The Changing Significance of Nationality for the Protection of Civilians in the Hands of a Party to an International Armed Conflict

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Abstract

The Fourth Geneva Convention provides the main protection regime for civilians in the hands of a party to an international armed conflict. Yet its application is limited to non-nationals, and conditional upon states' belligerent and legal relations. This article historicises and problematises the so-called nationality requirement for the treatment and protection of civilians. The significance of nationality for international humanitarian law has changed considerably since the late nineteenth century. The complex delineation of civilian protected persons under the Fourth Geneva Convention was, therefore, not inevitable. The article challenges the common perception of the treaty as a humanitarian achievement designed to safeguard innocent and vulnerable civilians. This detailed study of nationality provides insights into the changing perception of civilians as war victims and the role of international humanitarian law in protecting them.

Keywords: Geneva Conventions; protection; civilians; nationality; history

1. Introduction

The 1949 Geneva Conventions are commonly hailed as a milestone in the development of international humanitarian law (IHL). While this label for the law did not emerge until later,[1] the treaties adopted in the wake of World War II (WWII) are seen as marking a shift from the laws of war which regulate the belligerent relations between states to the humanitarian protection of war victims.[2] The fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (GCIV), in particular, is emphasised in the conventional narrative as embodying humanitarian progress since it expands the protection of civilians beyond the rudimentary safeguards which preceded World War I (WWI).

Yet, despite its full title, GCIV is *not* 'a Convention for the protection of *all* civilians in *all* circumstances in time of war'.[3] Article 4 defines the concept of 'protected persons' under GCIV and establishes nationality as the essential requirement for the application *ratione personae* of the treaty's main protection regime. It is limited to 'those who at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are *not nationals*'.[4] Moreover, Article 4 expressly excludes nationals of neutral and co-belligerent states 'while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are', as well as nationals of non-contracting states. It only extends the protection to all nationals of neutral states in occupied territory. The term 'protected person' under GCIV is thus understood

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The author would like to thank Professor Dino Kritsiotis for his comments on an early draft of this paper.

[1] A Alexander, 'A Short History of International Humanitarian Law' (2015) 26 *EJIL* 109.

[2] See eg R Kolb, *Advanced Introduction to International Humanitarian Law* (Edward Elgar 2014) 1-15.

[3] J Gutteridge, 'The Geneva Conventions of 1949' (1949) 26 *BYIL* 294, 319.

[4] GCIV, art 4 (emphasis added).

to refer primarily to two main categories of persons '(1) *enemy nationals* within the national territory of each of the Parties to the conflict and (2) *the whole population* of occupied territories (excluding nationals of the Occupying Power)'.[5]

The exclusionary nature of the main protection regime for civilians in the power of a party to an international armed conflict (IAC) gained prominence in the context of the hostilities in the former Yugoslavia[6] and the so-called 'war on terror' following the attacks of 9/11.[7] It continues to have detrimental practical consequences today, including for migrants[8] and humanitarian workers.[9] While the nationality requirement in GCIV is stated and sometimes (superficially) explained in the literature, it is accepted as part of the existing legal framework and rarely discussed. In contrast, this article historicises and problematises the centrality of nationality in the treaty. It argues that the complex delineation of protected persons in Article 4 was not inevitable, and it challenges the common perception of the GCIV protection regime as an essentially humanitarian achievement designed to protect vulnerable civilians.

The first part of this article examines the significance accorded to nationality from the late nineteenth century until WWII. The second part offers a systematic analysis of the importance of nationality in GCIV and its drafting history. It highlights the role that it played in understanding and protecting civilians in IACs, and within the international legal system. Yet, it also argues that the nationality requirement was a compromise between more humanitarian guarantees and the intention of some states to limit their obligations under the new convention. The last part demonstrates how the design of the GCIV regime has had a lasting effect for the protection of civilians despite an evolving understanding of war victims. By analysing the importance of nationality in the law throughout the twentieth century, the article provides insights into the changing perception of civilians and the role of IHL in protecting them.

2. Nationality and civilians from the late nineteenth century until World War II

The 1899 Hague Regulations on the Laws and Customs of War on Land (Hague Regulations), the first multilateral comprehensive convention in the field, is not concerned with the nationality of civilians. The second Hague Peace Conference eight years later, on the other hand, showed some engagement with the bond between civilians and the state of their nationality. For example, it features prominently in the declaration that subjects of neutral states are neutral themselves.[10] Some delegates, however, questioned the special treatment of neutral nationals during the discussion at the Conference. They emphasised that war was a conflict

[5] JS Pictet (ed), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War Commentary* (ICRC 1958) (hereafter *GCIV Commentary*) 46.
[6] See section 4.B. below.
[7] See eg L Vierucci, 'Prisoners of War or Protected Persons *qua* Unlawful Combatants? The Judicial Safeguards to Which Guantanamo Day Detainees Are Entitled' (2003) 1 *JICJ* 284, 298; J Callen, 'Unlawful Combatants and the Geneva Conventions' (2004) 44 *Virginia J Intl L* 1025, 1033, 1065-71; JB Bellinger and VM Padmanabhan, 'Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law' (2011) 105 *AJIL* 201, 216.
[8] H Obregón Gieseken, 'The Protection of Migrants under International Humanitarian Law' (2017) 99:904 *IRRC* 121, 132-33.
[9] K Mackintosh, 'Beyond the Red Cross: The Protection of Independent Humanitarian Organizations and Their Staff in International Humanitarian Law' (2007) 89:865 *IRRC* 113, 118-20.
[10] Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (1907), art 16.

between states, rather than individuals, and that the nationality of civilians was therefore irrelevant. It was argued that a differentiation based on nationality would be a step backward, since these individuals were believed to be protected as 'peaceful inhabitants' or 'non-combatants'.[11] Leaving the very limited nature of protections for civilians under the Hague Regulations to the side, the remarks of these delegates seem to imply the doctrine commonly associated with Jean-Jacques Rousseau. In his *Du Contrat Social*, Rousseau stated that war is a relationship between states, and that 'individuals are enemies only accidentally, not as men, nor even as citizens, but as soldiers'.[12] This maxim, which places civilians outside of the hostile relations between states, is commonly believed to underpin the modern laws of war.

A closer look at statements and codifications of the laws of war, as well as warfare itself from the late nineteenth century onwards suggests a more complex picture. Private persons who did not belong to the armed forces were indeed primarily associated with a state, rather than seen as 'civilians' in the modern sense. International law treatises commonly referred to the nationals of a belligerent state as enemies,[13] albeit sometimes as 'passive enemies' to distinguish them from combatants.[14] Around the turn of the century, some jurists observed that the modern laws of war were evolving to prohibit making private enemy nationals prisoners of war, and to allow for a reasonable period for them to leave the country after the outbreak of a war, subject to exceptional security measures.[15] The so-called Lieber Code, which is often seen as the first attempt to codify the laws of war, accepted that nationals of the enemy state are enemies themselves and consequently 'subjected to the hardships of the war'.[16] Yet, it also proclaimed that private individuals were increasingly spared its effects.[17]

History shows that civilians belonging to the opposing belligerent state were indeed subject to suspicion and adverse treatment during this period. While treaties concluded in peacetime *permitted* nationals of the state parties to leave the territory at the outbreak of war,[18] civilians were also *forced* to leave under belligerent states' policies of mass expulsion. In her historical study of *War and Citizenship*, Daniela Caglioti identifies the Franco-Prussian War (1870-71), where German nationals in France were regarded as 'enemies within' and expelled, as a 'watershed in national policies on civilians of enemy nationality'.[19] A similar policy of expulsion was adopted by the Ottoman government during the Thirty-Day War between Turkey and Greece (1897),[20] and by the Russian Empire during the Russo-Japanese War (1904-

[11] JB Scott (ed), *The Proceedings of the Hague Peace Conferences: The Conference of 1907 – Translation of the Official Texts*, vol 3 (OUP 1921) 38-39, 72-73 and 79-80.
[12] Cited in ME O'Connell, 'Historical Developments and Legal Basis' in D Fleck (ed), *The Handbook of International Humanitarian Law* (4th edn, OUP 2021) 28.
[13] See eg HY Halleck, *International Law; or Rules Regulating the Intercourse of States in Peace and War* (Bancroft & Co 1861) 356-67 and 411-12; J Westlake, *International Law, Part II: War* (CUP 1907) 37-38.
[14] See eg DD Field, *Draft Outlines of an International Code* (Baker, Voorhis & Co 1872) paras 744-47; L Oppenheim, *International Law: A Treatise, vol II: War and Neutrality* (Longmans, Green, and Co 1906) paras 87-92.
[15] Oppenheim (n 14) paras 100 and 116; Westlake (n 13) 42.
[16] General Orders No 100: Instructions for the Government of Armies of the United States in the Field (1863), art 21.
[17] Ibid arts 22-25.
[18] *GCIV Commentary* (n 5) 232.
[19] DL Caglioti, *War and Citizenship: Enemy Aliens and National Belonging from the French Revolution to the First World War* (CUP 2021) 40.
[20] Ibid 63.

05). The Japanese government, on the other hand, proclaimed to respect and protect enemy nationals in its territory as part of its strife to be recognised as a 'civilised' state.[21] The Anglo-Boer War (1899-1902) saw both the expulsion of Britons and the internment of civilians in concentration camps.[22]

The commission responsible for revising the laws of war at the 1907 Hague Peace Conference was confronted with proposals intended to address such mistreatment of enemy nationals. The Japanese delegation submitted a draft article that enemy nationals 'shall not be interned unless the exigencies of war make it necessary'.[23] The Italian delegation proposed to extend this prohibition to also forbid expulsion.[24] A Russian delegate even briefly suggested to create a separate chapter dedicated to the '*Ressortissants* of a belligerent in the territory of the adverse party'.[25] None of these proposals was adopted. The revised treaty merely prohibited to deprive enemy nationals of their access to courts, and to compel them 'to take part in the operations of war directed against their own country'.[26] The expulsion of non-nationals was considered a sovereign right of states and could, therefore, not be prohibited by international law. The Japanese proposal, on the other hand, was seen as enabling, rather than preventing, the internment of civilians with enemy nationality. It is noteworthy that it was argued during the debate that such adverse treatment of enemy nationals was only found in wars in colonial territories, and belonged to 'another age'.[27] In the spirit of their civilizing mission[28] and optimism, the Western states, which dominated the Conference, discarded the recent practice in distant places and ignored the experience of, for example, the Franco-Prussian War.

