

Master's Thesis

**The Syrian Conflict as an “Internationalized Armed
Conflict”? Proxy Wars and the Process of
Internationalization Under International Humanitarian
Law**

Author: Lasse Heckmann

Supervisor: Dr. Martin Mennecke, Department of Law

Number of characters: 191.995

*Thesis submitted in fulfillment of the requirements for the degree of Master of Social Sciences in
International Security and Law*

in the

**Faculty of Business and Social Sciences
University of Southern Denmark**

Summary

This paper asks whether the current conflict in Syria can be regarded as an international armed conflict despite the general consensus that the conflict is non-international. The paper analyzes some of the different processes of “internationalization” that have been proposed in the literature. Internationalization is understood as the process under which a non-international armed conflict can transform into an international armed conflict. Specifically, the paper analyzes the processes of 1) internationalization through direct military intervention by outside States, 2) internationalization as a consequence of the lack of consent for the use of force on a State’s territory, and 3) internationalization through the indirect intervention by outside States. Particular emphasis will be placed on examining State practice, as this aspect has often been neglected in the literature. The paper then applies that analysis to the case of Syria to see if Syria can be described as an “internationalized” armed conflict. The paper concludes that under the internationalization process of indirect intervention, the current conflict Syria can be said to be an international one.

Table of Contents

Introduction	7
1. Methodology	13
1.1. Approach and Sources of Law	13
1.2. State Practice and Methodology	14
1.3. Terminology	19
2. The Legal Framework	20
2.1. The IAC-NIAC Distinction	20
2.2. Temporal Scope of Application: Triggers and Thresholds	22
2.3. Geographical Scope of Application	29
2.3.1. <i>Text, context, and object and purpose</i>	32
2.3.2. <i>State practice</i>	36
2.3.3. <i>Drafting history</i>	38
2.4. Summary	40
3. Internationalization Through Direct Military Intervention	41
3.1. Intervention of a Foreign State on the Side of the non-State Group	41
3.2. Intervention of a Foreign State on the Side of the Government	50
3.3. Summary	54
4. Internationalization Through Lack of Consent	55
4.1. The ICRC Position: A Critical Assessment	56
4.2. An Argument for Extraterritorial Conflicts as NIACs	61
4.3. State Practice	71
4.4. The Lack of Authority for the ICRC Position	80
4.5. Summary	85
5. Internationalization Through Indirect Intervention	87
5.1. Effective or Overall Control? A Review of the Relevant Case Law and Literature	88
5.2. The Way Forward?	97
5.3. A New Approach: The Proxy Test	100
5.4. Summary	108
6. Syria as an Internationalized Armed Conflict?	109
6.1. Factual Background	109
6.2. Applying the Law to the Facts	111
6.2.1. <i>Direct military intervention</i>	111
6.2.2. <i>Lack of consent</i>	114
6.2.3. <i>Indirect intervention</i>	116
6.3. Consequences of Internationalization of the Conflict in Syria	119

Abbreviations

AP I	Protocol I additional to the Geneva Conventions, 1977
AP II	Protocol II additional to the Geneva Conventions, 1977
Art.	Article
CA2	Article 2 common to the four Geneva Conventions of 1949
CA3	Article 3 common to the four Geneva Conventions of 1949
DRC	Democratic Republic of the Congo
FSA	Free Syrian Army
GC I, II, III, IV	Geneva Convention I, II, III, IV
IAC	International armed conflict
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDF	Israel Defense Forces
IHL	International humanitarian law
IHRL	International human rights law
ILC	International Law Commission
ISAF	International Security Assistance Force
ISIL	Islamic State of Iraq and the Levant
LOAC	Laws of armed conflict
NATO	North Atlantic Treaty Organization
NIAC	Non-international armed conflict
OAS	Organization of American States

PKK	Kurdistan Workers' Party
POW	Prisoner of war
UN	United Nations
UNC	Charter of the United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
U.S. DoD	United States Department of Defense
U.S. DOJ	United States Department of Justice
VCLT	Vienna Convention on the Law of Treaties

Introduction

Since the outbreak of the Syrian civil war six years ago, more than 250,000 Syrians have been killed, and 11 million, around 65 percent of the population, have been displaced from their homes. An end to one of the bloodiest civil wars in recent history seems nowhere in sight, and what started out as peaceful protests around Syria have turned into a humanitarian catastrophe with a global refugee crisis to boot. The Assad regime has adopted brutal tactics in its pursuit of victory—including the use of chemical weapons—and the enormity of the conflict has shocked outside observers. Adding fuel to the fire, the terror organization Islamic State of Iraq and the Levant (ISIL) has emerged out of the chaos of war, an organization that, according to the United Nations Security Council (UNSC), represents “a global and unprecedented threat to international peace and security”,¹ and whose campaign of violence has affected vast swathes of Syria and its civilian population, who increasingly bears the brunt of ISIL’s acts of depredation. As a result of these developments, the conflict in Syria has taken on global dimensions. Not only is the conflict affecting the wider region and the rest of the world, but the conflict has also seen increased foreign intervention by outside States on both sides of the conflict.² Russia and Iran have sought to prop up the current regime while local Arab and Western States have provided support to the opposition forces. Contemporaneously, an International Coalition of sixty States, led by the United States (U.S.), has been engaging ISIL in both Iraq and Syria through air strikes. Due to this involvement by outside States, the conflict in Syria has widely been described as a “proxy war”, a battleground for foreign States to try and impose their geopolitical ambitions in the region.³ The significant foreign involvement in this *prima facie* civil war in Syria raises the important question of whether the legal classification of the conflict under international humanitarian law (IHL) needs to be reevaluated.

¹ United Nations (UN) Security Council Resolution 2249, S/RES/2249 (20 November 2015), available at: [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2249\(2015\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2249(2015)).

² Lucy Rodgers, David Gritten et al., “Syria: The story of the conflict”, *BBC*, 11 March 2016 (available at: <http://www.bbc.com/news/world-middle-east-26116868>).

³ Simon Mabon, “How to understand Syria’s ‘proxy war’ – and who’s fighting for whom”, *The Conversation*, 29 September 2016 (available at: <http://theconversation.com/how-to-understand-syrias-proxy-war-and-whos-fighting-for-whom-65685>).

Conflict classification under international humanitarian law operates with two distinct categories of armed conflict, each governed by its own legal regime: international armed conflicts (IAC), which are inter-State conflicts, and non-international armed conflicts (NIAC), the quintessential example of which being a civil war. It is generally accepted that foreign involvement in a civil war (or NIAC) can alter the characteristics of the conflict to such an extent as to transform the conflict, or “internationalize” it, into an international armed conflict instead, altering the legal regime applicable in the process. While the term “internationalization” is not defined or delineated in any treaty provisions or any other legal instruments, the concept has at times been used, including by the International Committee of the Red Cross (ICRC), to describe NIACs that were subject to outside intervention on either side of the conflict, whether or not the intervention transformed the conflict or altered the legal regime applicable.⁴ Others have used the term in a more narrow sense, applying it to situations where an outside State intervenes in a non-international armed conflict in support of a non-State party that is fighting against a government.⁵ But, as it will be argued, such an intervention will not necessarily internationalize a conflict. This paper will define the concept of “internationalization” in an even narrower and more specific sense as meaning the transformation of a *prima facie* non-international armed conflict into an international armed conflict, resulting in the application of the legal regime pertaining to international armed conflicts instead.⁶

Notwithstanding the lack of explicit legal basis, it is generally accepted that what is seemingly a non-international armed conflict may, under certain circumstances, transform into an international one.⁷ This transformative process can occur in three principal ways. First, Art. 1(4) of Additional Protocol I (AP I) expands the definition of IAC from its mainly inter-State character to include conflicts where non-State armed groups are fighting for self-determination against “colonial domination and alien occupation and against racist régimes”. Second, a State may grant

⁴ Tristan Ferraro, “The ICRC’s legal position on the notion of armed conflict involving foreign intervention and on determining the IHL applicable to this type of conflict”, *International Review of the Red Cross*, vol. 97, no. 900 (2015), pp. 1241-42, 1228-32; Hans-Peter Gasser, “Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon”, *The American University Law Review*, vol. 33, no. 1 (1983), p. 145 (“An internationalized non-international armed conflict is a civil war characterized by the intervention of the armed forces of a foreign power”).

⁵ See e.g. Katie A. Johnston, “Transformations of Conflict Status in Libya”, *Journal of Conflict and Security Law*, vol. 17, no. 1 (2012), pp. 95-96; Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, 2010, p. 155.

⁶ Marko Milanovic and Vidan Hadzi-Vidanovic, *A Taxonomy of Armed Conflict*, in: Nigel D. White & Christian Henderson (eds.), *Research Handbook on International Conflict and Security Law*, 2013, p. 292.

⁷ ICRC, “How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?”, *ICRC Opinion Paper* (2008), pp. 1, available at: <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> (noting that it is “important to underline that a situation can evolve from one type of armed conflict to another, depending on the facts prevailing at a certain moment.”).

belligerency to a non-State group in the course of its conflict against it, thereby bringing into effect the legal regime pertaining to IAC so that it applies to the State vis-à-vis the armed group. Third, the involvement of a State or its territory in the hostilities between another State and an armed group may be of such a nature that it affects the legal classification of the whole conflict. This type of internationalization can take various forms, but the following processes have generally been proposed in the legal literature: 1) direct outside intervention, 2) lack of consent, and 3) indirect outside intervention.⁸

It is this last category of potential processes of internationalization arising due to outside involvement that this paper will examine, and this is so for three distinct reasons. First, while conflicts of national liberation under Art. 1(4) of AP I and the granting of belligerency are unanimously accepted as mechanisms of internationalization, they have little importance or relevance in practice. The doctrine of granting of belligerency has fallen into disuse, not having been conferred since the Second Boer War (1899-1902), while Art. 1(4), on the other hand, has never been applied in practice—most likely because States, unsurprisingly, are rather averse to acknowledging that they are a colonial dominator or a racist regime. Second, unlike the other two types of processes, the processes of internationalization that arise due to the involvement of outside States are shrouded with controversy, the exact modalities of the law and its application in practice being associated with much uncertainty. Because the law is disputed, there is an urgent need to clarify the law on this issue, not least because outside involvement in NIACs is more prevalent than ever. Third, it is the effect of outside involvement that is of relevance to the case of Syria, since the Syrian regime has not granted belligerency to the Syrian opposition or recognized their struggle as one of self-determination and is unlikely to do so in the future.⁹

Furthermore, the paper will attempt to clarify the law on internationalized conflicts *in light of relevant State practice*. So far, the debate on internationalization has primarily taken place in the arenas of international criminal law and academic discourse, and little regard has been had for State

⁸ Milanovic and Hadzi-Vidanovic, *supra* note 6, pp. 292-300; Dieter Fleck, *The Law of Non-International Armed Conflicts*, In: Dieter Fleck (eds.), *The Handbook of International Humanitarian Law*, 2008, pp. 606-7.

⁹ See also Dapo Akande, "Self Determination and the Syrian Conflict – Recognition of Syrian Opposition as Sole Legitimate Representative of the Syrian People: What Does this Mean and What Implications Does it Have?", *EJIL: Talk!*, 6 December 2012, available at: <https://www.ejiltalk.org/self-determination-and-the-syrian-conflict-recognition-of-syrian-opposition-as-sole-legitimate-representative-of-the-syrian-people-what-does-this-mean-and-what-implications-does-it-have/> (arguing that while the Syrian conflict could potentially be seen as an example of peoples fighting to exercise their right of self-determination, it cannot be seen as a case where peoples are fighting against colonial domination, alien occupation, or a racist regime).

practice. In the broader literature on IHL, the mainstream view by the case law and scholars alike has been that the views of States are largely irrelevant when it comes to the classification of armed conflicts, and that the factual existence of armed violence is all that matters when it comes to the application of IHL.¹⁰ As a result, scholars writing on internationalization have to a large extent ignored the views of States. This conventional approach is evident in the academic literature on IHL. As Adam Roberts has stated with regard to IHL scholarship, “there is little tradition [...] of reasoned assessment of how the laws of war have operated in practice”.¹¹ Similarly, Sandesh Sivakumaran has stated that when it comes to the methodology of customary law of IHL, greater regard is had “for what ought to be the law than is otherwise the case” in general international law.¹² Specifically concerning the literature on internationalization, Noam Zamir has more recently pointed out the lack of engagement with relevant State practice.¹³ This approach is also evident in the case law; for example, in the *Nicaragua* judgment, the International Court of Justice (ICJ) held the rules of Common Article 3 (CA3) to be applicable in both IACs and NIACs as a matter of customary law but did not cite any State practice or *opinio juris* to support that assertion.¹⁴

While there is some merit to this approach, and while the views of States should not be accepted uncritically, to ignore the views of States seems in the end to essentially boil down to one argument: that there exist different sources of law under IHL—which do not include State practice—than under general international law. Since such an assertion can hardly be sustained, it is important to ascertain the views of States on the law of internationalization, especially because the fate of the victims of war depends on States’ views and understanding of the law since they are ultimately

¹⁰ See e.g. *Prosecutor v. Milan Milutinović et al.*, Trial Judgment, ICTY, 26 February 2009, para. 125 (“The existence of an armed conflict does not depend upon the views of the parties to the conflict”); *The Prosecutor v. Jean Paul Akayesu*, Trial Judgment, ICTR, 2 September 1998, para. 603 (“If the application of international humanitarian law depended solely on the discretionary judgment of the parties to the conflict, in most cases there would be a tendency for the conflict to be minimized by the parties thereto”); ICRC, *Commentary on the First Geneva Convention*, 2nd edition, 2016, paras. 236-44; ICRC, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Second Session 3 May - 3 June 1972: Report on the Work of the Conference, Volume I (Geneva, July 1972), p. 68, para. 2.54 available at: https://www.loc.gov/rr/frd/Military_Law/pdf/RC-Report-conf-of-gov-experts-1972_V-1.pdf; Christopher Greenwood, *Scope of Application of Humanitarian Law*, in: Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd edition, 2008, p. 46.

¹¹ Adam Roberts, *Land Warfare: From Hague to Nuremberg*, in: Michael E. Howard, George J. Andreopoulos, and Mark R. Shulman (eds.), *The Laws of War: Constraints on Warfare in the Western World*, 1994, p. 117.

¹² Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, 2012, p. 102.

¹³ Noam Zamir, “Minding the Gap between Scholarly Discourse and State Practice in International Humanitarian Law”, *Cambridge Journal of International and Comparative Law*, vol. 2, no. 2 (2013), pp. 3723-75.

¹⁴ *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States of America*), Judgment, International Court of Justice, 27 June 1986, paras. 218-19 (hereinafter *Nicaragua*).

responsible for its application in practice. This paper therefore attempts to include the views of States in the analysis.

Whether a conflict is classified as an IAC or a NIAC is not without significance. The protection of civilians and those *hors de combat* during armed conflict depends upon the application of IHL, which depends, in turn, upon the proper classification of the conflict. The treaty law applicable to IACs includes all of the four Geneva Conventions (GC) and AP I, while the treaty law relating to NIACs consists primarily of Common Article 3 and Additional Protocol II (AP II), which provides only for rudimentary protections under the law. While customary international law has to a large extent filled this gap, so that much IAC law is now equally applicable in NIACs, important differences remain.¹⁵ The most important differences are the status of the fighters in the conflict and the rules governing detention of fighters and civilians.¹⁶ Whether or not a conflict has become internationalized is therefore highly relevant since it dictates what law is applicable during the conflict.¹⁷

However, despite the widespread intervention by foreign powers in the conflict in Syria, any discussion about the potential for an internationalized armed conflict in Syria is almost entirely absent from the scholarly literature.¹⁸ In fact, a scholarly consensus seems to have emerged that the conflict in Syria should be classified as a NIAC.¹⁹ This paper therefore aims to fill this gap in the literature. The paper will examine whether, due to the foreign involvement, the conflict in Syria can

¹⁵ Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, In: Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, 2012, p. 36.

¹⁶ Laurie R. Blank and Benjamin R. Farley, "Identifying The Start of Conflict: Conflict Recognition, Operational Realities and Accountability in the Post-9/11 World", *Michigan Journal of International Law*, vol. 36, no. 3 (2016), p. 481.

¹⁷ *Ibid.*

¹⁸ While a few blog posts have discussed the possibility of the lack of consent by Syria to U.S. operations having internationalized the conflict, almost no other literature concerning the other processes of internationalization in the case of Syria has been found. See Dapo Akande, "When Does the Use of Force Against a Non-State Armed Group trigger an International Armed Conflict and Why does this Matter?", *EJIL: Talk!*, 18 October 2016 (available at: <http://www.ejiltalk.org/when-does-the-use-of-force-against-a-non-state-armed-group-trigger-an-international-armed-conflict-and-why-does-this-matter/>); Adil Ahmad Haque, "The United States is at War with Syria (according to the ICRC's New Geneva Convention Commentary)", *EJIL: Talk!*, 8 April 2016 (available at: <https://www.ejiltalk.org/the-united-states-is-at-war-with-syria-according-to-the-icrcs-new-geneva-convention-commentary/>).

¹⁹ See Terry D. Gill, "Classifying the Conflict in Syria", *International Law Studies*, vol. 92 (2016); Noam Zamir, "The Armed Conflict(s) Against the Islamic State", *Yearbook of International Humanitarian Law*, vol. 18 (2016); Deborah Pearlstein, "A Syrian IAC?", *Opinio Juris*, 14 October 2016 (available at: <http://opiniojuris.org/2016/10/14/a-syrian-iac/>); Deborah Pearlstein, "Still on that Syrian IAC", *Just Security*, 17 October 2016 (available at: <http://opiniojuris.org/2016/10/17/still-on-that-syrian-iac/>); Gabor Rona, "Letter to the Editor: Not So Fast on Calling it an 'Armed Conflict' Between the US and Syria", *Just Security*, 13 October 2016 (available at: <https://www.justsecurity.org/33546/letter-editor-fast-calling-armed-conflict-syria/>).

be said to have been internationalized. To answer this question, the paper will critically analyze the different processes that are accepted as potentially leading to the internationalization of a NIAC.

This paper is structured into three main sections. First, it will lay out and analyze the law, then it will present the facts as they relate to the conflict in Syria, and it will then apply the law to the facts. After presenting the methodology used for this paper, Part 2 examines the law relating to the classification of armed conflicts. Particularly, focus is on the temporal and geographical aspects of both IACs and NIACs. The findings in this Part will be of utmost importance for the following analysis. Part 3 analyzes the process of internationalization resulting from direct military intervention by a State. Part 4 then examines the controversial topic of whether the lack of consent by a State to the use of its territory by another State to fight a NIAC against a non-State armed group has the effect of internationalizing the NIAC. The paper concludes that the lack of consent will not, *ipso facto*, internationalize a NIAC, despite the ICRC's recent position to the contrary. Part 5 examines a perhaps even more controversial process of internationalization: the indirect intervention in NIACs by outside States. The paper critically assesses the current state of the law in the field and proceeds to present a novel approach to the issue as an alternative to the current approaches found in the literature. Finally, Part 6 applies the foregoing analysis to the case of Syria in order to determine whether or not Syria can be described as an internationalized armed conflict. The paper concludes that under the process of indirect intervention, Syria can in fact, if the alternative framework presented here is adopted, be regarded as an internationalized conflict. The paper concludes that despite the conventional view on this issue, an international armed conflict is currently taking place in Syria.

1

Methodology

1.1. Approach and Sources of Law

This paper employs a standard international law methodology. It relies on the sources of international law laid out in Art. 38(1) of the Statute of the ICJ: the primary sources of 1) international treaties, 2) customary international law, and 3) general principles of law, as well as the secondary sources of 1) judicial decisions and 2) the writing of scholars.

Relevant treaty law will be interpreted in good faith in accordance with the ordinary meaning of the terms of the treaty in their context and in light of the treaty's object and purpose, as prescribed by Art. 31 of the Vienna Convention on the Law of Treaties (VCLT).²⁰ According to Art. 32 of the VCLT, "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty [...] in order to confirm [...] or to determine the meaning when the interpretation according to article 31" leaves the meaning of a treaty ambiguous, obscure, or leads to an absurd or unreasonable result.²¹

Since the different factors that are to be taken into considerations when interpreting treaties can be contradictory, or even irreconcilable, in practice, different approaches that emphasize different elements are often followed, such as the textual or teleological elements or the intent of the parties

²⁰ *Vienna Convention on the Law of Treaties*, Vienna, 23 May 1969, *United Nations Treaty Series*, vol. 1155, No. 18232, p. 340, available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>.

²¹ *Ibid. Accord: Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534-35 (1991), online version available at: <https://supreme.justia.com/cases/federal/us/499/530/case.html#534> ("[w]hen interpreting a treaty, we begin with the text of the treaty and the context in which the written words are used [...] Other general rules of construction may be brought to bear on difficult or ambiguous passages [quotation marks and references omitted]."); *Societe Nationale v. District Court*, 482 U.S. 522, 534 (1987), online version available at: <https://supreme.justia.com/cases/federal/us/482/522/case.html#534> (stating that after looking to the text, "[t]he treaty's history, the negotiations, and the practical construction adopted by the parties may also be relevant [quotation marks omitted]."). See also *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-432 (1943), online version available at: <https://supreme.justia.com/cases/federal/us/318/423/case.html#431> ("treaties are construed more liberally than private agreements, and to ascertain their meaning, we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.").

to the treaty.²² The International Law Commission (ILC) has voiced a preference for looking to the text first and foremost,²³ and the ICJ has consistently favored the textual approach of interpretation as well, which it underlined in the *Territorial Dispute* case when it stated that “[i]nterpretation must be based above all upon the text of a treaty”.²⁴ Accordingly, this paper will put particular emphasis on interpreting treaty law in accordance with the “plain meaning rule”, but will do so without prejudice to the other constitutional elements that need to be considered under Art. 31.²⁵

Furthermore, this paper utilizes relevant international and national case law to help identify and interpret the law. Since international law does not operate with a concept of *stare decisis*, court decisions are not binding precedent on other courts or States. International law can instead be said to operate with a doctrine of *jurisprudence constante*, according to which court decisions are to be regarded as highly persuasive, but not as binding precedent. It is in this manner that this paper will regard and use the relevant jurisprudence.

The views of the International Committee of the Red Cross will also be given thorough consideration throughout the analysis. While the ICRC does not “lay down the law”, and even though, as the paper will show, this author does not always agree with the views of the ICRC, its opinions should be considered as highly authoritative on matters regarding international humanitarian law.

Finally, as the title indicates, this paper primarily focusses on international humanitarian law. While references to other bodies of law, such as international human rights law (IHRL), law of State responsibility, and the *jus ad bellum*, are made throughout, the paper is mainly concerned with analyzing internationalization and classification of armed conflicts through the lens of IHL.

1.2. State Practice and Methodology

²² Martin Dixon, *Textbook on International Law*, 7th edition, 2013, pp. 73-75; Alina Kaczorowska, *Public International Law*, 4th edition, 2010, pp. 122-25.

²³ Malgosia Fitzmaurice, *The Practical Workings of the Law of Treaties*, in: Malcolm D. Evans (ed.), *International Law*, 4th edition, 2014, p. 179.

²⁴ *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, International Court of Justice, 3 February 1994, para. 41.

²⁵ *Black's Law Dictionary* 1336 (10th ed. 2014).

A note on State practice is needed. Practice by States plays a very important role in international law. In one role, consistent and uniform State practice is fundamental to the formation of customary international law, as it is, in the words of the ICJ, “State practice from which customary law is derived”.²⁶ However, State practice is only one of the two elements that make up customary international law. Practice must also be accompanied by an element of *opinio juris*, which is the belief by the State that the practice in question must be followed because the State has a legal obligation to do so.²⁷ In another, unrelated role, practice by States also functions as proof of “subsequent practice”, evidence of how State parties have interpreted a particular treaty provision. According to Art. 31(3)(b) of the VCLT, such State practice needs to be taken into account during any interpretation of treaty law.

What exactly counts as State practice for those two purposes, however, has proven controversial. As an element of customary law, this paper generally follows the methodology used by the ICRC in its *Customary International Humanitarian Law Study*, which took quite a broad view on what constitutes practice by States. In the Study, the ICRC took into account both physical acts (i.e., what States do, such as behavior on the battlefield) and verbal acts (i.e., what States officially say and write).²⁸ It has been argued by commentators and States alike that practice should not include verbal acts, only what States actually do.²⁹ However, as the International Criminal Tribunal for the Former Yugoslavia (ICTY) has noted, it is often very difficult, if not impossible, to assess how parties in a conflict actually behaved on the battlefield, and to determine whether States followed certain rules

²⁶ *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), Judgment, International Court of Justice, 3 February 2012, para. 100; Michael Wood and Omri Sender, *State Practice*, in: Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, 2008, paras. 1-2.

²⁷ See e.g. *Nicaragua*, *supra* note 14, para. 207 (“[F]or a new customary rule to be formed, not only must the acts concerned “amount to a settled practice”, but they must be accompanied by the *opinio juris sive necessitates*.”); *North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, International Court of Justice, 20 February 1969, para. 77 (“[T]wo conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitates*.”).

²⁸ ICRC, *Customary IHL Database*, Introduction, accessed on 5 May 2017, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_in_in.

²⁹ Anthony D’Amato, *Concept of Custom in International Law*, 1971, p. 88; John B. Bellinger and III and William J. Haynes I, “A US government Response to the International Committee of the Red Cross Study *Customary International Humanitarian Law*”, *International Review of the Red Cross*, vol. 89, no. 866 (2007), pp. 443-47 (“[T]he Study places too much emphasis on written materials, such as military manuals and other guidelines published by States, as opposed to actual operational practice by States during armed conflict.”).

or not.³⁰ Likewise, both the International Law Association (ILA) and the International Law Commission (ILC) have opined that “verbal acts, and not only physical acts, of States count as State practice”.³¹ As noted by the ILA, “[t]here is no inherent reason why verbal acts should not count as practice”.³²

Under these two rubrics of physical and verbal acts, a variety of sources can count towards State practice. These include battlefield behavior, military manuals, official statements by States, opinions of official legal advisers, national case law, national legislation, diplomatic and government communications, executive decisions and regulations, statements at international fora, pleadings before international courts, positions taken with respect to resolutions of international organizations, etc.³³ Similarly, the International Law Commission (ILC) adopted a largely similar list of forms of practice in its 2016 draft report *Identification of customary international law*.³⁴ In addition, the ICTY has stated that “[i]n appraising the formation of customary rules [...] reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.”³⁵

Some commentators have questioned whether support for United Nations General Assembly (UNGA) resolutions can be used to provide evidence of a customary norm, given their generally

³⁰ *Prosecutor v. Dusko Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995, para. 99 (hereinafter *Tadić* Jurisdiction Decision).

³¹ International Law Association, *Statement of Principles Applicable to the Formation of General Customary International Law*, Final Report of the Committee on Formation of Customary (General) international Law, 2000, p. 14; International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 2001, p. 34, available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

³² International Law Association, *Statement of Principles Applicable to the Formation of General Customary International Law*, *supra* note 31, p. 14.

³³ The materials considered by the ICRC Study included: “Physical acts include, for example, battlefield behaviour, the use of certain weapons and the treatment provided to different categories of persons. Verbal acts include military manuals, national legislation, national case-law, instructions to armed and security forces, military communiqués during war, diplomatic protests, opinions of official legal advisers, comments by governments on draft treaties, executive decisions and regulations, pleadings before international tribunals, statements in international organisations and at international conferences and government positions taken with respect to resolutions of international organisations.” (ICRC, *Customary IHL Database*, *supra* note 28).

³⁴ According to the Report, “[f]orms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct “on the ground”; legislative and administrative acts; and decisions of national courts”. United Nations (UN) General Assembly, *Identification of customary international law*, A/CN.4/L.872 (30 May 2016), p. 2, Draft conclusion 6 [7], available at: <http://legal.un.org/docs/?symbol=A/CN.4/L.872>.

³⁵ *Tadić* Jurisdiction Decision, *supra* note 30, para. 99.

non-binding nature and the variety of reasons that States decide to vote or not vote in favor of such resolutions—reasons that often have nothing to do with a belief in a specific legal obligation.³⁶ However, the ICJ has frequently turned to UNGA resolutions as evidence of customary law, and that approach will generally be followed here.³⁷ Furthermore, since international organizations such as the UN have international legal personality, their practice can contribute towards the formation of customary international law.³⁸

As regards the other element of customary international law, *opinio juris*, the ICRC Study found it very difficult and even impossible at times to separate the elements of State practice and legal conviction. Crucially, it also took the view that more often than not it was not necessary to separately demonstrate the element of *opinio juris* from that of State practice, since the acts counting as practice often equally reflected the legal conviction of the State.³⁹ For example, this can often be the case with military manuals, which display both the behavior that the armed forces are at least supposed to follow as well as the legal opinion of the State. Some States, most notably the United States, have criticized ICRC's methodology of inferring *opinio juris* from practice. According to this criticism, an independent element of *opinio juris* needs, for the most part, to be proven in order for customary law to be accurately identified.⁴⁰ However, a rigid distinction

³⁶ See e.g. Duncan Hollis, "The Empire Strikes Back – Debating the Origins of the Customary Laws of War", *Opinio Juris*, 8 May 2007 (available at: <http://opiniojuris.org/2007/05/08/the-empire-strikes-back-%E2%80%93-debating-the-origins-of-the-customary-laws-of-war/>).

³⁷ See e.g. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, International Court of Justice, 8 July 1996, para. 70 ("The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; [...] Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule."); *Nicaragua*, *supra* note 14, paras. 188-195 ("The Court has however to be satisfied that there exists in customary international law an *opinio juris* as to the binding character of such abstention. This *opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations'. The effect of consent to the text of such resolutions cannot be understood as merely that of a 'reiteration or elucidation' of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.").

³⁸ ICRC, *Customary IHL Database*, Introduction, accessed on 10 May 2017, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_in; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, International Court of Justice, 28 May 1951, ICJ Reports 1951, p. 25 (relying on practice by the UN Secretary-General regarding reservations to treaties).

³⁹ ICRC, *Customary IHL Database*, Introduction, accessed on 10 May 2017, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_in.

⁴⁰ John B. Bellinger and III and William J. Haynes I, *supra* note 29, pp. 443-47 ("the Study places too much emphasis on written materials, such as military manuals and other guidelines published by States, as opposed to actual operational

between State practice and *opinio juris* as two independent and distinct, constituent elements of customary law is hardly achievable in practice.⁴¹ On the other hand, it is also true to say that some States apply certain rules in armed conflict due to policy reasons, rather than legal ones. For example, in the past it has been U.S. policy to apply the law of war in its entirety to all conflicts regardless of how these were characterized.⁴² Therefore, while this paper generally follows the methodological approach taken by the ICRC in its study on customary IHL, it will nevertheless attempt to take this criticism into account, for example by not including as practice in the analysis acts by States which are clearly based not on legal conviction but on policy or altogether other considerations.

In terms of State practice as an element of treaty interpretation, whereby State parties' understanding of a treaty is established, the ICJ in the *Kasikili/Sedudu Island* case took a more restrictive approach as to what materials might count as practice—for example, by not accounting for unilateral acts by either of the parties, on the basis that those acts were for internal purposes only.⁴³ However, this paper adopts the broader view taken by Oliver Dörr and Kirsten Schmalenbach in their *Commentary* to the VCLT instead. According to these authors, the “notion of ‘practice’ comprises any external behaviour of a subject of international law, here insofar as it is potentially revealing of what the party accepts as the meaning of a particular treaty provision”.⁴⁴ No particular formula is required, and for practice one can look to various sources, such as “official statements or manuals, diplomatic correspondence, press releases, transactions, votes on resolutions in international organizations [...] national acts of legislation or judicial decisions”.⁴⁵

practice by States during armed conflict. [...] The United States does not believe that this [the approach by the ICRC Study] is an appropriate methodological approach. Although the same action may serve as evidence both of State practice and *opinio juris*, the United States does not agree that *opinio juris* simply can be inferred from practice. Both elements instead must be assessed separately in order to determine the presence of a norm of customary international law”). See also Danish Ministry of Defense & Defence Command Denmark, *Militærmanual om folkeret for danske væbnede styrker i internationale militære operationer* [in Danish] (Copenhagen, DK MoD, 2016), p. 101, available at:

<http://www2.forsvaret.dk/omos/publikationer/Publications/Attachments/34/Milit%C3%A6rmanual%20AF%20SEPT%202016.pdf> (hereinafter *Danish Military Manual*).

