

The Humanitarian Civilian

*How the Idea of Distinction Circulates
Within and Beyond International
Humanitarian Law*

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1

Introduction

Introduction

A common vision of the principle of distinction in international humanitarian law (IHL) positions civilians and combatants as separate entities, divided by a fixed and stable bright line. As soon as one reaches for distinction and its promise of clarity, however, the line dissolves. It dims, moves, or disappears. Even as distinction eludes one's grasp, many people reach for it in many different places and in many different ways. In settings as disparate as Protection of Civilians sites in South Sudan, civil–military training spaces, and Geneva and the Hague, international actors can be found producing distinction. In many instances, the things they are doing with distinction render it unrecognizable as a civilian–combatant binary. A deceptively simple discovery arises here, one that implicates our fundamental assumptions about the practice of IHL: distinction means many things to many people.

Distinction's disorder is routinely downplayed, however, as incentives abound to conceal the chaos it produces. Particularly important here is the desire to live in a world in which civilians are robustly protected and do not come under deliberate attack. This protective impulse leads many international lawyers and protection advocates to suppress the fluidity of distinction and, when confronted by signs of strain, to double down on the bright-line vision. Such accounts lament the erosion of the civilian concept and the blurring of the civilian–combatant boundary, all the while holding the principle of distinction firmly in place as an otherwise stable rule.

Taking a sideways look at distinction, this monograph explores the way in which it circulates within and beyond IHL. A burgeoning critical scholarship shows that the distinction between combatants and non-combatants is not fixed, predictable, or reciprocally understood, but is instead contested and dynamic.¹

¹ Andrew Barros and Martin Thomas (eds.), *The Civilianization of War: The Changing Civil–military Divide 1914–2014* (Cambridge: Cambridge University Press, 2018) (*Civilianization*); Helen Kinsella, *The Image Before the Weapon: A Critical History of the Distinction between Combatant and Civilian* (Ithaca, NY and London: Cornell University Press, 2011) (*Image*); Claire Garbett, *The Concept of the Civilian: Legal Recognition, Adjudication and the Trials of International Criminal Justice* (Oxford: Routledge, 2015) (*The Concept of the Civilian*); Amanda Alexander, 'The Genesis of the Civilian', *Leiden Journal of International Law*, Vol. 20, 2007, pp. 359–376; Emily Crawford, *Identifying the Enemy: Civilian Participation in Armed Conflict* (Oxford: Oxford University Press, 2015) (*Identifying the Enemy*); Anicée van Engeland, *Civilian or Combatant? A Challenge for the 21st Century*

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Building on these contributions, the present study redirects attention to international humanitarian actors, a set of civilian actors who are caught up in the contradictions of the law in fascinating ways. By virtue of their role delivering assistance to war-affected populations, humanitarian actors bear responsibilities towards these populations, as well as to the parties to the conflict and to IHL. This professional role is imbued with great social value, but also brings attendant dangers that render them vulnerable. Seizing upon signifiers of ‘civilianness’, humanitarian actors present themselves as harmless, innocent, and outside the fight. They enact a range of everyday distinction practices that set them apart from those actors with whom they do not wish to be associated. Crucially, this includes other civilians, some of whom have qualities of ‘combatantness’ swirling around them as they appear to be complicit, dangerous, and participating in the conflict. These practices inevitably draw humanitarian actors into clashes with others, and this monograph focuses on tensions that arise with the international peacekeeping and military actors who populate comprehensive missions. As these differently situated actors collide on a routine basis, distinction is made and remade through struggle and contestation.

Drawing on the insights of multi-sited ethnography,² this bottom-up study follows the idea of distinction across different global sites, from South Sudan to Geneva. Contests unfold along multiple fault lines, and three figures emerge that are unfamiliar to IHL. The ‘civilian plus’ represents an especially pure civilian status that humanitarian actors long for, the ‘mere civilian’ is a default status that humanitarians wish to transcend, and the ‘civilian minus’ is a tainted status that haunts humanitarian practices. Insofar as the distinctions that are enacted do not map onto a civilian–combatant binary, these dynamics are typically obscured in IHL. This monograph makes these practices legible in all of their complexity, treating them as valid engagements with a legal rule that is already deeply disrupted.

(Oxford: Oxford University Press, 2011) (*‘Civilian or Combatant’*); Hugo Slim, *Killing Civilians: Method, Madness, and Morality in War* (Oxford: Oxford University Press, 2010), 210 (*‘Killing Civilians’*).

² George Marcus, ‘Ethnography in/of the World System: The Emergence of Multi-Sited Ethnography’, *Annual Review of Anthropology*, Vol. 24, 1995, pp. 95–117; Sally Engle Merry, ‘Ethnography of the Global’, Workshop at the Berkeley Centre for the Study of Law and Society, February 2013; Akhil Gupta and James Ferguson (eds.), *Anthropological Locations: Boundaries and Grounds of a Field Science* (Oakland, CA: University of California Press, 1997). See also Mark-Anthony Falzon, ‘Introduction: Multi-Sited Ethnography: Theory, Praxis and Locality in Contemporary Research’, in Mark-Anthony Falzon (ed.), *Multi-Sited Ethnography: Theory, Praxis and Locality in Contemporary Research* (Burlington, VT: Ashgate, 2009), pp. 1–24. For an example in international law scholarship see: Sarah Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge University Press, 2013), 235, n 45 (*Complementarity*): (‘Moving between The Hague, Gulu, Khartoum, Darfur, Kampala, and headquarters of international organizations, the study does not focus, like classic anthropology, on the culture of one community, traditionally a village.’)

1.1 Background to the study

The impetus for this study came from my personal experience as an international humanitarian actor. While based in West Darfur, Sudan as Head of Mission for the non-governmental organization (NGO) War Child Canada from 2009 to 2011, I experienced first hand how international actors struggle with distinction. On a day-to-day basis, international humanitarian NGOs in Darfur grappled with whether they should: participate in joint security planning with non-humanitarian actors; accept military offers of in-kind resources; conduct joint projects with the African Union (AU)/UN hybrid mission, UNAMID; travel in armed convoys; and/or engage in long-term development work and human rights advocacy. While the answers to these questions shifted as conflict dynamics fluctuated, what was striking was how these answers were routinely formulated in terms of distinction. Notably, this distinction did not always track along with a civilian–combatant binary. The more relevant divide was sometimes humanitarian–military or humanitarian–civilian, or even humanitarian–humanitarian. Moreover, the idea of distinction was often collapsed together with other priorities and cherished values. Yes, we brandished our organizational logo to safeguard our civilian status, but did so also to demonstrate ‘visibility’ for donors so that we could secure the necessary funds to continue operating. In the same vein, we did not only avoid an affiliation with UNAMID because of the dangers presented by the mission’s military aspects—though this was a live concern. It was also because we doubted the mission’s competence and we wanted to protect our good reputation.

When I left Darfur and returned to law school in Canada, I developed a more in-depth knowledge of IHL as lawyers understand it. As I was taught the civilian–combatant distinction in a JD classroom, I struggled to make sense of how this rule governed the intricate practices I had observed and participated in on the ground. My inability to piece this together satisfyingly alerted me to the fact that I had a significant puzzle to solve. This led me back to South Sudan, where I began to search for distinction in unusual spaces and places. The chance opportunity to become a trainer for soldiers and peacekeepers in West Africa led to a serendipitous discovery. That is, training spaces, and especially civil–military training sites, are also sites in which distinction is taught, learned, and brought into question. This uncovering of a middle realm in which people were modelling, simulating, and role-playing distinction challenged my initial expectation that this would be a straightforward story about conflict zone practices versus IHL rules ‘in the book’. The assumption that a bright-line binary distinction even exists at the level of text and doctrine was also, eventually, upended. Searching for a stable distinction in the Geneva Conventions and the Additional Protocols, in historical approaches to protection, and in the decisions of international tribunals, I realized that there is no bright line to be found.

1.2 The principle of distinction and the civilian concept in IHL

As a ‘second best’ to eradicating the use of force globally, IHL’s aim is to limit destruction and suffering in armed conflict.³ While contemporary international lawyers often use IHL, ‘laws of war’, or ‘laws of armed conflict’ interchangeably as translations of *jus in bello*,⁴ the respective terms have symbolic and political implications that must be acknowledged.⁵ Though the present study employs the term IHL, this does not indicate a belief that concerns of humanity eclipse military imperatives in the relevant doctrine.⁶ So long as an appreciation of military imperatives is required for securing state buy-in,⁷ it can be said that IHL is animated by a ‘push and pull’ between humanity and military necessity.⁸

The principle of distinction, which functions narrowly to govern targeting in the conduct of hostilities, reflects this balancing act. This rule allows parties to the conflict to attack military objectives and kill those deemed legitimate targets, while offering protection to civilians and civilian objects.⁹ Article 48 of AP I provides:¹⁰

³ Gabriella Blum, ‘The Laws of War and the “Lesser Evil”’, *Yale Journal of International Law*, Vol. 35, No. 1, 2010, pp. 1–69, 7 (‘Lesser Evil’).

⁴ As in Theodor Meron, ‘The Humanization of Humanitarian Law’, *American Journal of International Law*, Vol. 94, No. 2, 2000, pp. 239–278. For a critique of this practice, see Amanda Alexander, ‘A Short History of International Humanitarian Law’, *European Journal of International Law*, Vol. 26, No. 1, 2015, pp. 109–138, 112–113 (‘Short History’).

⁵ David Kennedy, *Of War and Law* (Princeton, NJ: Princeton University Press, 2006), 83 (‘War’); Blum, *supra*, 8 (‘Lesser Evil’).

⁶ Alexander, *supra*, 135 (‘Short History’). On the concept of unnecessary suffering, see Chris Jochnick and Roger Normand, ‘The Legitimation of Violence: A Critical History of the Laws of War’, *Harvard International Law Journal*, Vol. 35, No. 1, Winter 1994, pp. 49–95, 66 (‘Critical History’).