This prevailing conviction at the diplomatic conference soon proved to be fallacious. During WWI, European and other states around the world engaged in the expulsion, deportation and internment of enemy nationals.[29] Governments and populations at war desired to identify every civilian unequivocally as either friend or foe, and nationality served as a clear marker for these categories.[30] However, perceptions of enmity, dangerousness and untrustworthiness often varied across the states. Some governments especially of multi-ethnic empires included internal ethnic and religious groups under their special provisions for enemies,[31] whereas states with substantial immigrant communities considered enemy origin besides, and often above, enemy nationality.[32] Security measures were also employed against dissidents among states' own nationals, 'the so-called internal enemy'.[33] It should be noted that internment policies were not only driven by security reasons, but multiple factors comprising social, military and economic considerations.[34]

[21] Ibid 58-59.
[22] Ibid 56 and 60.
[23] Scott (n 11) 243.
[24] Ibid 105.
[25] Ibid 132.
[26] Annex to the Convention (IV) with respect to the Laws and Customs of War on Land (1907),art 23(h).
[27] Scott (n 11) 111-14.
[28] See F Mégret, 'From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Humanitarian Law's "Other"' in A Orford (ed), *International Law and Its Others* (CUP 2006).
[29] For a detailed historical study see Caglioti (n 19).
[30] Ibid 190.
[31] Ibid 192-93.
[32] Ibid 224.
[33] M Galvis Martínez, 'Internment of Enemy Aliens during the World Wars' (2021) 61 *Am.J.Legal Hist.* 211, 227.
[34] Ibid 215-16.

Nonetheless, the subsequent attempt by the International Committee of the Red Cross (ICRC) to develop a treaty protection regime ultimately focused on civilians of enemy nationality. It adopted the Draft International Convention on the Condition and Protection of Civilians of Enemy Nationality who are on Territory Belonging to or Occupied by a Belligerent[35] at its 1934 International Conference in Tokyo. The narrow scope of the so-called Tokyo Draft, 'reaffirmed the increasing importance of national belonging and citizenship in a world of sovereign states', but also 'ignored the suffering of many other people of enemy origin, as well as of stateless, denationalized and undesirable international minorities'.[36] Moreover, the plan to bring the Draft before a diplomatic conference was prevented by the outbreak of the war.[37]

During WWII, enemy nationals again experienced significantly deteriorating living conditions, and were subjected to mistreatment and abuse by government authorities as well as the general public. They were, however, not the only civilians suffering at the hands of the states involved in the war. The Nazi regime persecuted German Jews, Communists and other unwanted groups among its own citizens. Inhabitants of annexed territories also fell under German law, and may have no longer been regarded as non-nationals. Commentaries on the treatment of enemy aliens in the Allied States at the time highlighted that the problem extended beyond civilians with enemy nationality. In the United States, naturalised persons of Japanese or German origin were regarded with suspicion and subjected to control measures.[38] Others emphasised the importance of 'fundamental spiritual loyalties'[39] and ideologies,[40] instead of or in addition to nationality, as determining factors for an individual's enemy character in the ongoing war. This was to some extent reflected in the United Kingdom's classification of enemy aliens which distinguished between their perceived dangerousness. Germans and Austrians who could prove their loyalty to the Allied States, and who may have lost their citizenship, were considered as 'friendly enemies'.[41] The distinction between 'real' and 'friendly enemy aliens' was also adopted in other parts of the British Dominions, such as Canada, and belatedly in France.[42] The ICRC often unsuccessfully appealed to the belligerent states to adhere to the Tokyo Draft. Yet, even if it had been applied, many of these civilians would not have been protected.

3. Nationality in GCIV

[35] Reprinted in D Schindler and J Toman (eds), *The Laws of Armed Conflict: A Collection of Conventions, Resolutions, and Other Documents* (4th edn, Martinus Nijhoff 2004).
[36] Caglioti (n 19) 318-19.
[37] For an examination of the failed process see N Wylie and S Landefeld, 'POWs, Civilians and the Post-War Development of International Humanitarian Law' in R Kowner and I Rachamimov (eds), *Out of Line, Out of Place: A Global and Local History of World War I Internments* (Cornell University Press 2022).
[38] 'Alien Enemies and Japanese Americans: A Problem of Wartime Controls' (1942) 51 *Yale L.J.* 1316; for Australia's similar policy see K Saunders, '"The Stranger in our Gates": Internment Policies in the United Kingdom and Australia during the Two World Wars, 1914-39' (2003) 22 *Immigrants & Minorities* 22, 38.
[39] RMW Kempner, 'The Enemy Alien Problem in the Present War' (1940) 34 *AJIL* 443, 458; see also C Gordon, 'Status of Enemy Nationals in the United States' (1942) *Lawyers Guild Review* 9, 11.
[40] RR Wilson, 'Treatment of Civilian Alien Enemies' (1943) 37 *AJIL* 30, 30.
[41] Kempner (n 39) 445.
[42] M Koessler, 'Enemy Alien Internment: With Special Reference to Great Britain and France' (1942) 57 *Political Science Quarterly* 98, 113-118.

It is commonly observed that the main GCIV protection regime comprises those civilians who proved to be the most in need of protection during WWII.[43] In light of the above observations, this explanation relies on a simplified understanding of the experience of civilians. While a concern for enemy nationals undoubtedly informed the drafting of GCIV, the vulnerabilities of other civilians were also considered. Different categories of civilians were deliberated as beneficiaries of the safeguards throughout the drafting process with more or less humanitarian intentions. The next two sections show how nationality was used to conceptualise individuals within the belligerent relations of states, and the state-centric international legal system. The third section argues that the nationality requirement also served to strategically limit the scope of application of the new protection regime.

A. Civilians in armed conflicts between states

With the exception of Article 3, GCIV regulates IACs which by definition are set between two or more states.[44] René Provost declares that '[o]nly in the wider context of inter-belligerent relations can we see […] the rationale for the apparently inconsistent allocation of protection'.[45] The ICRC's *GCIV Commentary* notes the underlying assumption that nationals of an opposing belligerent state 'become enemy aliens, since they are citizens of an enemy Power'.[46] The nationality requirement in the definition of protected persons is thus commonly understood as entailing the delineation of friend and foe.

Conflicting state perspectives have prevented the development of international legal rules for identifying the enemy character of individuals.[47] While residence in enemy territory as well as enemy nationality have been considered as relevant factors, Van Panhuys emphasises the importance of the former for economic warfare, and the latter for the notion of states' internal security, thus leading to internment and expulsion,[48] which sets the context for GCIV. Especially in Anglo-Saxon countries, 'the conception of nationality is based on allegiance, and nationality is conceived of as a mutual relationship between State (Sovereign) and individual' involving reciprocal rights and obligations.[49] In these countries states are considered not only to be at war with each other, but also their respective subjects.[50] Traditionally, 'nationality acts as a presumption (rebuttable or not) of a disposition directed against the interest of the state; *enemy* nationality supposes *hostile* disposition'.[51] However, it is not only the nationals' presumed loyalty and animosity that provides them with enemy character. Caglioti ascribes the change in wartime policies towards enemy nationals in the nineteenth century to new forms of military recruitment, as well as the development of citizenship as a legal bond and people's identity.[52] WWI's character as a 'total war' further emphasised and strengthened the notion of

[43] See eg G Mantilla, 'The Origins and Evolution of the 1949 Geneva Conventions and the 1977 Additional Protocols' in M Evangelista and N Tannenwald (eds), *Do the Geneva Conventions Matter?* (OUP 2017) 45; *GCIV Commentary* (n 5) 212 and 249.
[44] GCIV, art 2.
[45] R Provost, *International Human Rights and Humanitarian Law* (CUP 2002) 41.
[46] *GCIV Commentary* (n 5) 263.
[47] P Weis, *Nationality and Statelessness in International Law* (2nd ed, Sijthoff and Noordhoff 1979) 10.
[48] HF Van Panhuys, *The Rôle of Nationality in International Law* (Sythoff 1959) 115.
[49] Weis, *Nationality* (n 47) 30.
[50] Ibid 11; see eg Alien Enemies Act of 1798 (current version at 50 U.S.C. §21).
[51] Van Panhuys (n 48) 115.
[52] Caglioti (n 19) 70.

enemy nationals since war was no longer considered to be limited to the armed forces and individuals suitable for military service.[53] The eminent international lawyer Hersch Lauterpacht believed that the two World Wars had validated the approach which extends the enmity of states to their citizens.[54]

Indeed, the concern with 'total war' and the possibility of civilians directly or indirectly contributing to the war efforts is evident in the drafting history of GCIV.[55] In light of the widespread system of compulsory military service, it was believed that '[n]owadays every enemy national is a potential soldier and his internment becomes understandable'.[56] The report of the 1949 Civilian Committee additionally emphasised that '[m]odern warfare does not take place on the battlefields alone; it also filters into the domestic life of the belligerent'.[57] Enemy nationals were perceived as posing a threat to the security of the state in whose territory they were as possible spies, saboteurs, or resistance fighters. Part III of GCIV therefore regulates security and control measures that have been historically adopted against such individuals, including the refusal to leave the territory, assigned residence and internment, as well as punishment. Anne Quintin describes the provisions on internment, for example, as 'strong permissions',[58] allowing states to respond to a security threat. Unlike the Tokyo Draft,[59] GCIV abstains from specifying the grounds for such control measures, thus widening the scope of their application.

Yet, the enemy character of civilians not only identifies enemy nationals as a potential security concern for the state, it also leaves them at risk of arbitrary acts and the abuse of power. In addition to direct state actions, enemy nationals are more susceptible to social and economic hardship, and may experience vilification, discrimination and attacks by the public. Indeed, GCIV provides for the voluntary internment of civilians who may require it for their own protection.[60] Whereas the Geneva Conventions on combatants were 'protecting people who had already become the victims of war', the new Civilian Convention 'had to prevent such people from becoming victims'.[61] Enemy nationality thus functioned as an indicator for the vulnerability of a civilian during an armed conflict between states, or occupation.