⁴¹ Wood and Sender, *supra* note 26, para. 1.

⁴² US Department of Defense, Directive 5100.77, *DoD Law of War Program*, 9 December 1998, para. 5.3.1.

⁴³ Fitzmaurice, *supra* note 23, p. 180.

⁴⁴ Oliver Dörr, *General Rule of Interpretation*, In: Oliver Dörr and Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, 2012, p. 555.

⁴⁵ *Ibid.*

Since most of the treaty content of IHL has been found to exist independently as customary international law as well,⁴⁶ this paper will not always rigidly distinguish between State practice that serves to illustrate subsequent practice and State practice that functions as an element of customary law.

Lastly, it should be noted that due to the linguistic limitations of this author, only practice available in English, German, the Scandinavian languages, and to a lesser extent French, will be assessed in this paper.

1.3. Terminology

Since the concept of war is largely obsolete in modern international law,⁴⁷ the terms war and international armed conflict (or IAC) will be used synonymously in this paper. Similarly, the terms civil war and internal war will occasionally be used in lieu of the strictly legal term, non-international armed conflict (or NIAC). “Armed conflict” will be used as a shorthand for either IAC or NIAC, depending on the context.

The terms “international humanitarian law (or IHL)”, “laws of armed conflict (or LOAC)”, and *jus in bello* are used interchangeably throughout to refer to the same body of law. Similarly, “non-State (armed) group” and “armed group” are used synonymously.

The term “territorial State” is used to describe States in which hostilities are occurring. The terms “foreign State”, “intervening State”, and “outside State” are all used to describe States that intervene in the hostilities occurring in the territorial State.

⁴⁶ See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, International Court of Justice, 8 July 1996, para. 79 (stating that “these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.”).

⁴⁷ While a war can still be declared, this has not happened since the Second World War. The term international armed conflict, which is a factual concept that requires no official declaration for its application, has therefore replaced war as the concept used for inter-State warfare.

The Legal Framework

2.1. The IAC-NIAC Distinction

Two types of armed conflict are recognized under IHL: an IAC and a NIAC, each governed by different bodies of rules. Some commentators argue that a generic concept of armed conflict exists in international law, one which can then further be sub-qualified into either an IAC or a NIAC.⁴⁸ However, according to what is perhaps the more common view, there is no generic definition of armed conflict in international law. Rather, the two distinct types of armed conflict are not subcategories of a broader concept, or of each other, but separate legal categories.⁴⁹ In other words, “an ‘armed conflict’ exists wherever there is an IAC or a NIAC, not the other way around.”⁵⁰

The Geneva Conventions do not provide any definition of the categories of IAC and NIAC. Common Article 2 (CA2) of the Geneva Conventions states that the conventions “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties”.⁵¹ This includes “all cases of partial or total occupation”. Thus, an IAC is an armed conflict between two or more States to which all four of the Geneva Conventions, as well

⁴⁸ See e.g. International Law Association, *Final Report on the Meaning of Armed Conflict in International Law*, 2010, pp. 1-5, 8-9; Robert Heinsch, “Conflict Classification in Ukraine: The Return of the ‘Proxy War’?”, *International Law Studies*, vol. 91 (2015), p. 331 (“In order to decide whether IHL is applicable, the existence of an armed conflict must first be established. Once an armed conflict exists, the applicable regime is determined by the question of whether it is an international or a non-international armed conflict.”).

⁴⁹ Sivakumaran, *The Law of Non-International Armed Conflict*, *supra* note 12, p. 232; Sandesh Sivakumaran, “Re-envisaging the International Law of internal Armed Conflict: A Rejoinder to Gabriella Blum”, *European Journal of International Law*, vol. 22, no. 1 (2011), p. 273; Dino Kritsiotis, “The Tremors of Tadić”, *Israel Law Review*, vol. 43, no. 2 (2010), p. 262; Milanovic and Hadzi-Vidanovic, *supra* note 6, pp. 269-72.

⁵⁰ Milanovic and Hadzi-Vidanovic, *supra* note 6, p. 271.

⁵¹ *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, 12 August 1949, Common Article 2, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/365?OpenDocument>.

as AP I,⁵² apply.⁵³ The institution of declaration of war, however, has fallen into desuetude, and the application of IHL is in any case not dependent on such a declaration.⁵⁴

The second type of armed conflict under IHL is a NIAC. According to CA3, it applies to "armed conflict[s] not of an international character occurring in the territory of one of the High Contracting Parties".⁵⁵ It follows from the wording and context of CA3—the preceding provision, CA2, applies to conflicts of inter-State nature—that NIACs are conflicts that do not involve two opposing States; instead, at least one of the parties to a NIAC is a non-State group.⁵⁶ In contrast to IACs, NIACs are as a matter of treaty law covered primarily by CA3 (which provides for a minimum level of protection to the victims of conflict) as well as a few other IHL treaties.⁵⁷ Certain NIACs will also be subject to the provisions of Additional Protocol II,⁵⁸ "which develops and supplements" CA3

⁵² *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, Geneva, 8 June 1977, Article 1(3), available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/470> ("This Protocol [...] shall apply in the situations referred to in Article 2 common to those Conventions).

⁵³ Moreover, as mentioned above, Additional Protocol I expands the definition of IAC to situations where "peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination". *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, Geneva, 8 June 1977, Article 1(4), available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/470>.

⁵⁴ ICRC, *Commentary on Additional Protocol I*, 1987, p. 40, para. 61, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=7125D4CBD57A70DDC12563CD0042F793>; International Law Association, *Final Report on the Meaning of Armed Conflict in International Law*, 2010, pp. 1, 7-8 (finding "that the term 'war', while still used, has, in general, been replaced in international law by the broader concept of 'armed conflict'.").

⁵⁵ *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, 12 August 1949, Common Article 3, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/365?OpenDocument>.

⁵⁶ ICRC, *Commentary on the First Geneva Convention*, 2nd edition, 2016, para. 393.

⁵⁷ See e.g. Art. 1(2), *Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices*, Geneva, 2 May 1996, *United Nations Treaty Series*, vol. 2048, No. 22495, p. 133 (available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%202048/v2048.pdf>); Art. 22(1), *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, The Hague, 26 March 1999, *United Nations Treaty Series*, vol. 2253, No. 3511, p. 172 (available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%202253/v2253.pdf>); Art. 19(1), *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, The Hague, 14 May 1954, p. 24 (available at: <http://unesdoc.unesco.org/images/0008/000824/082464mb.pdf>).

⁵⁸ Dietrich Schindler, "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols", *Collected Courses of the Hague Academy of International Law*, vol. 163 (1979), p. 149. However, while the Geneva Conventions (and by extension CA3) have been universally ratified, a number of States have not ratified AP II, including the United States, Israel, and Turkey, further decreasing its potential application. Furthermore, although two different types of NIACs exists as a matter of positive law, CA3 NIACs and AP II NIACs, it seems that States do not distinguish between them in practice (see Jelena Pejic, *Status of Armed Conflicts*, in: Elizabeth Wilmshurst & Susan Breau (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, 2007, p. 88). For example, in its Study on customary IHL, ICRC only lists rules applicable in IACs and NIACs, without distinguishing between two types of NIAC (ICRC, *Customary IHL Database*, accessed on 10 April 2017, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>), and the Rome Statute of the ICC does not employ the distinction

“without modifying its existing conditions of application”⁵⁹, but the legal regime for NIACs under AP II is more restrictive and narrow in scope.⁶⁰ However, the gap in treaty regulation of NIACs has to a large extent been mitigated by customary international law:⁶¹ for example, the 2005 *ICRC Customary Law Study* found that out of the 161 customary rules articulated in the Study, 148 were applicable in both NIACs and IACs.⁶²

Furthermore, it should be noted that although other purported categories of armed conflict are at times encountered in the literature—such as transnational armed conflict, cross-border armed conflict, extra-State armed conflict, extraterritorial armed conflict, etc.—no other categories of armed conflict exist other than IAC and NIAC, at least as a matter of law.⁶³

2.2. Temporal Scope of Application: Triggers and Thresholds

CA2 does not specify any threshold for the existence of an IAC. In *Prosecutor v. Tadić* on Interlocutory Appeal, the leading judicial decision on the characteristics of armed conflict, the Appeals Chamber found that an IAC “exists whenever there is a resort to armed force between States”.⁶⁴ On this common view, *any* use of armed force by one State against another, or any total

either (*Rome Statute of the International Criminal Court*, Rome, 17 July 1998, *United Nations Treaty Series*, vol. 2187, No. 38544, Article 8(2)(f), available at: <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>).

⁵⁹ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, Geneva, 8 June 1977, Article 1(1), available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/475?OpenDocument>.

⁶⁰ First of all, AP II only applies to conflicts between the armed forces of a State and non-State armed group(s), but not to conflicts between such groups. Secondly, AP II requires that the armed group exercise control over part of the territory of the State that it is fighting against, the control being such as to enable the group to carry out sustained and concerted military operations. And finally, the applicability of AP II is dependent on the ability of the non-State group to implement the Protocol. As a consequence of these differences, far fewer conflicts will qualify as AP II conflicts than will CA3 conflicts. See *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, Geneva, 8 June 1977, Article 1(1), available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/475?OpenDocument>.

⁶¹ *Tadić* Jurisdiction Decision, *supra* note 30, para. 127 (“[I]t cannot be denied that customary rules have developed to govern internal strife.”).

⁶² Jelena Pejic, “The Protective Scope of Common Article 3: More than Meets the Eye”, *International Review of the Red Cross*, vol. 93, no. 881 (2011), pp. 205-06.

⁶³ However, some scholars have suggested that the distinction between NIAC and IAC, as well as the distinction between NIAC under CA3 and NIAC under AP II will disappear in the future. See Michael N. Schmitt, *Classification in Future Conflict*, in: Elizabeth Wilmschurst (ed.), *International Law and the Classification of Conflicts*, 2012, p. 477; Schindler, “The Different Types of Armed Conflicts”, *supra* note 58, pp. 148-49; Pejic, *Status of Armed Conflicts*, *supra* note 58, p. 88.

⁶⁴ *Tadić* Jurisdiction Decision, *supra* note 30, para. 70.

or partial occupation of another State's territory, will give rise to an IAC between those States.⁶⁵ Indeed, concerning the threshold for IACs, the original *ICRC Commentary* states that “[i]t makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces”.⁶⁶ Building on “the prevailing legal opinion on the definition of ‘international armed conflict’”, the ICRC has likewise proposed that IACs “exist whenever there is resort to armed force between two or more States.”⁶⁷ However, the use of the preposition “between” in CA2 should not be interpreted, as some commentators have,⁶⁸ as requiring the concurrent involvement of the military forces of at least two States for an IAC to arise, thereby excluding the unilateral use of armed force by one State against another from the scope of CA2. Therefore, the more precise definition is that an IAC exists whenever there is a resort to armed force *by one State against one or more States*.⁶⁹

⁶⁵ *Prosecutor v. Delalić et al.*, Trial Judgment, ICTY, 16 November 1998, para. 184 (“[T]he existence of armed force between States is sufficient of itself to trigger the application of international humanitarian law.”); ICRC, *Commentary on the First Geneva Convention*, 2nd edition, 2016, paras. 236-37; Laurie R. Blank, “Complex Legal Frameworks and Complex Operational Challenges: Navigating the Applicable Law Across the Continuum of Military Operations”, *Emory International Law Review*, vol. 26, no. 1 (2012), pp. 92-93 (“International armed conflict occurs when there is any conflict between two states. Neither the duration of the hostilities, the intensity of any fighting, nor the number of wounded or killed affects the characterization as an armed conflict.”); Sylvain Vit , “Typology of armed conflicts in international humanitarian law: legal concepts and actual situations”, *International Review of the Red Cross*, vol. 91, no. 873 (2009), p. 72 (“The level of intensity required for a conflict to be subject to the law of international armed conflict is very low.”); Schindler, “The Different Types of Armed Conflicts”, *supra* note 58, p. 131 (“Any kind of use of arms between two States brings the Conventions into effect”); Hans-Peter Gasser, *International Humanitarian Law: An Introduction*, in: Hans Haug (ed.), *Humanity for All: The International Red Cross and Red Crescent Movement*, 1993, p. 510-11 (“As soon as the armed forces of one State find themselves with wounded or surrendering members of the armed forces or civilians of another State on their hands, as soon as they detain prisoners or have actual control over a part of the territory of the enemy State, then they must comply with the relevant convention”); Milanovic and Hadzi-Vidanovic, Milanovic and Hadzi-Vidanovic, *supra* note 6, p. 274; Akande, *Classification of Armed Conflicts*, *supra* note 15, pp. 51-53.

⁶⁶ Jean Pictet (ed.), *Commentary on the Third Geneva Convention*, 1960, Common Article 2, p. 23, available at:

<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=07B4DAD7719E37E4C12563CD00424D17>. See also ICRC, *Commentary on Additional Protocol I*, *supra* note 54, p. 40, para. 62 (“Neither the duration of the conflict, nor its intensity, play a role: the law must be applied to the fullest extent required by the situation of the persons and the objects protected by it.”).

⁶⁷ ICRC, “How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?”, *supra* note 7, pp. 1, 5; see also *ibid.*, p. 1 (“An IAC occurs when one or more States have recourse to armed force against another State, regardless of the reasons or the intensity of this confrontation.”).

⁶⁸ See e.g. Mary Ellen O’Connell, “Combatants and the Combat Zone”, *University of Richmond Law Review*, vol. 43, no. 3 (2009), pp. 855-56 (“Armed conflict requires exchange. It begins not with the attack, but with the counter-attack. [...] One-way attacks and minor armed exchanges are not armed conflicts.”); ICRC, *Commentary on Additional Protocol I*, *supra* note 54, p. 40, para. 62 (noting IACs are “dispute[s] between two States involving the use of *their* armed forces [emphasis added]”).

⁶⁹ See ICRC, “The relevance of IHL in the context of terrorism”, ICRC, 1 January 2011 (available at: <https://www.icrc.org/eng/resources/documents/faq/terrorism-ihl-210705.htm>) (“International armed conflict involves the use of armed force by one State against another.”); ICRC, *Commentary on the First Geneva Convention*,

According to a distinct minority position, however, a minimum level of intensity is required for the triggering of an IAC.⁷⁰ Under this approach, State practice demonstrates that many isolated and sporadic incidents are not treated as international armed conflicts. Rather, these are often termed “border clashes/incursions”, “border/naval incidents”, or “skirmishes” by the States involved. This, it is argued, supports the notion that certain inter-State uses of armed force are to be distinguished from proper IACs. It is argued accordingly that under customary international law, only when the fighting has reached a certain level of intensity, higher than of those clashes and incidents, can the hostilities legally be regarded as an IAC.⁷¹

2nd edition, 2016, paras. 222-23; Derek Jinks, “September 11 and the Laws of War”, *The Yale Journal of International Law*, vol. 28, no. 1 (2003), p. 47; Akande, *Classification of Armed Conflicts*, *supra* note 15, p. 41.

⁷⁰ See Solis, *supra* note 5, pp. 151-52 (“Generally speaking, an armed *incident*, even when between two states, is not sufficient to constitute an armed conflict in the sense of common Article 2 [...] The way in which the two states choose to characterize the action (incident or war) can make the difference.”); Yoram Dinstein, *War, Aggression and Self-Defence*, 5th edition, 2012, p. 11 (“Incidents involving the use of force, without reaching the threshold of war, occur quite often [...] The classification of a military action as either war or a closed incident (‘short of war’) is not always easy: in large measure, it depends on the way in which the two antagonists appraise the situation. As long as both Parties choose to consider what has transpired as a mere incident, and provided that the incident is rapidly closed, it is hard to gainsay that view.”); International Law Association, *Final Report on the Meaning of Armed Conflict in International Law*, 2010, pp. 3, 13-14, 18; Greenwood, *Scope of Application of Humanitarian Law*, *supra* note 10, p. 48; Michael N. Schmitt, “Wired warfare: Computer network attack and *jus in bello*”, *International Review of the Red Cross*, vol. 84, no. 846 (2002), p. 372; Ingrid Detter, *The Law of War*, 3rd edition, 2013, pp. 22-23 (“There must obviously exist a *de minimis* rule to distinguish war and other forms of armed conflict from raids. Sporadic operations fall outside the concept of ‘armed conflict’”); Andreas Paulus and Mindia Vashakmadze, “Asymmetrical war and the notion of armed conflict – a tentative conceptualization”, *International Review of the Red Cross*, vol. 91, no. 873 (2009), p. 101 (“[R]ecent state practice suggests that mere incidents, in particular an isolated confrontation of little impact between members of different armed forces, do not qualify as international armed conflict.”); Mary Ellen O’Connell, “Defining Armed Conflict”, *Journal of Conflict & Security Law*, vol. 13, no. 3 (2008), pp. 397-98; O’Connell, “Combatants and the Combat Zone”, *supra* note 68, pp. 854-56. See also *Ermittlungsverfahren gegen Oberst Klein und Hauptfeldwebel W. wegen des Verdachts einer Strafbarkeit nach dem VStGB und anderer Delikte*, Termination of the Proceedings pursuant to § 170 Abs. 2 Satz 1 StPO, The Public Prosecutor General of the Federal Court of Justice, 16 April 2010, p. 42, available at: <http://www.generalbundesanwalt.de/docs/einstellungsvermerk20100416offen.pdf> [In German] (“Das zentrale Tatbestandsmerkmal des „bewaffneten Konflikts“ knüpft allein an die tatsächlichen Gegebenheiten an und ist unabhängig von (Kriegs-) Erklärungen oder politischen Willensbekundungen der beteiligten Konfliktparteien. Erforderlich ist eine Auseinandersetzung von gewisser Intensität zwischen Staaten (internationaler bewaffneter Konflikt)...”).

⁷¹ Greenwood, *Scope of Application of Humanitarian Law*, *supra* note 10, p. 48.

Further authority for this position can be found in the military manuals of some States, such as those of the United Kingdom (UK)⁷² and Denmark,⁷³ although some other countries' military manuals do not address the issue of a threshold for IACs,⁷⁴ are split or ambiguous on the issue,⁷⁵ or take the opposite view by supporting a nominal threshold.⁷⁶

It seems, however, that some of the authors taking this view are guilty, at least in regard to some of the practice, of equating customary international law exclusively with State practice, neglecting the equally necessary requirement of *opinio juris*. The fact that a higher threshold for IACs may be disingenuously claimed by States in order to avoid the application of IHL cannot be taken to mean that such a threshold exists unless *opinio juris* for that claim can be established. What needs to be

⁷² UK Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict*, JSP 383 (23 October 2004), p. 29, available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf (indicating the existence of a threshold for IACs, but noting that an exact threshold for when military intervention will reach the level of armed conflict cannot be given but will depend on the circumstances at hand) (hereinafter *UK LOAC Manual*); See also UK Ministry of Justice, *The Governance of Britain: War Powers and Treaties: Limiting Executive Powers (CP26/07)* (25 October 2007), p. 25, available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243164/7239.pdf (... "[T]here may be difficult questions about when violence has reached the threshold where there can be said to be a state of 'armed conflict' between the participants").

⁷³ *Danish Military Manual*, *supra* note 40, pp. 46-47 (stating that a certain level of intensity is a fundamental prerequisite for the application of the laws of war in both IACs and NIACs, and specifically excludes some border disputes and provocations from falling within the definition of IAC).

⁷⁴ Canadian Department of National Defence, *Joint Doctrine Manual: Law of Armed Conflict at the Operational and Tactical Levels (B-GJ-005-104/FP-021)* (Ottawa, Office of the Judge Advocate General, 2001), available at: https://www.fichl.org/fileadmin/migrated/content/uploads/Canadian_LOAC_Manual_2001_English.pdf.

⁷⁵ *Compare* Norwegian Armed Forces, *Manual i krigens folkerett* [In Norwegian] (Oslo, Forsvarets stabsskole, 2013), p. 16, available at: https://brage.bibsys.no/xmlui/bitstream/id/201436/manual_krigens_folkerett.pdf (hereinafter *Norwegian LOAC Manual*) ("Det er ingen krav til hvor mange personer som skal være drept eller skadet, eller hvor mye skade på motpartens eiendom som må være forårsaket"), *with Ibid.*, p. 17 ("Ettersom maktbruk mellom stater i utgangspunktet er forbudt, er terskelen for internasjonal væpnet konflikt satt lavt. Det betyr imidlertid ikke at alle brudd på suverenitetsprinsippet uten videre utgjør en internasjonal væpnet konflikt").

⁷⁶ German Federal Ministry of Defence, *Humanitäres Völkerrecht in bewaffneten Konflikten – Handbuch (ZDv 15/2)* [In German] (Berlin, Bundesministerium der Verteidigung, 2013), p. 27, available at: <http://www.humanitaeres-voelkerrecht.de/Hb15.2Mai2013.pdf> ("Ein die Anwendbarkeit des Humanitären Völkerrechts auslösender internationaler bewaffneter Konflikt liegt vor, sobald eine staatliche Konfliktpartei gegen eine andere staatliche Konfliktpartei Waffengewalt einsetzt."); U.S. DoD, *Department of Defense Law of War Manual* (Washington, DoD, 2016), p. 82, available at:

<https://www.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190> ("The United States has interpreted 'armed conflict' in Common Article 2 of the 1949 Geneva Conventions to include 'any situation in which there is hostile action between the armed forces of two parties, regardless of the duration, intensity or scope of the fighting.'") (hereinafter *U.S. Department of Defense Law of War Manual*); Royal Australian Air Force (AAP 1003), *Operations Law for RAAF Commanders* (Tuggeranong, RAAF, 2004), p. 42, available at: http://usnwc.libguides.com/ld.php?content_id=2998112 ("A state of international armed conflict exists when states resort to the use of armed force against another or others. The duration and intensity of the conflict are not relevant to whether an armed conflict exists.").

ascertained is whether certain views advanced by States truly reflect legal conviction; that the statements are “an assertion of rules of existing international law”, and not “statements of international policy”.⁷⁷ For example, in the 1980s, when Syrian forces shot down a U.S. airplane over Syria and captured an American pilot, President Reagan publicly denied the existence of an IAC between the two nations, but behind the scenes the U.S. State Department insisted in their communications with Syria that the incident amounted to an armed conflict and demanded that the pilot be treated as a Prisoner of War (POW).⁷⁸ Similarly, while the UK initially denied a state of war with Argentina, it nonetheless applied IHL from the outset of the Falklands War.⁷⁹

In 1986, the ICJ famously opined:

It is not to be expected that in the practice of States the application of the rules in question should have been perfect [...] If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.⁸⁰

This *dictum* should work equally in reverse: if States publicly refuse to acknowledge a low-intensity incident as amounting to an armed conflict but at the same time applies the laws of war to that same incident, then that practice serves to confirm, rather than deny, the existence of a low threshold for the triggering of IACs.

Moreover, the fact that 1) CA2 applies to all IACs between two States “even if the state of war is not recognized by one of them”, and the fact that 2) it applies to occupations that “meet[] with no

⁷⁷ *Nicaragua*, *supra* note 14, para. 207.

⁷⁸ American Society of International Law, *Proceedings of the 82nd Annual Meeting*, vol. 82 (Washington DC, April 20-23, 1988), pp. 602-03, 609-11, available at: https://www.jstor.org/stable/25658407?seq=7#page_scan_tab_contents. This practice is cited in International Law Association's report (*see supra* note 48) as evidence of a higher intensity threshold for IACs.

⁷⁹ Gabriella Venturini, *The Temporal Scope of Application of the Conventions*, in: Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds.), *The 1949 Geneva Conventions: A Commentary*, 2015, p. 54; Leslie C. Green, *The Contemporary Law of Armed Conflict*, 2nd edition, 2000, pp. 92-93.

⁸⁰ *Nicaragua*, *supra* note 14, para. 186. *See also ibid.*, para. 207.

armed resistance” could indicate that the drafters of CA2 did not envision any particular threshold for the triggering of the law of IAC.⁸¹

In any case, on this issue of a threshold of application, while some State practice might be explained with reference to other factors, practice confirming an intensity requirement for IACs seems to abound.⁸² Thus, in the end, there seems to be a clear tension between judicial and scholarly opinion on the one hand, and State practice on the other.

Unlike IACs, it is widely accepted that for a situation to constitute a NIAC, the violence must reach a certain level of intensity and the non-State armed group(s) must be organized to a certain degree.⁸³ The rationale behind the requirement of certain levels of intensity and organization for a situation to amount to a NIAC is the wish to exclude from the concept of NIAC “situations of internal

⁸¹ *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, 12 August 1949, Common Article 2, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/365?OpenDocument>.

⁸² See e.g. the 1994 Convention on the Safety of United Nations and Associated Personnel, which outlaws the targeting of UN personnel during UN missions (*Convention on the Safety of United Nations and Associated Personnel*, New York, 9 December 1994, *United Nations Treaty Series*, vol. 2051, No. 35457, p. 393, Art. 7(1), available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%202051/v2051.pdf>). But Art. 2(2) stipulates that the Convention shall not apply during UN operations “in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.” (*ibid.*, Art. 2(2)) In other words, the Convention ceases to be in effect during an armed conflict involving UN forces. It would be strange if the drafters intended to terminate the application of the Convention any time a shot was fired against UN personnel. This would drastically limit its protective scope. It is therefore possible that the drafters had an intensity threshold for the initiation of IACs in mind, so that limited hostilities would not transform UN personnel into combatants and render them liable to lawful targeting (Greenwood, *Scope of Application of Humanitarian Law*, *supra* note 10, p. 53). Another example occurred on June 29, 2002, where a twenty-minute firefight between naval vessels of North and South Korea erupted off the coast of the Korean Peninsula, killing up to thirty-five sailors, wounding twenty-two, and sinking a South Korean patrol boat (Don Kirk, “North and South Korea Trade Charges Over Naval Clash”, *The New York Times*, 30 June 2002, available at: <http://www.nytimes.com/2002/06/30/world/north-and-south-korea-trade-charges-over-naval-clash.html>). South Korea did not treat the incident as an IAC. South Korea’s Ministry of National Defense characterized the confrontation as an “incursion”, “provocation”, and an “incident”, but stopped short of calling it an armed conflict. According to South Korean Ministry officials, the intrusion by North Korea was a violation of the joint pledge “to remove the threat of war” made at an inter-Korean defense ministers’ talk in September 2000, indicating that the confrontation itself was not an armed conflict but a threat of a wider war (Ministry of National Defense of the Republic of Korea, *The Naval Clash on the Yellow Sea on 29 June 2002 between South and North Korea - The Situation and ROK’s Position* (1 July 2002), available at: <http://www.globalsecurity.org/wmd/library/news/dprk/2002/dprk-020701-1.htm>). The United Nations Command referred to the clash as “this provocative act” (*ibid.*). See also International Law Association, *Final Report on the Meaning of Armed Conflict in International Law*, 2010, pp. 10-28 (examining State practice on this issue since 1945); Solis, *supra* note 5, p. 151 (listing State practice on the issue).

⁸³ Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, 2010, pp. 122-133; Yoram Dinstein, *Non-International Armed Conflicts in International Law*, 2014, pp. 28-36; ICRC, *Commentary on the First Geneva Convention*, 2nd edition, 2016, paras. 421-437; Sivakumaran, *The Law of Non-International Armed Conflict*, *supra* note 12, pp. 167-76, 232-33; Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts*, 2008, p. 78; Jinks, *supra* note 69, p. 28 (“[T]he “protracted” armed violence requirement is best understood as little more than a restatement of the general rule excluding rebellion and “mere acts of banditry” from the scope of humanitarian law.”); Schindler, “The Different Types of Armed Conflicts”, *supra* note 58, p. 147.

disturbances and tensions, such as riots, isolated and sporadic acts of violence”.⁸⁴ In *Tadić*, the Appeals Chamber defined NIACs as “*protracted* armed violence between governmental authorities and *organized* armed groups or between such groups”.⁸⁵ Similarly, after synthesizing the relevant jurisprudence and academic doctrine, the ICRC proposed that NIACs are “*protracted armed confrontations*” that must meet a “*minimum level of intensity*,” and in which both parties must “*show a minimum of organisation*.”⁸⁶ While the wording “protracted armed violence” seems to indicate an additional requirement of duration of hostilities to determine the existence of a NIAC, subsequent ICTY case law has interpreted protraction as an element of the overall criterion of intensity.⁸⁷ Thus, in the *Abella* case, the Inter-American Commission on Human Rights classified

⁸⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 8 June 1977, Article 1(2), available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/475?OpenDocument>; Rome Statute of the International Criminal Court, Rome, 17 July 1998, United Nations Treaty Series, vol. 2187, No. 38544, Article 8(2)(d), available at: <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> (stating that the war crimes pertaining to NIAC “applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.”); Jean Pictet (ed.), *Commentary on the Fourth Geneva Convention*, 1958, Common Article 2, p. 35, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE12C9954AC2AEC2C12563CD0042A25C> (stating that under the drafting process of CA3, States feared that NIACs “might be taken to cover any act committed by force of arms -- any form of anarchy, rebellion, or even plain banditry.”); *Prosecutor v. Tadić*, Trial Judgment, ICTY, 7 May 1997, para. 562 (“In an armed conflict [...] these closely related criteria [of intensity and organization] are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.”); *Prosecutor v. Haradinaj et al.*, Trial Judgment, ICTY, 3 April 2008, para. 38 (“This test serves to distinguish non-international armed conflict from banditry, riots, isolated acts of terrorism, or similar situations.”); *Prosecutor v. Kordić and Čerkez*, Appeals Judgment, ICTY, 17 December 2004, para. 341; *Prosecutor v. Limaj, Bala, and Musliu*, Trial Judgment, ICTY, 30 November 2005, paras. 84, 89; *Prosecutor v. Delalić et al.*, Trial Judgment, ICTY, 16 November 1998, para. 184; *Prosecutor v. Boškoski and Tarčulovski*, Trial Judgment, ICTY, 10 July 2008, para. 175.

⁸⁵ *Tadić* Jurisdiction Decision, *supra* note 30, para. 70 [emphasis added]; *Prosecutor v. Delalić et al.*, Trial Judgment, ICTY, 16 November 1998, para. 184.

⁸⁶ ICRC, “How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?”, *supra* note 7, p. 5.

⁸⁷ *Prosecutor v. Tadić*, Trial Judgment, ICTY, 7 May 1997, paras. 561-62 (“The test applied by the Appeals Chamber to the existence of an armed conflict [...] focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict.”); *Prosecutor v. Haradinaj et al.*, Trial Judgment, ICTY, 3 April 2008, paras. 40, 49 (“The criterion of protracted armed violence has therefore been interpreted in practice, including by the *Tadić* Trial Chamber itself, as referring more to the intensity of the armed violence than to its duration.”); *Prosecutor v. Slobodan Milošević*, Decision on Motion for Judgement of Acquittal, Trial Chamber, ICTY, 16 June 2004, para. 17 (“[T]he relevant portion of the *Tadić* test, which has been consistently applied within the Tribunal, is ‘protracted armed violence between governmental authorities and organized armed groups’. This calls for an examination of (1) the organisation of the parties to the conflict and (2) the intensity of the conflict [references omitted].”); *Prosecutor v. Boškoski and Tarčulovski*, Trial Judgment, ICTY, 10 July 2008, para. 175. See also Sivakumaran, *The Law of Non-International Armed Conflict*, *supra* note 12, p. 168. But see Dinstein, *Non-International Armed Conflicts*, *supra* note 83, pp. 32-34 (“A NIAC cannot burst in one fell swoop. It has to be preceded by a series of ‘isolated and sporadic’ internal disturbances, and it cannot come suddenly into existence. Only at some advanced point in the evolution of a civil strife can it be determined that the violence is no longer ‘isolated’ or ‘sporadic’, so that the stage has been set for a NIAC.”).

the 1989 violence in La Tablada, Argentina, as a NIAC due to its high intensity even though the clashes lasted only thirty hours.⁸⁸ Despite a few dissenters,⁸⁹ the criteria of intensity and organization are not seriously challenged.⁹⁰

2.3. Geographical Scope of Application

As mentioned in the Introduction, the involvement of another State's territory in the hostilities between other parties has been seen as potentially affecting the legal classification of the hostilities, and hence potentially leading to internationalization. For the purpose of this paper, it is therefore important to ascertain the geographical scope of both types of armed conflict before moving on to the substantive law on internationalization.