⁷ Frédéric Mégret, ‘Thinking about what International Humanitarian Lawyers “Do”: An Examination of the Laws of War as a Field of Professional Practice’, in Wouter Werner, Marieke de Hoon, and Alexis Galán (eds.), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge: Cambridge University Press, 2017), pp. 265–296, 271 (‘IHL Lawyers’).

⁸ In the present study, military necessity relates to achieving a legitimate military purpose or meeting an identified military objective. On debates about the status of humanity as an IHL principle, compare Meron, *supra* (arguing that humanity is at the centre of IHL), with, e.g.: Michael Schmitt, ‘Discriminate Warfare: The Military Necessity–Humanity Dialectic of International Humanitarian Law’, in David Lovell and Igor Primoratz (eds.), *Protecting Civilians During Violent Conflict: Theoretical and Practical Issues for the 21st Century* (Abingdon and New York: Ashgate, 2012), Chapter 6, 87–88 (‘Discriminate Warfare’). The ‘push and pull’ dynamic is discussed in Sandesh Sivakumaran, ‘Making and Shaping the Law of Armed Conflict’, *Current Legal Problems*, Vol. 71, No. 1, 2018, pp. 119–160, 156 (‘Making and Shaping’); Michael Schmitt, ‘Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance’, *Virginia Journal of International Law*, Vol. 50, No. 4, 2010, pp. 796–839. But see Adil Haque, ‘Indeterminacy in the Law of Armed Conflict’, *International Law Studies*, Vol. 95, No. 118, 2019, pp. 118–160 (‘Indeterminacy’) (challenging claims that IHL involves a balance of humanity against military necessity).

⁹ While there is some mention of civilian objects and IHL’s ‘protected persons’ in this study, the focus is on individual civilians and civilian populations.

¹⁰ Article 48 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3, Can TS 1991 No. 1 (‘AP I’); Article 13 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609, Can TS 1991 No. 2 (‘AP II’).

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

In the same instrument, the civilian is formally defined in international law for the first time.¹¹ AP I defines the civilian in a negative or residual manner, essentially referring to anyone who is not a combatant.¹² Article 50(1) stipulates:

A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

It has been suggested that the AP I definition treats the civilian as something of an afterthought. Crawford says the civilian is given ‘short shrift’ in AP I,¹³ Dinstein writes that IHL doesn’t ‘tell us who or what the protected persons and objects are’,¹⁴ and Garbett notes the lack of identifiable features and visual signifiers associated with the civilian.¹⁵ The ICRC Commentaries to the APs explain that the drafters of AP I purposely selected a negative definition, however.¹⁶ The aim was to expand the breadth of coverage to all those who are not combatants, rendering the civilian category more—not less—precise. A further stated benefit of the binary is that it does away with the problem of having an ‘undistributed middle’ between the civilian and combatant categories.¹⁷ The formulation is ostensibly alternative and exhaustive: every individual must fall into one of these two categories, and those who belong to one do not belong to the other.¹⁸

¹¹ As per Alexander, *supra*, 359–360 (‘Genesis’). See below in this section.

¹² Discussed in Cecilie Hellestveit, ‘The Geneva Conventions and the Dichotomy between International and Non-International Armed Conflict: Curse or Blessing for the “Principle of Humanity”’, in Kjetil Mujezinovic Larsen, Camilla Guldahl Cooper, and Gro Nystuen (eds.), *Searching for a ‘Principle of Humanity’ in International Humanitarian Law* (Cambridge: Cambridge University Press, 2013), pp. 86–123, 102; Avril McDonald, ‘The Challenges to International Humanitarian Law and the Principles of Distinction and Protection from the Increased Participation of Civilians in Hostilities’, *Spotlight on Issues of Contemporary Concern in International Humanitarian Law and International Criminal Law*, Working Paper, University of Tehran Round Table, April 2004.

¹³ Crawford, *supra*, 233 (*Identifying the Enemy*).

¹⁴ Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004), 114 (*CoH*).

¹⁵ Garbett, *supra*, 100 (*The Concept of the Civilian*).

¹⁶ Claude Pilloud, Yves Sandoz, Christophe Swinarski, et al. (eds.), *ICRC Commentary on Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC, 1987), 609–611 (*AP Commentary*). Discussed also in Kinsella, *supra*, 142 (*Image*).

¹⁷ Dinstein, *supra*, 142 (*CoH*).

¹⁸ Andrew Alexandra, ‘Private Military and Security Companies and the “Civilianization” of War’, in David Lovell and Igor Primoratz (eds.), *Protecting Civilians During Violent Conflict: Theoretical*

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This approach espouses the benefits of inclusiveness, comprehensiveness, and clarity.¹⁹

The promise of clarity quickly fades as soon as one contemplates the contemporary basis of civilian protection in armed conflict. According to the same ICRC Commentary, the protection of civilians under IHL is connected to ‘the inoffensive character of the persons to be spared and the situation in which they find themselves.’²⁰ The implication is that protection under the APs of 1977 is not solely based on an individual’s status as either civilian or combatant, but instead hinges on an individual’s conduct.²¹ While the armed/unarmed marker may thus serve as an indicator of civilian status, protection depends upon the nuances of actual participation.²² The concept of direct participation in hostilities (DPH) was introduced into IHL for this reason.²³ Along with other targeting rules, it unsettles the notion of a fixed and stable line. As Kinsella remarks, the introduction of a temporal element into the distinction, through the DPH concept, upends the notion that the civilian and the combatant are only ‘conceived in opposition to each other.’²⁴

Kindersley and Rolandsen identify a ‘self-imposed blind spot’, whereby practitioners knowingly disregard the complexities of civilian identity in the operating environment.²⁵ I would go further and suggest that, in addition to issues of on-the-ground practice, there is a discernible reluctance to confront distinction’s fragility as a legal idea.²⁶ To understand why a bright-line binary framework remains in circulation as the reference point, it is important to note how high the stakes are from an IHL perspective. Not only is the principle of distinction positioned as a central IHL rule, but also it is framed as the apotheosis of historical advancements in legal protections for those outside the fight.

and Practical Issues for the 21st Century (Abingdon and New York: Ashgate, 2012), pp. 183–189, 187 (‘Private Military Companies’).

¹⁹ Pilloud et al. (eds.), *supra*, 610–611 (*AP Commentary*).

²⁰ *Ibid.*, 610 (*AP Commentary*).

²¹ GC IV of 1949 implies that the primary basis for protecting civilians from harm is their lack of combatant status.

²² Slim, *supra*, 210 (*Killing Civilians*). See also *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9-T, Trial Judgment, ICTY, 17 October 2003, para. 659 (mere possession of a weapon does not create ‘reasonable doubt’ of civilian status); *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Appeal Judgment, ICTY, 17 July 2008, paras. 167, 178 (emphasizing actual harm caused by the civilian who directly participates in hostilities).

²³ DPH is addressed in Chapter 2 and Section 5.3.1. Civilian objects, in contrast, lose protection when they make an effective contribution to military action. See Article 52(2) of AP I.

²⁴ Kinsella, *supra*, 144 (*Image*).

²⁵ Nicki Kindersley and Øystein H. Rolandsen, ‘Who are the Civilians in the Wars of South Sudan?’, *Security Dialogue*, Vol. 50, No. 5, 2019, pp. 383–397, 393 (‘Who are the Civilians?’).

²⁶ On distinction as a fragile idea see Karma Nabulsi, *Traditions of War: Occupation, Resistance, and the Law* (Oxford: Oxford University Press, 1999), 1 (*Traditions of War*); Kinsella, *supra*, 3 (*Image*).

First, distinction has been described as ‘the basis for the law of armed conflict’,²⁷ ‘the foundation of the whole system’ of IHL,²⁸ a ‘fundamental’ component,²⁹ and a ‘cornerstone’³⁰ of IHL. While IHL instruments do not provide a civilian–combatant distinction in non-international armed conflicts (NIACs),³¹ Sassoli et al. propose that a distinction must exist in NIACs if IHL is to be respected.³² The logic is simple: if distinction fails, the wider body of law might fall apart. Berman critiques this tendency to tie the principle of distinction to IHL’s functioning. Assessing the ICRC’s strict approach to distinction, he contends: ‘The destabilization of *jus in bello* by means of its own categories ... cannot be held back through avowedly counter-realistic fiats about the rigorous difference between combatants and civilians.’³³ He holds that such decrees, in fact, facilitate the very destabilization that the ICRC is trying to avert.³⁴

Second, the temptation to conceal distinction’s disorder is heightened when the AP I rule is treated as the culmination of age-old efforts to protect civilians. Some cite GC 1864 as the first legal moment at which victims of war became the focal point,³⁵ though this instrument focuses on wounded combatants. Others highlight protections advanced in the Hague Regulations of 1899 and 1907,³⁶ though protections in these instruments are primarily assigned to prisoners and inhabitants of occupied territories. What is more, the Hague Regulations do not prohibit the bombing or starvation of those outside the fight, nor do they prohibit reprisals.³⁷ It is not until GC IV of 1949 that protections are advanced for the civilian as a legal entity,³⁸ but

²⁷ Pilloud et al. (eds.), supra, 438 (*AP Commentary*).

²⁸ Alejandro Lorite Escorihuela, ‘Humanitarian Law and Human Rights Law: The Politics of Distinction’, *Michigan State Journal of International Law*, Vol. 19, No. 2, 2013, pp. 300–407, 319.

²⁹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, International Court of Justice, 8 July 1996, para. 257.

³⁰ Crawford, supra, 1 (*Identifying the Enemy*).