At first sight, GCIV seems to depart from this understanding of enemy nationals in its provision on refugees. Article 44 declares that 'the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality *de jure* of an enemy State, refugees who do not, in fact, enjoy the protection of any government'. GCIV thus recognises that the formal

[53] M Greenspan, *The Modern Law of Land Warfare* (University of California Press 1959) 44; for the related understanding of civilians as military targets see A Alexander, 'The Genesis of the Civilian' (2007) 20 *LJIL* 359.
[54] H Lauterpacht (ed), *International Law – A Treaties, vol II: Disputes, War and Neutrality* (7th edn, Longmans Green and Co 1952) para 57.
[55] See eg *Commission of Government Experts for the Study of Conventions for the Protection of War Victims – Preliminary Documents Submitted by the International Committee of the Red Cross, vol III* (Translation, ICRC 1947) 5; *Conférence d'experts gouvernementaux pour étude des Conventions protégeant les victims de la guerre: Condition et protection des civils en temps de guerre,* vol IV (ICRC 1947) 17-20;*Final Record of the Diplomatic Conference of Geneva of 1949,* vol II(A) (Federal Political Department 1950) 654.
[56] *GCIV Commentary* (n 5) 232.
[57] *Final Record,* vol II(A) (n 55) 814.
[58] A Quintin, *The Nature of International Humanitarian Law: A Permissive or Restrictive Regime?* (Elgar 2020) 131 and 134.
[59] Tokyo Draft, arts 4 and 15.
[60] GCIV, art 42.
[61] *GCIV Commentary* (n 5) 5.

legal bond to a state alone may be an insufficient indicator for the affinity and loyalty of the individual. This reflects the distinction between 'real enemies' and 'friendly enemies' during WWII, where the latter often described German nationals in Allied States who were persecuted by the Nazi regime. The drafters believed that the otherwise 'legitimate' assumption 'that enemy nationals enjoying the protection of their own Government sympathize with their own country, and therefore constitute a danger to the security of the State in which they are resident' would be 'unfounded' in the case of refugees.[62] Rather, they were assumed to hold a hostile attitude against their government. The necessity of control mechanisms for these refugees was intended to be determined not on the basis of their nationality, but their conduct.[63]

Nationality still plays a central role in the protection of refugees under GCIV since it is limited to nationals *de jure* of the enemy state. These refugees, in the same way as other enemy nationals, are believed to be particularly vulnerable owing to their formal legal bond to the opposing belligerent state.[64] Article 44 serves to 'mitigate a refugee's difficulty' which may otherwise result from enemy nationality by imposing restrictions on the state exercising control.[65] The negative phrasing of the provision enshrines the (rebuttable) presumption of allegiance,[66] and thus indicates the importance of nationality in the GCIV protection regime. Refugees of non-enemy nationality may not have been deemed at risk since they are not associated with the enemy state. The formulation and restrictive scope of the provision suggests that refugees constituted an anomaly in the otherwise state-centric understanding of civilians in IACs.

Article 44 is illustrative of the tension between a generalised understanding of civilians based on their nationality, and the requirement of individualised assessments that characterised the negotiations and the text of the treaty. On the one hand, nationality was notably omitted as a prohibited ground for discrimination under Article 27 'because internment or measures restricting personal liberty were applied to enemy aliens precisely on grounds of nationality'.[67] On the other hand, Article 33, for example, enshrines individual responsibility and prohibits collective penalties. Several security and control measures are conditional on the examination of the individual protected person's case.[68] The ICRC's *GCIV Commentary* clarifies that enemy nationality alone does not constitute a valid reason for interment or assigned residence under Article 42 since the formal legal bond 'cannot be considered as threatening the security of the country'; rather a state must be convinced that 'the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security'.[69] Similarly, Article 5 as a derogation clause is designed to limit the restriction of certain rights and privileges to individual persons who are 'definitely suspected of or engaged in activities

[62] *Final Record of the Diplomatic Conference of Geneva of 1949*, vol III (Federal Political Department 1950) 121.
[63] Ibid; see also *Final Record*, vol II(A) (n 55) 411-12.
[64] *Conférence diplomatique 1949: sténogrammes de la Commission III, tome III* (6 July 1949, CD_1949_COMM3_CR40) 8.
[65] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, vol XV (Federal Political Department 1978) 16.
[66] Yet, note that the treaty itself does not regulate the duties that derive from allegiance, which is the domain of municipal law; see AM Boll, *Multiple Nationality and International Law* (Martinus Nijhoff 2007) 144-148.
[67] *Final Record*, vol II(A) (n 55) 641; see also *Final Record of the Diplomatic Conference of Geneva of 1949*, vol II(B) (Federal Political Department 1950) 390.
[68] See eg GCIV arts 35, 43, 68 and 78.
[69] *GCIV Commentary* (n 5) 258.

hostile to the security of the State'. A Soviet Union delegate pointed out that the recognition of the exceptional nature of security measures in various provisions of the Civilian Convention rendered the requirement of an individualised assessment with respect to refugees unnecessary.[70] The inclusion of Article 44 in GCIV may be the result of a particular concern with 'friendly enemies' arising from WWII, as expressed by the International Refugee Organization and the Israeli delegation.[71] It is also possible that the safeguards built into the permissive provisions for security measures were not deemed sufficiently strong to shield civilians of enemy nationality from collective treatment.

The drafters still seemed to expect, and possibly fear, that the position of enemy nationals in belligerent and occupied territory would be first and foremost determined by their nationality. This can be seen in the immediate response by the ICRC delegate Claude Pilloud to an enquiry into the restriction of the work for internees, stating that civilians are often interned on the basis of their nationality alone, even though he later corrected himself as to the main reason for the provision.[72] Similarly, it was noted that 'with regard to internment and assigned residence, it must be conceded that it was difficult at the outbreak of war to ask a State to refrain from taking collective measures'.[73] The individual assessment was deferred to the civilian's right to appeal and the periodical review of the individual case.[74] The tension between nationality and individualised measures appears to be the result of the engrained conceptualisation of civilians as nationals of a particular state, and the desire to prevent the arbitrary (mis)treatment of enemy nationals which was commonly seen during the World Wars.

The understanding of nationality as defining a civilian's allegiance may also explain the qualified application of the GCIV protection regime to non-enemy nationals. Lauterpacht observes that, as a general rule, 'subjects of the belligerents bear enemy character, whereas subjects of neutral States do not'.[75] Nationals of co-belligerents may also be considered as neither posing a threat to the security of the state nor being vulnerable to adverse treatment due to their allegiance to an allied state. The *prima facie* neutrality of nationals of neutral states and friendly disposition of nationals of co-belligerent states thus implies that these civilians do not require protection additional to diplomatic representation, which is further discussed below. During the drafting process, it was indeed remarked that certain guarantees for the humane treatment of enemy nationals were unnecessary for other non-nationals living in the territory of a belligerent party, such as the prohibition of compelling civilians to work which contributes to the war efforts of the state.[76] It was argued that, unlike in the case of enemy nationals, this work would not violate the duty of allegiance to their state of nationality.[77] As a result, Article 40 only applies to 'protected persons of enemy nationality'. This is despite the Soviet Union

[70] *Conférence diplomatique, tome III* (n 64) 14-16.
[71] *Final Record*, vol II(A) (n 55) 658 and 758.
[72] *Conférence diplomatique 1949: sténogrammes de la Commission III, tome II* (20 May 1949, CD_1949_COMM3_CR20) 57.
[73] *Final Record*, vol II(A) (n 55) 757.
[74] GCIV, art 43.
[75] Lauterpacht, *War and Neutrality* (n 54) para 88.
[76] *Final Record*, vol II(A) (n 55) 754-55.
[77] Ibid 657.

delegate's suggestion that it would 'conflict with a principle of international law, namely that neutrals could not be associated with the war effort of belligerents'.[78]

Overall, the main protection regime in GCIV is designed with the adversarial inter-state relations of IACs in mind. Enemy nationals, its primary beneficiaries, are not considered vulnerable because they are civilians, but because they are perceived as belonging to one side of the hostilities. These individuals are caught up in the belligerent relations between states and are recognised as in need of protection due to their formal legal bond to the enemy. While their classification as protected persons identifies them as potential war victims, the regime also implies that they are themselves seen as enemies.

This conceptualisation of individuals overlooks the wider experience of civilians during the two World Wars. The preliminary documents in preparation of GCIV not only recognised the general lack of protection for civilians under international law, they even noted that 'the position of *Civilians of other nationalities* was still less satisfactory than that of *Enemy Nationals* having the benefit of a Protecting Power'.[79] This concern is reflected in earlier more inclusive drafts of the Civilian Convention. The 1947 text adopted at the preparatory Conference of Government Experts primarily identified enemy nationals as the beneficiaries of the draft treaty.[80] Yet, it also declared that all other non-nationals 'shall in all circumstances enjoy treatment at least as favourable as that afforded to enemy civilians'.[81] The 1948 Stockholm Draft, which served as the working draft at the 1949 Diplomatic Conference, removed the distinction entirely by defining protected persons as non-nationals.[82] Consequently, the complex delineation of the status of non-nationals under GCIV cannot only be explained in light of a post-WWII concern for enemy nationals. The following section argues that the legal relations of states need to be considered as well.

B. Individuals and the international legal relations of states

Before turning to the delineation of non-nationals, the categorical exclusion of states' own nationals from the main protection regime of GCIV needs to be briefly addressed. It could be argued that, in accordance with the notion of allegiance and the belligerent relations of states, states' own nationals were not recognised as a security concern or in need of protection. More importantly, however, at the time the treaty was adopted, states generally only assumed international legal obligations in relation to aliens while the treatment of their own subjects was considered as falling under the *domaine réservé* and thus domestic law. It was believed that regulating the relationship between a state and its subjects 'would be contrary to international law and indeed it is difficult to conceive of a Power assuming obligations towards

[78] Ibid 756.
[79] *Preliminary Documents* (n 55) 1.
[80] *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims* (ICRC 1947) 272-73.
[81] Ibid 275.
[82] *Final Record of the Diplomatic Conference of Geneva of 1949,* vol I (Federal Political Department 1950) 114.

its own nationals by treaty with a foreign Power'.[83] The negative definition of protected persons as *non-nationals* remains faithful to the principle of non-interference.[84]

The exclusion of states' own nationals from the Civilian Convention was not only promoted by state delegations. Prior to the Diplomatic Conference, Max Huber, an eminent lawyer and former president of the ICRC, justified it in light of the lack of reciprocity which was necessary for ICRC intervention, and suggested that states' own nationals would fall instead within the remit of the United Nations Human Rights Commission.[85] The first 'deeply legalistic approach' was criticised by Soviet bloc countries and Jewish organisations since it had also provided 'a valid *legal* argument for the ICRC's non-intervention' during the Holocaust.[86] Yet, Boyd van Dijk explains it as 'a legally strategic decision' of the ICRC 'to gain widespread support from the Great Powers for its own proposal for the future Civilian Convention'.[87] It only expressed its hope in the *GC IV Commentary* that humanitarian safeguards for civilians would one day be extended to protect nationals against their own governments.[88] For the time being, they remained a blind spot in the law.