The Geneva Conventions are silent on the issue of the geographical reach of the laws of war.⁹¹ In the *Tadić* Decision, the ICTY found that:

⁸⁸ Inter-American Commission on Human Rights, *Case 11.137: Juan Carlos Abella (Argentina)*, 18 November 1997, OEA/Ser.L/V/II.98, doc. 6 rev., 13 April 1998, paras. 1, 154-156, available at: <https://www.cidh.oas.org/annualrep/97eng/Argentina11137.htm> ("The Commission concludes therefore that, despite its brief duration, the violent clash between the attackers and members of the Argentine armed forces triggered application of the provisions of Common Article 3, as well as other rules relevant to the conduct of internal hostilities.").

⁸⁹ See Adil Ahmad Haque, "Triggers and Thresholds of Non-International Armed Conflict", *Just Security*, 29 September 2016 (available at: <https://www.justsecurity.org/33222/triggers-thresholds-non-international-armed-conflict/>) (arguing that "We should [] accept only a nominal intensity threshold for NIAC" and that "if an organized armed group has the capacity to sustain military operations then any military operation by or against that group should be constrained by the law of armed conflict."); Michael Jefferson Adams, "Jus Extra Bellum: Reconstructing the Ordinary, Realistic Conditions of Peace", *Harvard National Security Journal*, vol. 5, no. 2 (2014), pp. 428-32, footnote 202; Michael Jefferson Adams and Ryan Goodman, "De Facto and De Jure Non-international Armed Conflicts: Is It Time to Topple Tadić?", *Opinio Juris*, 13 October 2016 (available at: <https://www.justsecurity.org/33533/de-facto-de-jure-non-international-armed-conflicts-time-topple-tadic/>).

⁹⁰ The ICRC has considered that indicative factors to determine the proper level of organization "include the existence of a command structure and disciplinary rules and mechanisms within the armed group, the existence of headquarters, the ability to procure, transport and distribute arms, the group's ability to plan, coordinate and carry out military operations, including troop movements and logistics, its ability to negotiate and conclude agreements such as cease-fire or peace accords, etc.", and similarly has considered the following factors pertinent for the assessment of the intensity criterion: "the number, duration and intensity of individual confrontations, the type of weapons and other military equipment used, the number and caliber of munitions fired, the number of persons and types of forces partaking in the fighting, the number of casualties, the extent of material destruction, and the number of civilians fleeing combat zones. The involvement of the U.N. Security Council may also be a reflection of the intensity of a conflict." ICRC, *International Humanitarian Law and the challenges of contemporary armed conflicts*, 31st International Conference of the Red Cross and Red Crescent Movement, 31IC/11/5.1.2 (Geneva, Switzerland 28 November – 1 December 2011), pp. 8-9, available at: <https://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf>.

⁹¹ ICRC, *Commentary on the First Geneva Convention*, 2nd edition, 2016, para. 236.

International humanitarian law applies from the initiation of such armed conflicts and [...] continues to apply *in the whole territory of the warring States* [i.e., in IACs] or, in the case of internal conflicts, *the whole territory under the control of a party*, whether or not actual combat takes place there.⁹²

The subsequent jurisprudence of the ICTY has taken the same approach, with one Appeals Chamber commenting that “[t]here is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war.”⁹³ For its part, the International Criminal Tribunal for Rwanda (ICTR) has likewise held that IHL applies “throughout the territory of the State where the hostilities are occurring”.⁹⁴ While this very broad conception is hardly unassailable, and might not always be appropriate,⁹⁵ it is universally accepted in the case law to the point where the Trial Chamber in *Limaj et al.* considered the issue of the geographical scope as “settled jurisprudence”.⁹⁶

What is less clear, however, is whether a NIAC can extend beyond the borders of a single State. The *Tadić* Appeals Chamber defined NIACs as conflicts taking place “within a State.”⁹⁷ This understanding of NIACs as conflicts that are occurring solely within the territory of one State has at

⁹² *Tadić* Jurisdiction Decision, *supra* note 30, para. 70 [emphasis added].

⁹³ *Prosecutor v. Kunarac et al.*, Appeals Judgment, ICTY, 12 June 2002, para. 57. *Accord: Prosecutor v. Delalić et al.*, Trial Judgment, ICTY, 16 November 1998, para. 185 (“[T]here does not have to be actual combat activities in a particular location for the norms of international humanitarian law to be applicable.”).

⁹⁴ *The Prosecutor v. Rutaganda*, Trial Judgment, International Criminal Tribunal for Rwanda (ICTR), 6 December 1999, paras. 102-03. *Accord: The Prosecutor v. Jean-Paul Akayesu*, Trial Judgment, ICTR, 2 September 1998, paras. 635-36 (holding that IHL “must be applied to the whole territory of the state engaged in the conflict.”); *The Prosecutor v. Bagilishema*, Trial Judgment, ICTR, 7 June 2001, para. 101; *The Prosecutor v. Rutaganda*, Appeals Judgment, ICTR, 26 May 2003, paras. 569-70; *The Prosecutor v. Jean-Paul Akayesu*, Appeals Judgment, ICTR, 1 June 2001, para. 444.

⁹⁵ Note, for example, the comments in 1972 by government experts, who “considered it inconceivable that, in the case of a disturbance in one specific part of a territory (in a town, for instance) the whole territory of the State should be subjected to the application of the Protocol.” ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Second Session 3 May - 3 June 1972: Report on the Work of the Conference, Volume I* (Geneva, July 1972), p. 68, para. 2.59, available at: https://www.loc.gov/rr/frd/Military_Law/pdf/RC-Report-conf-of-gov-experts-1972_V-1.pdf.

⁹⁶ *Prosecutor v. Limaj, Bala, and Musliu*, Trial Judgment, ICTY, 30 November 2005, para. 84.

⁹⁷ *Tadić* Jurisdiction Decision, *supra* note 30, para. 70.

times been shared by States,⁹⁸ was the position of the original ICRC Commentary,⁹⁹ and has further been adopted by influential bodies,¹⁰⁰ international organization,¹⁰¹ and scholars alike.¹⁰²

Accordingly, scholars who view NIACs as restricted to one State's territory have variously argued that NIACs which cross the borders of a State should instead be regarded as IACs;¹⁰³ considered a new category of "transnational armed conflicts" all together;¹⁰⁴ or perhaps not be considered as armed conflicts at all, but rather as "extraterritorial law enforcement".¹⁰⁵

Such a geographically limited reading seems appropriate for NIACs under AP II, since Art. 1 of AP II stipulates that it shall apply only to armed conflicts "which take place in the *territory of a High*

⁹⁸ U.S. Department of Justice, Office of Legal Counsel, 'Protected Person' Status in Occupied Iraq Under the Fourth Geneva Convention, Memorandum Opinion for the Counsel to the President (18 March 2004), p. 15, footnote 20, available at: <http://nsarchive2.gwu.edu//torturingdemocracy/documents/20040318.pdf>.

⁹⁹ Jean Pictet (ed.), *Commentary on the Third Geneva Convention*, 1960, Common Article 2, p. 37, available at: [https://ihl-](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=07B4DAD7719E37E4C12563CD00424D17)

[databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=07B4DAD7719E37E4C12563CD00424D17](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=07B4DAD7719E37E4C12563CD00424D17) ("[C]onflicts referred to in Article 3 are armed conflicts [...] [that] take place within the confines of a single country.").

¹⁰⁰ International Institute of Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict With Commentary* (Michael N. Schmitt, Charles H.B. Garraway, and Yoram Dinstein eds.), 2006, p. 2, available at: <http://www.iihl.org/wp-content/uploads/2015/12/Manual-on-the-Law-of-NIAC.pdf> ("Non-international armed conflicts are armed confrontations occurring within the territory of a single State and in which the armed forces of no other State are engaged against the central government."); Institut de Droit international, *The Principle of Non-Intervention in Civil Wars*, Resolution, Session of Wiesbaden (1975), p. 2, Art. 1(2)(b), available at: http://www.idi-iiil.org/app/uploads/2017/06/1975_wies_03_en.pdf ("Within the meaning of this Resolution, the term "civil war" shall not cover: [...] armed conflicts between political entities which are separated by an international demarcation line [...] or conflicts between any such entity and a State.").

¹⁰¹ Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. (22 October 2002), para. 60, available at: <http://www.cidh.org/terrorism/eng/intro.htm>; UN Commission on Human Rights, *Report on the situation of human rights in Somalia, prepared by the Independent Expert of the Commission on Human Rights, Mona Rishmawi, pursuant to Commission resolution 1996/57 of 19 April 1996*, E/CN.4/1997/88 (3 March 1997), para. 55, available at: <http://www.refworld.org/docid/3ae6b0700.html>.

¹⁰² Marko Milanovic, "Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings Case", *International Review of the Red Cross*, vol. 89, no. 866 (2007), p. 379 ("Non-international armed conflicts have always been regarded not just as conflicts between a state and a non-state actor, but as conflicts which are by their scope internal, occurring within a single state, as mandated by the text of Common Article 3 itself."); Lindsay Moir, *The Law of Internal Armed Conflict*, 2002, pp. 1–2; Louise Arimatsu, "Territory, Boundaries and the Law of Armed Conflict", *Yearbook of International Humanitarian Law*, vol. 12 (2009), p. 184, 186–87; Paulus and Vashakmadze, *supra* note 70, p. 110 (stating that "Common Article 3, however, does not provide for" the possibility of transnational NIAC, "as its territorial scope is limited to conflicts taking place 'on the territory of a State party' – that is, on one territory only."); Cordula Droeger, "Elective Affinities? Human Rights and Humanitarian Law", *International Review of the Red Cross*, vol. 90, no. 871 (2008), p. 534–35.

¹⁰³ See Part 3, Section 3.2. below.

¹⁰⁴ Roy S. Schöndorf, "Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?", *New York University Journal of International Law and Politics*, vol. 37, no. 1 (2004), p. 5; S. Corn, "Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict", *Vanderbilt Journal of Transnational Law*, vol. 40, no. 2 (2007), pp. 298–300.

¹⁰⁵ Dinstein, *War, Aggression and Self-Defence*, *supra* note 70, pp. 268–72.

Contracting Party between *its armed forces* and dissident armed forces or other organized armed groups”.¹⁰⁶ It is therefore clear that AP II applies only to internal conflicts between governmental forces of a State and one or more non-State armed groups that take place within the territory of that State.¹⁰⁷ Certain IHL instruments pertaining to NIACs would similarly be restricted to purely internal conflicts. For example, Art. 19(1) of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict applies to “armed conflict not of an international character occurring *within the territory* of one of the High Contracting Parties”.¹⁰⁸

However, it should be recalled that NIACs within the meaning of AP II are only a subset of NIACs, a subset that has a different scope of application than NIACs under CA3. Specifically, CA3 applies to NIACs that “occur[] in the territory of one of the High Contracting Parties”. For the purpose of CA3 NIACs, it is submitted that a reading along the lines of AP II would unreasonably narrow the scope of the law of NIAC. In fact, the law does not explicitly require conflicts under CA3 to be exclusively internal conflicts.¹⁰⁹ The purported requirement of “internality” should be distinguished in two principal ways: 1) internal conflict in the sense that a NIAC can only be fought between a State and an armed group in the territory of *that* State, and 2) internal conflict in the sense that a NIAC has to be confined within the borders of a single State. Ultimately, both of these propositions are faulty as a matter of law, as will be demonstrated from the following analysis.

2.3.1. *Text, context, and object and purpose*

In the first sense of internal, it has at times been suggested that when a State is fighting a non-State group outside its own territory—for example, by assisting another State in its civil war—the

¹⁰⁶ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, Geneva, 8 June 1977, Article 1(1), available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/475?OpenDocument> [emphasis added].

¹⁰⁷ *But see* Sivakumaran, *The Law of Non-International Armed Conflict*, *supra* note 12, p. 231 (arguing that AP II NIACs may take place across the borders of more than one State).

¹⁰⁸ *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, The Hague, 14 May 1954, p. 24, available at: <http://unesdoc.unesco.org/images/0008/000824/082464mb.pdf> [emphasis added]. *See also* *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, The Hague, 26 March 1999, *United Nations Treaty Series*, vol. 2253, No. 3511, p. 172, Art. 22(1), available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%202253/v2253.pdf>.

¹⁰⁹ Noam Lubell and Nathan Derejko, “A Global Battlefield? Drones and the Geographical Scope of Armed Conflict”, *Journal of International Criminal Justice*, vol. 11, no. 1 (2013), pp. 76-81; Sivakumaran, *The Law of Non-International Armed Conflict*, *supra* note 12, pp. 230-32; Jennifer C. Daskal, “The Geography of the Battlefield: A Framework for Detention and Targeting Outside the “Hot” Conflict Zone”, *University of Pennsylvania Law Review*, vol. 161, no. 5 (2013), p. 1191-92.

conflict cannot be said to be a NIAC due to the “international character” of the conflict, and hence it must be viewed as an IAC.¹¹⁰ There is no reason, however, why the text of CA3 cannot bear a reading that accommodates situations where, although the conflict is being waged inside the borders of a single State, the State that is assisting the territorial State is acting extraterritorially—that is, acting outside its own borders. After all, a conflict between State A and armed group x on the territory of State B would still be “occurring in the territory of one of the High Contracting Parties”, as mandated by CA3, on the precondition that State B was a High Contracting Party to the Conventions. In fact, the geographical scope of NIACs advanced by the ICTR in *Rutaganda* (quoted above) does not preclude the concept of extraterritorial NIACs, since that construction does not require the State where the hostilities are occurring to be the State *involved* in the conflict.¹¹¹ Thus, in 2010, the German Public Prosecutor General classified the conflict between the international ISAF forces and the Taliban in Afghanistan as a NIAC.¹¹² More importantly, the notion of “extraterritorial NIACs” is firmly established in practice. States frequently intervene by request of another State to help that State fight against an armed group in an internal NIAC. It is widely accepted in State practice that such interventions by a State at the request of the territorial State amount to a NIAC even though the intervening State is acting extraterritorially.¹¹³ That a State can be in a CA3 NIAC outside its own territory is confirmed in the Rome Statute of the International Criminal Court (ICC), which defines the scope of NIACs for the purpose of war crimes as “armed conflicts that take place in the territory of *a State*”¹¹⁴—in other words, in *any* State. Since there was general agreement among the State delegations during the preparatory work of the Rome Statute

¹¹⁰ See e.g. Gasser, “Internationalized Non-International Armed Conflicts”, *supra* note 4, p. 147; Jordan J. Paust, “Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan”, *Journal of Transnational Law & Policy*, vol. 19, no. 2 (2010), p. 261 (“An armed conflict involving use of armed force by the armed forces of a state outside its territory against an insurgent force should be recognized as an international armed conflict”). See also the comments section to the following blog post: Constantin von der Groeben, “German Federal Prosecutor Terminates Investigation Against German Soldiers With Respect to NATO Air Strike in Afghanistan”, *EJIL: Talk!*, 29 April 2010 (available at: <https://www.ejiltalk.org/german-federal-prosecutor-terminates-investigation-against-german-soldiers-with-respect-to-nato-air-strike-in-afghanistan/#comments>).

¹¹¹ Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, 2010, p. 101.

¹¹² *Ermittlungsverfahren gegen Oberst Klein und Hauptfeldwebel W. wegen des Verdachts einer Strafbarkeit nach dem VStGB und anderer Delikte*, Termination of the Proceedings pursuant to § 170 Abs. 2 Satz 1 StPO, The Public Prosecutor General of the Federal Court of Justice, 16 April 2010, p. 42, available at: <http://www.generalbundesanwalt.de/docs/einstellungsvermerk20100416offen.pdf> [In German].

¹¹³ See discussion of this in Part 3, Section 3.2 below.

¹¹⁴ *Rome Statute of the International Criminal Court*, Rome, 17 July 1998, *United Nations Treaty Series*, vol. 2187, No. 38544, Article 8(2)(f), available at: <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> [emphasis added].

that the definitions contained therein would “codify customary international law”,¹¹⁵ the definition in the Statute can be taken “to reflect existing customary international law”.¹¹⁶ This type of NIAC could, from the point of view of the intervening State, be referred to as an “extraterritorial NIAC”.

Whether a NIAC under CA3 has to be confined within the territory of one State is a more difficult question, but the better view is that this need not be the case. CA3 applies to armed conflicts “occurring in the territory of one of the High Contracting Parties”. The requirement that the conflict must occur “in the *territory of one* of the High Contracting Parties [emphasis added]” might seem *prima facie* to restrict the application of the article to fighting in *one* State. However, the provision could also be read as simply demanding that the conflict occur “in the territory of *one of the High Contracting Parties* [emphasis added]”, which could plausibly be interpreted to mean that the conflict must take place in the territory of *any* High Contracting Party, thereby simply excluding from the scope of its application the territories of non-State parties to the Conventions.¹¹⁷ The Geneva Conventions have been ratified by 196 countries, and resultantly, virtually all conflicts will take place in the territory of a High Contracting Party; as the ICRC has noted, the “requirement that the armed conflict must occur ‘in the territory of one of the High Contracting Parties’ has lost its importance in practice.”¹¹⁸ Furthermore, throughout the Conventions references are made to the High Contracting Parties. For example, CA2 provides that in cases where one of the States in the conflict is not a party to the Conventions, the High Contracting Parties nonetheless remain bound by the Convention amongst themselves. Read in this context, it is clear that the reference to the territory of High Contracting Parties in CA3 was not intended to restrict the application of the Article to purely internal conflicts; rather, it was probably included simply to ensure that the

¹¹⁵ United Nations, General Assembly, *Report of the Preparatory Committee on the Establishment of an International Criminal Court: Volume I (Proceedings of the Preparatory Committee during March-April and August 1996)*, A/51/22 (13 September 1996), p. 16, para. 54, available at: <https://www.legal-tools.org/doc/e75432/pdf/> (“Several delegations expressed the view that the crimes referred to in subparagraphs (a) to (d) should be defined by enumeration of the specific offences rather than by reference to the relevant legal instruments [...] to underscore the customary law status of the definitions [...] Several delegations held the view that the Statute should codify customary international law and not extend to the progressive development of international law.”).

¹¹⁶ Philippe Kirsch, *Foreword*, in: Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, 2003, p. xiii (“...general agreement that the definitions of crimes in the ICC Statute were to reflect existing customary international law, and not to create new law”). See also UN General Assembly, *Identification of customary international law*, *supra* note 34, p. 3 (“A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule: (a) codified a rule of customary international law existing at the time when the treaty was concluded”).

¹¹⁷ Jinks, *supra* note 69, p. 41; Marco Sassòli, “Transnational Armed Groups and International Humanitarian Law”, *Harvard University Program on Humanitarian Policy and Conflict Research: Occasional Paper Series*, no. 6 (2006), p. 9.

¹¹⁸ ICRC, “How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?”, *supra* note 7, p. 3.

provision would apply only to Contracting Parties and not to States not party to the Conventions.¹¹⁹ If it were intended to restrict the application, one would expect CA3 to contain language such as “occurring in the territory of a *single* High Contracting Party”, which it does not, suggesting it was not so intended.¹²⁰ Thus, on this view, when U.S. military forces in Afghanistan cross the Pakistani border in pursuit of Taliban or Al-Qaeda forces, the conflict between those forces and the United States remains a NIAC even though the conflict is no longer solely taking place within the borders of Afghanistan. Such type of conflicts could be referred to as a “spillover NIAC”.

The Geneva Conventions do not expressly lay out their object and purpose. The First Geneva Convention (GC I) states only in its preamble that the High Contracting Parties had the “purpose of revising the Geneva Convention for the Relief of the Wounded and Sick in Armies in the Field of July 27, 1929”. However, to take GC I as an example, since that Convention replaced the earlier Geneva Convention of 1929, the preamble of the 1929 Convention might be taken to represent the object and purpose for even GC I of 1949.¹²¹ That preamble sets out the purpose of the Convention as being “the desire to lessen, so far as lies in their power, the evils inseparable from war”.¹²² Similarly, the ICRC has aptly stated that the primary purpose of IHL “is to protect the victims of armed conflict and to regulate the conduct of hostilities based on a balance between military necessity and humanity.”¹²³ Moreover, Art. 2(1) of AP II states that “[t]his Protocol shall be applied [...] to *all persons affected* by an armed conflict”,¹²⁴ and the ICRC has noted elsewhere that “[w]hat is important is that persons affected by the armed conflict should be entitled to the protection of the Protocol, *wherever they might be*.”¹²⁵ While these statements were aimed at situations of NIACs within the territory of a State, there seem to be no cogent reasons not to extend that logic to situations where a conflict crosses a border. To delimit the geographical scope of NIACs to within

¹¹⁹ Jinks, *supra* note 69, p. 41; Sassòli, “Transnational Armed Groups and International Humanitarian Law”, *supra* note 117, p. 9.

¹²⁰ Michael N. Schmitt, “Charting the Legal Geography of Non-International Armed Conflict”, *International Law Studies*, vol. 90 (2014), p. 12; Sivakumaran, *The Law of Non-International Armed Conflict*, *supra* note 12, p. 230; Nils Melzer, *Targeted Killing in International Law*, 2008, p. 258.

¹²¹ ICRC, *Commentary on the First Geneva Convention*, 2nd edition, 2016, para. 112.

¹²² *Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field*, Geneva, 27 July 1929, Preamble, available at: <https://ihl-databases.icrc.org/ihl/INTRO/300?OpenDocument>.

¹²³ ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Nils Melzer ed.), 2009, p. 11, available at: <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>. See also *Prosecutor v. Delalić et al.*, Appeals Judgment, ICTY, 20 February 2001, para. 172 (stating that “the very purpose of the Geneva Conventions [...] is to protect the dignity of the human person”).

¹²⁴ Emphasis added.

¹²⁵ ICRC, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949: Commentary*, 1973, p. 134 [emphasis added].

the boundaries of a single State would have the unappealing consequence of allowing non-State armed groups to ensconce themselves from lawful targeting by relocating to the territory of an adjacent state, while at the same time depriving the civilian population in that area of the protective scope of the law. During the Vietnam War, for instance, the North Vietnamese Army and the Viet Cong often retreated from South Vietnam into the eastern border regions of neighboring Cambodia to avoid being attacked.¹²⁶

That a NIAC can “spillover” into adjacent territory also seems to have been acknowledged in the *Drone Deployment on 4 October 2010 in Mir Ali/Pakistan* case. Here, the German Public Prosecutor General had to determine whether or not to proceed with criminal proceedings arising after a German national was killed in a drone strike on October 4, 2010, in the Pakistani town of Mir Ali, located in the Federally Administered Tribal Areas (FATA) close to the Afghanistan border. The Public Prosecutor found that at least one NIAC was occurring at the time of the strike in the Pakistani FATA region and noted in that regard:

So ist einerseits aufgrund der Rückzugsräume der afghanischen Taliban in der FATA-Region ein „Überschwappen“ („spill-over-Effekt“) des afghanischen Konflikts auf diesen Teil des pakistanischen Staatsgebiets festzustellen.¹²⁷ (One the one hand due to the safe haven of the Afghan Taliban in the FATA region, a spillover (spillover effect) of the Afghan conflict to this part of Pakistani territory can be established; translated by the author).

2.3.2. State practice

There is, in addition, significant State practice that shows that States are increasingly interpreting CA3 in an evolutive way in order to encompass the notion of spillover NIACs. In the U.S. Department of Defense’s (DoD) new *Law of War Manual*, it is stated that “two non-State armed groups warring against one another or States warring against non-State armed groups may be

¹²⁶ Unknown Author, "The Cambodian Venture: An Assessment", *TIME*, 6 July 1970 (available at: <http://content.time.com/time/magazine/article/0,9171,878330,00.html>).

¹²⁷ *Drohneinsatz vom 4. Oktober 2010 in Mir Ali/Pakistan*, Order of the Public Prosecutor General, The Public Prosecutor General of the Federal Court of Justice, 20 June 2013, p. 18, available at: http://www.generalbundesanwalt.de/docs/drohneinsatz_vom_04oktober2010_mir_ali_pakistan.pdf [In German] [emphasis added].

described as ‘non-international armed conflict,’ *even if international borders are crossed in the fighting.*”¹²⁸ The French *Manual of the Law of Armed Conflict* defines NIACs as conflicts taking place “in the territory of one or more States.”¹²⁹ Commenting on the geography of NIACs, the German *LOAC Manual* notes that they “usually” take place in the territory of one State, which does not preclude a spillover situation.¹³⁰ The Norwegian *LOAC Manual* includes in its definition of NIACs conflicts “between a State and a group located in another country” as well as conflicts between a State and a group that “occur[] across an international boundary”.¹³¹ The Manual further states that while such a conflict has an “international character”, since “it is not a conflict between two or more States, it is the law of non-international armed conflict that is applicable”.¹³² Along the same lines, the Danish *Military Manual* also acknowledges the spillover scenario, although it refers to it as “transnational” NIACs instead.¹³³

Under the auspices of the Dutch Foreign Ministry, the Advisory Committee on Issues of Public International Law has similarly stated in a 2013 report that “[i]n the event of non-international (intra-state) armed conflict, [...] [i]n some cases the conflict may spill over, i.e. all or part of an armed group moves to the territory of another – usually neighbouring – state or is expelled to adjoining territory from which the group continues hostilities [...] Such operations are subject to IHL”.¹³⁴ Likewise, during the 1990s, the civil war in Rwanda spread to neighboring countries, but that the conflict stayed non-international was confirmed by the ICTR, whose Statute provides for

¹²⁸ U.S. Department of Defense *Law of War Manual*, *supra* note 76, p. 74 [emphasis added].

¹²⁹ French Ministry of Defense, *Manuel de Droit des Conflits Armés* (2012), p. 34, available at: http://www.cicde.defense.gouv.fr/IMG/pdf/20130226_np_cicde_manuel-dca.pdf (“Un conflit armé non international, ou conflit armé interne, existe dès lors que des violences armées prolongées ont lieu entre les autorités gouvernementales et des groupes armés organisés, ou entre de tels groupes entre eux, *sur le territoire d'un ou de plusieurs États* [emphasis added].”).

¹³⁰ German Federal Ministry of Defence, *supra* note 76, p. 175 (“Ein nicht-internationaler bewaffneter Konflikt ist eine in der Regel innerhalb eines Staatsgebietes...”).

¹³¹ Norwegian *LOAC Manual*, *supra* note 75, p.18. Original reads: “Væpnede konflikter mellom en stat og en gruppe som befinner seg på en annen stats territorium, kan deles inn i to kategorier: de konfliktene hvor staten også har styrker på den andre statens territorium, for eksempel norsk deltakelse i Afghanistan til støtte for den afghanske regjering, og de konfliktene hvor den ikke har det. Den siste kategorien har internasjonal karakter fordi den foregår over en internasjonal grense, men siden det ikke er en væpnet konflikt mellom to eller flere stater, er det regelverket for ikke-internasjonale væpnede konflikter som vil komme til anvendelse.”.

¹³² *Ibid.*

¹³³ Danish *Military Manual*, *supra* note 40, pp. 46, 61.

¹³⁴ Advisory Committee on Issues of Public International Law, *Advisory Report on Armed Drones*, Advisory Report No. 23, The Hague (July 2013), p. 16, available at: [http://cms.webbeat.net/ContentSuite/upload/cav/doc/CAVV_advisory_report_on_armed_drones_\(English_translation_-_final\)_2\).pdf](http://cms.webbeat.net/ContentSuite/upload/cav/doc/CAVV_advisory_report_on_armed_drones_(English_translation_-_final)_2).pdf). See also *ibid.*, p. 3 (“The applicability of IHL may be extended if the conflict spills over into another state in cases where some or all of the armed forces of one of the warring parties move into the territory of another – usually neighbouring – state and continue hostilities from there.”).

jurisdiction to try persons who have committed violations of CA3 and AP II in not just Rwanda but in “the territory of neighbouring States” as well.¹³⁵ Similarly, Uganda’s fight against the Lord’s Resistance Army has not infrequently extended across the border to the territory of Sudan, without the extraterritorial part of the hostilities being perceived by the parties, or the international community, as losing its character as a NIAC.¹³⁶

2.3.3. Drafting history

That NIACs need not be confined within the borders of one State is further supported by the drafting history of CA3. While it is frequently claimed in the literature that the intent of the framers of CA3 was to limit its application to internal armed conflicts,¹³⁷ the *travaux préparatoires* paint a different picture.¹³⁸ At a 1946 conference between the ICRC and the national Red Cross societies on the revision of the Geneva Conventions, the ICRC proposed the inclusion of a new article in the First Geneva Convention that would stipulate that “[i]n the case of armed conflict *within the borders of a State*, the Convention shall also be applied by each of the adverse parties, unless one of

¹³⁵ UN Security Council Resolution 955, *Statute of the International Tribunal for Rwanda*, S/Res/955 (8 November 1994), pp. 43, 47, Arts. 1, 7, available at: http://legal.un.org/avl/pdf/ha/ict_r EF.pdf. See also Sassòli, “Transnational Armed Groups and International Humanitarian Law”, *supra* note 117, p. 9; Sivakumaran, *The Law of Non-International Armed Conflict*, *supra* note 12, p. 230.

¹³⁶ See Human Rights Watch, *LRA Conflict in Northern Uganda and Southern Sudan, 2002* (29 October 2002), available at: <https://www.hrw.org/report/2002/10/29/lra-conflict-northern-uganda-and-southern-sudan-2002> (stating that Ugandan operations against the LRA in Sudan “brought the Ugandan civil war inside Sudan”, and further making reference to AP II and “the international law governing internal armed conflict” as the applicable law to the conflict, including the part in Sudan).

¹³⁷ See e.g. U.S. Department of Justice, Office of Legal Counsel, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees*, Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense (22 January 2002), p. 7, available at: <http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf> (“Analysis of the background to the adoption of the Geneva Conventions in 1949 confirms our understanding of common article 3. It appears that the drafters of the Conventions had in mind only the two forms of armed conflict that were regarded as matters of general *international* concern at the time: armed conflict between nation-States (subject to article 2), and large-scale civil war within a nation-State (subject to article 3)”); Sean D. Murphy, “Evolving Geneva Convention Paradigms in the ‘War on Terrorism’: Applying the Core Rules to the Release of Persons Deemed ‘Unprivileged Combatants’”, *The George Washington Law Review*, vol. 75, no. 5-6 (2007), pp. 1115-16 (“A fair reading of the negotiating history suggests that this Common Article 3 paradigm was principally designed to address the situation of an armed conflict *internal* to a single state. [...] Thus, Common Article 3 contemplates an armed conflict between a state and nonstate actor, but does so largely in the context of the classic civil war.”); Milanovic and Hadzi-Vidanovic, *supra* note 6, pp. 288-90 (“There is little (if any) historical evidence that the drafters of the major IHL instruments had anything other than purely conflicts in mind when formulating the relevant provisions”); Jinks, *supra* note 69, p. 40 (“substantial evidence suggests that the drafters of the provision envisioned its application only in truly internal conflicts”); Geoffrey Best, *War and Law since 1945*, 1994, p. 169 (“The Red Cross movement therefore, as after the war it focused on the question of revising and improving the Geneva Conventions, had their extension to civil wars in the centre of its sights”); Schöndorf, *supra* note 104, p. 10.

¹³⁸ Pejic, “The Protective Scope of Common Article 3”, *supra* note 62, pp. 12-13.

them announces expressly its intention to the contrary”.¹³⁹ This provision was adopted by the conference, but two years later, Art. 2 of the 1948 ICRC Draft Convention noted that NIACs “may occur in the *territory of one or more of the High Contracting Parties*”.¹⁴⁰ The commentary to this draft article does not explain why the change was made, but it does state that changes were made to earlier drafts after a conference the previous year between the ICRC and delegations from the Allied governments.¹⁴¹ Records from that conference suggest that the delegations did not find the proposed article from the 1946 conference suitable, taking the view instead that the Convention should apply “wherever the civil war may take place”.¹⁴² In any case, it was the 1948 ICRC Draft that came before the 1949 Diplomatic Conference of 1949—the conference that eventually adopted CA3 along with the rest of the Geneva Conventions.¹⁴³

The ICRC Draft was eventually rejected. However, this seems to have been mainly due to the fact that the ICRC Draft proposed that all of the Conventions would apply to civil wars, which some States saw as trespassing on the sovereign rights of States.¹⁴⁴ Some States supported the ICRC Draft, however, and as a result of the difference of opinion among the delegations, several amendments and proposals were produced during the Conference—all of which eventually led to a compromise in what became CA3.¹⁴⁵ Nothing in the available drafting history, however, suggests that the changes from the ICRC Draft to the final text came about due to an intent of the drafters to limit the application of CA3 to purely internal conflicts, or that the question of geographic scope was even considered an important issue. While the drafting history does not unequivocally reveal

¹³⁹ ICRC, *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* (Geneva: July 26-August 3, 1946), p. 15, available at: https://www.loc.gov/rr/frd/Military_Law/pdf/RC_report-1946.pdf [emphasis added].