³¹ Ibid., 15, 73. On the under-regulation of NIACs, in general, see: Sandesh Sivakumaran, ‘Re-Envisaging the International Law of Internal Armed Conflict’, *European Journal of International Law*, Vol. 22, No. 1, 2011, pp. 219–264, 219 (‘Re-Envisaging’); Dino Kritsiotis, ‘Humanitarian Warfare: Towards an African Appreciation’, in Jeremy I. Levitt (ed.), *Africa: Mapping New Boundaries in International Law* (Oxford: Hart, 2008), pp. 149–180, 152 (‘Humanitarian Warfare’).

³² Marco Sassoli, Antoine Bouvier, and Anne Quintin (eds.), *How Does Law Protect in War?* (Geneva: ICRC, 2011), Chapter 5, 1 (‘civilians can and will only be respected if government soldiers and rebel fighters can expect those looking like civilians not to attack them’) (*How Does Law Protect?*). The principle of distinction in NIACs is sourced in customary international law. See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Geneva: ICRC, 2005) (*ICRC Customary IHL Study*).

³³ Nathaniel Berman, ‘Privileging Combat? Contemporary Conflict and the Legal Construction of War’, *Columbia Journal of Transnational Law*, Vol. 43, No. 1, 2004, pp. 1–71, 54 (‘Privileging Combat?’) (discussing the ‘part-time combatant’).

³⁴ Ibid. See also Nicholette Boehland, *The People’s Perspectives: Civilian Involvement in Armed Conflict* (Oxford: Oxford University Press, 2010).

³⁵ Daniel Thurer, ‘Dunant’s Pyramid: Thoughts on the “Humanitarian Space”’, *International Review of the Red Cross*, Vol. 89, No. 865, 2007, pp. 47–61, 50 (‘Dunant’s Pyramid’).

³⁶ Crawford, supra, 14, 50 (*Identifying the Enemy*), citing the example of Pilloud et al. (eds.), supra, 598 (*AP Commentary*); Judith Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law* (Dordrecht: Martinus Nijhoff Publishers, 1993) (*Non-Combatant Immunity*). See also Richard Shelley Hartigan, *The Forgotten Victim: A History of the Civilian* (Chicago, IL: Precedent Publishing, 1982).

³⁷ Jochnick and Normand, supra, 76 (‘Critical History’); Alexandra, supra, 116 (‘Short History’).

³⁸ See e.g. Article 33 of GC IV; Article 49 of GC IV.

even then the civilian is not defined and the relevant protections are circumscribed in numerous ways.³⁹ And yet, as Alexander shows, delegates at the AP conferences in the 1970s behaved as though strong protections for civilians were already in place, and indeed at the core of IHL.⁴⁰ She argues that the seemingly broad protections ultimately introduced in the APs were in fact open to competing interpretations, containing a range of ‘cautious disclaimers and imprecise provisions.’⁴¹ On this account the AP I definition of the civilian does not remedy,⁴² but instead introduces an ambiguous civilian status. Like many other rules of international law,⁴³ it can be said that the principle of distinction is plagued by indeterminacy and ambiguity—some of which might be intentional and, indeed, considered advantageous.⁴⁴

This monograph takes the view that when it comes to the civilian concept, the problem is not so much that IHL sets up the civilian as a black box—though the negative definition presents some difficulties. It is rather that the principle of distinction rests on ambiguity, uncertainty, and contingency. Dominant narratives of IHL somehow manage to convey precisely nothing about the civilian, while at the same time establishing a nebulous and even contradictory civilian figure. This haziness continues in the treatment of the international humanitarian actor in IHL doctrine, and again with respect to the relationship between the international humanitarian actor and the civilian category. The fuzzy treatment of both the humanitarian actor and the civilian concept in IHL makes it possible to set up (some) humanitarian actors as the subjects of special protection and privilege—without framing this as a carve-out from IHL’s civilian category.

1.3 The actors of interest

This study explores the way in which distinction circulates globally, focusing on the practices of international actors in comprehensive missions governed by IHL. The international humanitarian actor is positioned as the central actor of interest, and the same qualities that make the humanitarian actor an intriguing figure to study

³⁹ Nabulsi, *supra*, 11 (*Traditions of War*); Crawford, *supra*, 233 (*Identifying the Enemy*).

⁴⁰ Amanda Alexander, ‘International Humanitarian Law: Postcolonialism and the 1977 Geneva Protocol I,’ *Melbourne Journal of International Law*, Vol. 17, No. 1, 2016, pp. 1–36, 21–22 (‘Postcolonialism’).

⁴¹ *Ibid.*

⁴² This argument is advanced in Garbett, *supra*, 100 (*Concept of the Civilian*).

⁴³ On indeterminacy in international legal rules see Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2009). On indeterminacy in IHL see Haque, *supra* (‘Indeterminacy’).

⁴⁴ Kinsella, *supra* (*Image*), 189. Citing Abram Chayes and Antonia Chayes, ‘On Compliance,’ *International Organization*, Vol. 47, No. 2, 1993, pp. 175–205, 189 (on indeterminacy); Theodor Meron, *War Crimes Law Comes of Age* (Oxford: Oxford University Press, 1998), 159 (on deliberate ambiguity). See also Chapter 2.

also pose definitional hurdles. Even before the term ‘humanitarian’ is brought into contact with IHL, it suffers from indeterminacy.⁴⁵ It is too simplistic to declare, for example, that a humanitarian actor is someone who provides humanitarian assistance.⁴⁶ This is potentially a useful point of departure, but it gathers inside the category peacekeeping and military actors who deliver (so-called) humanitarian assistance. A further challenge is that no category of ‘humanitarian actor’ exists as such in IHL doctrine.⁴⁷ I argue in this monograph that IHL positions the Red Cross figure as the paradigmatic humanitarian actor, but this only tells us so much because the bulk of international actors who actively deliver humanitarian assistance in contemporary armed conflicts do not resemble this entity. While some available typologies of humanitarian actors usefully grapple with the diversity of the role,⁴⁸ none explicitly engage with IHL. Nor, for that matter, do they account for the presence of non-humanitarian actors in the operational space. The concept of ‘humanitarian space’, which generally refers to the room humanitarian actors have to carry out their tasks unimpeded, is also limited in this respect.⁴⁹

This monograph situates humanitarian actors alongside other international actors engaged in political, military, and peacekeeping responses to armed conflict. The imperative to incorporate other international actors into the narrative flows from the fact that humanitarian actors do not simply ‘distinguish themselves’ in isolation. Instead, distinction is something that must be worked out and navigated in relationship with others. The relevant ‘field’ is defined here as the relational social space in which differently situated actors come into contact and struggle

⁴⁵ Monika Krause, *The Good Project: Humanitarian Relief NGOs and the Fragmentation of Reason* (Chicago, IL and London: University of Chicago Press, 2014), 109 (*Good Project*); Samir Elhawary and Sara Pantuliano, ‘UN Integration and Humanitarian Space’, Panel at University of Ottawa Centre for International Policy Studies, 31 January 2012. Available at: <https://www.youtube.com/watch?v=3SfTYAVvHyU>.

⁴⁶ Humanitarian assistance is defined here as the provision of humanitarian relief—namely humanitarian and protection assistance involving food, water, sanitation, shelter, and health services, as well as humanitarian coordination. This excludes post-conflict development activities, while recognizing that many actors who identify as humanitarian also engage in work across the relief–development continuum. For a similar definition, see: Kubo Macak, ‘Principles of Neutrality and Impartiality of Humanitarian Action in the Aftermath of the 2011 Libyan Conflict’, in Andrew J. Zwitter et al. (eds.), *Humanitarian Action: Global, Regional and Domestic Legal Responses* (Cambridge: Cambridge University Press, 2014), pp. 447–474, 447 (‘Principles’).

⁴⁷ See Section 2.3.1.

⁴⁸ Discussed in Abby Stoddard, ‘Humanitarian NGOs: Challenges and Trends’, *Humanitarian Policy Group*, Briefing paper, No. 1, July 2003, 3; Krause, *supra*, 110 (*Good Project*).

⁴⁹ For debates on the humanitarian space see Sarah Collinson and Samir Elhawary, *Humanitarian Space: A Review of Trends and Issues* (London: Overseas Development Institute, 2012) (*Humanitarian Space*); Marcos Ferreira, ‘Blurring of Lines in Complex Emergencies: Consequences for the Humanitarian Community’, *Journal of Humanitarian Assistance*, December 2012, available at <http://sites.tufts.edu/jha/archives/1625> (‘Blurring’). For accounts of humanitarian space that engage with IHL see Johanna Grombach Wagner, ‘An IHL/ICRC Perspective on “Humanitarian Space”’, *Humanitarian Exchange Magazine*, No. 32, 2005 (‘IHL/ICRC Perspective’); Thurer, *supra* (‘Dunant’s Pyramid’); Sylvain Beauchamp, ‘Humanitarian Space in Search of a New Home’, in Benjamin Perrin (ed.), *Modern Warfare: Armed Groups, Private Militaries, Humanitarian Organizations, and the Law* (Vancouver: UBC Press, 2012), pp. 199–234 (‘Humanitarian Space’).

over distinction.⁵⁰ Ultimately, I have organized the relevant actors into three broad categories:⁵¹

1. International humanitarian actors:
 - a. ‘*ICRC actor*’: humanitarian actors working for the International Committee of the Red Cross (ICRC) and Red Cross family;
 - b. ‘*humanitarian NGO actor*’: humanitarian actors working for NGOs such as MSF, Oxfam, Mercy Corps;
 - c. ‘*UN humanitarian actor*’: humanitarian actors working for UN humanitarian agencies such as UNHCR, UNICEF, and OCHA.
2. International peacekeeping actors:
 - a. ‘*peacekeeping actor/peacekeeper*’: forces who populate peacekeeping battalions of missions such as UNMISS, MONUSCO, EUPROFOR, UNAMID;
 - b. ‘*civilian/civilian staff*’: civilians working in civil affairs, human rights monitors, political and diplomatic actors working for the same missions.
3. International military actors:
 - a. ‘*military actor*’: soldiers, civil–military liaison officers, and other military actors deployed in multinational military missions and coalitions led by NATO, the US, and others (e.g. ISAF in Afghanistan).