Nationals of neutral and co-belligerent states may fall under the main GCIV protection regime if normal diplomatic representation is missing. It is commonly said that they 'will be protected by their state of origin through normal diplomatic channels, […] and therefore do not need the additional protection provided by [GCIV]'.[89] Indeed, the treaty was designed as a substitute for ordinary international peacetime laws,[90] providing only specific additional guarantees for enemy nationals. Although Article 38 stipulates that international law on the treatment of aliens remains applicable to protected persons, it was believed that enemy nationals generally 'cannot continue to be governed by peacetime laws' during an armed conflict.[91] The traditional distinction between the laws of peace and laws of war has become less relevant with the latter law's focus on IACs and not only 'war' in the legal sense, so that international peacetime law continues to apply.[92] Nevertheless, diplomatic relations between the belligerent parties are most likely severed in times of IACs,[93] and the state of origin may be unable to protect its nationals who find themselves on enemy territory. Belligerent occupation may also be understood as a disruption of the international legal relations between neutral states and the territorial, now occupied, state. The accreditation of diplomatic

[83] A Krafft, 'The Present Position of the Red Cross Geneva Conventions' (1951) 37 *Transactions of the Grotius Society* 131, 141.
[84] *GCIV Commentary* (n 5) 46; only Part II of GCIV (providing general protections against certain consequences of war for the whole of the populations irrespective of nationality) and Article 70 (prescribing particular safeguards in occupied territory for refugees who are nationals of the occupying power) diverge from the principle of non-interference.
[85] G Ben-Nun, *The Fourth Geneva Convention for Civilians: The History of International Humanitarian Law* (I.B. Tauris 2021) 59; see also B van Dijk, *Preparing for War: The Making of the Geneva Conventions* (OUP 2022) 70 and 78-79.
[86] Ben-Nun (n 85) 63.
[87] Van Dijk (n 85) 70.
[88] *GCIV Commentary* (n 5) 372-73.
[89] S Krähenmann, *Foreign Fighters under International Law* (Academy Briefing No. 7, Geneva Academy of International Humanitarian Law and Human Rights 2014) 19.
[90] Gutteridge (n 3) 322.
[91] *GCIV Commentary* (n 5) 244.
[92] JK Kleffner, 'Scope of Application of International Humanitarian Law' in Fleck (n 12) 51 and 79.
[93] M Mancini, 'The Effects of a State of War or Armed Conflict' in M Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 1004.

representation in the territory is in relation to the occupied and not the occupying state, which means that 'the Occupying Power is not bound by the treaties concerning the legal status of aliens which may exist'.[94] Nationals of neutral states in occupied territory, therefore, qualify as protected persons irrespective of existing diplomatic relations. Yet, the protection regime was not intended to extend beyond these limited exceptions to the traditional system.

As Van Panhuys notes, it 'may seem rather illogical' to exclude certain individuals on the basis of their nationality and related possible diplomatic protection 'because the Convention not only provides a substitute for diplomatic protection but also contains rules of substantive law'.[95] The Drafting Committee, on the other hand, seemed rather concerned that 'the superposition of normal diplomatic representation and of the protection ensured by the Convention, would lead to complications and would be indefensible from the point of view of consistency of procedure'.[96] Article 4 paragraph 2 thus indicates the subsidiary role of GCIV as a protection mechanism for civilians which comes into operation when ordinary inter-state mechanisms are unavailable.[97] It positions the individual within the international legal system by delineating the scope of application of various protection regimes of which GCIV is only one. Although the treaty's application is not confined to the regulation of belligerent relations, it was also not intended as *lex specialis* for the protection of civilians in time of war in general.

The situation of neutral and co-belligerent nationals is volatile since jurisprudence[98] and the literature[99] have consistently emphasised that the doctrine of diplomatic protection entails a right of the state of nationality to act on behalf of its own interests, rather than a right of the individual. This is due to the 'Vattelian fiction' that 'any ill treatment of a citizen by a third State indirectly injured that citizen's home State'.[100] Under this system of a state's discretionary diplomatic protection the individual's security is dependent on the home State's willingness to intervene on his or her behalf. At the Diplomatic Conference, a Belgian delegate observed disapprovingly that, due to this uncertainty, 'the text provided greater protection for enemy aliens than for neutrals'.[101] This also stands in contrast to the 1907 Hague Peace Conference, where some delegations argued for the special protection of neutral nationals given the status of the state to which they belonged.

Moreover, even though it was noted that the expression 'normal diplomatic representation' in Article 4 was vague,[102] it seems to concern the relations of states *inter se* and not the actual protection of an individual by the state of nationality. It requires a functioning relationship between a diplomatic representative and the State to which s/he is accredited.[103] Tamás

[94] *GCIV Commentary* (n 5) 49.
[95] Van Panhuys (n 48) 121.
[96] *Final Record,* vol II(A) (n 55) 814.
[97] E Salmón, 'Who Is a Protected Civilian?' in A Clapham, P Gaeta and M Sassòli (eds), *The 1949 Geneva Conventions – A Commentary* (OUP 2015) para 38.
[98] See eg *The Mavrommatis Palestine Concessions (Greece v United Kingdom)* (Jurisdiction) [1924] PCIJ Rep Series A No 2, 12; *Nottebohm* (*Liechtenstein v Guatemala*) [1955] ICJ Rep 4, 24; *Barcelona Traction, Light and Power Company, Limited* (*Belgium v Spain*) (New Application: 1962) [1970] ICJ Rep 3, para 79.
[99] See eg Van Panhuys (n 48) 60; RB Lillich, *The Human Rights of Aliens in Contemporary International Law* (MUP 1984) 11-12; K Rubenstein, 'Rethinking Nationality in International Law' (2007) 101 *ASIL PROC.* 99, 100.
[100] A Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (CUP 2016) 390.
[101] *Final Record,* vol II(A) (n 55) 794.
[102] Ibid.
[103] Ibid 814; *GCIV Commentary* (n 5) 49.

Hoffmann, therefore, interprets it as referring to 'the absence of a state's *ability* to potentially protect the interest of its citizens',[104] rather than the state's inaction in a specific case. The drafters only showed an interest in the effectiveness of diplomatic protection in relation to refugees of *de jure* enemy nationality.[105] Other refugees may only come under the scope of GCIV by qualifying under the nationality requirement of Article 4, notwithstanding the inadequacy of the traditional system of diplomatic protection for refugees generally. This arguable oversight can be explained with Paul Weis' observation that 'laws are made with the conception of the "normal," the protected alien, in the mind of the lawgiver'.[106] It also continues the inter-war approach to the refugee problem in which *ad hoc* arrangements, such as the Nansen passport, were tied to specified groups of particular national origins.[107]

Another issue that may arise from GCIV's reliance on diplomatic protection is related to the *Nottebohm* case which was decided by the International Court of Justice shortly after its adoption.[108] Although the decision is controversial, it suggests that a state has the right not to recognise another state's nationality, and to deny that state the exercise of diplomatic protection if a genuine link between the individual and the state of nationality is missing. A similar concern was raised by the World Jewish Congress in the preparation of GCIV. It pointed out that 'the grant of citizenship, by some neutral governments, as an emergency measure, to Jews and other persecuted civilians in occupied countries' was 'not always recognised by the occupying powers or their satellite governments in the occupied territories'.[109] In cases such as Nottebohm's, where an acquired neutral nationality of a former enemy national is not recognised, the individual would likely be regarded as an enemy national and thus a protected person. Other more problematic scenarios are conceivable where the former nationality constituted a link to a co-belligerent state, or the state itself in the power of which the person is. The application of GC IV may be arbitrary in such circumstances since the rapporteur of the Civilian Committee explained that whether a civilian is a protected person or not is determined by the state in whose hands s/he is.[110] The issue of controversial nationality (as well as dual and multiple nationalities) remained unaddressed in the treaty.

The status of a civilian under Article 4 paragraph 2 is not only determined by the maintenance of diplomatic relations of the state of nationality, but also its ratification of GCIV. The exclusion of nationals of non-contracting states arguably 'reflects the traditional State-centric, reciprocity-based approach of the law of war'.[111] The Canadian delegation argued at the Diplomatic Conference that it would have been 'unreasonable and contrary to all treaty practice' if states would have consented to a system of protection not based on mutual

[104] T Hoffmann, 'The Perils of Judicial Construction of Identity – A Critical Analysis of the International Criminal Tribunal for the Former Yugoslavia's Jurisprudence on Protected Persons' in F Jenkins, M Nolan and K Rubenstein (eds), *Allegiance and Identity in a Globalised World* (CUP 2014) 512 (emphasis added).
[105] GCIV, art 44.
[106] P Weis, 'The International Protection of Refugees' (1954) 48 *AJIL* 193, 193.
[107] CM Skran, 'Historical Development of International Refugee Law' in A Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011).
[108] *Nottebohm* (n 98).
[109] *Memorandum of the World Jewish Congress on the Draft Convention for the Protection of Civilian Persons in Time of War submitted to the XVIIth International Red Cross Conference* (ICRC 1948) 6.
[110] *Final Record,* vol II(A) (n 55) 793.
[111] T Meron, *The Humanization of International Law* (Martinus Nijhoff 2006) 34.

obligations of the states of nationality.[112] The United States and New Zealand delegations also maintained that it would be unfair or inappropriate if nationals of a non-contracting state were protected.[113] Even the ICRC *GCIV Commentary* found the application to nationals of non-contracting states difficult to conceive,[114] despite describing the protection of civilians elsewhere as 'a solemn affirmation of principles' by states, not in expectation of safeguarding their own nationals, but 'out of respect for the human person'.[115] The drafters seemingly perceived protection under GCIV as a duty a state owed towards another state, rather than as humanitarian guarantees owed to the civilians themselves. While the exclusion of nationals of non-contracting states may be inconsequential today given the universal ratification of GCIV, this provision demonstrates the role of nationality in framing the protection regime within the traditional international legal system. It suggests that civilians were not primarily perceived as potential or actual victims of IACs in need of protection, but as subjects of states. Any moral responsibility towards the individual was succumbed to the international legal obligations between states.