¹⁴⁰ ICRC, *Draft Revised or New Conventions for the Protection of War Victims* (Stockholm: August, 1948), p. 5, available at: http://www.loc.gov/rr/frd/Military_Law/pdf/RC_Draft-revised.pdf [emphasis added].

¹⁴¹ *Ibid.*, p. 6.

¹⁴² ICRC, *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims* (Geneva: April 14-26, 1947), p. 9, available at: https://www.loc.gov/rr/frd/Military_Law/pdf/RC_report-1947.pdf.

¹⁴³ Jean Pictet (ed.), *Commentary on the First Geneva Convention*, 1952, Common Article 3, p. 43, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=1919123E0D121FEFC12563CD0041FC08>.

¹⁴⁴ David A. Elder, “The historical background of Common Article 3 of the Geneva Conventions of 1949”, *Case Western Reserve Journal of International Law*, vol. 11, no. 1 (1979), pp. 43-44; Georges Abi-Saab, *Non-International Armed Conflicts*, in: UNESCO, *International Dimensions of Humanitarian Law*, 1988, p. 220; Jinks, *supra* note 69, p. 16.

¹⁴⁵ ICRC, *Commentary on the First Geneva Convention*, 2nd edition, 2016, paras. 376-383.

the intent of the drafters with regard to the geographical scope NIACs, it does dispel the notion that CA3 was designed from the start to apply only to internal conflicts.¹⁴⁶

In sum, as a matter of both desirability and law, a reading that allows NIACs to extend across borders of a single State, whether it be in the spillover or extraterritorial scenario, is consistent with the text of CA3, is accepted in practice, and furthers the object and purpose of the Conventions.

2.4. Summary

In summary, while the Geneva Conventions do not provide a definition of either IAC or NIAC, for the purpose of the present paper IACs exist whenever there is resort to armed force by one State against one or more States, while NIACs exist whenever there is protracted, intense armed violence between governmental armed forces and one or more organized armed groups, or between such groups, occurring in the territory of one or more States. IACs thus operate with a nominal threshold, while for a situation to amount to a NIAC, it will have to satisfy the requisite levels of intensity and organization. Duration of hostilities is not determinative. As for the geographic scope, it has been argued here that in addition to internal types, NIACs can also take the form of extraterritorial NIACs, which are conflicts where a State is fighting armed groups solely in the territory of another State, as well as spillover NIACs, which are conflicts that extend beyond the borders of one State. These concepts, and the other findings of this Part, will be used throughout the rest of the paper.

¹⁴⁶ Sivakumaran, *The Law of Non-International Armed Conflict*, *supra* note 12, pp. 229-30; Nils Melzer, *Targeted Killing in International Law*, 2008, pp. 257-58; Pejic, "The Protective Scope of Common Article 3", *supra* note 62, pp. 199-200.

Internationalization Through Direct Military Intervention

This Part is the first of three that will examine the potential processes of internationalization that have been proposed in the literature and the case law. This Part examines the effect that direct intervention by an outside State might have in terms of internationalization of NIACs. Historically, States have frequently intervened directly through their own troops in ongoing NIACs. The issue examined here is what effect, if any, that kind of intervention has on the classification of the original NIAC. According to the ICTY Appeals Chamber, a NIAC may transform into an IAC if “another State intervenes in that conflict through its troops”.¹⁴⁷ On its face, it would seem that a distinction should be made between intervention in support of the non-State armed group vis-à-vis the territorial State. Each of these two scenarios will be addressed in turn.

3.1. *Intervention of a Foreign State on the Side of the non-State Group*

When an outside State intervenes militarily against another State, there is a resort to armed force between two States, meeting the CA2 definition of IAC. The question examined here, however, is what effect this intervention has on the ongoing, original NIAC. On one view, direct intervention by a foreign State in favor of an armed group will transform the ongoing NIAC between the territorial State and the armed group into an IAC.¹⁴⁸ This position, which is known as the “global approach”,

¹⁴⁷ *Prosecutor v. Tadić*, Appeals Judgment, ICTY, 15 July 1999, para. 84 (hereinafter *Tadić* Appeals Judgment). See also *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Judgment, International Criminal Court, 14 March 2012, para. 551 (“In these circumstances, the question arises as to whether the military involvement by one or more of the DRC’s neighbours on its territory internationalised the relevant conflict or conflicts.”) (hereinafter *Lubanga* Judgment).

¹⁴⁸ See e.g. Mohamed Ghazi Janaby, “The Legal Status of Hezbollah in the Syrian Conflict: An International Humanitarian Law Perspective”, *Arizona Journal of International & Comparative Law*, vol. 33, no. 2 (2016), p. 407 (“An intervention by a foreign state in an internal armed conflict would lead to the internationalization of the conflict if such intervention supports the rebels.”); Vité, *supra* note 65, p. 71 (stating that in cases “of intervention in a previously existing internal conflict [...] the conflict is ‘internationalized’.”); Gasser, “Internationalized Non-International Armed Conflicts”, *supra* note 4, p. 146-47; Jennifer Elsea, *Treatment of “Battlefield Detainees” in the War on Terrorism*, Congressional Research Service, Report for Congress (13 Jan. 2005), p. 13 (“[F]oreign intervention on

is based primarily on two main arguments. First, proponents of the global approach argue that it is artificial and impractical to divide the components of an armed conflict where a foreign State has intervened into international and non-international parts, and that the global approach is easier to implement in practice.¹⁴⁹ For example, Theodor Meron has argued that if foreign interventions did not internationalize ongoing NIACs, it would lead to a “a crazy quilt of norms that would be applicable in the same conflict, depending on whether it is characterized as international or noninternational”.¹⁵⁰ Second, it has been argued that when a foreign intervention reaches a high level of intensity it will inevitably have an effect on the original NIAC, and as a result the NIAC should become internationalized.¹⁵¹

These arguments are also reflected in certain strains of the case law of the ICTY.¹⁵² Certain judgments, such as the *Blaškić* and *Kordić and Čerkez* Trial Chambers, have even found that the intervention of an outside State against another State will lead to the internationalization of an altogether separate conflict between the latter State and an armed group, because the intervention of the outside State has an impact on that separate conflict by weakening the ability of the territorial

behalf of a rebel movement would ‘internationalize’ the armed conflict.”); Solis, *supra* note 5, p. 154. See also Sivakumaran, *The Law of Non-International Armed Conflict*, *supra* note 12, pp. 224-25.

¹⁴⁹ See e.g. Theodor Meron, “The Humanization of Humanitarian Law”, *American Journal of International Law*, vol. 94, no. 2 (2000), p. 261. See also James G. Stewart, “Towards a Single Definition of Armed Conflict in International Humanitarian Law: A critique of Internationalized Armed Conflict”, *International Review of the Red Cross*, vol. 85, no. 850 (2003), p. 333-35 (stating that the mixed approach “often involves artificially differentiating internal aspects of armed conflicts from international, a process that has proved impractical, convoluted and imprecise.”); Johnston, *supra* note 5, p. 101 (stating that the mixed view is impractical and that it would be “impossible in the heat of battle to determine an enemy fighter’s origin, allegiance and the legal regime to which he is subject.”).

¹⁵⁰ Theodor Meron, “Classification of Armed Conflict in the Former Yugoslavia: Nicaragua’s Fallout”, *The American Journal of International Law*, vol. 92, no. 2 (1998), p. 238; *ibid.* (stating with respect to the case of the conflict in the former Yugoslavia that “to divide it into isolated segments to exclude the application of the rules of international armed conflict would be artificial.”).

¹⁵¹ See e.g. Vaios Koutroulis, “International Organisations Involved in Armed Conflict: Material and Geographical Scope of Application of International Humanitarian Law”, Proceedings of the 12th Bruges Colloquium 20-21 October 2011, International Organisations’ Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility, *Collegium*, no. 42 (Autumn 2012), pp. 35-36 (“I would suggest that in cases where the third-party intervention reaches a high level of intensity and influences the outcome of the conflict substantially, allowing for the party favoured by the intervention to go on with the fighting,¹⁸ the armed conflict should be viewed as one single IAC.”); Christine Byron, “Armed Conflicts: International or Non-International?”, *Journal of Conflict and Security Law*, vol. 6, no. 1 (2001), p. 83.

¹⁵² *Prosecutor v. Dusko Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Separate Opinion of Judge Li, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995, paras. 17-18 (“I am of the opinion that the submission of the Prosecution to view the conflict in the former Yugoslavia in its entirety and to consider it international in character is correct.”); *The Prosecutor v. Zlatko Aleksovski*, Trial Judgment, Dissenting Opinion of Judge Rodrigues, ICTY, 25 June 1999, paras. 18, 22 (stating that the conflict in Yugoslavia “must be viewed as a whole [...] I support a global approach to the conflict in the former Yugoslavia.”).

State to use all of its resources to fight against the armed group in the separate conflict.¹⁵³ Similarly, other judgments have held that the presence of Croatian Army units in some parts of the territory of Bosnia internationalized all of the NIACs ongoing there, since the overall conflict in Bosnia “must be looked upon as a whole”.¹⁵⁴ In fact, some ICTY decisions on potential internationalizations have been focused mainly on proving that the armed forces of the foreign State were present in the general area rather than proving that they took part in hostilities.¹⁵⁵

The global approach was also the approach of the United Nations Commission of Experts, which stated with regard to the conflict in the former Yugoslavia that:

[T]he Commission is of the opinion that the character and complexity of the armed conflicts concerned, combined with the web of agreements on humanitarian law that the parties have concluded among themselves, justifies the Commission’s approach in applying the law applicable in international armed conflicts to the entirety of the armed conflicts in the territory of the former Yugoslavia.¹⁵⁶

However, the more convincing and, seemingly, more common view is that direct foreign intervention on the side of the armed group does not, in and of itself, internationalize the ongoing NIAC.¹⁵⁷ Rather, this kind of intervention would result in two parallel and separate armed conflicts:

¹⁵³ *Prosecutor v. Blaškić*, Trial Judgment, ICTY, 3 March 2000, para. 94; *Prosecutor v. Kordić and Čerkez*, Trial Judgment, ICTY, 26 February 2001, paras. 108-09.

¹⁵⁴ *Prosecutor v. Naletilić and Martinović*, Trial Judgment, ICTY, 31 March 2003, paras. 194-96.

¹⁵⁵ *Ibid.*, paras. 189-96; *Prosecutor v. Ivica Rajić*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Trial Chamber, ICTY, 13 September 1996, paras. 13-20.

¹⁵⁶ UN Security Council, *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, S/1994/674 (27 May 1994), p. 13, para. 44, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/1994/674.

¹⁵⁷ See generally Dietrich Schindler, “International Humanitarian Law and Internationalized Internal Armed Conflicts”, *International Review of the Red Cross*, vol. 22, no. 230 (1982), pp. 256-58 (“[I]n internationalized civil war a distinction has to be made between its international and non-international components.”); Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd edition, 2016, pp. 35-36; Christopher Greenwood, “Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia”, *Max Planck Yearbook of United Nations Law*, vol. 2 (1998), pp. 117-19; Tamás Hoffmann, *Squaring the Circle? – International Humanitarian Law and Transnational Armed Conflicts*, in: Michael J. Matheson, Djamchid Momtaz (eds.), *Rules and Institutions of International Humanitarian Law Put to the Test of Recent Armed Conflicts*, 2007, p. 217; Akande, *Classification of Armed Conflicts*, *supra* note 15, pp. 63-64; Noam Zamir, *Classification of Conflicts in International Humanitarian Law: The Legal Impact of Foreign Intervention in Civil Wars*, 2017, pp. 100-10.

the original NIAC between the territorial State and the armed group and a new IAC between the territorial and intervening State. First, the fact that this approach—often referred to as the “mixed approach”—is more difficult to apply in practice does not necessarily undermine the existence of such an approach as a matter of law. As Greenwood has noted, “there is nothing intrinsically illogical or novel in characterising some aspects of a particular set of hostilities as an international armed conflict while others possess an internal character.”¹⁵⁸ Second, under the global approach the armed group will have an incentive to seek assistance from outside States in order to improve its own legal protection via the application of the more protective legal regime of IAC. By adopting the mixed approach, this incentive disappears. Third, while the mixed approach might not always be the most practical solution, it has the support of the international courts and tribunals that have examined the issue. This was the approach followed by the ICJ in *Nicaragua*, where the Court found that the conflict between the Contras and Nicaragua was a NIAC, while the conflict between the United States and Nicaragua was an IAC.¹⁵⁹ Moreover, in *Tadić*, the ICTY noted that “[t]he conflicts in the former Yugoslavia could have been characterized as both internal and international, or alternatively, as an internal conflict alongside an international one”.¹⁶⁰ Commenting on the “mixed” approach, the ICC has more recently stated, “conflicts taking place on a single territory at the same time may be of a different nature. The Chamber endorses this view and accepts that international and noninternational conflicts may coexist [reference omitted].”¹⁶¹

The “mixed view” is also supported by State practice. At the Conference of Government Experts in 1971, a majority of the 41 States present at the Conference were of the opinion that if foreign intervention on the side of rebels meant that the entire conflict would become internationalized,

¹⁵⁸ Greenwood, “Development of International Humanitarian Law”, *supra* note 157, p. 117.

¹⁵⁹ *Nicaragua*, *supra* note 14, para. 219.

¹⁶⁰ *Tadić* Jurisdiction Decision, *supra* note 30, paras. 72-3. *Accord: Tadić Appeals Judgment*, *supra* note 147, para. 84; *Prosecutor v. Delalić et al.*, Trial Judgment, ICTY, 16 November 1998, para. 209 (noting that separate NIACs can exist in the same territory where an overall IAC exists)

¹⁶¹ *Lubanga* Judgment, *supra* note 147, para. 540. *See also The Prosecutor v. Germain Katanga*, Trial Judgment, International Criminal Court, 7 March 2014, para. 1174 (“[D]epending on the parties involved in the hostilities, it is apparent to the Chamber that contemporaneous conflicts of a different nature may take place on a single territory and therefore that international and noninternational conflicts may coexist [reference omitted].”); *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of charges, Pre-Trial Chamber I, International Criminal Court, 29 January 2007, para. 209

(“[A]n internal armed conflict that breaks out on the territory of a State may become international – or, depending on the circumstances, *be international in character alongside an internal armed conflict*... [emphasis added]”) (hereinafter *Lubanga* Decision).

then as soon as a foreign State sent its troops over the border to help the rebels, thereby trespassing to begin with on the territorial rights of the neighbouring State, the State which suffered such aggression would have to treat its own rebels as prisoners of war and its local population as that of an occupied territory. [...] No government could accept that. [...] Consequently [...] the relations between the rebels and the legitimate government would have to continue to be subject to Article 3, while Article 2 would of course apply to relations between government forces and those of the foreign State.¹⁶²

More modern State practice bears this out as well. In a statement in 1999, the German Federal Foreign Office argued that there were two armed conflicts during the 1999 Kosovo Conflict: an IAC between the NATO States and Yugoslavia and a NIAC between Yugoslavia and the Kosovo Liberation Army.¹⁶³ Likewise, during the conflicts in the former Yugoslavia, the parties to the conflict were of the opinion that both international and internal conflicts were ongoing in the area despite the direct intervention of Yugoslav People's Army. This is demonstrated by the various agreements that the parties to the conflicts entered into with each other, with some of them referring only to the law of NIAC, while others committed the parties to abide by rules of IHL pertaining to IACs, thus in effect supporting the mixed approach.¹⁶⁴ In a U.S. Department of State country report on human rights practices in the Democratic Republic of the Congo (DRC), it was noted with regard to the civil war in the country that “elements of the armed forces of Burundi, Rwanda, and Uganda operated inside the country in support of the rebels”; however, the State Department nonetheless took the view that the conflict between the main rebel group and the DRC Government continued to be a “civil war”.¹⁶⁵ Along the same lines, the U.S. *Law of War Manual* states that “during a situation involving conflict between a variety of States and non-State armed groups, as between the States, the rules of international armed conflict would apply, while as between the

¹⁶² ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May – 12 June 1971): Report on the Work of the Conference* (Geneva, August 1971), p. 51, para 301, available at: http://www.loc.gov/rr/frd/Military_Law/pdf/RC-Report-conf-of-gov-experts-1971.pdf.

¹⁶³ Federal Foreign Office of Germany, *Zur volkerrechtlichen Beurteilung der Deportationen im Kosovo*, reported in: Avril McDonald (ed.), “Correspondents' Reports: A guide to state practice concerning International Humanitarian Law”, *Yearbook of International Humanitarian Law*, vol. 2 (1999), p. 364.

¹⁶⁴ See *Tadić* Jurisdiction Decision, *supra* note 30, para. 73 (listing the various agreements).

¹⁶⁵ United States Department of State, *U.S. Department of State Country Report on Human Rights Practices 1998 - Democratic Republic of Congo*, (26 February 1999), available at: <http://www.refworld.org/docid/3ae6aa5710.html>.

States and non-State armed groups, the rules of non-international armed conflicts would apply”.¹⁶⁶ The mixed view is likewise supported in the British and Danish military manuals.¹⁶⁷

Furthermore, the ICRC also supports the mixed approach, taking the view that in cases of direct military intervention on the side of a non-State group, internationalization will not occur. Rather, under the “fragmented approach” advanced by the ICRC, each belligerent relationship between belligerents is examined separately in order to classify the conflicts between them.¹⁶⁸

For the aforementioned reasons, it is submitted that, as a general matter, the mixed approach is to be preferred. However, there may be times where this approach will not be an appropriate solution. As stated above, under the ICRC’s fragmented approach, direct intervention on the side of non-State groups will never lead to internationalization, only to parallel conflicts.¹⁶⁹ However, this might be overly simplistic. It would seem that, under certain conditions, internationalization due to direct foreign intervention can in fact occur. First of all, under Art. 4(A)(2) of the Third Geneva Convention (GC III), if the members of a non-State group fulfill the requirements of that Article, the group will be said to belong to a State party to the conflict, thereby acquiring the status of lawful combatants.¹⁷⁰ While this provision deals with lawful combatancy, logically, if a non-State group belongs to a foreign State that is engaged in an IAC with the territorial State, then even the conflict

¹⁶⁶ *U.S. Department of Defense Law of War Manual*, *supra* note 76, p. 74. See also *ibid.* (“...[I]t may be possible to characterize parts of a conflict as international in character, while other parts of that armed conflict may be regarded as non-international in character”).

¹⁶⁷ *UK LOAC Manual*, *supra* note 72, paras. 1.33.6, 15.1.1, pp. 16-17 (“In practice, many armed conflicts have at the same time certain aspects which have the character of an internal armed conflict, while other aspects are clearly international. For example, an internal conflict may become internationalized, with the armed forces of outside states actively involved. Different parts of the law of armed conflict may, therefore, apply to different phases or aspects of the conflict.”). See also *ibid.*, p. 384 (“[I]n many cases, outside states have become involved in support of the rival parties in what may have originated as an internal conflict. In such cases, the more fully developed rules applicable in international armed conflict may be applied to *certain phases and aspects of the conflict* [emphasis added].”); *Danish Military Manual*, *supra* note 40, p. 44. *But see Solis*, *supra* note 5, p. 155, footnote 25 (stating that the mixed approach is “not customary”).

¹⁶⁸ Ferraro, “The ICRC’s legal position on the notion of armed conflict involving foreign intervention”, *supra* note 4, pp. 1241-42, 1245-47 (“[T]he ICRC considers that when a foreign power intervenes in support of a non-State party, the law of NIAC and the law of IAC apply in parallel. The belligerent relationship between the State party and the non-State party is governed by the law of NIAC, while the belligerent relationship between the State party and the intervening foreign power is governed by the law of IAC.”).

¹⁶⁹ *ibid.* (“...[D]irect intervention of a third State in support of one or more non-State parties does not internationalize all the relationships between the parties to the conflict, and the law of IAC does not apply to all the actors involved in that conflict.”).

¹⁷⁰ *Convention (III) relative to the Treatment of Prisoners of War*, Geneva, 12 August 1949, Article 4A(2), available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/375?OpenDocument>.

between the group and the territorial State would be international—although the meaning of the requirement of “belonging” has never been clear.¹⁷¹

Second, even if the armed group cannot be said to legally belong to the intervening State, there might come a point where the cooperation between the two is so close that they should be considered as one fighting force, with the result of consuming the NIAC between the group and the territorial State into the IAC between the intervening and territorial State. In such instances, the “fragmented approach” of the ICRC might not be realistic, or even preferable, to apply in practice. For example, during the initial phases of the war in Afghanistan (2001–present), there would have been two separate conflicts under the mixed approach, an IAC between the U.S. Coalition and the Taliban (the official government of Afghanistan) and a NIAC between the Coalition and Al-Qaeda. However, there existed at the time an extremely close relationship between the Taliban and Al-Qaeda, and around 5,000 Al-Qaeda fighters fought side by side on the frontlines with the Taliban during the U.S. invasion in October 2001.¹⁷² For example, Brigade 055, one of the elite units of the Taliban army, was made up of Al-Qaeda fighters; the majority of fighters trained in Al-Qaeda training camps in Afghanistan went on to fight in the Taliban army; and Al-Qaeda was part of the Afghan Ministry of Defense under the Taliban regime.¹⁷³ Considering these links, it is no surprise that the Coalition during the initial phases of the Afghanistan War treated operations against both groups as forming part of one single IAC.¹⁷⁴ On the other end of the spectrum, however, the approach in the *Blaškić* and *Kordić and Čerkez* judgments, where the outside intervention in one conflict was found to have internationalized a separate conflict, makes little sense, at least from a legal perspective. Similarly, the mere presence of foreign troops, without directly participating in the hostilities on the side of the rebels, should not suffice for internationalization.

¹⁷¹ Compare *Tadić* Appeals Judgment, *supra* note 147, paras. 92-98 (interpreting this requirement as containing a notion of control as defined in the law of State responsibility), with Jean Pictet (ed.), *Commentary on the Third Geneva Convention*, 1960, p. 23 (stating that for an armed group to belong to a State, only a ‘de facto relationship’ is required, which may find expression simply through a tacit agreement between the group and the State if the acts of the group clearly demonstrate which side the group is fighting on), and Katherine Del Mar, “The Requirement of ‘Belonging’ under International Humanitarian Law”, *The European Journal of International Law*, vol. 21, no. 2 (2010), p. 112 (agreeing with Pictet’s interpretation). See also Keiichiro Okimoto, “The Relationship Between a State and an Organised Armed Group and its Impact on the Classification of Armed Conflict”, *Amsterdam Law Forum*, vol. 5, no. 3 (2013), pp. 34, 40-41, 44, 50-51 (concluding that control is not necessary for a group to belong to a State).

¹⁷² See Françoise J. Hampson, *Afghanistan 2001-2010*, in: Elizabeth Wilmsurst (ed.), *International Law and the Classification of Conflicts*, 2012, pp. 250-51.

¹⁷³ Daniel Eisenberg, “Secrets of Brigade 055”, *Time*, 28 October 2001 (available at: <http://content.time.com/time/magazine/article/0,9171,1101011105-181591,00.html>).

¹⁷⁴ Hampson, *supra* note 172, pp. 250-52.

In order to determine the legal classification of the hostilities between the organized armed group and the territorial State in cases of outside foreign intervention, the key will be to ascertain the nature of the relationship between the armed group and the intervening State. For this purpose, the indications used in the ICTY case law to infer relationships between armed groups and outside States are a useful tool. The ICTY has considered many factors relevant, including: State forces of the intervening State engaging and participating in attacks and battles side by side with the armed group;¹⁷⁵ the adoption or sharing of the insignia and/or uniforms of the intervening State by the armed group, or vice versa;¹⁷⁶ the provision of troops of the intervening State to directly join the forces of the armed group;¹⁷⁷ the transfer and sharing of forces between the group and the intervening State;¹⁷⁸ officers of the intervening State serving in the ranks of the group in a special status or in their capacity as officers of the State, and officers of the intervening State taking command of units of the group;¹⁷⁹ the establishment of a common military command or the direction and supervision of the group by the State;¹⁸⁰ the payment of the members of the group's wages by the intervening State;¹⁸¹ coordination of decisions and military operations;¹⁸² control by the State over personnel and management issues of the group, such as appointing the high-ranking officers of the group;¹⁸³ State control over the implementation of certain policies of the group;¹⁸⁴ the planning of the operations and strategy of the group;¹⁸⁵ the creation of the group by the State;¹⁸⁶ the

¹⁷⁵ *Prosecutor v. Ivica Rajić*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Trial Chamber, ICTY, 13 September 1996, para. 19; *Tadić Appeals Judgment*, *supra* note 147, para. 151.

¹⁷⁶ *Prosecutor v. Blaškić*, Trial Judgment, ICTY, 3 March 2000, para. 85; *Prosecutor v. Naletilić and Martinović*, Trial Judgment, ICTY, 31 March 2003, para. 195; *Prosecutor v. Ivica Rajić*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Trial Chamber, ICTY, 13 September 1996, para. 18.

¹⁷⁷ *Prosecutor v. Blaškić*, Trial Judgment, ICTY, 3 March 2000, paras. 89, 120; *Tadić Appeals Judgment*, *supra* note 147, para. 151; *Prosecutor v. Ivica Rajić*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Trial Chamber, ICTY, 13 September 1996, para. 19.

¹⁷⁸ *Prosecutor v. Blaškić*, Trial Judgment, ICTY, 3 March 2000, paras. 101, 114, 120; *Tadić Appeals Judgment*, *supra* note 147, para. 150.

¹⁷⁹ *Prosecutor v. Ivica Rajić*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Trial Chamber, ICTY, 13 September 1996, para. 17; *Prosecutor v. Blaškić*, Trial Judgment, ICTY, 3 March 2000, para. 112; *Tadić Appeals Judgment*, *supra* note 147, para. 150.

¹⁸⁰ *Prosecutor v. Blaškić*, Trial Judgment, ICTY, 3 March 2000, paras. 92-93, 101; *Tadić Appeals Judgment*, *supra* note 147, paras. 151-52.

¹⁸¹ *Prosecutor v. Blaškić*, Trial Judgment, ICTY, 3 March 2000, para. 101; *Tadić Appeals Judgment*, *supra* note 147, para. 150.

¹⁸² *Prosecutor v. Blaškić*, Trial Judgment, ICTY, 3 March 2000, para. 118; *Prosecutor v. Naletilić and Martinović*, Trial Judgment, ICTY, 31 March 2003, para. 199; *Tadić Appeals Judgment*, *supra* note 147, para. 153.

¹⁸³ *Prosecutor v. Naletilić and Martinović*, Trial Judgment, ICTY, 31 March 2003, paras. 199, 201; *Prosecutor v. Blaškić*, Trial Judgment, ICTY, 3 March 2000, para. 112.

¹⁸⁴ *Prosecutor v. Blaškić*, Trial Judgment, ICTY, 3 March 2000, para. 117.

¹⁸⁵ *Prosecutor v. Naletilić and Martinović*, Trial Judgment, ICTY, 31 March 2003, para. 199; *Tadić Appeals Judgment*, *supra* note 147, para. 154.

¹⁸⁶ *Tadić Appeals Judgment*, *supra* note 147, para. 151.

State adopting the group as its own (e.g., signing peace agreements on behalf of the group),¹⁸⁷ and the complete dependency of the group on the intervening State.¹⁸⁸

In isolation, these factors might not warrant the conclusion that the group and the State should be treated as one for the purpose of the application of IHL, but taken together they might indicate that the two should be regarded as one force. In *Ilaşcu and others*, the European Court of Human Rights found that Russia had incurred international responsibility for unlawful acts committed by Transdniestrian separatists because the Russian Army had “*fought with and on behalf of the Transdniestrian separatist forces.*”¹⁸⁹ It is suggested that essentially the same standard—the participation of the State’s forces in the fighting alongside the group—should be applied when it comes to determining the internationalization of conflicts due to direct intervention.

For this purpose, a better approach than the “never internationalization” approach of the ICRC would be something along the lines of the one taken by the ICTY Trial Chamber in *Prosecutor v. Rajić*. Here, the Chamber found 1) that Croatian Armed Forces were involved “both directly and through their relations with HB and the HVO [i.e., the armed groups of the Bosnian Croats]” in hostilities against the Bosnian Government, 2) that there was a high level of cooperation and interaction between the Bosnian Croats and the Croatian Army forces present in Bosnia-Herzegovina to assist them (e.g., Croatian Army officers were serving concurrently in the ranks of the HVO), 3) that Croatian Army units “were engaged, *alongside* the Bosnian Croat forces, in fighting against the forces of the Bosnian Government”, and 4) that “as a result of the *significant and continuous military intervention* of the Croatian Army in support of the Bosnian Croats, the domestic conflict between the Bosnian Croats and their Government in central Bosnia became an international armed conflict”.¹⁹⁰ Thus, the key issues are the nature of the relationship and the level of cooperation and coordination between the foreign State and the armed group. If there is a particular high degree of cooperation between the two, and if the State’s forces intervene in a significant way and fight alongside the armed group, it would seem appropriate to treat the two as one fighting force, leading to the internationalization of the conflict between the group and the

¹⁸⁷ *Tadić Appeals Judgment*, *supra* note 147, paras. 158-59; *Prosecutor v. Blaškić*, Trial Judgment, ICTY, 3 March 2000, paras. 92-93.

¹⁸⁸ *Tadić Appeals Judgment*, *supra* note 147, para. 155.

¹⁸⁹ *Case of Ilaşcu and Others v. Moldova and Russia*, Judgment, European Court of Human Rights, 18 July 2004, paras. 380-85 [emphasis added].

¹⁹⁰ *Prosecutor v. Ivica Rajić*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Trial Chamber, ICTY, 13 September 1996, paras. 13-21 [emphasis added].

territorial State.¹⁹¹ If, on the other hand, the two fight separately, and the relationship between them amounts to nothing more than some level of coordination, or to assistance by the State to the armed group, then the mixed approach would seem more suitable. This was the case in Afghanistan, where the Northern Alliance fought a NIAC with the Taliban separate from the IAC between the Taliban and the international Coalition, despite the assistance the Alliance received from the United States. In the end, then, the potential internationalization of a NIAC due to direct intervention will turn on whether the two parties, in effect, constitute *de facto* one fighting force.

3.2. Intervention of a Foreign State on the Side of the Government

According to a strain of the literature, when an outside State intervenes militarily with its armed forces in support of the government of another State engaged in a NIAC against an armed group, such conflicts are to be considered as having been internationalized. For example, George Aldrich has argued that “whenever a state chooses to send its armed forces into combat in a previously noninternational armed conflict in another state—whether at the invitation of that state’s government or of the rebel party—the conflict must then be considered an international armed conflict”.¹⁹² Aldrich bases this view on the fact that any foreign intervention into an internal conflict will fundamentally change the nature of the conflict, and on the fact that it in any case will be practically impossible to apply both set of laws relating to NIAC and IAC.¹⁹³ Along similar lines, Jordan Paust has argued that since in such situations the “conflict is clearly not ‘internal’”, the conflict “realistically has been internationalized by the [outside] state.”¹⁹⁴ Paust argues that it is in the interest of intervening States to recognize their operations as IACs, since it will grant their armed forces combatant immunity and POW status. Building on this, Paust contends that “[t]he armed conflict between U.S. military forces and those of the Taliban inside and outside of Afghanistan since October 7, 2001 is an international armed conflict”. This is so, in the view of

¹⁹¹ Cf. Hampson, *supra* note 172, pp. 251-52 (“It may however be doubted whether it is feasible in this context to distinguish between operations of and against Al-Qaeda and the Taliban. Even if it is possible to make the legal distinction, for all practical purposes this was a single international armed conflict.”). See also Sivakumaran, *The Law of Non-International Armed Conflict*, *supra* note 12, p. 224-25.

¹⁹² George H. Aldrich, “The Laws of War on Land”, *American Journal of International Law*, vol. 94, no. 1 (2000), p. 63.

¹⁹³ *Ibid.*; Tom Farer, “Humanitarian Law and Armed Conflicts: Toward the Definition of ‘International Armed Conflict’”, *Columbia Law Review*, vol. 71, no. 1 (1971), p. 69.