Having outlined the relevant categories in this way, I want to emphasize that, more than the actors themselves, it is the boundaries between them that are of interest in this investigation.⁵² What is being tracked across global sites is thus not any particular individual or bounded group, but rather the idea of distinction and, especially, the civilian concept. In keeping with the bottom-up approach of the study and its emphasis on practice, I am tentatively reserving conclusions about the way in which these groupings interact with IHL’s civilian–combatant distinction. That is a central puzzle of this monograph, and it will be pieced together gradually over the course of the discussion. From a doctrinal IHL perspective, however, the reader will note that many of the international actors belonging to these three groups are

⁵⁰ Drawing on Lohne and Sandvick’s definition of the field in their legal sociology of humanitarianism, adding an IHL focus and a more explicit role for non-humanitarian actors. Kjersti Lohne and Kristin Bergtora Sandvik, ‘Bringing Law into the Political Sociology of Humanitarianism’, *Oslo Law Review*, Vol. 4, No. 1, 2017, pp. 4–27, 10–11, 15 (‘Political Sociology’). For a general discussion of the field see Pierre Bourdieu, *The Field of Cultural Production* (Cambridge: Cambridge University Press, 1993) (‘*The Field*’).

⁵¹ At the training sites, actors will additionally have the designation of ‘trainer’ or ‘trainee’. The listed organizations comprise a non-exhaustive set of examples of the relevant actors. Police and private international actors, such as those engaged in business activities or employed by private military and security companies, are not considered in detail.

⁵² Following the insights of relational ethnography. See e.g. Matthew Desmond, ‘Relational Ethnography’, *Theory and Society*, Vol. 43, No. 5, 2014, pp. 547–579 (‘Relational Ethnography’).

entitled to civilian protection in international law. Already, then, we see hints that the idea of distinction is circulating in civilian–civilian relations.

1.4 Central claims of the monograph

This monograph advances three main claims. The first is about the everyday life of international (humanitarian) law, the second is about distinction's perpetually disrupted nature, and the third is about the existence of a 'civilian plus' figure in international practice.

1.4.1 The everyday life of IHL

This claim concerns the wide range of unconventional actors who are shaping the idea of distinction and the civilian concept through their everyday practices and interactions.

This study connects the socio-legal study of law in everyday life to the study of everyday humanitarianism.⁵³ The latter occupies a corner of the broader literature on humanitarianism, situated in what some refer to as the field of humanitarian studies.⁵⁴ Relatively speaking, scholars of international law have been slow to embark on a comprehensively interdisciplinary engagement with humanitarianism.⁵⁵ As a consequence, the rich insights of the humanitarianism literature have not yet

⁵³ On everyday humanitarianism see: Lisa Ann Richey, 'Conceptualizing "Everyday Humanitarianism": Ethics, Affects, and Practices of Contemporary Global Helping', *New Political Science*, Vol. 40, No. 4, 2018, pp. 625–639 ('Everyday Humanitarianism'); Udan Fernando and Dorothea Hilhorst, 'Everyday Practices of Humanitarian Aid: Tsunami Response in Sri Lanka', *Development in Practice*, Vol. 16, No. 3/4, 2006, pp. 292–302 ('Everyday Practices'); Anais Aresseguier, 'The Moral Sense of Humanitarian Actors: An Empirical Exploration', *Disasters*, Vol. 42, No. 1, 2018, pp. 62–80 ('Moral Sense').

⁵⁴ Contributions to the broader literature on humanitarianism have been generated by academics in a wide range of individual disciplines, including anthropology, sociology, political science, and international relations. See, e.g.: Liisa H. Malkki, *The Need to Help: The Domestic Arts of International Humanitarianism* (North Carolina: Duke University Press, 2015) (*Need to Help*); David Mosse (ed.), *Adventures in Aidland: The Anthropology of Professionals in International Development* (New York: Berghahn, 2013) (*Aidland*); Silke Roth, *Passionate Professionals: The Paradoxes of Aid Work* (Abingdon and New York: Routledge, 2015) (*Paradoxes of Aid*); Didier Fassin and Mariella Pandolfini (eds.), *Contemporary States of Emergency: The Politics of Military and Humanitarian Interventions* (New York: Zone Books, 2010) (*States of Emergency*); Didier Fassin, *Humanitarian Reason: A Moral History of the Present* (University of California Press, 2011) (*Humanitarian Reason*); Krause, supra (*Good Project*); Antonio Donini (ed.), *The Golden Fleece: Manipulation and Independence in Humanitarian Action* (Virginia: Kumarian Press, 2012) (*Golden Fleece*); Zoe Marriage, *Not Breaking the Rules, Not Playing the Game: International Assistance to Countries at War* (London: Hurst, 2006) (*Not Breaking the Rules*). The present study also benefits from insights from the literature on everyday peacekeeping, especially: Severine Autessere, *Peaceland: Conflict Resolution and the Everyday Politics of International Intervention* (Cambridge: Cambridge University Press, 2014) (*Peaceland*).

⁵⁵ Lohne and Sandvik, supra, 5 ('Political Sociology').

meaningfully infused what Drumbl terms the ‘international legal imagination.’⁵⁶ Where IHL scholars have taken up the issue of humanitarianism, a doctrinal and normative approach to law has predominated. This can be explained, in part, by the need to clarify IHL’s application to issues such as state consent for humanitarian activities, humanitarian access to beneficiaries, and the deliberate targeting of humanitarian actors by violent actors.⁵⁷ Without denying the pressing nature of such concerns, much could also be learned from a more critical, socio-legal approach to the theory and practice of humanitarianism.⁵⁸ An important methodological contribution of the present study is to demonstrate the form that such an inquiry might take.

In socio-legal studies, law is viewed as a historical and culturally specific mode of social organization, taking different forms both within and across social strata.⁵⁹ With this bottom-up approach to the study of law, it is a legitimate task to study how rules work in practice.⁶⁰ One might ask, for example, how a given actor perceives, understands, experiences, uses, or avoids law.⁶¹ This has the potential to reveal how individual actors engage with law in unexpected ways.⁶² Scrutiny of practice is also instructive because, as noted above, IHL rules are open to alternative—and potentially contradictory—meanings. Focusing on practice can thus illuminate subtle dynamics that might otherwise be unaccounted for, such as the fact that that IHL’s civilian–combatant distinction is not the only fault line along which the relationships of international actors are organized.

The international actors examined in this study avoid, ignore, adopt, apply, develop, and promulgate IHL norms and rules. However, their engagement with IHL is not simply instrumental. These actors also self-conceptualize according to IHL’s civilian and combatant categories, such that law plays a constitutive role. The

⁵⁶ Mark Drumbl, *Re-imagining Child Soldiers in International Law and Policy* (Oxford: Oxford University Press, 2012), 9 (*Child Soldiers*) (referring to a ‘normative, aspirational, and operational mix of international law, policy, and practice—constituted as it is directly and indirectly by a broad constellation of actors’).

⁵⁷ See, e.g.: Claudie Barrat, *Status of NGOs in International Humanitarian Law* (Leiden: Brill Nijhoff, 2014) (*Status of NGOs*); Wagner, *supra* (‘IHL/ICRC Perspective’); Dapo Akande and Emanuela-Chiara Gillard, ‘Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict,’ *International Law Studies*, Vol. 92, 2016, pp. 483–511 (‘Consent’).

⁵⁸ On the need for a legal sociology of humanitarianism, see Lohne and Sandvik, *supra* (‘Political Sociology’).

⁵⁹ As articulated by the Centre for Socio-Legal Studies at the University of Oxford.

⁶⁰ On law from the ‘bottom up’ and from outside legal institutions, see: Susan Silbey and Ayn Cavicchi, ‘The Common Place of Law: Transforming Matters of Concern into the Objects of Everyday Life,’ in Bruno Latour and Peter Weibel (eds.), *Making Things Public: Atmospheres of Democracy* (Cambridge, MA: MIT Press, 2005), pp. 556–565 (‘Common Place of Law’); David Cowan, Linda Mulcahy, and Sally Wheeler, ‘Introduction,’ in David Cowan, Linda Mulcahy, and Sally Wheeler (eds.), *Major Works in Socio-Legal Studies* (London: Routledge, 2013), 5 (‘Introduction’).

⁶¹ Paraphrasing Cowan, Mulcahy, and Wheeler, *supra*, 5 (‘Introduction’).

⁶² Susan Silbey and Austin Sarat, ‘Critical Traditions in Law and Research,’ *Law and Society Review*, Vol. 21, 1987, pp. 165–174, 173; Austin Sarat and Thomas R. Kearns, ‘Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life,’ in Austin Sarat and Thomas R. Kearns (eds.), *Law in Everyday Life* (University of Michigan Press, 1993), pp. 21–62, 60 (‘Beyond the Great Divide’).

socio-legal study of law in everyday life engages with law's instrumental and constitutive aspects;⁶³ this recognizes that law is shaped by the way in which actors use it, but also that its constitutive power delimits the way in which actors are able to employ it.⁶⁴ This introduces an important caveat to the approach delineated above—namely that actors cannot *avoid* or *ignore* law, entirely. Even if international humanitarian actors in South Sudan were to fail to cite IHL on a daily basis, their civilian identity would continue to shape their self-perception and the organization of their affairs.