In contrast to this state-centric approach, Article 4 has been interpreted to include stateless persons since they are 'non-nationals', and do not fall under any of the exceptions listed in the second paragraph.[116] Yet, the provision itself fails to expressly specify their status. This silence is problematic given the prevailing understanding at the time that nationality forms the principal link between an individual and a state under international law. Without nationality, stateless persons 'lack protection as far as [international law] is concerned'.[117] To overcome this barrier, an explicit reference to stateless persons would have been necessary. The United Nations' *Study of Statelessness*, which was published less than a fortnight before GCIV was adopted, declared, for example, that 'improvement in the position of stateless persons requires their integration in the framework of international law', and it promoted providing them with a status and international protection to this effect.[118] In her study of statelessness, Mira Siegelberg notes, however, that after WWII, international law was not at first developed to provide individuals with subjecthood and rights, but rather to validate 'the sovereign state as the primary source of rights and law'.[119]

Since stateless persons do not belong to any state, they do not fit into the traditional (legal) inter-state system and have been considered an anomaly in international law.[120] Indeed, the drafters' belief that stateless persons fall under the scope of GCIV contradicts their reliance on reciprocity and their preoccupation with inter-state relations in the adopted text of Article 4. It is noteworthy that the Committee's rapporteur remarked that he 'did not believe that the mere fact of the denationalization of a person who had been excluded from protection by reason of

[112] *Final Record*, vol II(A) (n 55) 794; see also *Final Record*, vol II(B) (n 67) 375-77.
[113] *Conférence diplomatique 1949: sténogrammes de la Commission III, tome IV* (18 July 1949, CD_1949_COMM3_CR48) 16 and 23.
[114] *GCIV Commentary* (n 5) 48.
[115] Ibid 18.
[116] See eg ibid 47; *Final Record*, vol II(A) (n 55) 814.
[117] H Lauterpacht, (ed), *International Law: A Treatise, vol I Peace* (6th edn, Longmans, Green and Co 1947) para 312.
[118] UN, *A Study of Statelessness* (1949) UN Doc E/1112;E1112/Add.1, 43.
[119] ML Siegelberg, *Statelessness: A Modern History* (Harvard University Press 2020) 156.
[120] L van Waas, 'The UN Statelessness Conventions' in A Edwards and L van Waas (eds), *Nationality and Statelessness under International Law* (CUP 2014) 82.

the fact that his country of origin was not a Party to the Convention, could automatically transform him into a protected person'.[121] This undermines the supposedly general protection of stateless persons. It perpetuates the idea that in the international legal system, in which the individual is only brought into existence through the formal legal bond to a state, there is no place for persons who by definition have no nationality.

The debates at the Diplomatic Conference show that the delegations indeed disagreed on the position and needs of stateless persons. The Scandinavian states and Switzerland advocated their inclusion under GCIV, with the Norwegian delegate pointing out that the ordinary avenue for protection in form of diplomatic representation was 'inoperative' in their case.[122] The United Kingdom delegate, on the other hand, suggested treating stateless persons in the same manner as states' own nationals,[123] which would leave them at the government's discretion without the protection of international law. The lack of regulation leaves stateless persons in a precarious situation. The United Nations' *Study of Statelessness* observed that in practice a stateless person was 'treated more as an individual to be watched than as a man whose rights must be respected', and is regarded with prejudice, distrust and suspicion.[124] Similarly, it has been argued that 'stateless persons have no right to be considered neutral and in fact are often treated as enemy nationals, especially if they formerly possessed the nationality of the enemy'.[125] The very absence of nationality appears to render the stateless person more at risk; yet, this vulnerability is not recognised in GCIV. The silence leaves it to the state whether it treats stateless persons as protected persons or akin to its own nationals.

The indistinct position of stateless persons may also be the result of the conflation of their fate with that of refugees. The 1938 Convention concerning the Status of Refugees Coming from Germany 'understood stateless persons and refugees as effectively indistinguishable'.[126] These '[i]ndividuals without the protection of any state' were regarded as 'twin challenges' in the post-war context.[127] Together they formed a discrete point in the deliberation of the Civilian Convention at its preliminary stage.[128] The drafting history of GCIV furthermore implies a preoccupation with refugees of enemy nationality who were *de facto* stateless persons or denationalised by their state of origin, which was in all likelihood informed by the experience of WWII and, in particular, persecution under the Nazi regime. The situation was complicated by, for example, 'Nazi and Vichy nationality laws, which stripped Jews of their citizenship but preserved their status as legal subjects'.[129] Muddling these issues may have resulted in the belief that persons lacking the protection of any government were provided for under Article 44, precluding a more thorough engagement with the fate of persons without nationality *de jure*.

[121] *Final Record*, vol II(A) (n 55) 793.
[122] Ibid 621.
[123] Ibid.
[124] UN Doc E/1112;E1112/Add.1, 25.
[125] Van Panhuys (n 48) 121.
[126] M Foster and H Lambert, *International Refugee Law and the Protection of Stateless Persons* (OUP 2019) 23.
[127] Siegelberg (n 119) 196.
[128] *Report on the Work of the Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of Various Problems Relative to the Red Cross* (ICRC 1947) 103.
[129] Siegelberg (n 119) 151.

Under the traditional international legal system, nationality is regarded as a 'default setting' based on the assumption that it 'provides the greatest protection for the individual vis-à-vis other states, and only when it fails, cannot apply, or is unrelated to the context of the protection provided to the individual, do other systems of protection become relevant'.[130] GCIV follows this approach. It provides safeguards when ordinary international legal protection is in principle not available. This understanding of GCIV within the international legal system, in addition to the belligerent relations of states, explains the exclusionary and subsidiary nature of its main protection regime. The nationality requirement ultimately suggests a preoccupation with the relations between states rather than between states and civilians.

C. Nationality and the strategic limitation of the scope of GCIV

The debates on the status of nationals of neutral, co-belligerent and non-contracting states, as well as stateless persons reveal a disagreement throughout the drafting process with respect to the scope and purpose of the new Civilian Convention. As stated above, the inclusive formulation of the scope *ratione personae* of the 1947 draft comprised all non-nationals. Moreover, the Convention was seemingly envisaged as a minimum standard of treatment; it was indeed deemed desirable that aliens who were not enemy nationals would be entitled to more protection.[131] At the 1949 Diplomatic Conference, it was primarily the Scandinavian and Soviet bloc countrieswhich, 'as harbingers of universalism, […] wished for an all-encompassing convention that would be applicable to all people, under all circumstances, in all places'.[132] Focusing on the situation of the individual person, the Swiss and Scandinavian delegates emphasised that providing additional safeguards under the Civilian Convention would 'not be harmful',[133] but 'could only be regarded as an advantage' since they went further than diplomatic protection.[134] The Soviet Union delegation, which opposed the non-application to nationals of non-contracting states most strongly, albeit with some lack of clarity,[135] proclaimed that their exclusion would be 'contrary to elementary humanitarian principles' and the purpose of the Civilian Convention.[136] However, this humanitarian approach to protection collided with the intention of some states to limit the Convention's scope of application as much as possible.

The differentiation between non-nationals was introduced at the Diplomatic Conference by the United Kingdom delegation. It promoted a limited focus on enemy nationals, excluding nationals of neutral and co-belligerent states from the civilian protection regime entirely.[137] During the debate, the United Kingdom and United States delegations brought forward different justifications for narrowing the treaty's scope of application. They proclaimed that its safeguards would be unnecessary since these non-nationals would be sufficiently protected by their own diplomatic representations, or treated like citizens. Furthermore, they argued that Protecting Powers should not be overburdened, but focus their work on civilians most in need

[130] Boll (n 66) 127-128.
[131] *Conférence d'experts gouvernementaux* (n 55) 5.
[132] Ben-Nun (n 85) 106.
[133] *Final Record*, vol II(A) (n 55) 794.
[134] Ibid 621.
[135] Ibid 795.
[136] *Final Record*, vol II(B) (n 67) 376.
[137] *Final Record*, vol II(A) (n 55) 620.

of protection.[138] With regard to the obligation to facilitate repatriation, the United States and Canada also showed a concern for the practical difficulties and economic consequences that mass departure might cause especially for countries with large alien populations.[139] In his detailed study of the United Kingdom and United States' attitudes towards the drafting of the 1949 Geneva Conventions, van Dijk reveals a more sinister and self-interested part of the history. He shows that the 'Anglo-American drafters regularly pushed for the most regressive solutions and opposed further restrictions on regulating occupation'.[140] The above analysis suggests that the states may have invoked the distinction between enemy, co-belligerent, and neutral nationals strategically to confine their obligations under GCIV.

The United Kingdom's proposal to treat stateless persons like their own nationals may have also been self-interested. Under its domestic law at the time, stateless persons were technically aliens, since 'alien' was defined as 'a person who is not a British subject'.[141] Van Dijk observes that, '[w]hile not against the idea of legally protecting stateless persons, British officials wished to have no specific reference, fearing it might directly affect their strict immigration policies and the burden for their occupying forces'.[142] He argues that the reference to stateless persons in the Draft Convention was removed '[f]ollowing Anglo-American pressure to prevent a larger legal burden amid refugee crises in Europe and beyond'.[143] As a treaty written in the post-WWII environment, GCIV was not only influenced by the recent suffering of civilians, but also the occupying powers' and potential future belligerent states' consciousness of their obligations under the protection regime. Nationality appears to have served as a convenient criterion recognised in international law that allowed reluctant states to limit its scope of application by (partially) removing neutral and co-belligerent nationals, and placing stateless persons under governmental discretion.

This is not to deny the humanitarian nature of GCIV as such. The Drafting Committee adopted the differentiation of non-nationals in its definition of protected persons. Yet, Article 4 became more complex since it was recognised that diplomatic representation was not always available during hostilities, and that some neutral and co-belligerent nationals required other safeguards. Moreover, the prohibition of torture, collective punishment, reprisals, hostage taking, and summary executions, as well as humane standards of treatment and conditions of detention are undeniably humanitarian achievements. Within the protection regime, enemy nationals, in particular, emerge as 'humanitarian subjects', in accordance with Neville Wylie and Lindsey Cameron's notion of persons 'whose treatment was based on an understanding of their humanitarian needs'.[144] Ultimately, however, a protected person is in the first place not conceptualised as an innocent civilian or a war victim, but as a national of a particular state. The humanitarian guarantees are confined to those civilians who fall within the relevant

[138] Ibid 620 and 794.
[139] Ibid 653-54.
[140] Van Dijk (n 85) 6.
[141] Status of Aliens Act 1914, s 27(1); see also Lord McNair and AD Watts, *The Legal Effects of* War (4th edn, CUP 1966) 71.
[142] Van Dijk (n 85) 83.
[143] Ibid 94.
[144] N Wylie and L Cameron, 'The Impact of World War I on the Law Governing the Treatment of Prisoners of War and the Making of Humanitarian Subjects' (2019) 29 *EJIL* 1328, 1347.

constellation of belligerent and legal relations between the state of origin and the state in whose power they are.

