would require changes in the education and training of soldiers, as well as the legal personnel working for the defence. It would also require changes on the tactical and operational level, and some might claim that it would complicate matters further for the soldiers on the ground. Admittedly, the incorporation of a human security approach is a very ambitious proposal. It asks Denmark to implement legal rules that is not considered *lex lata*, in order to afford a better protection of people that are not even Danish citizens. However, given that Denmark continuously claim that it is committed to improving security and guaranteeing human rights in countries engaged in armed conflict by military means, it is imperative that Denmark is engaged in a debate about how this can be done in the best possible way. Incorporating a human security approach warrants research into how operating under a stricter legal regime would affect the Danish defence in international operations. The conclusion of the thesis proposes a number of new questions and research opportunities.

The first question that arises, is whether the human security approach poses more challenges than advantages for the Danish armed forces, for instance: is the approach simply too idealistic and impossible to implement in practice, is the approach far more complicated than the IAC-NIAC dichotomy, and would the approach actually hinder Denmark in carrying out an activist military foreign policy. It could be argued that in armed conflicts compromises are made, and while the human security approach is appealing, it will make it impossible for Danish soldiers to do their job. Furthermore, it could be argued that the human security approach is so complicated to apply in practise, that it makes it non-operational, as it would demand that soldiers on the ground would have all information and time needed to figure out which regime that provides the most explicit rule designed for the situation. Future research could therefore look into how a human security approach would matter for the Danish forces on the ground, focusing both on the cooperation between military and civilian means under a human security imperative, and on the tactical and the operational challenges. Last, it could be argued that Danish forces would have to work under such tight rules of engagements, that they would not be able to conduct military operations, and therefore, it might dampen Danish military engagement, leading to a shift in Danish foreign policy to a more civilian and humanitarian approach.

Another question is how the incorporation of a human security approach would affect Denmark's ability to work in coalitions. This demands a closer look at the issues of legal interoperability. Denmark's increased inclusion of human rights obligations in its international operations could complicate cooperation with coalition partners, because it often varies a lot which human rights treaties the participating states are parties to, as well as how they interpret their scope of application.[342] Multinational operations does not form a common set of legal obligations, and all participating states are still bound by both their individual national and international obligations. In, for example, NATO operations, different interpretations of extraterritorial applicability of human rights obligations are evident among the alliance partners, and especially between the US and the European states. This affects the legal interoperability, and therefore, also the corporation on the ground.[343] Therefore, future research could look into cooperation challenges posed by legal differences between Denmark and its allies, and thereby, add to a deeper understanding of Denmark's incorporation of a human security approach.

A third question arising in regards to the application of international law to new wars is how to engage non-state actors. Given that much violence in new wars is committed by non-state actors, it is crucial that a human security approach also somehow manages to engage them, if there is to be any serious attempt to protect civilians and end new wars. The examples of armed conflicts, in which non-state actors have or still hold control over large groups of people are many: Boko Haram in Nigeria; ISIS in Syria and Iraq; and the Taliban or Al-Qaeda in Pakistan to Afghanistan.[344] However, the lack of compliance with both IHL and HRL by non-state actors is one of the most fundamental problems of international law. International law is premised on states, and non-state actors cannot accede treaties, why they have they little to no influence on the law-making process, and therefore, might not feel a strong incentive to adhere to the law. The above mentioned actors are actually notoriously known for massive violations of HRL and IHL. Concerning the compliance with IHL, it

[342] Marten Zwanenburg, "International humanitarian law interoperability in multinational operations", *International Review of the Red Cross*, vol. 95, no. 891/892, (2013), 683.
[343] Kirby Abbott, "A brief overview of legal interoperability challenges for NATO arising from the interrelationship between IHL and IHRL in light of the European Convention on Human Rights", *International Review of the Red Cross*, vol. 96, no. 893 (2014), 114.
[344] Andrew MacLeod, "Engaging Non-state Armed Groups for Humanitarian Purposes", *Chatham House,* 2016, 7 (available at: https://www.chathamhouse.org/sites/default/files/publications/research/2016-04-29-NSAG.pdf).

could be argued that the only remedy is to give non-state actors an incentive to follow the rules, by granting them the same status as states' armed forces under IHL, i.e. the combatant's privilege to fight. The point is that as long as non-state actors are fighting illegally, they might as well use illegal methods. When "organized armed groups face legal liability whether they target soldiers or civilians, they are not provided with incentive to refrain from targeting civilians."[345] For political reasons, the acceptance of non-state actors legitimate right to armed conflict seems unlikely, and other ways to include them in international law might be more feasible. Organisations like the 'Geneva Call' have for the last two decades tried to reach out to non-state actors via their 'Deed of Commitments', a pledge non-state actors can make to respect IHL: "the *Deed of Commitment* process gives armed non-state actors the opportunity to formally express their agreement to abide by humanitarian norms and take ownership of these rule."[346] Such initiatives might help expand knowledge of IHL and raise compliance among non-state actors. Therefore, future research might look into possible ways to address non-state actors' lack of compliance with international law, as well as how this could be incorporated in a human security approach.

A fourth question arising is what consequences the application of a human security approach in the Danish military manual would have in regard to cyber warfare. The Danish military manual is only sporadically concerned with cyber warfare, but given that it is an area of armed conflicts that will continue to demand attention from both politicians, scholars and the military, it would be extremely relevant to discuss what role human rights have in relation to cyber operations. The manual introduce cyber warfare in Chapter 3, section 10 as 'Computer Network Operations' (CNO), and writes that it can be discussed whether these operations belong to a whole new domain in armed conflicts or if they are just a new method of warfare.[347] The manual concludes that CNO is merely a new method, and this is important, because then CNO is also regulated through the existing international law regime. The manual, therefore, does not have a separate section on CNO, but addresses CNO-aspects of the general rules when relevant throughout the manual.[348] The Danish military manual also refers to the Tallinn manual, an academic non-binding study on how international law applies

[345] David Kretzmer, *supra* note 88, 44.
[346] Geneva Call, "Deed of Commitment" (available at: https://genevacall.org/how-we-work/deed-of-commitment/).
[347] Knudsen (ed.), *supra* note 12, 80.
[348] *Ibid.*

to cyber operations.[349] Further research could, thereby, discuss the application of international law to cyber operations in a human security perspective, including the interplay between IHL and HRL, and how this should be addressed in the Danish military manual.

[349] NATO Cooperative Cyber Defence Centre of Excellence, *Tallin Manual on the International Law Applicable to Cyber Warfare,* Cambridge University Press, 2013.

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