This monograph also makes a deeper point about legal pluralism, about who might shape IHL's meaning beyond the usual suspects and outside the usual venues.⁶⁵ Settings as dissimilar as Geneva and South Sudan are treated here as sites where the meaning of IHL is articulated, disseminated, and shaped.⁶⁶ The fact that distinction takes on myriad forms and surfaces in a variety of contexts for different reasons, is in itself noteworthy. Moreover, distinction is being constituted and re-constituted on a daily basis by those we might not tend to think of as legal actors. Traditionally, states have been positioned as the main actors engaged in making international law,⁶⁷ including IHL.⁶⁸ Yet the development of IHL has been demonstrably pluralistic, with non-state actors playing a significant role.⁶⁹ This study understands IHL as a body of law and a practice with room for the contributions of non-traditional actors. Moving away from a focus on collective entities, the study contributes to the burgeoning legal literature on individual actors—particularly

⁶³ Sarat and Kearns, *supra*, 29, 32 ('Beyond the Great Divide').

⁶⁴ *Ibid.*, 55; Barbara Yngvesson, 'Inventing Law in Local Settings: Rethinking Popular Legal Culture,' *Yale Law Journal*, Vol. 98, No. 8, 1989, pp. 1689–1709.

⁶⁵ See Sally Engle Merry, 'International Law and Sociolegal Scholarship: Towards a Spatial Global Legal Pluralism,' in Austin Sarat (ed.), *Special Issue: Law and Society Reconsidered (Studies in Law, Politics and Society)*, Vol. 21, 2007, pp. 149–168 (linking socio-legal studies and legal pluralism). See also Lianne M. Boer, 'The Greater Part of Juriconsults: On Consensus Claims and their Footnotes in Legal Scholarship,' *Leiden Journal of International Law*, Vol. 29, 2016, pp. 1021–1042, 1041–1042 (study of practice shows that 'the law is "made" by those working with it, and there are very many people doing so, in many different capacities').

⁶⁶ On the need to study unorthodox locales, see David M. Trubeck and John Esser, 'Critical Empiricism in American Legal Studies: Paradox, Program, or Pandora's Box?', *Law and Social Inquiry*, Vol. 14, 1989, pp. 1–52, 45.

⁶⁷ Jean d'Aspremont, 'International Law-Making by Non-State Actors: Changing the Model or Putting the Phenomenon into Perspective?', in Math Noortmann and Cedric Ryngaert (eds.), *Non-State Actor Dynamics in International Law: From Law-Takers to Law Makers* (London: Routledge, 2010).

⁶⁸ Michael Schmitt and Sean Watts, 'State *Opinio Juris* and International Humanitarian Law Pluralism,' *International Law Studies*, Vol. 91, 2015, pp. 171–215 ('IHL Pluralism'); Sivakumaran, *supra* ('Making and Shaping').

⁶⁹ Leslie Green, *The Contemporary Law of Armed Conflict*, 3rd edition (Manchester: Manchester University Press, 2008), pp. 26–64; Martha Finnemore, *National Interests in International Society* (Ithaca, New York: Cornell University Press, 1996), Chapter 1; Schmitt and Watts, *supra*, 172 ('IHL Pluralism'). On the desirability of a role for non-state actors, compare Schmitt and Watts, *supra*, 174 ('IHL Pluralism') (calling for a narrower state-based approach) with Sivakumaran, *supra* ('Making and Shaping') (IHL is made by the 'community of international humanitarian lawyers', which includes states, 'state-empowered' actors and non-state actors).

those occupying lower-level and frontline roles.⁷⁰ The monograph does not assert that these unconventional actors are enacting positive law in the sense of contributing to treaties and legal conventions (though some might). The claim, rather, is that they are producing the meaning of international legal rules through their everyday practices and interactions.⁷¹ We might thus think of them as ‘lawmakers’, in the broadest sense of the word.⁷²

As a point of clarification, not everything needs to be considered law to be of interest in this interdisciplinary inquiry. A socio-legal examination of the everyday invites a closer look at practices that might, on the surface, seem to have very little to do with law.⁷³ As Sarat and Kearns point out, ‘motives, needs, emotions, anxieties, aspirations that are not entirely fixed by legal meanings or by legal forces operate throughout without totally losing their identity to law.’⁷⁴ The empirical material gathered for this study demonstrates that turf battles, power struggles, status anxiety, feelings of affinity or resentment, jealousy, and petty gripes all play a role in the everyday life of distinction.

1.4.2 Distinction as a perpetually disrupted idea

The second claim is about the idea of distinction being disrupted apart from, and prior to, anything that is going on in the everyday practices of international actors.

It should be emphasized at the outset that this is not a study of IHL compliance. The question animating this investigation is thus not whether a given actor follows the law of distinction, but how international actors make and remake distinction as a matter of grounded practice. There are two reasons for which a compliance focus would be limiting here. First, a compliance focus potentially obscures significant aspects of actual practice.⁷⁵ It assumes, for example, that the civilian–combatant distinction is in fact the distinction of greatest significance—an assumption belied

⁷⁰ Jutta Brunée and Stephen Toope, *Legitimacy and Legality in International Law* (Cambridge: Cambridge University Press, 2010); Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge: Cambridge University Press, 2011), Chapter 3; Michael P. Scharf, ‘International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate’, *Cardozo Law Review*, Vol. 31, 2009, pp. 45–97; Lassa Oppenheim, *International Law: A Treatise* (London and New York: Longmans, Green, 1905).

⁷¹ This brings an IHL focus to the growing literature on the everyday life of international law. See, e.g. Luis Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development* (Cambridge: Cambridge University Press, 2015).

⁷² For a similarly broad approach to law-making, see Itamar Mann, *Humanity at Sea: Maritime Migration and the Foundations of International Law* (Cambridge: Cambridge University Press, 2016); Sivakumaran, *supra*, n 5 (‘Making and Shaping’).

⁷³ Sarat and Kearns, *supra*, 55 (‘Beyond the Great Divide’).

⁷⁴ *Ibid.*

⁷⁵ On the limits of a compliance focus see Martti Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001), 485 (a compliance focus ‘silently assumes that the political question—what the objectives are—has already been solved’). See also Kinsella, *supra*, 4 (*Image*).

by the civilian–civilian tensions that this study brings to light. Second, in a compliance study those practices that depart from a civilian–combatant binary would be regarded as violations of the law, or perhaps as extra-legal and therefore irrelevant. Such accounts treat the IHL rule as both stable and valuable, obfuscating distinction’s more troubling aspects.

Adopting a different tack, the study does not simplistically juxtapose the practices of international actors with an inert legal doctrine. Nor does it frame the practices in question as interfering with a rule that is otherwise orderly. Instead, the study uncovers the messiness of distinction at every level: from the AP I codification of the principle of distinction, to other IHL targeting rules that dim or move the line, to the co-location of humanitarian actors with armed UN forces in South Sudan. The crucial point being conveyed here is that it is not simply the case that international humanitarian actors are disrupting distinction through their practices—though that may well be true. The claim, instead, is that distinction is a deeply disrupted idea that is plagued by pre-existing disorder.

1.4.3 The existence of the ‘civilian plus’

The third claim is about the existence in international practice of a special civilian figure and its corollaries.

As the empirical findings show, the routine interactions that take place between international humanitarian actors and others in the operational space are shaped by contests over distinction. In the vision of distinction that animates these practices, the notion of static civilian and combatant entities is supplanted by more fluid qualities of ‘civilianness’ and ‘combatantness’. It is as though these qualities float in the air, potentially affixing to any individual at any given moment—depending upon one’s self-presentation and behaviour, and the surrounding context. This is a world in which civilianness is more a matter of degree than category, and we thus find international actors jostling with one another for positioning on a civilianness continuum. The relationship of ‘humanitarianism’ to civilianness (and combatantness) is also a live question, one that is pursued across the multi-sited study.

To capture the way in which the civilian concept is diffracted through the lenses of various international actors, I introduce three new figures: the ‘civilian plus’, ‘mere civilian’, and ‘civilian minus’. This triptych relies upon a concept of civilianness that is relative, contingent, and aligned with an already-fragmented civilian category in IHL. While all three civilian figures attract the same target immunity IHL accords to civilians in armed conflict, they are situated differently in other respects. The ‘civilian plus’ is a special status that provides an extra layer of inviolability to individuals who express particularly pure iterations of civilian characteristics. The ‘mere civilian’ denotes a default status given to those who are ‘only’

ordinary civilians, and who have done nothing to attract a ‘plus’ or ‘minus’ designation. The ‘civilian minus’ is a tainted status accompanied by swirling qualities of combatantness, assigned to otherwise-civilian individuals who creep too close to the fight. The engagement with these three civilian figures in the monograph is both descriptive and analytical, but judgement on whether IHL should accommodate a special civilian status is reserved until the concluding chapter. This deferral of the normative question is intended as a corrective, so that we might first understand these grounded practices before making pronouncements on their destabilizing potential.

Coming now to the normative question, I am sympathetic to the desire for a special status but, in the end, I propose that the ‘civilian plus’ is a dangerous proposition. While a special status for international humanitarian actors responds to their genuine security anxieties and incentivizes the crucial tasks they perform in war, it also (further) splinters IHL’s civilian category and sets some civilians apart from others. My main concern is that the ‘civilian plus’ entrenches humanitarian exceptionalism, giving legal imprimatur to the differential treatment of the lives of humanitarian actors as compared to those of other civilians—including the war-affected populations whose suffering provides humanitarians with their *raison d’être*.⁷⁶ This conundrum highlights the paradoxical nature of the ‘civilian plus.’ The power of a special civilian figure derives from the notion that lesser civilians exist, and this serves to weaken the general norm of civilian protection. The more beleaguered or undermined the civilian ideal becomes, however, the more desirable the prospect of a special civilian status appears.

1.5 A note on methodology

While it might seem perverse to introduce a special civilian figure only to conclude that it is a dangerous idea, this outcome flows naturally from deliberate methodological choices and the epistemology that underpins the study.