4. Nationality and the protection of civilians since the adoption of GCIV

A. Humanitarian protection under the First Additional Protocol

The 1970s Diplomatic Conference on the reaffirmation and development of the 1949 Geneva Conventions recognised the shortcomings of the nationality requirement in GCIV. As a result, the first 1977 Additional Protocol relating to the protection of victims of IACs (API) partly expands the civilian protected person status. It also provides fundamental guarantees of humane treatment for all individuals who do not benefit from more favourable safeguards under international law in Article 75 API. This section examines how the centrality of nationality in understanding individuals in need of protection was overcome in the drafting of these provisions.

Article 73 API explicitly stipulates that refugees and stateless persons are protected persons for the purpose of GCIV. The provision was intended to overcome the deficiencies in the safeguards for refugees under the 1949 treaty.[145] Since it includes all refugees under the protected person status without any reference to their nationality *de jure*, it also strengthens the protection of refugees of enemy nationality and refugees in occupied territory beyond the limited guarantees of Articles 44 and 70 GCIV. Regarding stateless persons, the provision has been described as only formalizing an already existing protection. As explained above, however, the silence on the status of stateless persons in Article 4 GCIV may give rise to ambiguity. The ICRC acknowledged during the preparation of API that the 1949 protection regime applies to stateless persons by implication; yet, it 'felt that it might be useful to state that specifically and more clearly in the draft Protocol, thus reaffirming and strengthening the protection already afforded'.[146] While the lack of nationality was arguably not considered an obstacle for the enjoyment of the GCIV guarantees by stateless persons before, it constitutes the very rationale for their protection under Article 73 API.

The inclusive nature of Article 73 needs to be considered in relation to the historical context of its drafting, as well as wider developments in international law since the adoption of GCIV. The United Nations efforts leading to the *Study of Statelessness* concurred with the preparation of the 1949 Geneva Conventions. Nevertheless, international awareness of the particular needs of stateless persons, and the correspondent willingness to provide for special protection increased only slowly following WWII. By the time API was adopted, treaties attempting to mitigate the hardship of stateless persons and reducing statelessness had been created and gradually attracted state parties and academic interest.[147] They were invoked in the discussion of what is now Article 73,[148] and the provision itself refers to those 'considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned'.[149] Furthermore, Sara Cosemans argues that 'the 1970s saw an upsurge in

[145] *Official Records*, vol XV (n 65) 13.
[146] Ibid 14.
[147] See eg Convention Relating to the Status of Stateless Persons (1954); Convention on the Reduction of Statelessness (1961); see also van Waas (n 120).
[148] *Official Records*, vol XV (n 65) 14.
[149] API, art 73.

humanitarian – and even legal – attention for the people rendered stateless due to decolonisation'.[150] Article 73 was thus adopted in a different normative environment in which individuals and their needs could be unequivocally recognised under international law independently of their being (non-)nationals of a state.

While the phenomenon of refugees was also not new, it was noted during the drafting of API that it had reached an unprecedented scale.[151] The preparation of the 1951 Convention relating to the Status of Refugees began before the adoption of GCIV. Yet, not only was the work ongoing at the time of the 1949 Diplomatic Conference, the definition of refugees in this post-war treaty was also marked by temporal and geographical limitations. These shortcomings were only removed by the 1967 Protocol to the Refugee Convention which intended 'to make the treaty-based protection of refugees universal'.[152] It was a response to the large-scale refugee flow outside of Europe, especially in Africa. In this context, the Organisation of African Unity also adopted the Convention Governing Specific Aspects of Refugee Problems in Africa in 1969.[153] In preparation of Article 73 API, the United Nations High Commissioner for Refugees observer at the Diplomatic Conference drew attention to the 1951 Refugee Convention, similar international instruments and national legislation. He remarked that there had been 'an extraordinary development of political and legal phenomena which it had not been possible to understand or conceive in 1949'.[154] This suggests a greater understanding of the precarious situation of refugees generally and not only the subjects of an enemy state. The protection provided under Article 73 is thus in accordance with the evolving historical context and international law on statelessness and refugees, as well as the conceptualisation of these individuals therein. They are perceived as vulnerable and in need of protection not because of their nationality, but rather the absence or ineffectiveness of nationality.

Nevertheless, even the protective scope of Article 73 API is limited. Only stateless persons and refugees who are recognised as such 'before the beginning of hostilities' fall under this provision. Those individuals who become stateless or refugees as a result of the armed conflict do not benefit from the GCIV protection regime, but the guarantees under Article 75 API. This provision serves as a safety net for all 'persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the [Geneva] Conventions or under this Protocol'. Relying on the preparatory discussions and drafts, the ICRC's *API Commentary* provides a summary of the beneficiaries which comprise *inter alia* those civilians explicitly excluded from the definition of protected persons under Article 4 GCIV.[155] Indeed, Article 75 seems to have been worded *ex negativo* due to its status as a safeguarding provision to ensure that no one would be (un)intentionally overlooked.[156] Its significance arguably lies in its application without regard to an individual's formal legal bond to a state. Nationality is

[150] S Cosemans, 'Modern Statelessness and the British Imperial Perspective: A Comment on Mira Siegelberg's Statelessness: A Modern History' (2021) 47 *History of European Ideas* 801, 804.
[151] *Official Records,* vol XV (n 65) 16-17.
[152] T Einarsen, 'Drafting History of the 1951 Convention and the 1967 Protocol' in Zimmermann (n 107) para 68.
[153] Ibid paras 70-71.
[154] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, vol VI (Federal Political Department 1978) 247.
[155] C Pilloud et al (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff 1987) (hereafter: *API Commentary*) paras 3022-28.
[156] DFJJ De Stoop, 'New Guarantees for Human Rights in Armed Conflicts – A Major Result of the Geneva Conference 1974-1977' (1974) 6 *Aust YBIL* 52, 57.

no longer considered as a rationale or barrier for protection under IHL; rather it is deemed irrelevant for the basic principles of humane treatment.

Unlike the nationality requirement in Article 4 GCIV, which shows the regime's deference to diplomatic protection, Article 75 provides a consistent minimum standard of humane treatment in IACs. Its guarantees apply to nationals of neutral and co-belligerent states with diplomatic representation since it was believed that they 'would in most cases enjoy sufficient protection; but their position would be improved if they were granted legal status'.[157] While this argument was unsuccessful during the drafting of GCIV, Article 75 addresses the uncertainty and potentially insufficiency of the system of diplomatic protection triggered by the individual's nationality. Moreover, paragraph 8 requires that 'any other more favourable provision granting greater protection' is not limited or infringed.[158] The safeguards in Article 75 exist parallel to international human rights law (IHRL), which protects civilians, including those who do not benefit from GCIV, without reference to their nationality. As the law specifically designed for the context of hostilities, however, it is not subject to derogations, unlike IHRL. While Article 75 should be read in connection with other protection mechanisms available under international law, its scope of application is determined on the basis of the interests of the individual rather than the state.

Article 75 also moves the protection of the individual further away from the reciprocal regulation of inter-state relations. Its safeguards pertain to all individuals irrespective of their nationality, and thus whether the state of nationality is bound by the same provisions. Although the ICRC's *API Commentary* admits that the issue has become more of a theoretical question with the universal ratification of the 1949 Geneva Conventions, it expressly acknowledges that Article 75 would protect nationals of non-contracting states.[159] GCIV may still be regarded as creating mutual obligations between the state parties, rather than unilateral undertakings,[160] whereas Article 75 seems to fall under the latter category. It thus resembles IHRL which tends to apply to individuals not only regardless of nationality but also whether the state of nationality has ratified the respective treaty.[161] According to Theodor Meron, a shift from the principle of reciprocity to the principle of humanity has occurred,[162] as can be seen in Article 75 API.

Furthermore, Article 75 pierces the veil of sovereignty by extending its protective scope to states' own nationals. A controversial reference to this effect in the original draft failed to achieve consensus at the Diplomatic Conference and was deleted from the treaty text as a means of compromise.[163] Yet, it is commonly believed that states' subjects are protected despite the provision's silence on this matter.[164] Nationality no longer serves to differentiate between international and internal relations with respect to the treatment of individuals by states. Some of the arguments brought forward during the discussion of Article 75, including

[157] *Official Records*, vol XV (n 65) 27.
[158] API, art 75(8).
[159] *API Commentary* (n 155) para 3023.
[160] Provost (n 45) 149-50.
[161] Ibid 25.
[162] Meron (n 111) 1-2.
[163] *Official Records*, vol XV (n 65) 461 and 514.
[164] *API Commentary* (n 155) para 3020; JK Kleffner, 'Friend or Foe? On the Protective Reach of the Law of Armed Conflict' in M Matthee, B Toebes and M Brus (eds), *Armed Conflict and International Law: In Search of the Human Face* (Springer 2013) 296-97; De Stoop (n 156) 58.

those on its application to states' own nationals and nationals of states who are not party to API,[165] were similar to those in the deliberation of GCIV. At the 1970s Diplomatic Conference, however, attempts to exclude individuals from the minimum safeguards were no longer accepted by a majority of states. It was merely clarified that Article 75 applies to situations connected to the armed conflict. API was thus able to achieve certain humanitarian aims which were proposed during the drafting of GCIV, but which were unsuccessful given the opposition of influential states.

While it has been widely remarked that Article 75 is inspired by or reflects the language and principles of IHRL,[166] it also reveals an evolution in the understanding of the individuals who are protected. IHRL deviates from the traditional view of persons as no more than an 'appendix of State's sovereignty', and regards the individual instead 'as a holder of human dignity vis-à-vis any State, including, most importantly, the one of which he (or she) is a national'.[167] A similar conceptual change arguably underlies the fundamental guarantees in Article 75, and the extension of the civilian protected person status in Article 73. It has been argued that international law has evolved to increasingly recognise the international legal personality of subjects other than states, including individuals.[168] Without going into the debate whether the 1949 Geneva Conventions and the 1977 Additional Protocols confer rights on individuals or merely provide standards of treatment,[169] the individual seems to have gained a position of its own under API.