¹⁹⁴ Paust, “Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan”, *supra* note 110, p. 261, footnote 55.

Paust, because of, *inter alia*, the “participation by U.S. combat troops in sustained hostilities for more than eight years” and the “general control of large areas of Afghanistan by the Taliban”.¹⁹⁵ In addition, Sir Daniel Bethlehem has pondered whether it is “really credible, for example, that the hostilities in Afghanistan, with upwards of 130,000 International Security Assistance Force (ISAF) troops from fifty States, is classified as a non-international armed conflict?”¹⁹⁶

However, the better view, from a legal standpoint, is that such an intervention on the side of the government does not render the NIAC international. This is so in view of the fact that in such situations there will be no conflict *between* States, as both States are fighting on the same side against an armed group.¹⁹⁷ While there is an “international element” to the conflict, since no States are opposing each other on each side of the conflict, legally speaking the conflict remains non-international. The ICC has rejected internationalization of conflicts under such scenarios, stating in the *Bemba* case that “a conflict will only be transformed to an international armed conflict where a second state is involved, directly or indirectly, on an *opposing* side of the conflict”.¹⁹⁸ Likewise, the German Federal Prosecutor in the *Klein* case found that the conflict between ISAF forces and the Taliban in Afghanistan should be “qualified as a NIAC despite the participation of international

¹⁹⁵ *Ibid.*

¹⁹⁶ Daniel Bethlehem, *Foreword*, in: Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, 2012, p. v.

¹⁹⁷ Dinstein, *War, Aggression and Self-Defence*, *supra* note 70, p. 6 (“If a non-international armed conflict is raging in Ruritania, and Atlantica assists the central Government of Ruritania in combatting those who rise in revolt against it, the domestic upheaval does not turn into an inter-State war. In such a case, two States (Ruritania and Atlantica) are entangled in military operations, but since they stand together against the Ruritanian insurgents, the internal nature of the conflict remains intact”); Sivakumaran, *The Law of Non-International Armed Conflict*, *supra* note 12, p. 224 (“...if an outside state intervenes on the side of the government, the conflict remains a non-international one”); Solis, *supra* note 5, p. 154 (“If Arcadia seeks and receives assistance from another state, Blueland, then the subsequent presence of Blueland’s armed forces in Arcadia to provide assistance such as training and logistical help for Arcadia does not alter the character of the conflict; it continues to be a common Article 3 conflict. That remains true even if Blueland forces engage the rebels in combat. Arcadia continues to combat its rebels, aided by Blueland.[reference omitted]”); Elsea, *supra* note 148, p. 13 (“[C]onsider an armed conflict to remain internal where a foreign state intervenes on behalf of a legitimate government to put down an insurgency”); Fleck, *supra* note 8, p. 605; Kolb and Hyde, *supra* note 83, p. 80; Dan E. Stigall, “The French Military Intervention in Mali, Counter-Terrorism, and the Law of Armed Conflict”, *Military Law Review*, vol. 223, no. 1 (2015), p. 31; Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection*, 2009, p. 155; ICRC, *Commentary on the First Geneva Convention*, 2nd edition, 2016, para. 259 (stating that in cases where States invite other State to intervene in order to assist them, “the existence of consent would clearly rule out the classification of the intervention as an international armed conflict”).

¹⁹⁸ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Judgment, International Criminal Court, 21 March 2016, para. 654. *See also The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Confirmation of Charges, Pre-Trial Chamber II, International Criminal Court, 15 June 2009, para. 246 (“No information on the involvement of foreign States, which would characterise the conflict as international, is available in the Disclosed Evidence. *The presence of a limited number of foreign troops on the CAR territory [...] was intended to support the CAR government authorities* [emphasis added]”).

troops, because ISAF is fighting on the side of the State of Afghanistan”.¹⁹⁹ Furthermore, States have consistently resisted attempts to internationalize internal armed conflicts as a result of intervention on the side of the government. When the ICRC proposed at both the 1971 and 1972 conferences of government experts that all of the Geneva Conventions should apply in cases of outside intervention on the side of the government in an internal conflict, it was rejected by States, which argued that the conflict “would continue to be subject to [Common] Article 3”.²⁰⁰ Thus, in 2013 when France sent troops to support the Government of Mali during its civil war, the status of forces agreement between them referred to AP II, which regulates only NIACs, as the law applicable to French operations, indicating that both parties regarded such interventions as remaining subject to the law of NIAC.²⁰¹ Similarly, the Office of the Prosecutor of the ICC, in its report on the conflict in Mali, noted with regard to the intervention of Mauritania in that conflict in early June of 2012 that “Mali and Mauritania agreed to lead a joint military operation to fight AQIM. Therefore, the involvement of Mauritania does not change the noninternational character of the armed conflict”.²⁰² In the same vein, after the overthrow of the Taliban and the installment of a new government of Afghanistan, the States of the international Coalition present in the country to assist Afghanistan in its continued fight against the Taliban and Al-Qaeda have regarded the

¹⁹⁹ *Ermittlungsverfahren gegen Oberst Klein und Hauptfeldwebel W. wegen des Verdachts einer Strafbarkeit nach dem VStGB und anderer Delikte*, Termination of the Proceedings pursuant to § 170 Abs. 2 Satz 1 StPO, The Public Prosecutor General of the Federal Court of Justice, 16 April 2010, p. 42, available at:

<http://www.generalbundesanwalt.de/docs/einstellungsvermerk20100416offen.pdf> [In German]. Original reads: “...Völkerrechtlich ist der Konflikt daher trotz der Beteiligung internationaler Truppen als nichtinternational zu qualifizieren, weil die ISAF auf Seiten der Staatsgewalt Afghanistans kämpft”.

²⁰⁰ ICRC, *Conference of Government Experts*, *supra* note 162, p. 51, paras 301-02; ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Second Session 3 May - 3 June 1972: Report on the Work of the Conference, Volume I* (Geneva, July 1972), pp. 97-99, paras. 2.332-2.347, available at: https://www.loc.gov/rr/frd/Military_Law/pdf/RC-Report-conf-of-gov-experts-1972_V-1.pdf.

²⁰¹ Government of France, *Décret n° 2013-364 du 29 avril 2013 portant publication de l'accord sous forme d'échange de lettres entre le Gouvernement de la République française et le Gouvernement du Mali déterminant le statut de la force « Serval », signées à Bamako le 7 mars 2013 et à Koulouba le 8 mars 2013* (29 April 2013), Article 10, available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027376103>. See also U.S. Department of Defense *Law of War Manual*, *supra* note 76, p. 73 (stating that when States are not on opposite sides of a conflict, the conflict will be a NIAC).

²⁰² The Office of the Prosecutor of the International Criminal Court, *Situation in Mali: Article 53(1) Report* (16 January 2013), p. 16, para. 65, available at: https://www.icc-cpi.int/itemsDocuments/SASMaliArticle53_1PublicReportENG16Jan2013.pdf.

conflict as a NIAC, including the U.S.²⁰³ and the UK,²⁰⁴ as have Afghanistan itself²⁰⁵ and international organizations such as the ICRC²⁰⁶ and the UN.²⁰⁷

For the foregoing reasons, conflicts where a State intervenes on the side of a government is best seen, from the point of view of the intervening State, as extraterritorial NIACs.²⁰⁸

²⁰³ Eric Holder, United States Attorney General, *Speech at Northwestern University School of Law*, 5 March 2012, available at: <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law>.

²⁰⁴ *GS (Existence of Internal Armed Conflict) Afghanistan v. Secretary of State for the Home Department*, CG [2009] UKAIT 00010, UK Asylum and Immigration Tribunal, 23 February 2009, available at: http://www.refworld.org/cases,GBR_AIT,49a3b4242.html (“The Secretary of State concedes that as at 7 January 2009 for the purpose of International Humanitarian Law (IHL) there is an internal armed conflict in Afghanistan extending to the whole of the territory of Afghanistan”).

²⁰⁵ Afghanistan Independent Human Rights Commission (AIHRC), *From Hope to Fear: An Afghan Perspective on Operations of Pro-Government Forces in Afghanistan* (December 2008), pp. 7-8, available at: http://www.aihrc.org.af/media/files/Research%20Reports/english/Eng_Pro_G_2.pdf (“The ongoing conflict in Afghanistan is defined as a non-international armed conflict because it is between state parties (the Afghan government, NATO member states and their partners) and non-state groups”).

²⁰⁶ Letter from Philip Spoerri, Legal Adviser, International Committee of the Red Cross, to Mr. Doherty, Clerk of the International Development Committee of the House of Commons, 20 December 2002, available at: <https://publications.parliament.uk/pa/cm200203/cmselect/cmintdev/84/84ap09.htm> (“Following the convening of the Loya Jirga in Kabul in June 2002 and the subsequent establishment of an Afghan transitional government on 19 June 2002, [...] the ICRC has changed its initial qualification as follows: The ICRC no longer views the ongoing military operations in Afghanistan directed against suspected Taliban or other armed groups as an international armed conflict. Hostilities conducted by United States and allied forces against groups such as the Taliban and al-Qaeda in Afghanistan after 19 June 2002 are therefore governed by the rules applicable to situations of non-international armed conflict”).

²⁰⁷ United Nations Assistance Mission in Afghanistan, *Afghanistan Annual Report on Protection of Civilians in Armed Conflict: 2016* (February 2017), p. 107, available at: https://unama.unmissions.org/sites/default/files/protection_of_civilians_in_armed_conflict_annual_report_8feb_2016.pdf (“UNAMA takes the position that the armed conflict in Afghanistan is a non-international armed conflict between the Government of Afghanistan and its armed forces (Afghan national security forces supported by international military forces).”).

²⁰⁸ Even if foreign interventions on the side of the government are classified as NIACs, there is still the question of whether the intervention by the intervening State should be classified as an independent NIAC between the intervening State and the armed group, or whether the intervention should be considered part of the ongoing NIAC between the territorial State and the armed group. The problem with the first option is that the separate conflict between the intervening State and the armed group would then have to independently meet the threshold of NIAC (i.e., intensity and organization). The better approach is therefore that when an outside State intervenes in a NIAC at the request and invitation of the territorial State that is in a NIAC with an armed group, the hostilities between the outside State and the armed group will form part of the ongoing NIAC between the armed group and territorial State. ICRC has supported such an approach through its notion of “co-belligerency”, or its “support-based approach”. ICRC considers that when a State intervenes on the side of a government in an ongoing NIAC, and when hostilities by the outside State are carried out in the context of the ongoing NIAC, then “[w]hen there is a close link between the action of the intervening power and the pre-existing NIAC, the assessment can be made on the basis of the nature of the support provided [to the territorial State] rather than on the traditional criteria for determining the existence of a NIAC, which will already have been met for the pre-existing conflict.” (Ferraro, “The ICRC’s legal position on the notion of armed conflict involving foreign intervention”, *supra* note 4, p. 1231). See also Tristan Ferraro, “The applicability and application of international humanitarian law to multinational forces”, *International Review of the Red Cross*, vol. 95, no. 891/892 (2013), pp. 583-87.

3.3. Summary

In sum, foreign intervention in an ongoing NIAC on the side the government does not suffice for internationalization. Intervention on the side of the non-State group does not, as a general matter, internationalize the conflict, although such an intervention might have the effect of transforming the NIAC to an IAC if the relationship between the intervening State and the group is of such a nature that they can, in essence, be considered as one fighting force.

Internationalization Through Lack of Consent

So far, we have examined what effect the common phenomenon of direct outside involvement in a NIAC by an outside State, through its military troops, has in regard to internationalization. In an equally common scenario, NIACs will often straddle the borders of more than one State in the course of military operations. This occurs, for example, in situations where States are engaged in military operations against non-State groups as part of a NIAC, but where some of the operations are taking place in the territory of another State without the latter State's consent. This type of situation occurs not infrequently in contemporary armed conflicts, U.S. drone strikes around the world being an illustrative example. In this scenario, the operations will inevitably lead to the involvement of other States' territory in conflicts that they have otherwise no part in. The State to which the NIAC is exported might not consent to the use of its territory as a battlefield for the exported NIAC, but it may nonetheless, for various reasons, decide not to directly engage itself in the hostilities. Even in that case, the hostilities that occur in its territory could have severe consequences for the State, especially for its civilian population. The question that follows is therefore what role, if any, the consent of the territorial State should have in the classification of the NIAC that has been exported (or expanded) into its territory, and hence what role the lack of consent should have as a potential catalyst for internationalization. This Part therefore analyzes what effect the unconsented-to involvement of another State's territory has on the internationalization of NIACs.

It has been argued that "internationalization can occur [...] if State A intervenes on the territory of state B against non-state actor C without B's consent."²⁰⁹ In 2016, the ICRC endorsed exactly that view. However, one problem with the ICRC's position, and with the literature dealing with this

²⁰⁹ Marko Milanovic, *The Applicability of the Conventions to "Transnational" and "Mixed" Conflicts*, in: Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds.), *The 1949 Geneva Conventions: A Commentary*, 2015, p. 35. See also *ibid.*, p. 38 (noting that "the territorial state's consent to the foreign intervention, or lack thereof, would have bearing on the matter" of internationalization).

issue overall, has been the lack of engagement with relevant State practice. Furthermore, the authority that the ICRC and others have relied on to reach their conclusion has been uncritically accepted and not properly examined. This Part will attempt to remedy these two shortcomings in the current literature. In the following Part, the position of the ICRC will be analyzed in depth. The arguments by other scholars who have come to the same conclusion will also be examined, albeit to a lesser extent. Particularly, the arguments made by Dapo Akande will be examined, since he is the sole author whom the ICRC cites in favor of its position, and because he is one of the few authors who have provided an extensive argument in favor of the ICRC proposition.²¹⁰

4.1. The ICRC Position: A Critical Assessment

In its newly revised *Commentary* to GC I, the ICRC states that “an international armed conflict arises between the territorial State and the intervening State when force is used on the former’s territory without its consent” (hereinafter “the ICRC position”).²¹¹ The ICRC acknowledges that such situations can occur often when a State, as part of a spillover NIAC, is fighting non-State actors that do not confine themselves within the borders of one State. Nevertheless, according to the ICRC, such operations will still constitute an “unconsented-to armed intrusion” into the territorial State’s sphere of sovereignty and thus amount to an IAC within the meaning of CA2.²¹² This is so because attacks against non-State groups might affect the population and infrastructure of the territorial State as well, and because members of the group might also be citizens of the territorial State.²¹³

It is not clear whether the position of the ICRC would result in total internationalization of the conflict in either the spillover or extraterritorial NIAC situation or whether it would simply lead to an additional IAC between the intervening and territorial State, along the lines of the mixed view presented above. The *Commentary* states only in succinct fashion that its position “does not exclude the existence of a parallel non-international armed conflict between the intervening State and the armed group.”²¹⁴ However, the ICRC cites only two scholars as authority of its position, both of

²¹⁰ Akande, *Classification of Armed Conflicts*, *supra* note 15, p. 77.

²¹¹ ICRC, *Commentary on the First Geneva Convention*, 2nd edition, 2016, para. 262.

²¹² *Ibid.*, para. 261.

²¹³ *Ibid.*, para. 262.

²¹⁴ *Ibid.*, para. 261.

them supporting the “complete internationalization” option—that is, that the NIAC between the intervening State and armed group is fully internationalized when it is “exported” to the territory of the territorial State without the consent of the territorial State.²¹⁵

However, whether one argues for internationalization or for a NIAC/IAC “double classification”, it is suggested here that the result will inevitably be the same: complete internationalization of the conflict. If it is the case that use of force against an armed group on the territory of another State without that State’s consent amounts to an IAC, it follows that any such subsequent uses of force against the group would be subject to the law of IAC. To hold to the contrary would be to argue that the type of operation against an armed group that initially brought about an IAC between the intervening and territorial State could be governed by the law of NIAC in any subsequent operations. In other words, while the initial military operation against the group would at one and the same time also be an operation against the territorial State, any future operations against the group would apparently not be. Therefore, even if, from a theoretical point of view, two parallel NIACs/IACs were in existence, for all practical purposes, the intervening State would be forced to abide by the rules governing IACs in its operations against the group since its operations would simultaneously be against the territorial State; in effect, the conflict would have been internationalized.

This is also the position of Akande, who argues that in situations where a foreign State is fighting non-State groups in the territorial State without the consent of that State, the two conflicts will be so bound up with each other that they will be impossible to separate in practice. Every act of targeting by the foreign State against the group will, because of the lack of consent, simultaneously be an act of targeting against the territorial State.²¹⁶ The foreign State is therefore bound to follow the rules of IAC in all of its targeting and conflict-related actions. On this view, then, a NIAC that extends into the territory of a second State without its consent will become internationalized—at least the part of it that takes place in the territory of the second, unconsenting State. As Akande summarizes, “the law that applies to transnational conflicts between a foreign State and a non-state group is the law of international armed conflicts where the foreign State intervenes without the consent of the territorial State”.²¹⁷ Other IHL scholars have also taken the view that when a State is fighting a NIAC against

²¹⁵ Akande, *Classification of Armed Conflicts*, *supra* note 15, p. 77. The ICRC also cites Fleck in footnote 98, who support internationalization (*supra* note 8), but the quote it attributes to him is actually from Akande (*supra* note 15).

²¹⁶ Akande, *Classification of Armed Conflicts*, *supra* note 15, p. 77.

²¹⁷ *Ibid.*, p. 79.

a non-State armed group on the territory of another State without the consent of the latter State, the NIAC will transform into an IAC,²¹⁸ although some have qualified this by arguing that this is only the case when the non-State actor has “insurgent status”.²¹⁹ This is ultimately so, in the view of these authors, because such unconsented-to use of force by the foreign State on the territory of the territorial State amounts to a use of force *against* the territorial State.²²⁰

²¹⁸ See Sassòli, “Transnational Armed Groups and International Humanitarian Law”, *supra* note 117, p. 5 (“[T]he law of international armed conflicts applies when a state is directing hostilities against a transnational armed group on the territory of another state without the agreement of the latter state”); Fleck, *supra* note 8, pp. 607-8 (“The internationalization of an armed conflict has also been assumed when a state is engaged in military operations against a transnational group on the territory of a foreign state without the agreement of the latter”); Yoram Dinstein, *War, Aggression and Self-Defence*, 4th edition, 2005, p. 245 (“The situation amounts to an international armed conflict since Utopia resorts to forcible measures on Arcadian soil in the absence of Arcadian consent, and thus two States are involved in the use of force without being on the same side.”); Arimatsu, “Territory, Boundaries and the Law of Armed Conflict”, *supra* note 102, p. 184 (“Where a state deploys its armed forces on foreign territory, absent consent or an express Security Council resolution, the rules that apply in IACs would seem to be the more appropriate body of law to govern hostilities”); Mary Ellen O’Connell, “Saving Lives Through a Definition of International Armed Conflict”, Proceedings of the 10th Bruges Colloquium 22-23 October 2009, Armed Conflicts and Parties to Armed Conflicts under IHL: Confronting Legal Categories to Contemporary Realities, *Collegium*, no. 40 (Autumn 2010), pp. 23-24 (“We may have seen it [the conflict in Afghanistan] evolve again into an IAC with U.S. attacks into Pakistan emanating from Afghanistan without Pakistan’s consent.”); Milanovic and Hadzi-Vidanovic, *supra* note 6, pp. 293, 295-97 (arguing that the lack of consent by Lebanon to Israel’s armed conflict with Hezbollah on Lebanon’s territory in 2006 meant that the conflict was internationalized into one single IAC, further noting that this approach would greatly simplify the qualification analysis, since there would only be a single IAC to deal with); International Institute of Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict*, *supra* note 100, p. 2 (“Non-international armed conflicts do not [...] encompass conflicts extending to the territory of two or more States”); James Stewart, “The UN Commission of Inquiry on Lebanon: A Legal Appraisal”, *Journal of International Criminal Justice*, vol. 5, no. 5 (2007), p. 1043; Zamir, “The Armed Conflict(s) Against the Islamic State”, *supra* note 19, p. 112; Milanovic, *The Applicability of the Conventions to “Transnational” and “Mixed” Conflicts*, *supra* note 209, pp. 37-39. See also Corn, *supra* note 104, pp. 313-15 (arguing against the categorization of transnational armed conflicts against non-State actors as NIACs on operational grounds). Claus Kreß refers to this position as the “pure international (inter-State) conflict model”, according to which the lack of fighting between the two States is irrelevant, since the IAC is triggered not by the non-State actors’ violence but by the use of force carried out by foreign State on the territory of the territorial State without the latter’s consent. See Claus Kreß, “Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts”, *Journal of Conflict and Security Law*, vol. 15, no. 2 (2010), p. 253.

²¹⁹ Paust, “Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan”, *supra* note 110, p. 261 (“An armed conflict involving use of armed force by the armed forces of a state outside its territory against an insurgent force should be recognized as an international armed conflict to which all of the customary laws of war apply”).

²²⁰ Akande, *Classification of Armed Conflicts*, *supra* note 15, pp. 73-75; See also Dapo Akande, “When Does the Use of Force Against a Non-State Armed Group trigger an International Armed Conflict and Why does this Matter?”, *EJIL: Talk!*, 18 October 2016 (available at: <http://www.ejiltalk.org/when-does-the-use-of-force-against-a-non-state-armed-group-trigger-an-international-armed-conflict-and-why-does-this-matter/>) (arguing that a State using force against another State so as to lead to an IAC between the “means simply that the force is used on the territory of the other state without its consent”); Gasser, *International Humanitarian Law: An Introduction*, *supra* note 65, p. 510 (“[A]ny use of armed force by one State against the territory of another, triggers the applicability of the Geneva Conventions between the two States”); Adil Ahmad Haque, “Whose Armed Conflict? Which Law of Armed Conflict?”, *Just Security*, 4 October 2016 (available at: <https://www.justsecurity.org/33362/armed-conflict-law-armed-conflict/>) (arguing that an armed interference in a State’s sphere of sovereignty is a use of force against that State that leads to an IAC).

It may be desirable, in terms of better legal protection, to apply the law of IAC to the kind of situations in question. However, to expand the definition of IAC to encompass transnational conflicts with non-State actors has potentially adverse consequences as well. For example, in IACs, civilians are “persons who are not, or no longer, members of the armed forces.”²²¹ Consequently, to follow the ICRC’s suggestion and classify the kind of situation in question as an IAC would mean that, since the armed group would not be “under a command responsible” to the territorial State under Art. 43 of AP I or “belong” to the territorial State under Art. 4(A)(2) of GC III, the members of the non-State group would presumably have to be classified as civilians pursuant to Art. 50 of AP I,²²² rather than fighters of an armed group with a “continuous combat function” fighting in a NIAC.²²³ Thus, the Israeli Supreme Court has found that Palestinian terrorist groups engaged in an IAC against Israel that do not belong to a State qualify as civilians.²²⁴ It is a cardinal principle of IHL that States may not make civilians the object of attacks²²⁵—a principle that undoubtedly has

²²¹ *Prosecutor v. Blaškić*, Trial Judgment, ICTY, 3 March 2000, para. 180; ICRC, *Interpretive Guidance*, *supra* note 123, p. 20 (“For the purposes of the principle of distinction in international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians”).

²²² See ICRC, *Interpretive Guidance*, *supra* note 123, p. 23 (“Groups engaging in organized armed violence against a party to an international armed conflict without belonging to another party to the same conflict cannot be regarded as members of the armed forces of a party to that conflict, whether under Additional Protocol I, the Hague Regulations, or the Geneva Conventions. They are thus civilians under those three instruments.”). *But see* Michael N. Schmitt, “The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis”, *Harvard National Security Journal*, vol. 1, no. 1 (2010), p. 18 (arguing that armed groups that do not belong to a State in an IAC should not be classified as civilians); Dapo Akande, “Clearing the Fog of War? The ICRC’s Interpretive Guidance on Direct Participation in Hostilities”, *International and Comparative Law Quarterly*, vol. 59, no. 1 (2010), pp. 185-86 (“In these exceptional cases where the armed group does not belong to a State it is better to use the definition of civilian adopted by the ICRC Interpretive Guidance with respect to non-international armed conflicts. This would mean that any member of such a group with a continuous combat function would be not be regarded as a civilian.”).

²²³ See ICRC, *Interpretive Guidance*, *supra* note 123, p. 27 (“In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities (“continuous combat function”).”).

²²⁴ *The Public Committee against Torture in Israel et al. v. The Government of Israel et al.*, Judgment, Supreme Court of Israel sitting as the High Court of Justice, 11 December 2005, paras. 25-26 (hereinafter *Targeted Killings*). See also *Hamdi v. Rumsfeld*, 542 U.S. 507, 516-20 (2004). The preceding citation refers to the officially printed version of the *Hamdi* Judgment in volume 542 of *United States Reports*, starting at page 507, the parts cited to appearing at pages 516-20. An online version of the Judgment is available at: <https://www.supremecourt.gov/opinions/03pdf/03-6696.pdf> (pp. 10-14).

²²⁵ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, Geneva, 8 June 1977, Article 51(2), available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/470> (“The civilian population as such, as well as individual civilians, shall not be the object of attack.”). *Accord: Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, International Court of Justice, 8 July 1996, para. 78 (“The first [cardinal principle of IHL] is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack”); *Prosecutor v. Blaškić*, Appeals Judgment, ICTY, 29 July 2004, para. 109 (“The Appeals Chamber underscores that there is an absolute prohibition on the targeting of civilians in customary international law.”); *Prosecutor v. Galić*, Trial Judgment, ICTY, 5 December 2003, paras. 44-45 (“civilians and the civilian population as such should not be the object of attack”); *Prosecutor v. Kordić and Čerkez*, Corrigendum

customary status.²²⁶ As a result, under Art 51(3) of AP I,²²⁷ the foreign State would be proscribed from legally targeting members of the armed group “unless and for such time as they take a direct part in hostilities”.²²⁸ The approach of treating members of armed groups as civilians directly participating in hostilities in the kind of situations in question is in fact advocated by some

to Judgement of 17 December 2004, ICTY, 26 January 2006, revised para. 54 of original Appeals Judgment (“The Appeals Chamber clarifies that the prohibition against attacking civilians and civilian objects may not be derogated from because of military necessity.”); *Prosecutor v. Strugar*, Trial Judgment, ICTY, 31 January 2005, para. 280; *Prosecutor v. Blagojević and Jokić*, Trial Judgment, ICTY, 17 January 2005, para. 544.

²²⁶ See e.g. *Western Front, Aerial Bombardment and Related Claims - Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26*, Partial Award, Eritrea-Ethiopia Claims Commission, 19 December 2005, para. 95 (“The provisions of Geneva Protocol I cited by the Parties represent the best and most recent efforts of the international community to state the law on the protection of the civilian population [...] and the Commission considers them to express customary international humanitarian law. Those provisions [...] prohibit targeting civilians”); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, International Court of Justice, 8 July 1996, paras. 79, 84 (stating that many rules in AP I are “merely the expression of the pre-existing customary law”, and expressing that the principle of protection of the civilian population “constitute[s] intransgressible principles of international customary law.”); ICRC, *Customary IHL Database*, Rule 1, accessed on 10 May 2017 (available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1) (“Attacks must not be directed against civilians.”); *Prosecutor v. Blaškić*, Appeals Judgment, ICTY, 29 July 2004, para. 113, footnote 220 (“That these persons [i.e. civilians] are protected in armed conflicts reflects a principle of customary international law.”); *Prosecutor v. Blagojević and Jokić*, Trial Judgment, ICTY, 17 January 2005, para. 544 (“It is a principle of customary international law that these persons [i.e. civilians] are protected in armed conflicts.”); *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Appeals Judgment, Special Court for Sierra Leone, 28 May 2008, para. 247 (“[T]he absolute prohibition under international customary and conventional law on targeting civilians precludes military necessity or any other purpose as a justification”); *The Prosecutor v. Callixte Mbarushimana*, Decision on the confirmation of charges, Pre-Trial Chamber I, International Criminal Court, 16 December 2011, para. 142; UN General Assembly Resolution 61/154, *The human rights situation arising from the recent Israeli military operations in Lebanon*, A/RES/61/154 (19 December 2006), para. 5, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/61/154&Lang=E (“Emphasizes that attacks against civilians, wherever they may occur, are contrary to international humanitarian law”); UN General Assembly Resolution 2444 (XXIII), *Respect for Human Rights in Armed Conflicts* (19 December 1968), para. 1(b), available at: <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/244/04/IMG/NR024404.pdf?OpenElement>.

²²⁷ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, Geneva, 8 June 1977, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/470>; Kreß, *supra* note 218, p. 253.

²²⁸ This author is in favor of a plain reading of Art. 51(3)’s “unless and for such time”, which would mean that civilians would only lose protection from targeting during the period in which they are engaged in hostilities. This is also the position of the ICRC (ICRC, *Interpretive Guidance*, *supra* note 123, pp. 70-71). It was also the approach of the Israeli Supreme Court in the *Targeted Killings* case, where it stated: “A civilian who violates that law and commits acts of combat does not lose his status as a civilian, but as long as he is taking a direct part in hostilities he does not enjoy – during that time – the protection granted to a civilian.” (*Targeted Killings*, *supra* note 224, para. 31). Opinions on this issue vary wildly, however, with some authors taking a more restrictive approach. The specificities of the notion of direct participation in hostilities, such as the temporal aspect and the exact meaning of the term, have produced a vast literature. For an overview of the discussions on the topic, see e.g. ICRC, *Interpretive Guidance*, *supra* note 123, pp. 41-85; William Boothby, “‘And for Such Time As’: The Time Dimension to Direct Participation in Hostilities”, *New York University Journal of International Law and Politics*, vol. 42, no. 3 (2010), pp. 741-768; Kenneth Watkin, “Opportunity Lost: Organized Armed Groups and the ICRC ‘Direct Participation in Hostilities’ Interpretive Guidance”, *New York University Journal of International Law and Politics*, vol. 42, no. 3 (2010), pp. 641-695; Michael N. Schmitt, “Deconstructing Direct Participation in Hostilities: The Constitutive Elements”, *New York University Journal of International Law and Politics*, vol. 42, no. 3 (2010), pp. 697-739.

proponents of the ICRC position.²²⁹ However, it would seem unreasonable that the fighters of the non-State group should enjoy the benefits of the more protective legal regime afforded to civilians, thereby rendering them targetable only during periods in which they are engaged in hostilities, while the soldiers of the intervening State could be targeted at any time by the group based on their status as combatants alone.²³⁰

Moreover, as was noted in *Katanga* by the ICC Trial Chamber II in response to the claim that the distinction between IAC and NIAC was no longer useful, the “distinction is especially important in that it is based on the capacity of actors, particularly non-State armed groups, to apply the relevant provisions of international humanitarian law effectively.”²³¹ In most cases, armed groups would have difficulty applying certain parts of the law of IAC, such as the requirement to provide judicial review of the internment of individuals, and in any case, if the members of the group were regarded as civilians, they would have no legal obligations vis-à-vis the intervening State, creating a gross imbalance of obligations between the two belligerents.²³²

4.2. An Argument for Extraterritorial Conflicts as NIACs

Pace the ICRC and many prominent scholars, the better view is therefore that in situations where a NIAC between a foreign State and an armed group crosses the border into another State, no internationalization will occur, and the conflict there will continue to be classified as a NIAC despite the lack of consent by the territorial State. The issue of lack of consent is a *jus ad bellum* issue, and is as such irrelevant to the issue of internationalization. The classification of a conflict as IAC or NIAC under IHL does not depend on the legality of the operations under the *jus ad bellum*, nor on the violation of the territorial State’s sovereignty. Rather, that assessment is based on factual criteria and on conditions on the ground, namely the identification of the parties to the conflict as either States (IAC) or as a State and a non-State group (NIAC).²³³

²²⁹ See e.g. Milanovic and Hadzi-Vidanovic, *supra* note 6, pp. 296-97; Akande, *Classification of Armed Conflicts*, *supra* note 15, pp. 78-79.

²³⁰ ICRC, *Interpretive Guidance*, *supra* note 123, pp. 70-71.

²³¹ *The Prosecutor v. Germain Katanga*, Trial Judgment, International Criminal Court, 7 March 2014, para. 1175.

²³² Noam Lubell, *The War (?) against Al-Qaeda*, in: Elizabeth Wilmshurst (ed.) *International Law and the Classification of Conflicts*. 2012, p. 431.