To begin with, the empirical component⁷⁷ of this monograph was developed through a grounded theory approach.⁷⁸ This approach involves an iterative process that is primarily inductive, but has deductive aspects as well.⁷⁹ Although the

⁷⁶ Building on Didier Fassin, ‘Inequality of Lives, Hierarchies of Humanity: Moral Commitments and Ethical Dilemmas of Humanitarianism’, in Ilana Feldman and Miriam Ticktin (eds.), *In the Name of Humanity* (Durham, NC: Duke University Press, 2010), pp. 239–255 (‘Inequality of Lives’).

⁷⁷ On empirical approaches in international legal scholarship, see: Elena Baylis, ‘The Transformative Potential of Rigorous Empirical Research’, *American Society of International Law Annual Meeting*, Vol. 104, March 2010 (‘Empirical Research’); Gregory Shafer and Tom Ginsburg, ‘The Empirical Turn in International Legal Scholarship’, *American Journal of International Law*, Vol. 106, No. 1, 2012, pp. 1–48 (‘Empirical Turn’).

⁷⁸ See Kathy Charmaz, *Constructing Grounded Theory: A Practical Guide Through Qualitative Analysis* (London: SAGE, 2006) (*Grounded Theory*).

⁷⁹ *Ibid.*, 4, 188.

research was guided by a foreshadowed problem (i.e. how the idea of distinction circulates in international practices), it did not begin with a specific hypothesis.⁸⁰ Rather, it left open the possibility of adjusting the research plan in response to surprising discoveries.⁸¹ Riles describes the task of sorting out the relationships between various discoveries as a process of ‘unwinding’; in this process, the scholar faces an intellectual risk, as she must follow where the material leads her.⁸²

The empirical material this study draws on was generated by interviews, surveys, focus group discussions, and participant observation I conducted in South Sudan and at civil–military training grounds. Informed by ethnographic approaches developed in the discipline of anthropology, these empirical methods aim to see through the eyes of international actors, describing and explaining their motivations, actions, interpretations, values, and patterns of meaning.⁸³ I conducted research in South Sudan in 2015, in the states of Central Equatoria, Jonglei, and Unity.⁸⁴ Across the fieldwork sites, I completed 100 hours of participant observation and conducted 113 interviews; 55 of these interviews were with key informants and the rest took the form of focus group discussions. I carried out fieldwork on civil–military training sites in 2016 in Italy (NATO CIMIC), Germany (Zif), and Sweden (SWEDINT) (see Section 1.6.2). At the training grounds, I logged over 200 hours of participant observation; I conducted 38 interviews with trainers and trainees, mostly in the form of small focus group discussions, and also administered 17 supplementary perception surveys.⁸⁵

The gathering, synthesizing, and coding of empirical material for this study led to the discovery of the ‘civilian plus’ figure, as described. While traces of this figure’s dark side lingered around the edges of my attempts to describe the grounded practices, I deferred the question of whether a special civilian is something we should want. This move is also linked to the epistemological framework I am working within. This study falls closer to the interpretive end of the positivist–interpretivist

⁸⁰ Bronislaw Malinowski, *Argonauts of the Western Pacific: An Account of Native Enterprise and Adventure in the Archipelagoes of Melanesian New Guinea* (London: Routledge, 1922/1984), 9.

⁸¹ Alan Bryman, ‘The Debate about Quantitative and Qualitative Research: A Question of Method or Epistemology’, *The British Journal of Sociology*, Vol. 35, No. 1, 1984, pp. 75–92, 78 (‘The Debate’); David Silverman (ed.), *Doing Qualitative Research: A Practical Handbook*, 3rd edition (London: SAGE, 2010), 274 (‘Doing Qualitative Research’).

⁸² Annelise Riles, ‘Afterword: A Method More than a Subject’, in David Cowan and Daniel Wincott (eds.), *Exploring the ‘Legal’ in Socio-Legal Studies* (London: Palgrave, 2016), pp. 257–264, 260; Annelise Riles, ‘Anthropology, Human Rights and Legal Knowledge: Culture in the Iron Cage’, *American Anthropologist*, Vol. 108, 2008, pp. 52–65.

⁸³ Bryman, *supra*, 77–88 (‘The Debate’). On methodological borrowing in socio-legal studies, see David Cowan and Daniel Wincott, ‘Exploring the “Legal”’, in David Cowan and Daniel Wincott (eds.), *Exploring the ‘Legal’ in Socio-Legal Studies* (London: Palgrave, 2016), pp. 1–32, 5, 14. For a socio-legal study of international law employing anthropological methods, see Nouwen, *supra* (‘Complementarity’).

⁸⁴ The research is also informed by earlier visits I made to South Sudan in 2010, 2011, and 2014 as an aid practitioner.

⁸⁵ A more extensive account of methodology, research ethics, and positionality is provided in Rebecca Sutton, *The Humanitarian Actor as ‘Civilian Plus’: The Circulation of the Idea of Distinction in International Law* (Unpublished PhD Thesis, 2018).

spectrum, aiming not to explain so much as to engender understanding.⁸⁶ For this reason, it focuses on descriptive inference, which permits high levels of authenticity, richness, and trustworthiness in the findings.⁸⁷ In order to enhance the reliability of the research, a well-defined and vigorous coding frame involving precise coding rules was developed.⁸⁸ To strengthen the validity of the research, both data triangulation (i.e. drawing on different sources of data) and method triangulation (i.e. drawing on mixed methods) were employed.⁸⁹ In terms of the falsifiability of the research, it should be pointed out that this study does not concentrate on causal relationships. However, the intention is not to ignore potential causal relationships, but to keep the causal aspect open-ended.⁹⁰ Finally, as for the generalizability of the research,⁹¹ the study's multi-sited approach permits a certain level of typicality and transferability. In particular, the inclusion of the civil–military training sites helps to situate the findings from South Sudan in a wider global context.

1.6 Introduction to the three realms: distinction from the bottom up

This multi-sited study interrogates the idea of distinction across three domains: the Kinetic, where distinction is in motion in the operational context (South Sudan); the Pedagogical, where distinction is taught to practitioners in a classroom setting (civil–military training grounds in Italy, Germany, and Sweden); and the Intellectual, where distinction is adjudicated, theorized, and made into policy (Geneva and the Hague). Eschewing the assumption that the most important divide is a civilian–combatant one, this study investigates a wide range of line-drawing practices and captures numerous distinctions at play. As the bottom-up discussion within each chapter progresses across the three realms, the findings become increasingly normative and abstract—and more obviously relevant for international law. Yet a point the monograph conveys is that all of these sites are spaces in which the idea of distinction is produced. The civilian concept is to be found not only in the Geneva Conventions or the verdict of an international criminal tribunal, but also in the ‘no weapons allowed’ sign erected outside an NGO office in

⁸⁶ John Macdonis and Linda Gerber, *Sociology*, 7th edition (Toronto: Pearson, 2011), 33.

⁸⁷ On the value of a descriptive approach in the study of law, see Anne Orford, ‘In Praise of Description’, *Leiden Journal of International Law*, Vol. 25, No. 3, 2012, pp. 609–625, 616; Drumbl, *supra*, Preface and Acknowledgments (*Child Soldiers*).

⁸⁸ As per Lee Epstein and Gary King, ‘The Rules of Inference’, *University of Chicago Law Review*, Vol. 69, No. 1, 2002, 85.

⁸⁹ Uwe Flick, *An Introduction to Qualitative Research* (London: SAGE, 2009), 136, 443–453.

⁹⁰ Anna MacDonald, ‘Local Understandings and Experiences of Transitional Justice: A Review of the Evidence’, *London School of Economics Justice and Security Research Program*, Paper No. 6, July 2013, 7.

⁹¹ On ethnographic methods and generalizability, see John Gerring, ‘Mere Description’, *British Journal of Political Science*, Vol. 42, No. 4, 2012, pp. 721–746, 726. See also Desmond, *supra* (‘Relational Ethnography’) 573 (the most important part about generalizability is being right).

Juba and the virtual reality game that teaches Swedish soldiers how to interact with NGOs on the battlefield.

To make these dynamics legible as part of the everyday life of distinction, this study employs the concept of *everyday distinction practices*. These refer to the day-to-day competent performances⁹² that international humanitarian actors engage in to operationalize their distinction project. These performances are profoundly relational; even as humanitarian actors strive to distance themselves and maintain separation, they are often still intertwined and bound together with other actors.⁹³ These distinction practices materialize mainly in the Kinetic and Pedagogical realms, assuming different forms to reflect the demands of each respective context. Distinction circulates in the Intellectual realm in something less of a quotidian manner, befitting the more normative qualities of this domain. Each realm is now outlined in turn.

1.6.1 The Kinetic realm

Of all three realms, Kinetic practices tend to be the most practical—and potentially reactive. As the Kinetic realm is where one finds distinction in motion, it sheds light on the way in which distinction is enacted as a day-to-day matter on the ground. Here, official policies and normative debates are brought into contact with the mundaneness of daily decision-making, revealing the nuances of what international actors actually do. It is also in the Kinetic realm that the most intense relationships between international actors are formed, as these actors routinely come into physical contact.⁹⁴

This attention to grounded practice builds on the insights of scholars such as de Waal, Marriage, and Koddenbrock, whose respective works illuminate the way in which the commitments of humanitarian actors are (not) implemented. De Waal entreats us to consider ‘actually existing humanitarianism,’⁹⁵ and Marriage likewise instructs us to look beyond official discourse: humanitarian actors may invoke rules or principles at the same time as they ignore or breach them, in practice.⁹⁶

⁹² The reference to ‘competent performances’ comes from Emanuel Adler and Vincent Pouliot (eds.), *International Practices* (Cambridge: Cambridge University Press, 2011), 6, 15. Drawing more generally on Pierre Bourdieu, *Outline of a Theory of Practice* (Cambridge: Cambridge University Press, 1977), 78–86 (*Outline*).