In addition to the reconceptualization of the individual within the international legal system, a similar change has been achieved in relation to the status of the individual in IACs. Whereas nationality served to identify the position of civilians within the belligerent relations of states, Article 75 is completely devoid of the friend/foe distinction. Firstly, it regulates the treatment of individuals 'in the power of *a* Party to the conflict'[170] without qualifying this party as the enemy. Secondly, the absence of a nationality requirement or any other criterion designed to establish the individual's allegiance permits universal guarantees and a more individualised analysis of necessary protection for everyone affected by an IAC. The individual is no longer perceived as part of a collective; instead, it is recognised that anyone may become a war victim. The relationship between the state and the individual is thus no longer conceived as one with the enemy or enemy national, but rather with a human being subject to the control of state authorities. Article 75 provides fundamental standards of treatment for all individuals by virtue of their common humanity.

Despite these humanitarian developments, the nationality requirement remains the unchallenged and unchanged main criterion for the protection of civilians in the power of a

[165] *Official Records*, vol XV (n 65) 41-42.
[166] See eg L Doswald-Beck and S Vité, 'Le Droit International Humanitaire et le Droit des Droits de l'Homme' (1993) 75:800 *IRRC* 99, 120; V Gowlland-Debbas and G Gaggioli, 'The Relationship between International Human Rights and Humanitarian Law: An Overview' in R Kolb and G Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar 2013) 78.
[167] G Distefano, 'The Position of Individuals in Public International Law Through the Lens of Diplomatic Protection: The Principle and its Fragmentation' in Kolb and Gaggioli (n 166)65.
[168] For a critique of this conventional narrative see A Kjeldgaard-Pedersen, *The International Legal Personality of the Individual* (OUP 2018).
[169] See eg Provost (n 45) 27-32; K Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (CUP 2011) ch 3; Peters (n 100) ch 7; Kjeldgaard-Pedersen (n 168) ch 5.
[170] API, art 75 (emphasis added).

belligerent party under IHL. API does not extend the protected person status under Article 4 GCIV to all civilians. Only particular categories of civilians, now also comprising stateless persons and refugees, benefit from the detailed 1949 protection regime. While Article 75 API is an important safety net for all other civilians, its guarantees are limited. It is noteworthy that the *Customary International Humanitarian Law* study, published by the ICRC in 2005, does also not observe a separate customary protection regime for civilians in the power of a party to the conflict. Instead, it suggests a humanitarian approach in form of standards of treatment which apply equally to all civilians and persons *hors de combat*.[171] This resembles the law on non-international armed conflicts (NIACs) and the fundamental guarantees of Article 75 API more so than GCIV. This may be due to the attempt to identify rules which apply to both international and non-international armed conflicts. Yet, even when the ICRC conducted an internal study, followed by consultations with states, on the strengthening of legal protection for victims of armed conflicts more than sixty years after the adoption of the 1949 Geneva Conventions, it deemed the humanitarian needs of individuals deprived of their liberty in IACs sufficiently addressed by conventional and customary law.[172] GCIV with its nationality requirement, and thus restricted scope of application *ratione personae* remains the dominant legal framework.

B. Jurisprudence of the ICTY

Jurisprudence and some scholarship have adopted an overtly progressive and expansive approach to Article 4 GCIV to broaden its scope in accordance with the nature of contemporary IACs and developments in the international legal system. The International Criminal Tribunal for the Former Yugoslavia (ICTY), in particular, was crucially involved in the evolutionary interpretation of the nationality requirement. This was due to its jurisdiction under Article 2 of the ICTY Statute being dependent on the grave breaches regime,[173] which in relation to GCIV hinged on the commitment of an enumerated offence against the category of persons defined in Article 4.[174] Rather than evaluating the ICTY's approach in accordance with the rules of treaty interpretation,[175] this section highlights the similarities and differences in the significance of nationality in the case law as compared to the drafting of GCIV.

The various dynamics of the armed conflicts in the former Yugoslavia had shown the complexity of the relationship between states and civilians. As Mélanie Jacques remarks, in these inter-ethnic armed conflicts, 'in most cases, the victims share the same nationality as their abusers. As civilians in the hands of a power of which *they are nationals*, these victims fall outside the ambit of protection of [GCIV]'.[176] In the early *Tadić* case, the ICTY Trial Chamber applied a literal interpretation of nationality which led to the conclusion that the protected

[171] J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (CUP 2009) chs 32 and 37.
[172] ICRC, *Strengthening International Humanitarian Law Protecting Persons Deprived of their Liberty – Concluding Report* (ICRC 2015) 10-11.
[173] UNSC 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) UN Doc S/25704, Annex art 2.
[174] GCIV, art 147.
[175] See eg Hoffmann (n 104); M Galvis Martínez, 'The "Allegiance" Test: Judicial Legislation and Interpretation of GCIV' (2022) 27 *JCSL* 21, 36-45.
[176] M Jacques, *Armed Conflict and Displacement: The Protection of Refugees and Displaced Persons under International Humanitarian Law* (CUP 2012) 43.

person status was not applicable.[177] The decision was criticised for being 'too rigid and mechanical'[178] and 'unacceptably legalistic'.[179] The ICTY subsequently extended the protection to victims sharing the same nationality with the perpetrator by adopting two different approaches, which have sometimes been applied in combination.[180]

Firstly, the ICTY built upon the approach taken by the Trial Chamber in the *Tadić* case. In response to the internationalisation of NIACs due to the involvement of a foreign state on the side of a non-state armed group, it examined the relationship between these two actors not only for the purpose of establishing the international character of the armed conflict in question but also in relation to the nationality requirement of Article 4 GCIV.[181] The two are closely related.[182] It considered the role of the non-state armed group as a *de facto* organ or agent of the foreign intervening state to be sufficient for fulfilling the nationality requirement irrespective of a shared nationality between the victim and the immediate individual perpetrator.[183] Therefore, the finding under the agency test in the *Blaškić* case, that the victim owed no allegiance to the state party,[184] is arguably due to the difference of nationality between the civilian and the state exercising control over the non-state armed group. However, opinions differ regarding the degree of command and control or dependence that is required.[185] The agency test seems to consider the meaning of the phrase 'in the hands of a Party to the Conflict', and clarifies which actor the nationality requirement relates to in an internationalised armed conflict. Although this possibility was not discussed in the drafting of GCIV, the treaty itself suggests in Article 29 that the state identity of the occupying power rather than the nationality of the individual agent may be decisive.[186] As a result, this approach arguably continued to rely on the traditional formal legal sense of nationality in Article 4.

The second, and better known, approach applied a more liberal interpretation of the nationality requirement focusing on ethnicity as a criterion for a civilian's allegiance.[187] Foreign state involvement was at times 'based solely upon ethnicity and religion versus traditional national alliances or treaties'.[188] The reference to non-nationals in Article 4 was thus understood to mean the absence of allegiance between the party to the conflict and the civilian under its control.[189] It emphasised the need to analyse the substantive relationship between the state and the individual rather than the formal legal bond of nationality. Even though it did not specify the nature of 'substantial relations', the factual context and legal reasoning of the

[177] *Prosecutor v Tadić* (Opinion and Judgment) IT-94-1-T (7 May 1997) paras 584-608.
[178] BS Brown, 'Nationality and Internationality in International Humanitarian Law' (1998) 34 *Stan.J.Int'l L.* 347, 351.
[179] Meron (n 111) 34.
[180] See eg *Prosecutor v Aleksovski* (Judgment) IT-95-14/1-A (24 March 2000) paras 79 and 150-51.
[181] *Prosecutor v Tadić* (Judgment) IT-94-1-A (15 July 1999) paras 167-69.
[182] *Prosecutor v Delalić and Delić* (Judgment) IT-96-21-T (16 November 1998) (*Čelebići*) para 245; Brown (n 178) 379.
[183] *Tadić* (1999) (n 181) paras 167-69.
[184] *Prosecutor v Blaškić* (Judgment) IT-95-14-A (29 July 2004) para 175.
[185] See eg *Tadić* (1997) (n 177) paras 586-88 and 607-08, separate and dissenting opinion Judge McDonald, 288; Brown (n 178) 381-82.
[186] GCIV, art 29; see also *GCIV Commentary* (n 5) 212.
[187] *Tadić* (1999) (n 181) para 166; *Prosecutor v Blaškić* (Judgment) IT-95-14-T (3 March 2000) para 127; for a detailed critique see Galvis Martínez, 'The "Allegiance" Test' (n 175).
[188] S Reeves, 'The Expansive Definition of "Protected Persons" in War Crime Jurisprudence' (2009) *Army Lawyer* 23, 25.
[189] Provost (n 45) 39.

Appeals Chamber in the *Tadić* case suggest that the reference was intended to denote ethnic relations.[190] To a lesser extent, the ICTY also considered the absence of diplomatic protection in these cases.[191] The Appeals Chamber in the *Blaškić* case, for example, declared that 'normal diplomatic representation' in the definition of protected persons requires '*effective* and *satisfactory* diplomatic representation' for the exclusion of individuals from the protection regime.[192] The allegiance test has seemingly become 'the accepted interpretative framework' for Article 4.[193] It has been described as 'effectively writing out the nationality requirement'.[194] However, a careful reading of the relevant case law suggests that the criterion has been rather reinterpreted and that nationality, albeit in a more liberal, less legalistic sense, continues to inform the concept of civilian protected persons.