²³³ See Elizabeth Wilmshurst, *Conclusions*, in: Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, 2012, p. 484; Siobhan Wills, “The Legal Characterization of the Armed Conflicts in Afghanistan and Iraq: Implications for Protection” *Netherlands International Law Review*, vol. 58, no. 2 (2011), p. 177; Laurie Blank and

Nor can “intrusion[s] into the territorial State’s sphere of sovereignty” be regarded as determinative as a trigger for IACs. If simply the mere violation of sovereignty triggered the application of IHL, it would expand the concept of IAC considerably. In *Nicaragua*, the Court found that the United States, “by directing or authorizing overflights of Nicaraguan territory”, was in breach of its obligation “not to violate the sovereignty of another State”.²³⁴ Certainly, it cannot be argued that such contraventions amount to an IAC. If that were the case, many Eastern European and Baltic countries would be in almost perpetual armed conflict with Russia, which frequently performs unconsented overflights of the territories of those States. In modern armed conflicts in the twenty-first century, where non-State actors often operate from ungoverned and uncontrolled territory, violation of sovereignty should not be determinative.²³⁵

That is not to say that in the kind of situations in question an IAC could not arise. If the intervening State, in the course of its military operations against the non-State group, deliberately targets civilians, causes widespread harm to the civilian population, or profoundly damages the infrastructure of the territorial State, an IAC between them would emerge.²³⁶ But that would not necessarily affect the classification of the hostilities between the intervening State and the armed group. Instead, parallel conflicts would be in existence, along the lines of the mixed approach detailed above.

It would seem that a conceptual distinction should be drawn between the *jus ad bellum* and the *jus in bello*. As it was noted in *Prosecutor v. Fofana and Kondewa*, the separation of those two bodies of law is a “bedrock principle” of IHL.²³⁷ According to Akande, since an attack on an armed group

Benjamin R. Farley, “Characterizing US Operations in Pakistan: Is the United States Engaged in an Armed Conflict?”, *Fordham International Law Journal*, vol. 34, no. 2 (2011), p. 183. See also Paulus and Vashakmadze, *supra* note 70, p. 112.

²³⁴ *Nicaragua*, *supra* note 14, para. 292(5).

²³⁵ Kenneth Watkin, “The ICRC Updated Commentaries: Reconciling Form and Substance, Part I”, *Just Security*, 24 August 2016 (available at: <https://www.justsecurity.org/32538/icrc-updated-commentaries-reconciling-form-substance/>).

²³⁶ Lubell, *The War (?) against Al-Qaeda*, *supra* note 232, p. 433.

²³⁷ *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Appeals Judgment, Special Court for Sierra Leone, 28 May 2008, paras. 530-31. This distinction is also supported in the literature, see e.g. Keiichiro Okimoto, *The Distinction and Relationship between Jus ad Bellum and Jus in Bello*, 2011, p. 14 (“The principle of the separation between *jus ad bellum* and *jus in bello* is now universally accepted.”); Corn, *supra* note 104, p. 313 (“...it is indisputable that the laws of war emphasize a strict distinction between the law that regulates the conduct of armed conflict (*jus in bello*) and the law that governs the legality of the armed conflict (*jus ad bellum*)”); Robert D. Sloane, “The Cost of Conflation: Preserving the Dualism of *Jus ad Bellum* and *Jus in Bello* in the Contemporary Law of War”, *The Yale Journal of International Law*, vol. 34, no. 1 (2009), pp. 48-56; Marco Sassòli, *Jus ad Bellum and Jus in Bello - The Separation Between the Legality of the Use of Force and Humanitarian Rules To Be Respected in Warfare: Crucial or Outdated?*, in:

in the territory of another State without that State's consent is a violation of Art. 2(4) of the UN Charter (UNC), which forbids the threat or use of force against the territorial integrity or political independence of another State, an IAC will "automatically arise[]" following such an attack.²³⁸ Similarly, at a 2010 meeting for IHL scholars, the majority of the participants were of the opinion that in cases of operations against a non-State actor in the territory of an unconsenting State, the mere fact that the operations are illegal under the *jus ad bellum* would "turn[] the conflict into an IAC."²³⁹ While the ICRC is less explicit, its argument that the kind of force in question "constitutes an unconsented-to armed intrusion into the territorial State's sphere of sovereignty" also seems to echo the language of the *jus ad bellum*.²⁴⁰ However, this argument problematically mixes the *jus ad bellum* and *jus in bello*. A separation between these two bodies of law should be drawn in at least two ways.

First, the question of the classification of conflicts under IHL should remain independent of the question of the lawfulness of military operations under the *jus ad bellum*. In other words, the application of *jus in bello* ought not to be affected by the *jus ad bellum*. First of all, if the military operations against the armed group on the territory of the territorial State are carried out pursuant to the right of self-defense, then no violation of Art. 2(4) would occur. While it is beyond the scope of this article to deal with the issue of self-defense against non-State actors, it will suffice here to state that the text of Art. 51 of the UNC does not require an armed attack, the act that triggers the right to self-defense, to necessarily emanate from an organ of a State—a reading that is affirmed by overwhelming State practice.²⁴¹ However, even if the operations were not carried out in self-

Michael Schmitt and Jelena Pejic (eds.), *International Law and Armed Conflict: Exploring the Faultlines*, 2007, pp. 241, 244-49.

²³⁸ Akande, *Classification of Armed Conflicts*, *supra* note 15, p. 74; Elsewhere, Akande has further stated: "[W]here a State engages in hostilities with a non-State group on the territory of another State but without the consent of that latter [*sic*], there is an international armed conflict. [...] the US government have taken the view that the type of conflict under consideration is a non-international armed conflict. However, such a view ignores the fact that a use of force by one State on the territory of another State, without the consent of the latter, is a use of force *against* that latter State under the *jus ad bellum*, even if the purpose of the use of force is to engage non-State forces." Akande, "Clearing the Fog of War?", *supra* note 222, p. 185, footnote 24.

²³⁹ See Proceedings of the 10th Bruges Colloquium 22-23 October 2009, *Armed Conflicts and Parties to Armed Conflicts under IHL: Confronting Legal Categories to Contemporary Realities*, *Collegium*, no. 40 (Autumn 2010), p. 66.

²⁴⁰ ICRC, *Commentary on the First Geneva Convention*, 2nd edition, 2016, para. 261. See also Tristan Ferraro, "EJIL Talk! Book Discussion: Some Considerations on Intervention Against Non-state Actors in Foreign Territory", *EJIL: Talk!*, 31 May 2017 (available at: <https://www.ejiltalk.org/ejil-talk-book-discussion-some-considerations-on-intervention-against-non-state-actors-in-foreign-territory/>) ("When a State conducts a military operation in the territory of another State without its consent, these operations are by definition *against* that State").

²⁴¹ See e.g. UN Security Council Resolution 1368, S/RES/1368 (12 December 2001), available at: [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1368\(2001\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1368(2001)) (recognizing the inherent right of self-defense as a response to the 9/11 terrorist attack by Al-Qaeda); UN Security Council Resolution 1373, S/RES/1373 (28

defense, and thus violated Art. 2(4), a violation of the *jus ad bellum* should not affect the classification under the *jus in bello*. A determination to the contrary would be a violation of one of the overriding principles of IHL: that the law applies equally to the belligerent parties, irrespective of the determination of the legality under the *jus ad bellum*.²⁴² That the two bodies of law operate independently is clearly seen, for example, by the fact that while the threat of use of force is a violation of Art. 2(4), in the absence of any resort to actual armed force such a threat will not initiate an IAC.²⁴³ Conversely, when a State intervenes in an internal conflict at the invitation of the government, IHL will apply and the intervening State's operations will be subject to the law of

September 2001), available at: [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1373\(2001\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1373(2001)); North Atlantic Treaty Organization, *Statement by the North Atlantic Council*, Press Release(2001)124 (12 September 2001), available at: <http://www.nato.int/docu/pr/2001/p01-124e.htm> (stating that the Council finds the Al Qaeda terrorist attack of 9/11 to be an armed attack); UN Security Council, *Letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council*, S/2015/688 (8 September 2015), available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2015/688 ("In accordance with Article 51 of the Charter of the United Nations [...] I am writing to report to the Security Council that the United Kingdom of Great Britain and Northern Ireland has undertaken military action in Syria against the so-called Islamic State in Iraq and the Levant (ISIL) in exercise of the inherent right of individual and collective self-defence."); UN Security Council, *Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General*, S/2014/695 (23 September 2014), available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2014/695 (the U.S. invoking its right to self-defense against ISIL); UN Security Council, *Letter dated 24 July 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council*, S/2015/563 (24 July 2015), available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2015/563 (stating that "Turkey has initiated necessary and proportionate military actions against Daesh in Syria" pursuant to Turkey's inherent right of "Individual and collective self-defence"); UN Security Council, *Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council*, S/2015/693 (9 September 2015), available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2015/693 (Australia informing the UNSC that "in accordance with Article 51 of the Charter of the United Nations, to report to the Security Council that Australia is taking measures against the Islamic State in Iraq and the Levant (ISIL) in Syria in support of the collective self-defence of Iraq"); UN Security Council, *Identical letters dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council*, S/2015/745 (9 September 2015), available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2015/745 ("In accordance with Article 51 of the Charter of the United Nations, France has taken actions involving the participation of military aircraft in response to attacks carried out by ISIL from the territory of the Syrian Arab Republic."); UN Security Council, *Letter dated 31 March 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council*, S/2015/221 (31 March 2015), available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2015/221 ("I am writing to report to the Security Council that Canada is taking necessary and proportionate measures in Syria in support of the collective self-defence of Iraq [...] to strike ISIL sites and military strongholds in Syria"). *But see Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, International Court of Justice, 9 July 2004, para. 139 ("Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State.").

²⁴² See Adam Roberts, "The equal application of the laws of war: a principle under pressure", *International Review of the Red Cross*, vol. 90, no. 872 (2008), p. 936; Dinstein, *The Conduct of Hostilities*, *supra* note 157, pp. 4-6. See also Gill, *supra* note 19, p. 369.

²⁴³ See Greenwood, *Scope of Application of Humanitarian Law*, *supra* note 10, p. 57.

NIAC even though there is no violation of the *jus ad bellum*. Moreover, on one view, while the law of NIAC will apply to internal conflicts, if the armed force against the State is not directed from outside the State's own territory, then that use of force will not amount to an armed attack, and issues under the *jus ad bellum* will not arise.²⁴⁴

Second, while the *jus in bello* and *jus ad bellum* contain similar terminology, the meaning of the terms is not identical. For example, the concept of "proportionality" exists in both the *jus ad bellum* and IHL but with different meanings.²⁴⁵ Another example is the *jus in bello* term "attack", defined in Art. 49(1) of AP I, which is not synonymous with the *jus ad bellum* term "armed attack", found in Art. 51 of the UNC.²⁴⁶ It can therefore not be assumed that a use of force in the *jus ad bellum* context is the same as a use of force under the *jus in bello*. Evidently, in many instances, a use of force in terms of the *jus ad bellum* will concurrently also be a use of force against a State under IHL that will trigger an IAC. One example would be the ground invasion of State A by State B, which is clearly a use of force against State A under both bodies of law. But arguably, the concept of use of force under Art. 2(4) of the UNC and its customary counterpart is broader than the concept under the *jus in bello*.²⁴⁷ For instance, when a soldier stationed at a border site shoots across the border and kills members of the armed forces of the neighboring State, without orders to do so, such an act would arguably be a use of force under Art. 2(4), as well as incurring State responsibility under Art. 7 of the International Law Commission's (ILC) Draft Articles on State Responsibility for the State to which the soldier belongs.²⁴⁸ But since the soldier is acting *ultra vires*, no IAC will arise from the incident.²⁴⁹ Thus, according to this author, while the use of force by one State on the territory of

²⁴⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, International Court of Justice, 9 July 2004, para. 139; Elizabeth Wilmshurst, "Principles of International Law on the Use of Force by States In Self-Defence", ILP WP 05/01, *Chatham House Working Paper* (1 October 2006), p. 7, available at: <https://www.chathamhouse.org/publications/papers/view/108106>.

²⁴⁵ Solis, *supra* note 5, pp. 281-82; *U.S. Department of Defense Law of War Manual*, *supra* note 76, p. 86.

²⁴⁶ Dinstein, *The Conduct of Hostilities*, *supra* note 157, p. 4.

²⁴⁷ See e.g. the situations listed in UNGA Res. 2625 (XXV) that amounts to a use of force. UN General Assembly Resolution 2625 (XXV), *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, A/RES/25/2625 (24 October 1970), available at: <http://www.un-documents.net/a25r2625.htm>; Albrecht Randelzhofer and Oliver Dörr, *Article 2 (4)*, in: Bruno Simma et al., *The Charter of the United Nations: A Commentary*, Vol. II, 3rd edition, 2012, p. 216 (referring to the prohibition against the use of force as "cover[ing] any possible kind of trans-frontier use of armed force.").

²⁴⁸ International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts*, *supra* note 31, p. 45 ("The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.").

²⁴⁹ See ICRC, *Commentary on the First Geneva Convention*, 2nd edition, 2016, para. 241 ("It is important, however, to rule out the possibility of including in the scope of application of humanitarian law situations that are the result of a mistake or of individual *ultra vires* acts, which – even if they might entail the international responsibility of the State to

another State without consent to do so might be a “use of force against the territorial integrity” of that State in terms of Art. 2(4) of the UNC and the *jus ad bellum*, it does not follow that the same action is a use of force *against* that State in terms of the *jus in bello*. This question is still decided with reference to CA2, not Art. 2(4) of the UNC. As will be explained below, CA2 has a narrower scope of application—namely, armed conflict *between* two or more States. According to the ICC, an IAC, in terms of CA2, “exist[s] in case of armed hostilities between States *through their respective armed forces* or other actors acting on behalf of the State.”²⁵⁰ While this statement might be overly narrow in that it seems to require the simultaneous involvement of the armed forces of at least two States, a notion that was rejected in Part 2 above, the more salient point of the Trial Chamber’s argument seems to be clear: the requirement of the involvement of at least two States in hostilities, whether directly or indirectly, for a situation to be one of international armed conflict.

In short, it cannot be assumed that certain *ad bellum* considerations inevitably lead to a specific *in bello* qualification. This is implicitly supported by the ICJ in the *Nicaragua* judgment. Here, after finding the United States to have violated the prohibition on the use of force, the Court turned to examine what international humanitarian law provisions might be applicable to the dispute between the U.S. and Nicaragua, since “[c]learly, use of force *may in some circumstances* raise questions of such law.”²⁵¹

Accordingly, it is submitted that if the intervening State attacks exclusively the non-State group and does not target the armed forces, military bases, civilian population, or critical national infrastructure of the territorial State, or occupy part of its territory, then the intervening State’s operations are not directed at the territorial State, and it has not, in terms of the *jus in bello*, used

which the individual who committed the acts belongs – are not endorsed by the State concerned. Such acts would not amount to armed conflict.”). See also *ibid.*, para. 259 (“First of all, it should be specified that not every use of armed force in the territory of another State, including its territorial waters and airspace, creates a belligerent relationship with the territorial State and would therefore not necessarily be classified as an international armed conflict”); Detter, *supra* note 70, pp. 22-23 (“...no international armed conflict will exist if raids are carried out by expeditionary forces which do not represent their government, or by other units for which a State is not responsible [references omitted]”); Vité, *supra* note 65, pp. 72-73 (ruling out that IACs can result from cases “in which the use of force is the result of an error”); Norwegian *LOAC Manual*, *supra* note 75, p. 17 (“Det vil for eksempel ikke automatisk bli en væpnet konflikt dersom maktbruken eller suverenitetskrekkelsen skyldes et uhell eller en feil. Eksempler på slike uhell eller feil kan være [...] at en grensesoldat alene og uprovosert begynner å skyte over grensen.”; “It will not automatically be an armed conflict if the use of force or violation of sovereignty is due to an accident or mistake. Examples of such accidents or mistakes could be [...] that a soldier at a border alone and unprovoked starts shooting across the border”; translated by the author).

²⁵⁰ *Lubanga* Judgment, *supra* note 147, para. 541 [emphasis added]; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Confirmation of Charges, Pre-Trial Chamber II, International Criminal Court, 15 June 2009, para. 223.

²⁵¹ *Nicaragua*, *supra* note 14, para. 216 [emphasis added].

force against the territorial State.²⁵² Thus, in the *Bemba* case, the ICC Pre-Trial Chamber found that the presence of foreign troops in the Central African Republic (CAR) did not create an IAC because their actions were “not directed against the *State of the CAR and its authorities*.”²⁵³ It might be the case, of course, that the fighters of the armed group also are civilians of the territorial State. However, in the view of this author, a status as civilian of the territorial State should not supersede the status of the person as a fighter in a NIAC with the foreign State.²⁵⁴ To classify the situations in question as armed conflicts between States, when in reality the contention is between a State and a non-State group, is an inaccurate approach that is likely to lead to artificial results,²⁵⁵ such as the non-inclusion of the non-State group as a party to the conflict mentioned above. A categorization as a NIAC instead would best reflect the fact the hostilities are between a State and an armed group and is to be preferred.²⁵⁶

This view is based primarily on a textualist reading of CA2, CA3, and on State practice. First, CA2 limits the full application of the Geneva Conventions to cases of “armed conflict which may arise *between* two or more of the *High Contracting Parties*”. This provision would seem to imply a need for the existence of armed violence between two or more States for an IAC to arise. In the *Tadić* decision, the ICTY interpreted CA2 along the same lines when it found that “an [international]

²⁵² Lubell, *Extraterritorial Use of Force against Non-State Actors*, *supra* note 111, pp. 94-99; Gill, *supra* note 19, p. 367. See also UN Security Council, *Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council*, S/2015/693 (9 September 2015), available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2015/693 (“These operations [against ISIL in Syria] are not directed against Syria or the Syrian people”); UN Security Council, *Letter dated 31 March 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council*, S/2015/221 (31 March 2015), available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2015/221 (“Canada’s military actions against ISIL in Syria [...] are not aimed at Syria or the Syrian people”).

²⁵³ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Confirmation of Charges, Pre-Trial Chamber II, International Criminal Court, 15 June 2009, para. 246 [emphasis added].

²⁵⁴ For a contrary opinion, see Akande, *Classification of Armed Conflicts*, *supra* note 15, p. 78; ICRC, *Commentary on the First Geneva Convention*, 2nd edition, 2016, para. 262. As Rule 6 of the ICRC *IHL Customary Law Study* states, practice is unclear as to whether members of armed groups in NIACs are to be considered civilians, only liable to attack in cases of direct participation in hostilities, or whether such members are to be considered as “combatants”, a group that is distinct from the civilian population. (see ICRC, *Customary IHL Database*, Rule 6, accessed on 10 May 2017, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule6). However, the *lex scripta* relating to NIACs uses the terms “civilian”, “armed forces”, and “organized armed groups” in a mutually exclusive fashion, indicating that they are to be regarded as separate categories. For example, CA3 talks of “members of armed forces” of “each Party to the conflict” (see ICRC, *Interpretive Guidance*, *supra* note 123, pp. 27-28). The ICRC has proposed a category of “organized armed groups”, which comprises the armed wing of a non-State group in a NIAC, and should be regarded as distinct from the category of civilian (*Ibid.*, pp. 31-32).

²⁵⁵ Schöndorf, *supra* note 104, p. 26.

²⁵⁶ Kreß, *supra* note 218, pp. 253-56.

armed conflict exists whenever there is a resort to armed force *between States*”.²⁵⁷ Since non-State armed groups are not States, and therefore cannot be parties to the Geneva Conventions, the presumptive classification of the kind of situations in question should be that they cannot be IACs.²⁵⁸ The wording of CA2 clearly indicates that the type of conflict it applies to (IAC) is defined as being between two or more States. That is also clear from the context of the Conventions: CA2 is followed by a provision, CA3, that applies to armed conflicts “*not of an international character*”, which stands in contrast to CA2 as conflicts that do not involve two or more opposing States.²⁵⁹ That is how the term “*international armed conflict*” should be understood, not as a reference to cross-border conflicts or to conflicts that are not internal to a State.²⁶⁰ As it was stated by Judge Vohrah and Judge Nieto-Navia in *Prosecutor v. Aleksovski*, “an international armed conflict requires the involvement of two States”.²⁶¹ Therefore, since there are not two opposing States pitted against each other and involved in an armed conflict in the kind the situation in question, there is no IAC even though the conflict is taking place in the territory of another, consenting State. This is supported by the ICC Trial Chamber in the *Lubanga* case, which stated:

It is widely accepted that when a State enters into conflict with a nongovernmental armed group located in the *territory of a neighbouring State* and the armed group is acting under the control of its own State, the fighting falls within the definition of an international armed conflict between the two States. *However, if the armed group is not acting on behalf of a*

²⁵⁷ *Tadić* Jurisdiction Decision, *supra* note 30, para. 70 [emphasis added].

²⁵⁸ Lubell, Lubell, *The War (?) against Al-Qaeda*, *supra* note 232, p. 431; Dinstein, *War, Aggression and Self-Defence*, *supra* note 70, p. 6; ICRC, “The relevance of IHL in the context of terrorism”, ICRC, 1 January 2011 (available at: <https://www.icrc.org/eng/resources/documents/faq/terrorism-ihl-210705.htm>) (“International armed conflict involves the use of armed force by one State against another.”).

²⁵⁹ See also ICRC’s interpretation of the phrase ‘not of an international character’: “Which can, but not necessarily must, be understood primarily as a reference to the State or non-State character of the Parties to a potential non-international armed conflict”. ICRC, *Commentary on the First Geneva Convention*, 2nd edition, 2016, para. 184.

²⁶⁰ For a contrary opinion, see Stewart, “Towards a Single Definition of Armed Conflict in International Humanitarian Law”, *supra* note 149, p. 319 (arguing that IAC is not a “synonym for inter-State warfare”).

²⁶¹ *The Prosecutor v. Zlatko Aleksovski*, Trial Judgment, Joint Opinion of the Majority, Judge Vohrah and Judge Nieto-Navia, On the Applicability of Article 2 of the Statute Pursuant to Paragraph 46 of the Judgment, ICTY, 25 June 1999, para. 8. See also Vité, *supra* note 65, p. 71 (“The situations referred to here [in CA2] are conflicts between States”). This is of course unless the conflict falls under the ambit of Art. 1(4) of AP I, which stipulates that IACs also include “conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination”.

*government, in the absence of two States opposing each other, there is no international armed conflict.*²⁶²

Second, CA3 states that it shall apply in cases of “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties”. According to Akande, since CA3 and Art. 1(1) of AP II “confine such conflicts to the territory of one Contracting Party”, the type of transnational conflicts in question cannot be NIACs.²⁶³ But as it has been argued in Part 2 above, the laws of armed conflict do not require the fighting in NIACs to be confined within the borders of a single State, nor are NIACs limited to internal conflicts between a State and an armed group taking place within the State’s own territory.²⁶⁴ If it is accepted that when it comes to the classification of conflicts the geographical location of the conflict is largely inconsequential, it consequently becomes clear that it is the parties involved, rather than the territorial scope of the conflict, that distinguish IACs and NIACs.²⁶⁵ This understanding of NIACs is also reflected in State practice.²⁶⁶ Moreover, as was shown above, the ICTY has in its jurisprudence consistently defined NIACs as armed conflicts “between governmental authorities and organised armed groups” or between such groups.²⁶⁷ Seen in this light, conflicts between a State and a non-State armed group taking place in the territory of another State sans consent fall within the definition of NIACs

²⁶² *Lubanga Judgment*, *supra* note 147, para. 541 [emphasis added, references and quotation marks omitted].

²⁶³ Akande, *Classification of Armed Conflicts*, *supra* note 15, p. 71.

²⁶⁴ See section 2.3. above.

²⁶⁵ Cf. Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law*, 2002, p. 136; Paulus and Vashakmadze, *supra* note 70, p. 12 (“Yet the geographical element should not determine whether a conflict is qualified as international”); Christof Heyns et al., “The International Law Framework Regulating the Use of Armed Drones”, *International and Comparative Law Quarterly*, vol. 65, no. 4 (2016), p. 805; Arimatsu, “Territory, Boundaries and the Law of Armed Conflict”, *supra* note 102, p. 175; Jinks, *supra* note 69, pp. 40-41; Jelena Pejic, “Terrorist Acts and Groups: A Role for International Law?”, *British Yearbook of International Law*, vol. 75, no. 1 (2005), p. 81.

²⁶⁶ See e.g. Australian Department of Defence, *The Manual of the Law of Armed Conflict*, Australian Defence Doctrine Publication 06.4 (11 May 2006), para. 3.8, available at: <http://docplayer.net/1051779-Executive-series-addp-06-4-law-of-armed-conflict.html> (“A non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other; the parties to the conflict are not sovereign states...”); *U.S. Department of Defense Law of War Manual*, *supra* note 76, p. 74 (“States warring against non-State armed groups may be described as ‘non-international armed conflict,’ even if international borders are crossed in the fighting”); *Danish Military Manual*, *supra* note 40, p. 46: “Der er tale om NIACs i tilfælde, hvor OVG står alene i konflikt med en eller flere stater.” (Conflicts will be NIACs in circumstances where organized armed groups stand alone in conflict with one or more States; translated by the author).

²⁶⁷ *Prosecutor v. Milorad Krnojelac*, Trial Judgment, ICTY, 15 March 2002, para. 51; *Prosecutor v. Kordić and Čerkez*, Appeals Judgment, ICTY, 17 December 2004, para. 336; *Tadić* Jurisdiction Decision, *supra* note 30, para. 70; *Prosecutor v. Blagojević and Jokić*, Trial Judgment, ICTY, 17 January 2005, para. 544; *Prosecutor v. Halilović*, Trial Judgment, ICTY, 16 November 2005, para. 24.

contained in CA3.²⁶⁸ This was confirmed by the U.S. Supreme Court in *Hamdan v. Rumsfeld*, where the Court held that the conflict between the United States and Al-Qaeda was a NIAC.²⁶⁹ Importantly, the Supreme Court found that the *overall* conflict with Al-Qaeda was non-international (i.e., the conflict with Al-Qaeda taking place in several countries without consent from those countries), not just the conflict in Afghanistan.²⁷⁰ The Court correctly considered that CA3's wording "not of an international character" does not refer to the geographical scope of the conflict but refers instead to the fact that a NIAC is distinguished from an IAC "chiefly because it does not involve a clash between nations."²⁷¹ Other U.S. federal courts have followed the same approach in regard to terrorist suspects, applying the law of NIAC to the acts of defendants captured outside the main theaters of hostilities in Afghanistan and Iraq—for example in places such as Yemen and Bosnia.²⁷²

²⁶⁸ Gill, *supra* note 19, p. 370.

²⁶⁹ *Hamdan v. Rumsfeld*, 548 U.S. 557, 630-32 (2006). All following citations to *Hamdan v. Rumsfeld* will be to the online Slip Opinion: *Hamdan v. Rumsfeld*, Opinion of the Court, U.S. Supreme Court, 548 U.S. ____ (2006), pp. 67-69, available at: <https://www.supremecourt.gov/opinions/05pdf/05-184.pdf> (hereinafter *Hamdan*).

²⁷⁰ *Ibid.*, p. 68 ("Although the official commentaries accompanying Common Article 3 indicate that an important purpose of the provision was to furnish minimal protection to rebels involved in one kind of 'conflict not of an international character,' i.e., a civil war, [...] the commentaries also make clear 'that the scope of the Article must be as wide as possible,' [...] In fact, limiting language that would have rendered Common Article 3 applicable 'especially [to] cases of civil war, colonial conflicts, or wars of religion,' was omitted from the final version of the Article, which coupled broader scope of application with a narrower range of rights than did earlier proposed iterations"). For court decisions and authors interpreting *Hamdan* in the same way, see *Prosecutor v. Boškoski and Tarčulovski*, Trial Judgment, ICTY, 10 July 2008, para. 182 (finding that "[t]he Supreme Court of the United States held in 2006 that the United States was in a state of armed conflict with the non-State group known as Al Qaeda on the basis [of] Common Article 3"); Marty Lederman, "Top Ten Myths About Hamdan, Geneva, and Interrogations", *Georgetown Law Faculty Blog*, 5 July 2006 (available at: http://gulcfac.typepad.com/georgetown_university_law/2006/07/top_ten_myths_a_1.html); George P. Fletcher, "The Hamdan Case and Conspiracy as a War Crime: A New Beginning for International Law in the US", *Journal of International Criminal Justice*, vol. 4, no. 3 (2006), pp. 442, 444; Harold Hongju Koh, "Setting the World Right", *Yale Law Journal*, vol. 115, no. 9 (2006), pp. 2365–6. *But see* International Law Association, *Final Report on the Meaning of Armed Conflict in International Law*, 2010, p. 25.

²⁷¹ *Ibid.*, p. 67 ("The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being 'international in scope,' does not qualify as a 'conflict not of an international character.' [...] That reasoning is erroneous [...] The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations [...] In context, then, the phrase 'not of an international character' bears its literal meaning."); Lederman, *supra* note 270. *But see* Milanovic, "Lessons for Human Rights and Humanitarian Law in the War on Terror", *supra* note 102, pp. 379-81 (arguing that the position of the U.S. Supreme Court is ahistorical, since NIACs have always been regarded as internal and occurring within one State).

²⁷² See *Mohammed Al-Adahi and Miriam Ali Abdullah Al-Haj v. Barack Obama et al.*, Opinion of the Court, No 09-5333, United States Court of Appeals for the District of Columbia Circuit, 13 July 2010, available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=F2B8B58F935C0C64C1257C66004A328E&action=openDocument&xp_countrySelected=US&xp_topicSelected=GVAL-992BU9&from=state&SessionID=DZ9SGMXY5; *Belkacem Bensayah v. Barack*

4.3. State Practice

The ICRC does not attempt to derive their position from, or support it with, State practice. As was shown in Part 2 above, there is significant practice that confirms that, as a general matter, some parts of the hostilities in NIACs can occur extraterritorially in the territory of another State without the conflict losing its character as a NIAC in the process. What needs to be discerned here, then, is whether the lack of consent by the affected State has any bearing on the issue. Therefore, specific cases of transnational NIACs taking place in States that did not consent to the presence of the hostilities on their soil will need to be examined here. Examples of such instances go back to the famous *Caroline* affair, where British forces, accompanied by Canadian militia, entered U.S. territory to kill Canadian and American rebels onboard the ship *Caroline*, sparking outrage in the U.S. Government. In a case at the New York Supreme Court against Alexander McLeod, one of the alleged perpetrators of the attack on the *Caroline*, it was pointed out that neither Great Britain nor the United States “ha[s], to this day, characterized the transaction [i.e., the destruction of the *Caroline*] as a public war”, and the judge in the case agreed, reasoning that if such incidents amounted to a state of war then “England and the United States can scarcely be said to have been at peace since the revolution which made them two nations.”²⁷³ Of perhaps more relevance, however, are modern incidents of States fighting non-State groups in the territory of nonconsenting States. Examples of this include U.S. operations against Al-Qaeda in several countries around the world, such as Pakistan, Yemen, and Libya; the U.S.-led Coalition’s air strikes against ISIL in Syria; Turkey’s targeting of PKK fighters in Iraq; Colombian air strikes on members of FARC in Ecuador in 2008; and the 2006 use of armed force by Israel against Hezbollah in Lebanon.²⁷⁴ State practice relating to these incidents will be examined below.

Since 2001, the United States has been fighting various non-State terrorist groups around the world, primarily Al-Qaeda and more recently ISIL. Since the United States is in Afghanistan and Iraq by

Obama et al., No 08-5537, United States Court of Appeals for the District of Columbia Circuit, 28 June 2010, available at: <http://caselaw.findlaw.com/us-dc-circuit/1530425.html>.

²⁷³ *The People v. McLeod*, Judgment, Supreme Court of Judicature of the State of New-York, July 1841, reprinted in: John L. Wendell, *Reports of Cases Argued and Determined in the Supreme Court of Judicature and in the Court for the Trial of Impeachments and the Correction of Errors of the State of New-York, [1828-1841]*, vol. 25, 1842, pp. 517, 579, available at: <https://babel.hathitrust.org/cgi/pt?id=mdp.35112102516343;view=1up;seq=589>. See also Robert Yewdall Jennings, “The Caroline and McLeod Cases”, *The American Journal of International Law*, vol. 32, no. 1 (1938), pp. 82-99.