⁹³ See George Marcus, *Ethnography through Thick and Thin* (Princeton, NJ: Princeton University Press, 1998), 90; Desmond, *supra*, 554 (‘Relational Ethnography’). For relational accounts of humanitarian practice see Larissa Fast, *Aid in Danger: The Perils and Promise of Humanitarianism* (Philadelphia, PA: University of Pennsylvania Press, 2014), 8; Roth, *supra*, 91 (*Paradoxes of Aid*).

⁹⁴ Slim makes a similar point regarding civil–military policies; see Hugo Slim, ‘The Stretcher and the Drum: Civil–Military Relations in Peace Support Operations’, *International Peacekeeping*, Vol. 3, No. 2, 1996, pp. 123–140, 129, 131 (‘Stretcher’).

⁹⁵ Alex de Waal, *Famine Crimes: Politics and the Disaster Relief Industry in Africa* (Melton, Suffolk: James Currey, 1997), 66 (*Famine Crimes*).

⁹⁶ Marriage, *supra*, 10 (*Not Breaking the Rules*).

Koddenbrock further argues that a disregard for operational practice sustains the visible and public face of international intervention.⁹⁷ Normative debates about the traditional humanitarian principles, for example, tend to treat the principles as untethered by what goes on ‘on the ground’.⁹⁸ Taking these findings about humanitarian practice in a new direction, this monograph centres the idea of distinction.

South Sudan has been selected as the operational site that serves as the focal point of the Kinetic realm discussions. There is a long history of intentionally targeting civilians in the region’s conflicts, and those claiming to be outside the fight are typically regarded with suspicion in South Sudan. Focusing on the period since 2013, South Sudan has been the site of an armed conflict in which international humanitarian actors struggle to secure sustained access to populations in need, while facing threats to their own safety. From 2013 to 2018, at least 100 aid workers were reportedly killed in the country.⁹⁹ South Sudan was ranked the most dangerous place in the world for humanitarian actors to operate in 2017,¹⁰⁰ with a record number of aid workers being killed by gunfire.¹⁰¹ In a study from 2018, South Sudan had the highest number of both major global attacks on humanitarian actors (55 incidents) and of victims (111).¹⁰² South Sudan is also a context in which diverse intervening actors converge. International humanitarian actors share the operational space with other civilian and military actors, including members of a UN integrated mission with a robust ‘Protection of Civilians’ mandate, UNMISS. The presence of a UN integrated mission that is empowered to use force poses numerous challenges for humanitarian actors, some of whom live with peacekeepers in close quarters and rely upon UN military assets.

In South Sudan, IHL rules are not a habitual topic of conversation for international actors. Nonetheless, distinction influences these actors’ self-conceptualization and their encounters with each other. Distinction is activated when humanitarian actors eject armed actors from a site where they deliver services, or when a humanitarian actor travels on a UNMISS helicopter and everyone gossips about it. A crucial element of Kinetic practices is thus the relevance of optics: distinction has a more explicit visual life in the operational context, and the

⁹⁷ Kai Koddenbrock, *The Practice of Humanitarian Intervention: Aid Workers, Agencies, and Institutions in the Democratic Republic of the Congo* (New York: Routledge, 2016), 59, 62 (*Humanitarian Intervention*).

⁹⁸ *Ibid.*, 68.

⁹⁹ African Press Organization, ‘South Sudan: Aid Workers Freed, Humanitarian Deaths Reach 100 since 2013’, Press Release, Distributed by APO Group on Behalf of OCHA, 1 May 2018. Available at: <https://www.africa-newsroom.com/press/south-sudan-aid-workers-freed-humanitarian-deaths-reach-100-since-december-2013>.

¹⁰⁰ Humanitarian Outcomes, *Aid Worker Security Report: 2018*, August 2018. Available at: <https://reliefweb.int/report/world/aid-worker-security-report-figures-glance-2018>.

¹⁰¹ Adele Harmer, ‘Aid Worker Deaths: The Numbers Tell the Story’, *OCHA News*, 16 August 2018. Available at: <https://www.unocha.org/story/aid-worker-deaths-numbers-tell-story>.

¹⁰² Humanitarian Outcomes, *Aid Worker Security Report: 2019*, August 2019. The main types of attacks in 2018 in South Sudan were shooting (76), bodily assault (50), and kidnapping (15). Available at: https://www.humanitarianoutcomes.org/sites/default/files/publications/awsr_figures2019.pdf.

deployment of signs and symbols reveals much about whose perceptions are being managed, and why. A final noteworthy aspect of the Kinetic realm is the way in which it exposes conflicts that are otherwise concealed. This study draws attention, in particular, to a tension that arises in daily practice between the traditional humanitarian principle of humanity and the idea of distinction.

1.6.2 The Pedagogical realm

While South Sudan is perhaps more obviously a site of everyday life—albeit a conflict-affected one—professional training spaces are also venues where everyday life unfolds.¹⁰³ The Pedagogical realm is a middle zone that lies in between the conflict zone and the legal text; it is a space between theory and practice. Whereas Kinetic practices are more reactive and responsive to grounded realities, Pedagogical practices have a very strong normative component. This is where the idea of distinction is taught and critiqued. In treating the Pedagogical realm as its own domain, this study makes the case that training reveals something new that cannot be gleaned from the doctrine, scholarship, and practice of the Intellectual realm, nor from the day-to-day operations of the Kinetic realm. Three benefits of studying training sites will now be outlined.

First, civil–military training grounds are venues where overt attempts are made to disseminate international rules and norms and to shape the behavioural ideals of international actors. Given that civil–military training programmes are explicitly designed to address the contact point between civilian and military actors, they inevitably implicate IHL’s principle of distinction. Unlike in South Sudan, international actors in the training spaces have explicit and sustained conversations about the civilian–combatant distinction and other rules governing the conduct of hostilities.

Second, the exploration of training spaces complements the investigation of civil–military interaction in operational contexts. Almost all of the actors in the civil–military training programmes are returning from frontline work in the field, on a break between stints, or preparing for a new mission. At their most useful, the programmes establish a temporary space where these international actors can take stock and make sense of their experience in the field. Trainees bring their knowledge and experiences with them from the operational context, and their unique individual experiences also shape their engagement with the lessons. Trainees’ first-hand accounts of their experiences in deployment zones offer granular, thick descriptions of how contests over distinction materialize in the operational

¹⁰³ Bureaucratic conferences and meetings are treated as a site of everyday life in Sarat and Kearns, *supra* (“The Great Divide”).

context.¹⁰⁴ To varying degrees, these training grounds also bring civilian and military actors together in face-to-face interaction. It is because of these differently situated actors' varied outlooks that the training grounds are also sites of struggle, and it is through these struggles that distinction is constituted and reconstituted.

Third, rather than measuring how well the training programmes mimic the 'real' world, this monograph looks at the artificial aspects of the trainings, showcasing facets of distinction that are often hidden from view. Simulation exercises, for example, afford an opportunity to observe complex patterns of interaction as if in slow motion. Trainees can literally pause the action as a simulation exercise unfolds, and they might even be granted a chance at a 'do-over'. This kind of iterative process is rarely witnessed in other contexts. It is also through these types of exercises that tensions between competing ideals start to emerge. Commitments that seem possible to uphold simultaneously in the relevant texts, or in the classroom, suddenly rub up against each other, and trainees must negotiate this friction. This more practical aspect of training thus begins to edge closer to the operational context.

Three civil–military training programmes were selected for scrutiny in this study. The programmes are led, respectively, by: NATO's Multi-National Civil–Military Cooperation Group (CIMIC) in Motto di Livenza, Italy; the Swedish Armed Forces (SWEDINT) training centre outside Stockholm; and the German Centre for Peace Operations (Zif) outside Berlin. These trainings deal with one variant of civil–military relations, which is the interaction of external or international civilian and military actors who are involved in international missions in armed conflicts.¹⁰⁵ While the selected training programmes are all delivered in Europe, they have a global dimension, as they prepare a diverse set of international actors to deploy to a variety of conflict contexts. Of particular importance is that the trainings share the aim of preparing international actors to participate in comprehensive-type missions. Since the end of the Cold War, international institutions such as the EU, the UN, and NATO have steadily moved towards comprehensive, integrated, and multidimensional international missions.¹⁰⁶ These missions are imbued with values such as 'working together' and are accompanied by imagery of walls coming down between different kinds of international actors.¹⁰⁷ The

¹⁰⁴ Some stories told at trainings that relate to South Sudan have thus been included in the Kinetic part of the study.

¹⁰⁵ Michael Pugh, 'The Challenge of Civil–Military Relations in International Peace Operations', *Disasters*, Vol. 25, No. 4, 2001, pp. 345–357, 346 ('Civil–Military Relations').

¹⁰⁶ Joanna Macrae and Nicholas Leader, 'Shifting Sands: The Search for "Coherence" Between Political and Humanitarian Responses to Complex Emergencies', *Humanitarian Policy Group Report*, No. 8, August 2000, 9 ('Shifting Sands').

¹⁰⁷ Jonathan Goodhand, 'Contested Boundaries: NGOs and Civil–Military Relations in Afghanistan', *Central Asian Survey*, Vol. 32, No. 3, 2013, pp. 287–305, 287 ('Contested Boundaries'); Victoria Metcalfe et al., 'UN Integration and Humanitarian Space: An Independent Study Commissioned by the UN Integration Steering Group', *Stimson Center and Overseas Development Institute*, 2011 ('Stimson Report').

selected training spaces thus showcase the way in which the idea of distinction circulates in settings in which civilian and military actors are encouraged to traverse the boundaries that separate them.