IHL itself does not define nationality, despite its central role for the GCIV protection regime.[195] Article 4 was originally understood to mean nationality in its traditional, ordinary sense as the formal legal bond between a state and its subjects.[196] Yet, a study on 'The Law of Nationality' in 1929 already suggested that '[n]ationality has no positive, immutable meaning. On the contrary its meaning and import have changed with the changing character of states. […] Nationality always connotes, however, membership of some kind in the society of a state or nation'.[197] Even in international law nationality may also refer to ethnicity and ethnic origin.[198] The controversial decision by the International Court of Justice in the *Nottebohm* case, on the other hand, invokes 'effective nationality' which has 'as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties'.[199] The ICTY sometimes applied this approach to Article 4 GCIV.[200] Its consideration of an 'effective link' has been, in particular, defended on the ground that ethnicity was seen in, for example, Bosnia-Herzegovina as an indication for being treated as a *foreigner*, i.e. non-national,[201] thus seemingly conceptualizing ethnicity in terms of belonging to a *nation*. In the words of the ICTY, 'the victims may be "assimilated" to the external State'.[202] Indeed, during the conflicts in the former Yugoslavia, 'the boundary between national and foreigner blurred, and distinctions based on formal categories became

[190] *Tadić* (1999) (n 181) para 166.
[191] Ibid para 165; *Blaškić* (2000) (n 187) para 145.
[192] *Blaškić* (2004) (n 184) para 186.
[193] Hoffmann (n 104) 501; see eg *Aleksovski* (2000) (n 180) paras 151-152; *Prosecutor v Delalić, Mucić, Delić and Landžo* (Judgment) IT-96-21-A (20 February 2001) (*Čelebići*) paras 56-85; *Prosecutor v Naletilić and Martinović* (Judgment) IT-98-34-T (31 March 2003) para 207; *Prosecutor v Kordić and Čerkez (*Judgment) IT-95-14/2-A (17 December 2004) para 328*; Prosecutor v Prlić et al* (Judgment Vol I) IT-04-74-A (29 November 2017) paras 353-55; *Kaing Guek Eav alias Duch* (Judgment) Case File No. 001/18-07-2007-ECCC/TC (16 August 2010) paras 419 and 426;*Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the Confirmation of Charges) ICC-01/04-01/07 (30 September 2008) paras 290-93.
[194] S Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law* (CUP 2014) 118.
[195] Jacques (n 176) 48.
[196] *Final Record*, vol II(B) (n 67) 13 and 41.
[197] RW Flournoy, Jr, 'The Law of Nationality' (1929) 23 *AJIL Special Supplement* 11, 21.
[198] A Zimmermann and C Mahler, 'Article 1A, para. 2 (Definition of the Term "Refugee")' in Zimmermann (n 107) paras 383 and 390.
[199] *Nottebohm* (n 98) 23.
[200] see eg *Čelebići* (1998) (n 182) para 258.
[201] Meron (n 111) 34-35; Brown (n 178) 399-400.
[202] *Čelebići* (2001) (n 193) para 83.

meaningless'.[203] Other scholars have interpreted the basis for allegiance even more widely. Shane Reeves suggests a more general development towards granting civilian protected person status to states' own nationals in religious, ethnic and tribal wars which qualify as IACs.[204] Sandra Krähenmann also believes that this approach can be applied to foreign fighters who are motivated by religion and ideology.[205] Meron advocates that, in situations similar to Yugoslavia, the nationality requirement should simply 'be construed as referring to persons in the hands of an adversary'.[206]

By reinterpreting the nationality requirement to comprise more informal bonds which imply allegiance, the liberal approach draws on the clause's function to position an individual within the belligerent relations of an international(ised) armed conflict. Enmity and belonging to the opposing belligerent party remain the prevalent undercurrent of the protected person status. Similar to nationality in 1949, the association with the enemy is used to identify a civilian's vulnerability to adverse treatment, and need for protection. Nationality, the conferral of which is the discretionary sovereign right of the state under its domestic jurisdiction[207] and generally based on the accident of birth, may indeed be an inadequate indicator for the individual's sympathy and commitment to a state. Yet, even when GCIV was drafted, nationality did not constitute a sufficient and necessary condition for positioning civilians within the belligerent relations in state practice. During the two World Wars, not only subjects of the opposing belligerent states were treated as enemies; ethnicity, for example, already played a role. The drafters of the 1949 treaty, nonetheless, relied on the formal legal bond for identifying enemy civilians, and thus a collective understanding of individuals. The ICTY, and promoters of the liberal approach are shifting the balance to a more individualised assessment of war victims by examining substantive relations.

The ICTY also portrayed its approach as progressive interpretation in accordance with evolving international law. Pointing to developments in IHRL, it believed that a literal reading of the nationality requirement, preserving the traditional principle of non-interference, 'would be incongruous with the whole concept of human rights, which protect individuals from the excesses of their own governments'.[208] Robert Cryer argues that 'the Trial Chamber appears to have, rather unthinkingly, assimilated human rights law and humanitarian law'.[209] At the same time, however, the ICTY emphasised that the civilians who it recognised as protected persons were perceived as non-nationals on the basis of their ethnicity. It has been argued that the protection of these civilians would not amount to an interference with the state's treatment of its own nationals.[210] Although the influence of IHRL may have led to accepting the protection of states' own subjects from governmental abuse under international law, a position that was still insupportable for state delegations in 1949, the liberal interpretation of Article 4 GCIV

[203] Hoffmann (n 104) 499.
[204] Reeves (n 188) 23.
[205] Krähenmann (n 89) 19.
[206] Meron (n 111) 34-35.
[207] Lauterpacht, *Peace* (n 117) para 293.
[208] *Čelebići* (1998) (n 182) para 266.
[209] R Cryer, 'The Interplay of Human Rights and Humanitarian Law: The Approach of the ICTY' (2010) 14 *JCSL* 511, 518.
[210] Meron (n 111) 35.

continues to be contingent on the affiliation of an individual with the opposing belligerent party.

The difference between GCIV's drafting history and the ICTY's approach is more glaring with regard to the understanding of the purpose of the treaty. A teleological approach to interpretation has been commonly invoked to justify the diminishing role of the nationality requirement for the GCIV protection regime. The ICTY argued that 'the protection of civilians to the maximum extent possible' constitutes the object and purpose of GCIV.[211] Similarly, Kai Ambos endorses 'a normative, value-based approach, informed by the Geneva Law's humanitarian purpose of protection', which would extend the scope of Article 4 to civilians in the hands of the enemy irrespective of nationality in its formal sense.[212] This approach reflects the common belief that the 1949 Geneva Conventions 'have been drawn up first and foremost to protect individuals, and not to serve State interests'.[213] It considers GCIV as the protection regime for 'civilians' in the hands of a party to an IAC generally, perceiving them as innocent and vulnerable war victims. Yet, as elaborated above, the definition of protected persons not only served to exclude states' own nationals from its protective scope, but also to limit states' obligations as much as possible. In 1949, the concern for inter-state relations and sovereign state interests prevailed over the regard for the civilians' well-being.

In many respects, the ICTY's reasoning stands in direct contrast to the role that the nationality requirement played in situating civilians within the international legal system. It reflects the changing understanding of individuals in international law and the purpose of IHL. Individuals are recognised as human beings or civilians, and not primarily as nationals of a state. They may even be protected against their own government. As part of the humanitarian law on IACs, the treaty's protective aim is given precedence over the regulation of inter-state relations. The approach shows a concern for the experience of the individual, rather than the obligations of states. Overall, the importance and role of nationality for the protection of civilians in the hands of a party to an IAC seems to have changed due to an increasing focus on the individual, and a distancing from state-centric concerns.

Given these differences, it is all the more worth emphasising that, despite the desire to protect civilians to the greatest extent possible, the nationality requirement cannot be removed from GCIV by means of treaty interpretation. While nationality may acquire a different meaning in some circumstances, Article 4 has embedded the civilian protected person status in an inherently inter-state, and adversarial structure. Even the liberal approach relies on the collective identity of a group or entity to which civilians are perceived to belong, and thus their recognition as either friend or foe. Indeed, it could be argued that the allegiance test has further strengthened the notion that GCIV is intended to protect *enemy* civilians, even though the humanitarians after WWII endeavoured with some success to extend the guarantees to otherwise unprotected non-nationals.

5. Conclusion

[211] *Tadić* (1999) (n 181) para 168.
[212] K Ambos, *Treatise on International Criminal Law: Volume II: The Crimes and Sentencing* (OUP 2014) 149; see also Meron (n 111) 34-35.
[213] *GCIV Commentary* (n 5) 21; cited in *Čelebići* (1998) (n 182) para 263.

The significance of nationality for the protection of civilians has considerably changed over time. It peaked in the definition of protected persons under Article 4 GCIV. Indeed, it seems rather ironic that individuals were only regarded as 'civilians' in contradistinction to combatants in the negotiations at the second Hague Peace Conference in 1907, at a time when civilians as such were not protected. GCIV partly filled a *lacuna* in the law by providing a protection regime for civilians in the power of a party to an IAC; yet, it is not the individuals' status as civilians but their association with a state which identifies them as protected persons. Nationality thus functions both as a trigger and an obstacle for the safeguards under the treaty.

The nationality requirement in Article 4 GCIV is often explained (in passing) as a response to the suffering of enemy civilians in belligerent and occupied territory during WWII, the reciprocal nature of the laws of war, and international law's traditional principles of non-intervention. While these factors played an important role, this article demonstrated that the concept of civilian protected persons in the 1949 treaty was not an inevitable development of the existing law and state practice. The nationality requirement is the product of a contested and contingent process. A more expansive and humanitarian scope for the Civilian Convention was envisaged by some of the drafters, but it failed at the Diplomatic Conference in light of the resistance of influential states. Nationality was seemingly chosen as a means to reduce state obligations under the new protection regime. Whether a civilian was ultimately deemed worthy of the detailed guarantees in the treaty is determined on the basis of the belligerent and legal relations of states. This challenges the common understanding of GCIV as a humanitarian achievement designed to safeguard innocent and vulnerable civilians.

The understanding of civilian protected persons, and the treaty's role within the international legal system during the drafting of GCIV jars with the shift in the conceptual and normative framework, and changing attitude of states that have occurred since 1949. Developments with respect to international legal and belligerent relations have resulted in a more human-centric approach. Evolving international law, with its progress in the protection of stateless persons, refugees and human rights, as well as the nature of contemporary armed conflicts have required and facilitated a reconceptualization of individuals under IHL. The importance of nationality is arguably diminishing as individuals become increasingly protected in their own right rather than as the nationals of any particular state. Nevertheless, while this may have influenced the making of conventional law under API, the application of existing law is limited by its restrictive terms. As long as GCIV remains the main protection regime for civilians in the power of a party to an IAC, the significance attributed to nationality in 1949 will continue to hold sway and impose an adversarial understanding of civilians. Actors such as the ICTY may merely strive to protect the greatest possible number of civilians within the scope of the exclusionary post-WWII treaty. The legacy of the nationality requirement endures despite the more humanitarian vision of protecting civilians today.