²⁷⁴ Akande, *Classification of Armed Conflicts*, *supra* note 15, p. 71; Gill, *supra* note 19, p. 371.

consent of the respective local governments to help combat the Taliban/Al-Qaeda and ISIL, respectively, those conflicts constitute NIACs. But from the outset, the United States has clearly stated that it sees itself as being engaged in a “global armed conflict” against Al-Qaeda “and associated forces” as well, a conflict distinct from the one in Afghanistan, and one that is not confined to any particular country or knows any geographical delimitation²⁷⁵—a view that has been maintained under the Obama administration.²⁷⁶ The United States has consequently targeted Al-Qaeda and ISIL forces, as well as affiliated groups such as Al-Shabaab and Al-Qaeda in the Arabian Peninsula (AQAP), in numerous other countries outside the main conflict areas (Afghanistan and Iraq). Sites for such attacks include Pakistan, Yemen, Syria, Somalia, and Libya, and these attacks have often been carried out without the national governments’ consent—although consent seems to exist in the case of Pakistan.²⁷⁷ Even though the U.S. under the Bush administration initially characterized the conflict with Al-Qaeda as neither an IAC nor a NIAC,²⁷⁸ since 2006 it has, despite at times being reluctant to clearly articulate its views on the classification, stated that it views the conflict as non-international.²⁷⁹ For example, Presidential Executive Order 13491 of January 22, 2009, mandates that Al-Qaeda fighters captured by U.S. forces be treated pursuant to CA3.²⁸⁰ The following year, a report prepared by the U.S. Government for the UN Universal Periodic Review elaborated further on the U.S. classification when it stated that CA3

²⁷⁵ See Authorization for Use of Military Force (AUMF), Public Law 107-40, S.J. Res. 23, 18 September 2001, available at: <https://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf>.

²⁷⁶ See Prepared Statement of Stephen W. Preston, General Counsel of the Department of Defense, *The Framework Under U.S. Law for Current Military Operations - Committee on Foreign Relations United States Senate*, 21 May 2014, pp. 2-3, available at: https://www.foreign.senate.gov/imo/media/doc/Preston_Testimony.pdf (informing that the U.S. Government relies on the AMUF for both ongoing U.S. military operations in Afghanistan and for ongoing military operations against al-Qaeda and associated forces outside of the U.S. and the theater of Afghanistan); Harold Koh, *The Obama Administration and International Law*, Speech to the American Society of International Law, 25 March 2010, available at: <http://www.cfr.org/international-law/legal-adviser-kohs-speech-obama-administration-international-law-march-2010/p22300> (“In the conflict occurring in Afghanistan *and elsewhere*, we continue to fight the perpetrators of 9/11: a non-state actor, al-Qaeda [emphasis added]”); Holder, *Speech at Northwestern University School of Law*, *supra* note 203 (“Our legal authority is not limited to the battlefields in Afghanistan. Indeed, neither Congress nor our federal courts has limited the geographic scope of our ability to use force to the current conflict in Afghanistan. We are at war with a stateless enemy, prone to shifting operations from country to country”).

²⁷⁷ Lubell, *The War (?) against Al-Qaeda*, *supra* note 232, pp. 438-29; Blank and Farley, “Characterizing US Operations in Pakistan”, *supra* note 233, pp. 182-84.

²⁷⁸ George Bush, *Memorandum: Humane Treatment of Taliban and al Qaeda Detainees*, 7 February 2002, available at: http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf.

²⁷⁹ See e.g. blog post by State Department Legal Adviser John B. Bellinger, “Armed Conflict With Al Qaida: A Response”, *Opinio Juris*, 16 January 2007 (available at: <http://opiniojuris.org/2007/01/16/armed-conflict-with-al-qaida-a-response/>) (“...the U.S. is in an armed conflict – and therefore that the laws of war are appropriate to apply – but that the armed conflict is not of an international character”).

²⁸⁰ Executive Order 13491—Ensuring Lawful Interrogations, section 3(a), printed in: *Federal Register*, vol. 74, no. 16 (27 January 2009), p. 4894. Also available at: <https://www.archives.gov/federal-register/executive-orders/2009-obama.html>.

provides “‘minimum’ standards of protection in *all non-international armed conflicts, including in the conflict with Al Qaeda.*”²⁸¹ In a 2009 brief filed with the United States District Court for the District of Columbia regarding the United States’ authority for detention at Guantanamo Bay, the U.S. Government avoided clearly classifying the conflict with Al-Qaeda; however, the conflict was contrasted with IACs, and when discussing the United States’ detention authority over Al-Qaeda, the brief made reference to CA3 and AP II.²⁸²

Along similar lines, in a 2010 speech by the Legal Adviser of the Department of State Harold Koh, reference was made to CA3 and AP II when discussing the conflict with Al-Qaeda, but reference was also made more vaguely to simply the “laws of war”. However, Koh’s statement that the “laws of war were designed primarily for traditional armed conflicts among states, not conflicts against a diffuse, difficult-to-identify terrorist enemy” might indicate a classification of non-international.²⁸³ In any case, Koh was unequivocal in a 2011 keynote address regarding the classification as a NIAC, stating that “[t]he U.S. is deeply committed to applying the Laws of War to *its NIAC with Al Qaeda*, with respect to both detention and targeting”.²⁸⁴

Since 2002, the United States has undertaken operations against AQAP in Yemen,²⁸⁵ which it has framed as forming part of the overall conflict with Al-Qaeda.²⁸⁶ Most notably, on September 30, 2011, the leader of external operations for AQAP, Anwar al-Aulaqi, was killed in a U.S. drone

²⁸¹ Human Rights Council, *National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: United States of America*, A/HRC/WG.6/9/USA/1 (23 August 2010), p. 18, para. 84, available at: http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/A_HRC_WG.6_9_USA_1_United%20States-eng.pdf [emphasis added].

²⁸² In re: Guantanamo Bay Detainee Litigation, *Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay*, Misc. No. 08-0442, filed 13 March 2009 (D.D.C.), pp. 1, 9, available at: <https://www.justice.gov/sites/default/files/opa/legacy/2009/03/13/memo-re-det-auth.pdf>. See also Jeh Charles Johnson, General Counsel of the U.S. Department of Defense, *The conflict against al Qaeda and its affiliates: how will it end?*, Speech to the Oxford Union at the University of Oxford, 30 November 2012, available at: <https://www.state.gov/documents/organization/211954.pdf> (“We detain those who are part of al Qaeda, but in a manner consistent with Common Article 3 of the Geneva Conventions...”).

²⁸³ Koh, *The Obama Administration and International Law*, *supra* note 276.

²⁸⁴ Harold Koh, *International Law and Armed Conflict in the Obama Administration*, PowerPoint slides from keynote address at the Naval War College, 22 June 2011, available at: <https://www.usnwc.edu/getattachment/f53eec9c-1e22-48bb-8fb2-85f6f70b9c9b/The-Honorable-Harold-Koh-slideshow.pdf> [emphasis added].

²⁸⁵ Mark Mazzetti, Eric Schmitt, and Robert F. Worth, “Two-Year Manhunt Led to Killing of Awlaki in Yemen”, *The New York Times*, 30 September 2011 (available at: <http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html>).

²⁸⁶ Johnson, *supra* note 282 (“Al Qaeda’s core has been degraded, leaving al Qaeda more decentralized, and most terrorist activity now conducted by local franchises, such as Al Qaeda in the Arabian Peninsula (based in Yemen) [...] So, therefore, in places like Yemen, and in partnership with that government, we are taking the fight directly to AQAP”).

strike in northern Yemen, although that particular operation appears to have been carried out with Yemeni cooperation.²⁸⁷ Regarding operations in Yemen, a 2010 Department of Justice (DOJ) memorandum took the view that despite Yemen being far removed from the most active theater of combat in the fight between the U.S. and Al-Qaeda, since “AQAP has a significant and organized presence” in Yemen, and given that AQAP is “either a component of al-Qaida or [...] is a co-belligerent of that central party to the conflict and engaged in hostilities against the United States as part of the same comprehensive armed conflict”, these factors taken together “would make the DoD operation[s] in Yemen part of the non-international armed conflict with al-Qaida.”²⁸⁸ The issue of Yemeni consent did not factor in to the DOJ’s analysis.

More recently, the United States has likewise classified its conflict with ISIL in Syria as a NIAC. In a speech in 2016, the U.S. State Department Legal Adviser Brian Egan remarked that military operations against ISIL in Syria are carried out “*without Syrian consent* because we had determined that the Syrian regime was unable or unwilling to prevent the use of its territory for armed attacks by ISIL”.²⁸⁹ Notwithstanding this lack of consent, the United States still took the view that “[b]ecause we are engaged in an armed conflict against a non-State actor, our war against ISIL is a non-international armed conflict, or NIAC.”²⁹⁰ This rationale is consistent with the U.S. position on the broader campaign against terrorist forces. In a 2012 speech on the NIAC against Al-Qaeda, Attorney General Eric Holder commented that the authority to target Al-Qaeda was not confined to Afghanistan, and that while use of force in foreign territory would be lawful with consent of the

²⁸⁷ Eric Holder, United States Attorney General, *Letter to the Chairman of the U.S. Senate Committee on the Judiciary Patrick J. Leahy*, 22 May 2013, p. 3, available at: <https://www.justice.gov/slideshow/AG-letter-5-22-13.pdf> (stating that the operations against Anwar al-Aulaqi was “undertaken consistent with Yemeni sovereignty”); Jennifer Griffin, “Two U.S.-Born Terrorists Killed in CIA-Led Drone Strike”, *Fox News*, 30 September 2011 (available at: <http://www.foxnews.com/politics/2011/09/30/us-born-terror-boss-anwar-al-awlaki-killed.html>) (“Top U.S. counter terrorism adviser John Brennan says such cooperation with Yemen has improved since the political unrest there. Brennan said the Yemenis have been more willing to share information about the location of Al Qaeda targets, as a way to fight the Yemeni branch challenging them for power. Other U.S. officials say the Yemenis have also allowed the U.S. to fly more armed drone and aircraft missions over its territory than ever previously”).

²⁸⁸ U.S. Department of Justice, Office of Legal Counsel, *Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi*, Memorandum for the Attorney General (16 July 2010), pp. 24, 27, available at: <https://www.justsecurity.org/wp-content/uploads/2014/06/OLC-Awlaki-Memo.pdf>.

²⁸⁹ Brian Egan, *International Law, Legal Diplomacy, and the Counter-ISIL Campaign*, Speech to the American Society of International Law, 4 April 2016, available at: <https://www.lawfareblog.com/state-department-legal-adviser-brian-egans-speech-asil> [emphasis added].

²⁹⁰ *Ibid.*

State involved, consent was not necessary if it was determined “that the nation is unable or unwilling to deal effectively with a threat to the United States.”²⁹¹

Denmark has, as part of the U.S.-led Coalition, also carried out military operations against non-State actors in unconsenting States’ territory—most recently against ISIL in Syria. The Danish *Military Manual* states:

A third scenario is the case where other States, as part of a collective self-defense of a State, uses force against a non-State organized armed group on the territory of a third State without the third State’s consent, when the third State does not have the will or ability to stop attacks which emanate from its territory against the State that is being acted in collective self-defense of. *The conflict will be a NIAC, as long as the hostilities are directed solely against the non-State organized armed group.*²⁹²

The Manual mentions the conflict with Al-Qaeda that spans several countries as an example of such type of NIAC.²⁹³ The Government of Denmark has also adopted this classification with regard to its military operations in Syria. In a parliamentary resolution of September 2014, after requests by Iraq and the United States for assistance in the fight against ISIL in Iraq, the Danish Government asked the Danish parliament for authorization to deploy fighter jets and military personal to the conflict, which the Government believed would mean that “Denmark enters on Iraq’s side [...] in the armed conflict against ISIL”.²⁹⁴ While the armed conflict was not specified as being a NIAC, given that the resolution sought authorization for assistance to Iraq in its fight against ISIL in Iraq, there can

²⁹¹ Holder, *Speech at Northwestern University School of Law*, *supra* note 203.

²⁹² *Danish Military Manual*, *supra* note 40, p. 46 [translated by the author, emphasis added]. The original quotation reads as follows: “Et tredje scenarie er det tilfælde, hvor andre stater som led i kollektivt selvforsvar af en stat anvender magt mod en OVG på en tredjestats område uden tredjestatens samtykke, når tredjestaten ikke har viljen eller evnen til at standse angreb, der udgår fra tredjestatens territorium mod den stat, som der udøves kollektivt selvforsvar af. Konflikten vil være intern, så længe kamphandlingerne alene er rettet mod den OVG”. **Note:** While the Danish word “intern” in the last sentence would normally be directly translated as “internal”, the word is used in the manual as part of the Danish translation for NIAC: “Intern væbnet konflikt” (*see Ibid.*, figure 2.1., p. 41). The translation of the last sentence as “The conflict will be a NIAC” instead of “The conflict will be *internal*” is therefore more correct.

²⁹³ *Ibid.*

²⁹⁴ Beslutningsforslag nr. B 123, *yderligere dansk militært bidrag til støtte for indsatsen mod ISIL* (30 September 2014), p. 4, available at: <http://www.ft.dk/samling/20131/beslutningsforslag/b123/bilag/1/1403349.pdf>.

be no doubt that it was indeed regarded as such. In two subsequent parliamentary resolutions in 2015 and 2016, the Government asked for parliamentary authorization for the “expansion of the Danish military contribution to the international Coalition’s effort in Syria as well”, first through the deployment of radar operators and subsequently through the use of air strikes against ISIL in Syria.²⁹⁵ In both resolutions, the Government was of the opinion that the expansion into Syria meant that “Denmark *continues*, together with Iraq and the rest of the militarily active members of the Coalition, to be a party to *the armed conflict* with ISIL.”²⁹⁶ This demonstrates that the Danish Government believes that despite the expansion of the conflict into the territory of Syria (which has not consented to the operations), the conflict remains a NIAC, the operations in Syria forming part of one single NIAC against ISIL. The resolutions passed.²⁹⁷

Syria has not officially consented to the operations by the anti-ISIL Coalition, but its public stance on the U.S.-led Coalition’s air strikes inside Syria has been varied. In August 2014, before the United States and other Western countries had initiated their operations against ISIL in Syria, Walid al-Moallem, the foreign minister of Syria, stated that “[a]ny strike which is not co-ordinated with the government will be considered as aggression”.²⁹⁸ However, a month later, after the United States had begun its campaign, the foreign minister remarked in a speech at the UN General Assembly that while Syria had not received any requests for permission to bomb ISIL in Syria or had had any communication with the U.S. and the Arab countries in the Coalition about it, as long as the air strikes were aimed at ISIL locations in Syria, the Government was “OK” with that.²⁹⁹ Yet, on September 21, 2015, following the initiation of air strikes against ISIL in Syria by the UK,

²⁹⁵ Beslutningsforslag nr. B 8, *udsendelse af et supplerende dansk militært bidrag til støtte for indsatsen mod ISIL* (8 October 2015), p. 3, available at: http://www.ft.dk/Rlpdf/samling/20151/beslutningsforslag/B8/20151_B8_som_fremsat.pdf; Beslutningsforslag nr. B 108, *Forslag til folketingsbeslutning om udsendelse af yderligere danske militære bidrag til støtte for indsatsen mod ISIL i Irak og Syrien* (29 March 2016), pp. 1-2, available at: http://www.folketingstidende.dk/Rlpdf/samling/20151/beslutningsforslag/B108/20151_B108_fremsaettelsestale.pdf.

²⁹⁶ *Ibid.* [emphasis added]; *Ibid.*, p. 3.

²⁹⁷ Folketingsbeslutning, *om udsendelse af et supplerende dansk militært bidrag til støtte for indsatsen mod ISIL* (10 November 2015), available at: http://www.ft.dk/Rlpdf/samling/20151/beslutningsforslag/B8/20151_B8_som_vedtaget.pdf; Folketingsbeslutning, *om udsendelse af yderligere danske militære bidrag til støtte for indsatsen mod ISIL i Irak og Syrien* (19 April 2016), available at: http://www.ft.dk/Rlpdf/samling/20151/beslutningsforslag/B108/20151_B108_som_vedtaget.pdf.

²⁹⁸ Unknown Author, “Syria offers to help fight ISIS but warns against unilateral air strikes”, *The Guardian*, 26 August 2014 (available at: <https://www.theguardian.com/world/2014/aug/26/syria-offers-to-help-fight-isis-but-warns-against-unilateral-air-strikes>).

²⁹⁹ Unknown Author, “Minister al-Moallem: dual policy a recipe for more violence and terrorism”, *The Syria Times*, 30 September 2014 (available at: <http://syriatimes.sy/index.php/arab-and-foreign-press/14651-minister-al-moallem-dual-policy-a-recipe-for-more-violence-and-terrorism>).

Australia, and France, the Syrian UN representative stated in a letter to the UN Secretary-General and the President of the UNSC that “[i]f any State invokes the excuse of counter-terrorism in order to be present on Syrian territory without the consent of the Syrian Government, [...] its actions shall be considered a violation of Syrian sovereignty.”³⁰⁰

While Syria’s statement from August 2014 stating that air strikes would be considered “aggression” could indicate that Damascus views such operations as amounting to an IAC, at the same time, such a statement may not necessarily indicate that. The references by Syria to aggression and breaches of its sovereignty are *jus ad bellum* terms and are thus not *per se* indicative of its view on the classification. Furthermore, Syria has made a number of incredulous claims at the UN. For example, it has claimed that the United States is a “partner of ISIL”, that the real motive of U.S. attacks in Syria is to secure a safe corridor for ISIL fighters, and has even accused Turkey and the Coalition of helping ISIL and other terrorists hide chemical weapons inside Syria—all accusations that are wildly implausible.³⁰¹ It is therefore not at all certain that the statements from Syria in this regard can be seen as truly expressing the *opinio juris* of Syria, rather than political hyperbole. In any case, what remains is that Syria has not clearly articulated its view on the classification of the military operations carried out by the international Coalition on its soil, and there is therefore a high degree of uncertainty as to what its views are.

On March 1, 2008, Colombian forces entered Ecuadorian territory in Operation Phoenix, killing twenty-six people in a raid against a camp of the Colombian insurgent group FARC.³⁰² Following the incident, the Permanent Council of the Organization of American States (OAS), represented by all thirty-five States in North and South America, unanimously passed a resolution that found that Colombia had carried out the operation “without the express consent” of Ecuador, and that the operation constituted a “a violation of the sovereignty and territorial integrity of Ecuador” as well as a violation of the principle of non-intervention—but did not find that an armed conflict had

³⁰⁰ UN Security Council, *Identical letters dated 17 September 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council*, S/2015/719 (21 September 2015), available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2015/719.

³⁰¹ United Nations Security Council, *7919th Meeting: The Situation in the Middle East*, S/PV.7919 (7 April 2017), meeting record, pp. 18-19, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.7919.

³⁰² Simon Romero, “Files Suggest Venezuela Bid to Aid Colombia Rebels”, *The New York Times*, 30 March 2008 (available at: <http://www.nytimes.com/2008/03/30/world/americas/30colombia.html>).

erupted.³⁰³ Notably, the Council also did not find that the operation constituted a violation of the principle of non-use of force against Ecuador in terms of the *jus ad bellum* despite the fact that the resolution in an earlier passage referred to both Art. 28, which prohibits the use of force against any other American State, and Art. 21 of the Charter of the OAS, which contains the principle of territorial integrity.³⁰⁴ In other words, while the member States found that Colombia had violated the sovereignty and territorial integrity of Ecuador (as well as violating the principle of non-intervention), the member States stopped short of finding that an IAC had taken place, or that Colombia had used force against Ecuador. This stands in contrast to the ICRC position, according to which operations such as Operation Phoenix, carried out sans consent, amount to a use of force against the territorial State.³⁰⁵ Independently, neither Colombia nor Ecuador seems to have considered the operation to be an IAC, at least according to one OAS Commission.³⁰⁶ At a Rio Group Summit on March 7, 2008, the President of Ecuador Rafael Correa stated after a meeting with the president of Colombia that “we can consider the very serious *incident* resolved.”³⁰⁷ In April, Correa informed Colombia that any further incursions would be considered an “act of war”, suggesting that the threshold of IAC had not been reached by Operation Phoenix.³⁰⁸ Moreover, the foreign minister of Brazil called the operation a “territorial violation”, the president of Peru referred to a “violation of Ecuadorian sovereignty”,³⁰⁹ and the United States to a “violation of territorial integrity”,³¹⁰ but none of them referred to an armed conflict or a use of force. In *Nicaragua*, the ICJ clearly distinguished between the violation of sovereignty, the principle of non-intervention, and the principle of non-use of force.³¹¹

³⁰³ The Permanent Council of the Organization of American States (OAS), *Convocation of the Meeting of Consultation of Ministers of Foreign Affairs and Appointment of a Commission*, CP/RES/ 930 (1632/08) (5 March 2008), available at: <http://reliefweb.int/report/colombia/convocation-meeting-consultation-ministers-foreign-affairs-and-appointment>.

³⁰⁴ *Ibid.*

³⁰⁵ See also the Norwegian *LOAC Manual*, *supra* note 75, p. 17, which states: “...ikke [...] alle brudd på suverenitetsprinsippet uten videre utgjør en internasjonal væpnet konflikt (“...not all violations of the principle of sovereignty will necessarily amount to an international armed conflict”; translated by the author).

³⁰⁶ OAS Commission, *Report of the OAS Commission That Visited Ecuador and Colombia*, RC.25/doc. 7/08 (16 March 2008).

³⁰⁷ U.S. Senate Committee on Foreign Relations, *Playing With Fire: Colombia, Ecuador, and Venezuela - Report To Members of the Committee on Foreign Relations United States Senate*, S. PRT. 2008 110–45 (28 April 2008), p. 3, available at: <http://www.hsdl.org/?abstract&did=487090> [emphasis added].

³⁰⁸ *Ibid.*, p. 4.

³⁰⁹ Quoted in: Felicity Szesnat and Annie R. Bird, *Colombia*, in: Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, 2012, pp. 235, 237.

³¹⁰ U.S. Senate Committee on Foreign Relations, *Playing With Fire*, *supra* note 307, p. 9.

³¹¹ *Nicaragua*, *supra* note 14, paras. 292(3)-292(6).

The Turkish-Kurdish Conflict, a NIAC between Turkey and Kurdish insurgent groups such as the PKK, has raged since 1984. The conflict has been fought primarily in southeastern Turkey, but the PKK has also launched attacks from the border region in northern Iraq, and as a consequence, Turkey has frequently carried out military strikes against PKK targets inside Iraq.³¹² For example, in 2008, after artillery bombardment by the PKK, thousands of Turkish troops crossed the border into Iraq to carry out operations against PKK targets that ultimately resulted in seventy-nine people dead. While Iraq did not approve of the operation—Iraq did complain about the destruction of some infrastructure—the Iraqi foreign minister also cautioned that “[t]his is a limited military incursion into a remote, isolated and uninhabited region”. He stressed that Iraq would not take part in the conflict unless Iraqi civilians were targeted, but warned that the operation should end as soon as possible in order to avoid any escalation.³¹³ Iraq did not view itself as a party to the conflict, and both nations clearly did not regard themselves as being in an IAC with each other.

In other instances, however, States have not been entirely clear about how they classify the kind of situations in question. The United States has on occasion targeted Al-Qaeda operatives in Libya, with the Libyan Government clearly announcing its consent.³¹⁴ However, on November 13, 2015, the United States conducted an air strike against ISIL in Libya for the first time, targeting a senior ISIL leader in Libya, Abu Nabil.³¹⁵ There have been no reports or official announcement that Libya consented to the operation, although seemingly no official protest has been voiced either. In its official announcement, the U.S. did not claim to have received consent by the Libyan Government, which might have been expected if that were the case. In an official statement, the Pentagon stated only that the strike “was authorized”, which most likely refers to authorization from the American president or under U.S. domestic law.³¹⁶ In the statement, the U.S. Defense Department does not

³¹² Suzan Fraser, “Turkey strikes Kurds in Iraq, Syria, drawing condemnation”, *Associated Press*, 25 April 2017 (available at: <https://www.usnews.com/news/world/articles/2017-04-25/turkey-hits-kurdish-areas-in-iraqs-sinjar-northeast-syria>).

³¹³ Unknown Author, “Iraq warns Turkey over incursion”, *BBC*, 23 February 2008 (available at: <http://news.bbc.co.uk/2/hi/7260478.stm>).

³¹⁴ Eric Schmitt, “U.S. Airstrike in Libya Targets Planner of 2013 Algeria Attack”, *The New York Times*, 14 June 2015 (available at: https://www.nytimes.com/2015/06/15/world/middleeast/us-airstrike-targets-qaeda-operative-in-libya.html?_r=0).

³¹⁵ Eugene Scott, “U.S. airstrike in Libya kills ISIS leader”, *CNN*, 14 November 2015 (available at: <http://www.cnn.com/2015/11/14/politics/airstrike-libya-isis-leader-paris-attacks/>).

³¹⁶ U.S. Department of Defense, *Statement from Pentagon Press Secretary Peter Cook on U.S. strike in Libya*, Release No: NR-436-15, 14 November 2015, available at: <https://www.defense.gov/News/News-Releases/News-Release-View/Article/628954/statement-from-pentagon-press-secretary-peter-cook-on-us-strike-in-libya/>; Jake W. Rylatt, “The Use of Force against ISIL in Libya and the Sounds of Silence”, *EJIL: Talk!*, 6 January 2016 (available at: <https://www.ejiltalk.org/the-use-of-force-against-isil-in-libya-and-the-sounds-of-silence/>).

provide a classification of the operation; however, it does state that the strike was the first against ISIL in Libya, and that this “demonstrates we will go after ISIL leaders wherever they operate.”³¹⁷ This could be understood as suggesting that the U.S. saw the operation in Libya as forming part of the overall conflict with ISIL, which, as shown above, it has classified as a NIAC.

Furthermore, the UK appears not to have publicly endorsed a specific view on the classification of the conflict in Syria, although there are some indications that it views it as a NIAC.³¹⁸

In sum, State practice does not confirm the position of the ICRC. States have quite frequently engaged in hostilities against armed groups on the territory of other States without consent to do so, and there is no indication from the international community that such hostilities should be viewed as being IACs. What the review of the above practice demonstrates is that States have, for the most part, classified these kinds of situations as being NIACs, although at times States have not been clear on their legal views regarding the classification of such conflicts. There seem to be no instances, however, where a State has regarded these type of situations as amounting to an IAC.

4.4. The Lack of Authority for the ICRC Position

Lastly, the evidence that the ICRC and authors taking the ICRC position present to bolster their claim does not, when properly examined, actually support their position. For example, those taking the ICRC view often point to one piece of State practice that they claim support their view: the 2006 Israel-Hezbollah conflict.³¹⁹ In that conflict, Israel responded to Hezbollah rocket attacks and border raids by sending the Israeli Defense Forces (IDF) into Lebanon to target Hezbollah, despite strong protests from Lebanon. The ICRC states that even though “the hostilities *only involved* Hezbollah and Israeli armed forces”, the conflict was treated by the UN as an IAC.³²⁰ ICRC and others argue that this confirms their position.

³¹⁷ U.S. Department of Defense, *Statement from Pentagon*, *supra* note 316.

³¹⁸ See Jacques Hartmann, Sangeeta Shan, and Colin Warbrick, “United Kingdom Materials on International Law 2014”, *British Yearbook on International Law*, vol. 85, no 1 (2015), p. 680.

³¹⁹ Sassòli, “Transnational Armed Groups and International Humanitarian Law”, *supra* note 117, p. 5; Fleck, *supra* note 8, p. 607; Akande, *Classification of Armed Conflicts*, *supra* note 15, p. 76.

³²⁰ ICRC, *Commentary on the First Geneva Convention*, 2nd edition, 2016, footnote 101 [emphasis added].

While it is true that the UN Human Rights Council in its *Report of the Commission of Inquiry on Lebanon* concluded that the conflict was indeed international,³²¹ it is important to examine how the Commission came to that conclusion. The Report found that “the State of Lebanon was the subject of direct hostilities conducted by Israel, consisting of such acts, as [...] *armed attacks on its Armed Forces*”.³²² More specifically, the Commission found that “IDF attacked the Lebanese Armed Forces and its assets (e.g. military airport at Qliat in northern Lebanon, all radar installations along the Lebanese coast, and the army barracks at Djamhour, 100 kilometres from the southern border with Israel.)”.³²³ The Commission further concluded that Lebanon was a victim of “a widespread and systematic campaign of direct and other attacks throughout its territory against its civilian population and civilian objects, as well as massive destruction of its public infrastructure, utilities, and other economic assets” by Israel.³²⁴ The targeting of the civilian population by Israel was also confirmed by other independent actors.³²⁵ Several villages were more than eighty percent destroyed, and one million Lebanese civilians—a quarter of the population of Lebanon—were internally displaced as a result of the conflict.³²⁶

While it is true that the fighting was *primarily* between IDF and Hezbollah (as the Report also duly notes), it was not *exclusively* between those two parties, as there were also armed confrontations between IDF and the Lebanese Armed Forces, which would have led to an IAC between the two

³²¹ UN Human Rights Council, *Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1**, A/HRC/3/2 (23 November 2006), para. 55, available at: <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Lebanon%20A%20HRC%203%202.pdf> (hereinafter *Report of the Commission of Inquiry on Lebanon*).

³²² *Ibid.*, para. 58.

³²³ *Ibid.*, para. 53 [references omitted].

³²⁴ *Ibid.*, para. 58.

³²⁵ Human Rights Watch, *Written statement submitted by Human Rights Watch (HRW) to the Second Special session of the Human Rights Council: The terrible toll of the Israel - Lebanon conflict on civilians: ongoing human rights abuses and violations of international humanitarian law* (10 August 2006), available at: <http://pantheon.hrw.org/legacy/english/docs/2006/08/10/lebanon13955.htm> (accusing Israel of deliberately targeting Lebanese civilians by frequently striking areas where Hezbollah was not present); Amnesty International, *Israel/Lebanon Under fire: Hizbullah's attacks on northern Israel*, MDE 02/025/2006 (13 September 2006), p. 1, available at: <https://www.amnesty.org/en/documents/mde02/025/2006/en/> (stating that more than 1,000 civilians died during Operation Change of Direction); UNICEF, *Middle East Crisis UNICEF Situation Report No. 26*, (18 August 2006), available at: <http://reliefweb.int/report/lebanon/middle-east-crisis-unicef-situation-report-no-26> (stating that one third of all casualties are estimated to have been children); Victor Kattan, “Israel, Hezbollah and the Conflict in Lebanon: An Act of Aggression or Self-Defense?”, *Human Rights Brief*, vol. 14, no. 1 (2006), p. 28 (noting that Israel’s operations threatened the very existence and political independence of Lebanon).

³²⁶ Amnesty International, *Israel/Lebanon Deliberate destruction or “collateral damage”? Israeli attacks on civilian infrastructure*, MDE 18/007/2006 (22 August 2006), pp. 2-4, 7-9, available at: <https://www.amnesty.org/en/documents/MDE18/007/2006/en/> (characterizing the level of destruction of Lebanese infrastructure during the conflict as “catastrophic” and “incalculable”).

States. As noted in Part 2 above, for an IAC to come into existence, it requires only that a State uses armed force against the armed forces of another States; an *exchange* of force is not necessary.

The Commission of Inquiry further bases its finding on the classification of the hostilities on the fact that the IDF carried out “an aerial and maritime blockade that commenced on 13 July 2006, until their full lifting on 6 and 8 September 2006, respectively” as well as “acts constituting temporary occupation of Lebanese villages and towns by IDF.”³²⁷ As was mentioned in Part 1, a state of occupation constitutes a form of IAC under CA2. Accordingly, the Israeli occupation of parts of Southern Lebanon would have triggered an IAC.³²⁸ Furthermore, the imposition of a blockade is recognized as an inter-State affair, applying only in IACs; hence, a blockade is necessarily an act of direct hostilities against Lebanon by Israel, as the Report also makes clear, in addition to being an “act of aggression”.³²⁹

Additionally, the Report bases its conclusion on Hezbollah’s status within Lebanon. At the time of the conflict, Hezbollah was represented in the Lebanese Cabinet with two ministers as well as having fourteen members in the 128-seat Parliament of Lebanon.³³⁰ According to the Report, Hezbollah is therefore to be regarded as a State organ of Lebanon under Art. 4 of the ILC’s Draft Articles on State Responsibility.³³¹ Attacks by Hezbollah would consequently be attributable to Lebanon as if carried out by Lebanon’s Armed Forces themselves, creating an IAC between Israel and Lebanon.³³² This was also the view taken by Israel during the opening phases of the conflict.³³³

³²⁷ *Report of the Commission of Inquiry on Lebanon*, *supra* note 231, para. 58.