1.6.3 The Intellectual realm

The Intellectual realm encompasses a collection of sites more traditionally associated with law-making. It focuses on the legal rules encoded in the Geneva Conventions, historical approaches to legal protection in war, and decision-making at the International Criminal Tribunal for the Former Yugoslavia (ICTY). This is a realm in which lawyers, legal officials, judges, and (legal) academics, formally trained in international law, codify, adjudicate, and theorize distinction. It is also a domain in which policymakers and practitioners devise soft law guidelines and rules for civilian–military interaction. While one might expect that here, finally, we will find a bright-line civilian–combatant distinction intact, this quickly unravels as distinction is disrupted historically, doctrinally, and in practice. As the notion of a unified civilian category crumbles, the civilian figure that emerges is beset by contradiction. The civilian is at once a cherished ideal, imbued with extraordinarily high expectations and aspirations, and a fragile entity, routinely questioned, beleaguered, and undermined. These findings shed light on why international humanitarian actors would seek to transcend the civilian’s vulnerability by asserting a special status.

1.7 Structure of the monograph

Adopting the motif of a line, the main substantive chapters (Chapters 2–5) examine the circulation of the idea of distinction across the three realms. The narrative in each chapter begins in South Sudan, then progresses to the civil–military trainings, and finally on to Geneva and the Hague. In the Kinetic and Pedagogical realms, the discussion is organized around a series of encounters, inspired by Goffman’s understanding of an encounter as ‘the natural unit of social organization in which focused interaction occurs’.¹⁰⁸ These opening passages distil the relevant empirical findings into composite interactions that are representative and easily digestible, presaging the themes that will be developed in the discussion to follow.

¹⁰⁸ Erving Goffman, *Encounters: Two Studies in the Sociology of Interaction* (Eastford, CT: Martino Fine Books, 2013/1961), 8 (*Encounters*).

1.7.1 Chapter 2: What is the distinction?

Chapter 2 introduces, but does not resolve, the conundrum of what the idea of distinction *is* that is circulating in international practices, and how it relates to the IHL targeting rule. The main point conveyed is that distinction in the conduct of hostilities sense is in play, but that it is being deployed in ways we might not expect. Actors routinely move the line to assert intra-civilian distinctions, for example. They also collapse IHL's principle of distinction together with other values, ideas and principles to compose what we might think of as the 'distinction vernacular'.¹⁰⁹ The muddling of distinction is easier to observe in the training spaces than in South Sudan, as conversations about IHL are more explicit in the former. Trainees can be found struggling to locate a civilian–combatant binary in the conduct of hostilities sense, and they extend this fuzzy treatment to their categorization of humanitarian actors. The chapter also outlines the comprehensive ethos that guides contemporary international missions, explaining how the 'working together' mentality shapes intervention in South Sudan and the goings on at the three civil–military training sites. From the perspective of international humanitarian actors, international military and peacekeeping actors are encroaching upon them and blurring the lines—though what lines, exactly, is an issue not easily settled. Finally, the discussion of the Intellectual realm examines the status of these differently situated international actors in IHL, canvasses civil–military guidance documents, and considers high-level pronouncements about distinction. Attention is drawn to slippage between a civilian–combatant distinction and other fault lines, as distinction's haziness prevails at the level of doctrine, soft law, and policy.

1.7.2 Chapter 3: Who draws the line?

In a world in which international actors are intermingled and different spheres of activity coalesce, international humanitarian actors take it upon themselves to assert distinction. Crucially, this is not only about being distinct from other types of actors, but also about being *seen* to be distinct. It emerges in South Sudan that safeguarding distinction is in many respects a project of managing perceptions. The perceptions in question, I argue, belong to an amorphous onlooker: the 'phantom local'. This imagined local audience—which folds together the varied perspectives of armed actors, authorities, and beneficiaries—ultimately decides

¹⁰⁹ The concept of vernacularization is developed in Peggy Levitt and Sally Merry, 'Vernacularization on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States', *Global Networks*, Vol. 9, No. 4, 2009, pp. 441–461 ('Vernacularization'). The authors define vernacularization as a 'process of appropriation and local adoption of globally generated ideas and strategies'.

who is who amongst international actors and whether appropriate lines are being drawn. A concern for perceptions is also palpable in the Pedagogical realm, though here humanitarian actors additionally ground their vision of distinction in law. In both South Sudan and in the training spaces, other international actors contest the vision of distinction that humanitarians promulgate. A power struggle ensues as these other actors remonstrate, push back, and adjust the lines humanitarian actors draw. Notably, international military trainees are explicitly encouraged to foster proximity with humanitarian actors (and other civilians) in operational settings. The exploration of the Intellectual realm focuses squarely on the figure of the humanitarian actor in IHL, examining the historical evolution of this figure and its treatment in AP I. I propose that IHL projects a Red Cross fantasy, such that protections for humanitarian actors are grounded in a very particular vision of humanitarianness. This leaves other humanitarians with status anxiety, yet their efforts to emulate this vision serve to further entrench the Red Cross actor's paradigmatic status.

1.7.3 Chapter 4: How is the line drawn?

Building on observations made previously about the importance of perceptions, Chapter 4 presents distinction as a performance. Jettisoning the notion that there is a line, as such, being drawn, the discussion conveys the dynamism of everyday distinction practices. Distinction takes on an explicit visual life in the Kinetic realm: humanitarian actors deploy signs and symbols, and carry themselves in deliberate ways, so as to ensure that their civilianness is unimpeachable. It is not a question of being civilian or not-civilian, but rather being more or less civilian; everything is a matter of degree and subtle gradation. Other international actors emerge here as potential sources of contamination, and these include (armed) actors who would be entitled to civilian protection in IHL. Humanitarian actors embark on dogged attempts to assert distinction from these other actors, but they do so in a wider context in which distinction is always already compromised. While the possible futility of their distinction project leads some humanitarian actors to rally behind distinction even more strongly, other humanitarians balance distinction with other pressing priorities. In the Pedagogical realm, international military and peacekeeping actors voice incredulity about the logic of humanitarian distinction practices. From the perspective of these other actors, humanitarians are behaving erratically and prevaricating. The Intellectual realm zeroes in on the civilian concept, locating a continuum of civilianness in international law. The discussion examines qualities that have historically been associated with civilianness—such as harmlessness, innocence, and non-participation in fighting—and highlights the shifting relevance of an armed/unarmed marker. Engaging with the adjudication

of crimes against humanity cases at the ICTY,¹¹⁰ it is shown even in international tribunals that civilianness might be a matter of degree. The chapter closes by introducing three unfamiliar figures: the ‘civilian plus’, ‘mere civilian’, and ‘civilian minus’.

1.7.4 Chapter 5: Where is the line drawn?

This chapter pursues the ‘civilian plus’ and its corollaries across the three realms, exploring where the line is being drawn within the civilian category. Adopting parallel structures, the discussions in the Kinetic and Pedagogical realms first consider the humanitarian actor as a ‘civilian plus’ figure, and then examine arguments that humanitarian actors instead merit ‘civilian minus’ status. It is shown that in everyday practice, humanitarian actors strive to escape the vulnerability of the ‘mere civilian’ and to disperse any qualities of combatantness that might swirl around them. They root their claims to the ‘civilian plus’ in their important professional role and in the risk of harm it exposes them to; they also emphasize the expertise required to carry out humanitarian work. Other international actors detect a humanitarian superiority complex at play, sensing that humanitarian actors look down on them from a virtuous perch. Intriguingly, it is the very same professional role that could legitimate a claim to a special status that also impugns the civilianness of humanitarian actors—as when they are accused of ‘feeding the enemy’. The discussion in the Intellectual realm conveys that these intra-civilian distinctions are not disturbing an otherwise stable binary framework. Attention is drawn to IHL targeting rules, such as DPH, that trouble a bright-line distinction. It is further shown that before the civilian was defined in AP I, the category was disaggregated for purposes of protection and access to services. Finally, returning to the notion of a Red Cross fantasy, it is proposed that IHL sets some humanitarian actors apart from the general civilian population.

1.7.5 Chapter 6: Conclusion

The final chapter opens with one last encounter from South Sudan, highlighting the importance of the temporal element to everyday distinction practices. As is shown, struggles over distinction unfold at the most micro of levels: within a single individual. Having deferred normative questions, the discussion now confronts the conundrum of whether a special status for humanitarian actors is desirable.

¹¹⁰ *Prosecutor v. Milan Martić*, Case No. IT-95-II-A, Appeal Judgment, ICTY, 8 October 2008 (‘*Martić* Appeal Judgment’); *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Trial Judgment, ICTY, 12 December 2007 (‘*Milošević* Trial Judgment’).

A debate is presented between two composite perspectives: the ‘help the helpers’ view (in favour of a special status for humanitarian actors) and the ‘against humanitarian exceptionalism’ view (wary of a special status). Ultimately siding with the latter outlook, I argue that caution is merited in the face of proposals to give humanitarian actors something more than civilian status. Emphasizing the relational nature of distinction, I query whether further fragmentation of IHL’s civilian category might adversely impact all those civilians not singled out for special treatment. This is a live issue that extends beyond the realm of humanitarian actors: advocates are increasingly calling for more *lex specialis* for different types of civilians, such as children and journalists. After contemplating the implications of this wider investigation for a range of issues, such as humanitarian practice and the civilian concept, the discussion gestures towards potential avenues for further inquiry.

Conclusion

As this monograph pursues line-drawing practices across the three realms, the civilian–combatant distinction is broken up and other, unfamiliar distinctions are also introduced and broken up—such as the ‘civilian plus’ and ‘mere civilian’. We find that so many people are reaching for distinction, in so many different ways, even as a bright-line binary distinction eludes their grasp. To lay the foundation for the broader inquiry, the next chapter embarks on an exploration of what the idea of distinction is that is circulating in the practices of international actors.