³²⁸ Yoram Dinstein, *The International Law of Belligerent Occupation*, 2009, pp. 276-80.

³²⁹ Wolff Heintschel von Heinegg, *Blockade*, in: Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, 2008, para. 25; Iain Scobbie, *Lebanon 2006*, in: Elizabeth Wilmschurst (ed.), *International Law and the Classification of Conflicts*, 2012, p. 387; *Report of the Commission of Inquiry on Lebanon*, *supra* note 231, para. 58; UN General Assembly Resolution 3314 (XXIX), *Definition of Aggression* (14 December 1974), Art. 3(c), available at: [http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/3314\(XXIX\)](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/3314(XXIX)).

³³⁰ Jonathan Masters & Zachary Laub, “Hezbollah (a.k.a. Hizbollah, Hizbu'llah)”, *Council on Foreign Relations*, 3 January 2014 (available at: <http://www.cfr.org/lebanon/hezbollah-k-hizbollah-hizbullah/p9155>); Lara Deeb, “Hizballah: A Primer”, *Middle East Research and Information Project*, 31 July 2006 (available at: <http://www.merip.org/mero/mero073106>).

³³¹ *Report of the Commission of Inquiry on Lebanon*, *supra* note 231, para. 56.

³³² Catherine Bloom, “The Classification of Hezbollah in Both International and Non-International Armed Conflicts”, *Annual Survey of International & Comparative Law*, vol. 14, no. 1 (2008), pp. 78-79, 96. *But See* Scobbie, *supra* note 329, p. 407 (“In sum, Hezbollah’s acts cannot be attributed to Lebanon under the law of State responsibility and thus, as Hezbollah could not be said to be acting on its behalf, the conflict between Israel and Lebanon cannot be classified as an international armed conflict on the basis that there existed some relationship between Hezbollah and the Lebanese Government.”).

³³³ On July 12, 2006, the day Hezbollah initiated its incursion across Israel’s border, the Israeli UN Permanent Representative wrote in a letter directed at both the UN Secretary-General and the President of the Security Council

For the reasons listed above, the fact that the UN Commission of Inquiry classified the conflict as international cannot be taken as an instantiation for the ICRC position, given that other considerations were the reason it was classified as such. It is based on these observations that other commentators and organs have come to the conclusion that the 2006 conflict in Lebanon was either an IAC³³⁴ or a mixed conflict with an IAC between Israel and Lebanon and a NIAC between Israel and Hezbollah³³⁵—and not based on the ICRC view that unconsented-to uses of force against non-State groups on foreign territory create an IAC. Notably, however, not all UN organs came to the conclusion that the conflict was international.³³⁶ Security Council resolutions 1697 and 1701 did not attempt to qualify the conflict either, perhaps suggesting that the Council were divided on the issue.³³⁷ A week into the conflict, it was likewise claimed by Israel that it “ha[d] no conflict with Lebanon”.³³⁸ Upon closer scrutiny, then, the belief that the 2006 Lebanon conflict validates the ICRC view can be rejected.

that “[r]esponsibility for this belligerent act of war lies with the Government of Lebanon, from whose territory these acts have been launched into Israel.”. See UN General Assembly and UN Security Council, *Identical letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council*, A/60/937–S/2006/515 (12 July 2006), available at:

http://www.un.org/en/ga/search/view_doc.asp?symbol=A/60/937. Furthermore, at a press conference on the same day, the Israeli Prime Minister Ehud Olmert reiterated that responsibility lay with Lebanon, a claim which he based on the fact that Hezbollah was part of the Lebanese Cabinet. See Scobbie, *supra* note 329, p. 392.

³³⁴ *Ibid.*, paras. 55-60; Bloom, *supra* note 332, p. 79 (“Hezbollah has achieved such significant status in Lebanese politics and culture that they are no longer a “subordinate” group under Lebanon’s control. In fact, Hezbollah has cemented their position in Lebanon to such a degree (with the government’s consent and encouragement), that Lebanon and Hezbollah have indeed become one.”); Dinstein, *War, Aggression and Self-Defence*, *supra* note 70, p. 273 (arguing that the widespread targeting of Lebanese soldiers and civilians, as well as the position of Hezbollah in the Lebanese Government, made the conflict an IAC).

³³⁵ Milanovic and Hadzi-Vidanovic, *supra* note 6, p. 297 (arguing that the killing of Lebanese civilians and the destruction of Lebanese infrastructure at the very least would create a mixed IAC/NIAC); Scobbie, *supra* note 329, pp. 402-410 (finding that due to the occupation and blockade by Israel, an IAC existed, but concluding, in contrast to the Commission of Inquiry, that the acts of Hezbollah could not be attributed to Lebanon, thereby additionally creating a NIAC between Hezbollah and Israel); Vité, *supra* note 65, pp. 91-92; Paulus and Vashakmadze, *supra* note 70, p. 115.

³³⁶ The UN report from the mission to Lebanon and Israel by the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on the right to health, the Representative of the Secretary-General on human rights of internally displaced persons, and the Special Rapporteur on adequate housing did not qualify the conflict further, see Human Rights Council, *Mission to Lebanon and Israel* (7-14 September 2006)*, A/HRC/2/7 (2 October 2006), para. 23, available at:

<http://www.mineaction.org/sites/default/files/documents/Israel%20Lebanon%20Special%20Rapporteurs%20Report%20on%20Res.%2060%20251.pdf> (noting only that the qualification of the conflict is “complex”).

³³⁷ UN Security Council Resolution 1697, S/RES/1697 (31 July 2006), available at:

[http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1697\(2006\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1697(2006)); UN Security Council Resolution 1701, S/RES/1701 (11 August 2006), available at:

[http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1701\(2006\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1701(2006)).

³³⁸ Scobbie, *supra* note 329, p. 393.

Another purported instantiation of the ICRC position is the *Democratic Republic of the Congo v. Uganda* case (hereinafter *Armed Activities*), which both the ICRC and other scholars in favor of the ICRC position refer to as support for their argument. In the Judgment, the ICJ found that Uganda had violated IHL applicable to IACs even though Ugandan troops were in the DRC to fight various non-State groups. This is taken to implicitly support the position that such use of force, when carried out without consent from the territorial state, constitutes an IAC.³³⁹

However, upon closer investigation, the reasoning of the Court does not support such a view. Several issues were before the Court. First, the Court found that between August 1998 and July 1999, the Ugandan Armed Forces “engaged in military operations in a multitude of locations, including Bunia, Kisangani, Gbadolite and Ituri, and many others”, and that evidence showed that Uganda “decided in early August 1998 to launch an offensive together with various factions which sought to overthrow the Government of the DRC”.³⁴⁰ The Court further concluded that Uganda had illegally occupied the Ituri province in eastern DRC, and as a result, Uganda was held responsible for violations of IHL and IHRL perpetrated in the province.³⁴¹ Based on this finding, the Court found, *inter alia*, that the Hague Regulations of 1907 and the Fourth Geneva Convention (GC IV) were applicable to the case—the two instruments that contain the majority of IHL occupation law.³⁴² In particular, the Court held that Uganda had violated articles 27, 32, and 53 of the GC IV as well as articles 25, 27, 28, 43, 46, and 47 of the Hague Regulations of 1907, all of which concern obligations as an occupying power.³⁴³

Furthermore, ICRC claims that the Court also applied IHL outside the occupied province of Ituri, which further supports its position.³⁴⁴ The Court does seem to have done so³⁴⁵, but this is unsurprising since the Court found that Uganda had “committed acts of killing, torture and other forms of inhumane treatment of the civilian population, destroyed villages and civilian buildings,

³³⁹ ICRC, *Commentary on the First Geneva Convention*, 2nd edition, 2016, para. 261; Akande, *Classification of Armed Conflicts*, *supra* note 15, p. 74; Zamir, “The Armed Conflict(s) Against the Islamic State”, *supra* note 19, p. 111.

³⁴⁰ *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, International Court of Justice, 19 December 2005, paras. 153-55 (hereinafter *Armed Activities*).

³⁴¹ *Ibid.*, paras. 178-79.

³⁴² *Ibid.*, para. 217.

³⁴³ *Ibid.*, para. 219.

³⁴⁴ ICRC, *Commentary on the First Geneva Convention*, 2nd edition, 2016, para. 261; Akande, *Classification of Armed Conflicts*, *supra* note 15, p. 74; Zamir, “The Armed Conflict(s) Against the Islamic State”, *supra* note 19, p. 111.

³⁴⁵ *Ibid.*, para. 220 (“The Court thus concludes that Uganda is internationally responsible for violations of international human rights law and international humanitarian law committed by the UPDF and by its members *in the territory of the DRC* and for failing to comply with its obligations as an occupying Power in Ituri in respect of violations of international human rights law and international humanitarian law in the occupied territory [emphasis added].”).

failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, incited ethnic conflict and took no steps to put an end to such conflicts, [and] was involved in the training of child soldiers”.³⁴⁶

Ultimately, it is clear that the Court applied IHL applicable to IACs due to the fact that it found that Uganda had failed “to comply with its obligations as an occupying Power in Ituri in respect of violations of [...] international humanitarian law in the occupied territory”,³⁴⁷ and because Uganda’s operations led to mass devastation for the civilian population of the DRC—not due to the fact that Uganda was fighting armed groups in the DRC without consent. On the contrary, the Court seemed to deliberately avoid qualifying the cross-border military operations by Uganda against non-State actors in the DRC.³⁴⁸ In the end, the *Armed Activities* case cannot be taken to support the ICRC position.

Lastly, Akande’s reliance on the *Targeted Killings* case of the Israeli Supreme Court is likewise misguided. While the Court in that case does delineate an IAC as “one that crosses the borders of the state”,³⁴⁹ the Court’s finding is erroneous. The Court is mistaken in its view that IACs are defined by a cross-border element. As discussed above, not all conflicts that cross State borders are IACs, as the cases of spillover and extraterritorial NIACs demonstrate.³⁵⁰ Rather, as stated above, what primarily defines an IAC is that the parties to it are States.³⁵¹

4.5. Summary

In sum, transnational NIACs that cross over into the territory of another State that does not consent to the use of force on its territory, or NIACs that are fought entirely within boundaries of that State

³⁴⁶ *Ibid.*, paras. 206-10, 211.

³⁴⁷ *Ibid.*, para. 220.

³⁴⁸ *Ibid.*, para. 147; *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, Separate Opinion of Judge Simma, International Court of Justice, 19 December 2005, para. 6.

³⁴⁹ *Targeted Killings*, *supra* note 224, para. 18.

³⁵⁰ Pejic, “Terrorist Acts and Groups: A Role for International Law?”, *supra* note 265, p. 81; Arimatsu, “Territory, Boundaries and the Law of Armed Conflict”, *supra* note 102, p. 175 (“The crossing of a border may be suggestive of an international armed conflict but it is not determinative; likewise, the crossing of a border does not necessarily transform an internal conflict into an international one”).

³⁵¹ *Lubanga Decision*, *supra* note 161, para. 209 (“The Chamber considers an armed conflict to be international in character if it takes place between two or more States”); Green, *supra* note 79, pp.54-55. For a more detailed analysis of the Court’s ruling in *Targeted Killings*, see Milanovic, “Lessons for Human Rights and Humanitarian Law in the War on Terror”, *supra* note 102, pp. 373-93; See also Kristen E. Eichensehr, “On Target? The Israeli Supreme Court and the Expansion of Targeted Killings”, *The Yale Law Journal*, vol. 116, no. 8 (2007), pp. 1874-80.

(like the Israel-Hezbollah conflict), do not become internationalized as a result of the lack of consent. The position of the ICRC does not conform with either judicial precedent or State practice, nor is it predicated on a plausible interpretation of the relevant treaty law, and as has been shown, the authority cited in favor does not actually support the position. Furthermore, the reliance on the *jus ad bellum* to define *jus in bello* obligations should be rejected. The classification of the conflict remains independent of the lawfulness of the military operation under the *jus ad bellum*.

It is possible, of course, to argue from a normative perspective that transnational NIACs should nonetheless be subject to internationalization upon the crossing of a border, irrespective of the prevalence of State practice to the contrary. However, to the extent that the legal position of the ICRC ought to reflect the current state of the law—which this author thinks it should—it must be concluded that the position of the ICRC represents *lex ferenda* at best.

Rather, as IACs require the actual use of armed force by one State against another, it better corresponds with the law, as well as with the reality of twenty-first century warfare, to qualify NIACs that are “exported” or “extended” over into the territory of another State that does not consent to the use of force on its territory as “spillover” NIACs (*see* Part 2 above). If no fighting between the foreign and territorial State occurs, and if the foreign State essentially limits itself to targeting the non-State group, without significantly harming the civilians or infrastructure of the territorial State, then no IAC arises.

If, on the other hand, the foreign State occupies part of the territory of the territorial State, or if the territorial State responds militarily and engages the foreign State with military force, an IAC between the foreign and territorial State will break out.³⁵² But these hostilities will not internationalize the NIAC; instead, parallel conflicts, a NIAC and an IAC, will be in existence.

³⁵² Kreß, *supra* note 218, p. 256.

Internationalization Through Indirect Intervention

The perhaps most controversial issue when it comes to the topic of internationalization is the issue of indirect intervention. States often choose not to intervene directly in a conflict with their own armed forces, intervening “indirectly” instead by supporting one or more non-State armed groups fighting in a NIAC against another State. That support by a foreign State to a non-State group can transform a NIAC into an IAC is generally not in dispute. The ICTY has held that a NIAC can “become internationalized because of external support”.³⁵³ Similarly, in 1998, a report by the UN Secretary-General’s Investigative team in the DRC tried to determine whether the involvement “of the foreign armed forces” in the civil war in the DRC “was so predominant as to consider the conflict an international one”.³⁵⁴ Thus, whether a NIAC is internationalized due to indirect intervention will turn on the level of involvement of an outside State in the hostilities waged against the territorial State.³⁵⁵ However, the exact level of support, and the precise legal standard used to determine when such support will internationalize the conflict, has long been a highly debated topic.³⁵⁶ The general consensus has been that it is the rules of attribution as articulated under the law of State responsibility that should determine the question of internationalization of armed conflicts where outside States indirectly intervene in the conflict.³⁵⁷ In general, judicial practice and

³⁵³ *Tadić* Jurisdiction Decision, *supra* note 30, para. 72. See also *Tadić* Appeals Judgment, *supra* note 147, para. 84 (finding that NIAC can become international in nature if “some of the participants in the internal armed conflict act on behalf of [a] State.”); *Lubanga* Decision, *supra* note 161, para. 209; *Lubanga* Judgment, *supra* note 147, para. 541.

³⁵⁴ UN Security Council, *Report of the Secretary-General's Investigative Team charged with investigating serious violations of human rights and international humanitarian law in the Democratic Republic of the Congo, S/1998/581* (29 June 1998), p. 12, para. 16, available at: <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Civilians%20S1998581.pdf>.

³⁵⁵ Dinstein, *War, Aggression and Self-Defence*, *supra* note 70, p. 8 (“Whether at any given temporal framework the war is inter-State in character [...] depends on the level of involvement of a foreign State in hostilities waged against the central Government of the local State.”).

³⁵⁶ For an overview of the debate, See generally Antonio Cassese, “The Nicaragua and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia”, *European Journal of International Law*, vol. 18, no. 4 (2007), pp. 649-668

³⁵⁷ See *Ibid.*, pp. 651-655, 663; Sivakumaran, *The Law of Non-International Armed Conflict*, *supra* note 12, p. 226; Scobbie, *supra* note 329, pp. 402-408 (using the test set forth in *Nicaragua* and ILC’s Draft Articles on State Responsibility in order to classify the conflict between Israel and Hezbollah on the basis of attributing the acts of Hezbollah to Lebanon); Hampson, *supra* note 172, p. 246 (“If Al Qaeda were acting under the *effective or overall*

academic doctrine have proposed and relied upon two competing standards of attribution: 1) the “effective control” standard, employed by the ICJ, and 2) the broader “overall control” standard, articulated by the ICTY. Each will be examined in turn.

5.1. *Effective or Overall Control? A Review of the Relevant Case Law and Literature*

In the 1986 *Nicaragua* case, the ICJ had to determine, *inter alia*, whether violations of IHL and IHRL by the Contras—an umbrella term for U.S.-supported and funded paramilitary groups fighting against the Government of Nicaragua—were imputable to the United States. While the ICJ was concerned with determining State responsibility, due to the general consensus mentioned above, the *Nicaragua* ruling has been seen as relevant for the issue of internationalization as well. In fact, ICTY decisions prior to the *Tadić* Appeals Judgment which dealt with the potential internationalization of conflicts relied on the precedent set by *Nicaragua*, including the *Tadić* Trial Chamber.³⁵⁸

In *Nicaragua*, the Court considered that the level of support required for the attribution of acts by the Contras to the United States would have to amount to some sort of control. The Court laid out two tests. For the first test, the Court had to “determine [...] whether or not the relationship of the *contras* to the United States Government was so much one of *dependence on the one side and control on the other* that it would be right to equate the *contras*, for legal purposes, with an organ of

control of the Taliban, then, even if fighting as separate units, the totality of fighters might constitute one force [emphasis added]”); Gill, *supra* note 19, pp. 364-65, 375 (arguing that either the effective control or overall control over an armed group in Syria by a State in the foreign Coalition would internationalize the Syrian Conflict); Szesnat and Bird, *supra* note 309, p. 221 (“None of these allegations, even if proven true, are sufficient to indicate that either Ecuador or Venezuela exercise either *effective or overall control* over any of the non-state armed groups active in Colombia. Therefore, it cannot be said that the armed conflict has been internationalized owing to the involvement of any third States [emphasis added, reference omitted]”); Philip Leach, *South Ossetia (2008)*, in: Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, 2012, pp. 334-339 (relying on the effective control test and the law of State responsibility to classify the armed conflict between Georgia and South Ossetian forces); Schmitt, *Classification in Future Conflict*, *supra* note 63, p. 465 (“Should they [non-State groups] operate against a State, but under the control of another State, the conflict will likewise be classified as international. The determining factor will be the degree of control the latter State exercises and whether the *Nicaragua* effective control or the *Tadić* overall control standard applies”); Zamir, *Classification of Conflicts in International Humanitarian Law*, *supra* note 157, p. 119 (“until IHL develops [...] different rules of attribution, the rules of attribution of the law of state responsibility should be used at least as a benchmark for conflict classification in IHL”).

³⁵⁸ The Trial Chamber considered ICJ’s concept of “effective control” as implying “command and control”, and found that no such control existed by Yugoslavia over the *Republika Srpska*, See *Prosecutor v. Tadić*, Trial Judgment, ICTY, 7 May 1997, paras. 585-606. See also *Prosecutor v. Ivica Rajić*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Trial Chamber, ICTY, 13 September 1996, paras. 22-32; *The Prosecutor v. Zlatko Aleksovski*, Trial Judgment, Joint Opinion of the Majority, Judge Vohrah and Judge Nieto-Navia, On the Applicability of Article 2 of the Statute Pursuant to Paragraph 46 of the Judgment, ICTY, 25 June 1999, paras. 9-14.

the United States Government, or as acting on behalf of that Government”.³⁵⁹ This rule of attribution of acts by *de jure* or *de facto* organs of a State (organs not designated as such by internal law) is also contained in Art. 4 of the International Law Commission’s (ILC) Draft Articles on State Responsibility.³⁶⁰ The ILC did not provide any test in the commentary to that Article that could be used to decide when a non-State group can be regarded as a *de facto* organ of a State, but according to the Court, the test to decide this question was the “complete dependence” test.³⁶¹ Secondly, since the Court found that the Contras were not so dependent on the United States so as to constitute a *de facto* State organ,³⁶² the Court then moved on to a second test under which the acts by the Contras could nonetheless still be attributable to the U.S., but for this it would “have to be proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed”.³⁶³ For the United States to have “effective control” over the Contras, it would require that the U.S. had “directed or enforced the perpetration of the acts” of the Contras.³⁶⁴ It therefore seems that the Court required the issuance of direct orders by the U.S. to the Contras for there to be “effective control” by the U.S. and, consequently, to find the specific operations to be imputable to the U.S. While the Court found that the U.S. had had a decisive role in the “financing, organizing, and, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation[s]”, it found this insufficient to attribute the acts of the Contras to the U.S. since the U.S. had not given direct and specific instructions to the Contras to commit the acts.³⁶⁵

As noted above, the “effective control” test remained the applicable legal test for the potential internationalization of NIACs due to indirect involvement of outside States until 1999 and the *Tadić* Appeals Judgment. In this case, the ICTY Appeals Chamber had to decide whether the conflict in Bosnia-Herzegovina had been transformed into an IAC by the indirect, outside involvement in the conflict by the Federal Republic of Yugoslavia (FRY). For the Appeals Chamber, this question turned on whether the Bosnian Serb forces, primarily the Bosnian Serbian Army of the Republika Srpska (VRS), could be “considered as *de iure* or *de facto* organs of a foreign Power, namely the

³⁵⁹ *Nicaragua*, *supra* note 14, para. 109 [emphasis added].

³⁶⁰ International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts*, *supra* note 31, pp. 40-42, para. 11; Akande, *Classification of Armed Conflicts*, *supra* note 15, p. 59.

³⁶¹ At times also referred to as the “complete dependence and control” test, “strict control” test, “complete control” test, or the “agency” test in the literature.

³⁶² *Nicaragua*, *supra* note 14, paras. 110-111.

³⁶³ *Ibid.*, para. 115 [emphasis added].

³⁶⁴ *Ibid.*

³⁶⁵ *Ibid.*, paras. 115-16.

FRY.”³⁶⁶ Like the ICJ, the Appeals Chamber found that the test to determine this should be one of control by the State over the non-State group,³⁶⁷ and it set out to specify “what degree of authority or control must be wielded by a foreign State over armed forces fighting on its behalf in order to render international an armed conflict which is *prima facie* internal.”³⁶⁸ The Appeals Chamber looked to IHL to infer a test, but found that IHL did not contain any unique criteria to help determine when armed groups are under the control of a State, and it therefore turned to the general law of State responsibility to provide an answer.³⁶⁹ Since the ICJ in *Nicaragua* dealt with State responsibility, the Appeals Chamber found the tests set out in that decision pertinent to the question of internationalization as well, since it considered that the test to determine whether acts by armed groups are attributable to a State for the purpose of State responsibility, and the test to determine whether a non-State group are acting on behalf of a State for the purpose of rendering the conflict international had to be one and the same.³⁷⁰

The Appeals Chamber distinguished between two situations that required two different tests: 1) cases of private individuals and unorganized groups, and 2) cases of organized groups. The Chamber seemed to accept the ICJ’s “effective control” test for cases of the first category, with such cases requiring specific instructions by the State.³⁷¹ However, in cases of organized groups, the Appeals Chamber rejected the ICJ’s test of effective control, instead finding that “for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the *overall control* of the State”.³⁷² According to the Appeals Chamber, for a State to possess “overall control” over an organized group, it is *not* necessary to show the “issuing of specific orders by the State, or its direction of each individual operation”, nor is it necessary that the State should “plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international

³⁶⁶ *Tadić* Appeals Judgment, *supra* note 147, para. 87.

³⁶⁷ *Ibid.*, para. 95

³⁶⁸ *Ibid.*, para. 97.

³⁶⁹ *Ibid.*, paras. 98, 105.

³⁷⁰ *Ibid.*, paras. 101, 104 (“What is at issue is a *preliminary question*: that of *the conditions on which under international law an individual may be held to act as a de facto organ of a State*. Logically these conditions must be the same both in the case: (i) where the court’s task is to ascertain whether an act performed by an individual may be attributed to a State, thereby generating the international responsibility of that State; and (ii) where the court must instead determine whether individuals are acting as *de facto* State officials, thereby rendering the conflict international and thus setting the necessary precondition for the “grave breaches” regime to apply [...] In the one case these acts, if they prove to be attributable to a State, will give rise to the international responsibility of that State; in the other case, they will ensure that the armed conflict must be classified as international”).

³⁷¹ *Ibid.*, paras. 118, 122.

³⁷² *Ibid.*, para. 120 [emphasis added].

humanitarian law”.³⁷³ Instead, a State has overall control when it has “a role in *organising, coordinating or planning* the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group”.³⁷⁴ According to the Tribunal, when these conditions are met, the group is then to be considered a *de facto* State organ of the State, and acts by the group will be attributable to the State despite the lack of specific instructions.³⁷⁵

Tadić lowered significantly the level of control required in order to establish that an outside State has responsibility for the acts of the armed group (which would, in the view of the ICTY, thereby internationalize the conflict), requiring some level of authority over the group but limiting this authority to a more general role in the coordination and planning of the actions of the group.

The judgments in both *Nicaragua* and *Tadić* are not limpid or easy reading, and they have effected many different interpretations and opinions over the years. As a preliminary issue, and without regard to the merits of its final argument, it should be noted that the Appeals Chamber was wrong on at least two counts. First, the Appeals Chamber understood *Nicaragua* as laying out only one test of attribution rather than two.³⁷⁶ Contrary to that understanding, however, *Nicaragua* actually contained two distinct tests, as outlined above.³⁷⁷ Second, as a result of this misconception, the Appeals Chamber erred in its treatment of *Nicaragua*’s effective control test. The Appeals Chamber sought to equate the VRS with *de facto* organs of Yugoslavia, thereby attributing all of VRS’s actions to Yugoslavia, and took in that context issue with the effective control test. But as is obvious from the overview above, the ICJ did *not* utilize the effective control test in order to determine whether the Contras were *de facto* organs of the United States—that test was rather the “complete dependence” test. After the Court found that the Contras were not *de facto* organs—which would mean that *all conduct* of the Contras was attributable to the U.S.—it went on to the test of effective control, which, if found to have existed, would only attribute the *specific acts* of the

³⁷³ *Ibid.*, para. 137.

³⁷⁴ *Ibid.* [emphasis added].

³⁷⁵ *Ibid.*, paras. 122-23, 131, 137.

³⁷⁶ *Ibid.*, paras. 111-12 (“[I]n paragraph 115 of the *Nicaragua* judgement, where ‘effective control’ is mentioned, it is unclear whether the Court is propounding ‘effective control’ as an alternative test to that of ‘dependence and control’ set out earlier in paragraph 109, or is instead spelling out the requirements of the same test. The Appeals Chamber believes that the latter is the correct interpretation. [...] the Court propounded only the ‘effective control’ test”).

³⁷⁷ The ICJ itself confirmed in 2007 that it did indeed lay out two distinct tests in *Nicaragua*, see *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, International Court of Justice, 26 February 2007, para. 399 (hereinafter *Genocide Convention* case). See also Akande, *Classification of Armed Conflicts*, *supra* note 15, p. 59 (criticizing the Appeals Chamber for misrepresenting the number of tests the ICJ laid out in *Nicaragua*); Milanovic and Hadzi-Vidanovic, *supra* note 6, p. 294 (arguing that *Tadić* misunderstood the number of tests the ICJ presented).

Contras to the U.S. that were committed under the effective control of the U.S. For these reasons, and while acknowledging that the conflation of the two *Nicaragua* tests is common in the literature,³⁷⁸ it is hard to escape the impression that the Appeals Chamber profoundly “misread *Nicaragua*.”³⁷⁹

Notwithstanding these issues, while the *Tadić* Decision was considered “controversial” when it was first delivered,³⁸⁰ a majority of scholars now seem to have endorsed the overall control test.³⁸¹

The ICRC is likewise of the opinion that since IHL contains no specific test or criteria for attribution of acts by armed groups to States, the solutions laid down by the law of State responsibility should be transposed to IHL. This is appropriate, according to the ICRC, because the test for determining a link between an armed group and a State for the purpose of conflict classification involves the attribution of conduct to a State, just as is the case under the international law on responsibility.³⁸² In the view of the ICRC, the recourse to the international law on responsibility is also important in order to “avoid a situation where some acts are governed by the law of international armed conflict but cannot be attributed to a State.”³⁸³ Specifically, the ICRC has adopted the overall control test to determine the legal classification of conflicts with indirect intervention by an outside State, arguing that applying the test of effective control to every single act or operation by an armed group would be virtually impossible since proof of direct orders for

³⁷⁸ See e.g. Sheng Li, “When Does Internet Denial Trigger the Right of Armed Self-Defense?”, *The Yale Journal of International Law*, vol. 38, no. 1 (2013), p. 203 (“The ‘effective control’ standard was initially articulated in the *Nicaragua* case and requires that nonstate actors act in total dependence before their actions can be attributable to the state.”); Heinsch, *supra* note 48, p. 341. ICRC also seems to conflate the two tests of “complete dependence” and “effective control”, see ICRC, *Commentary on the First Geneva Convention*, 2nd edition, 2016, para. 269 (“[I]t is necessary to emphasize that international jurisprudence – and doctrine – has long hesitated between the more restrictive options of complete dependence and control or ‘effective control’ adopted by the International Court of Justice for the purposes of State responsibility [...] and the broader notion of ‘overall control’ suggested by the ICTY”).

³⁷⁹ Marko Milanovic, “State Responsibility for Genocide”, *European Journal of International Law*, vol. 17, no. 3 (2006), p. 581 (arguing that the ICTY “dramatically misread *Nicaragua*”).

³⁸⁰ See Danesh Sarooshi & Malcolm D. Evans, “Command Responsibility and the *Blaskic* Case”, *The International and Comparative Law Quarterly*, vol. 5, no. 2 (2001), p. 455.

³⁸¹ See e.g. Jann Kleffner, *Human Rights and International Humanitarian Law: General Issues*, in: Terry Gill and Dieter Fleck (eds.), *The Handbook of the International Law of Military Operations*, 2nd edition, 2015, pp. 41–42; Sivakumaran, *The Law of Non-International Armed Conflict*, *supra* note 12, pp. 226–27; Cassese, “The *Nicaragua* and *Tadić* Tests Revisited”, *supra* note 356, pp. 655–663; Meron, “Classification of Armed Conflict in the Former Yugoslavia”, *supra* note 150, pp. 237, 241–42; Jörn Griebel and Milan Plücker, “New Developments Regarding the Rules of Attribution? The International Court of Justice’s Decision in *Bosnia v. Serbia*”, *Leiden Journal of International Law*, vol. 21, no. 3 (2008), pp. 602–20.

³⁸² Ferraro, “The ICRC’s legal position on the notion of armed conflict involving foreign intervention”, *supra* note 4, p. 1235–36.

³⁸³ ICRC, *Commentary on the First Geneva Convention*, 2nd edition, 2016, para. 271.

every act would be hard to come by, and in any case, with the use of that test one might have to reclassify the conflict with every operation depending on whether a specific instruction by a State was given for that operation.³⁸⁴

This critique has been echoed by some scholars who have criticized the high evidentiary burden required to prove effective control, and who have therefore regarded the overall control standard as the better option.³⁸⁵ The subsequent case law of the ICTY,³⁸⁶ the ICC,³⁸⁷ and the Special Court for Sierra Leone³⁸⁸ has also rebuked the ICJ standard and opted for the overall control test, as have

³⁸⁴ Ferraro, “The ICRC’s legal position on the notion of armed conflict involving foreign intervention”, *supra* note 4, p. 1238; ICRC, *Commentary on the First Geneva Convention*, 2nd edition, 2016, para. 271.

³⁸⁵ See e.g. Griebel and Plücker, *supra* note 381, pp. 618, 620 (“Here lies another major weakness of the Court’s overall conception. Is it not true that regarding attribution states can presently easily escape international responsibility? The *Nicaragua* case is an extreme example, where even massive forms of support, without which many of the atrocities committed by the contras would never have occurred, were regarded as insufficient for an attribution. This is remarkable, considering that the support was sufficient for the contras to increase in number from 500 to more than 12,000”); Meron, “Classification of Armed Conflict in the Former Yugoslavia”, *supra* note 150, pp. 237, 241-42.

³⁸⁶ See *Prosecutor v. Zlatko Aleksovski*, Appeals Judgment, ICTY, 24 March 2000, paras. 134 (“the Appeals Chamber will follow its decision in the *Tadić* Judgment, since, after careful analysis, it is unable to find any cogent reason to depart from it. [...] The ‘overall control’ test, set out in the *Tadić* Judgment is the applicable law”); *Prosecutor v. Delalić et al.*, Appeals Judgment, ICTY, 20 February 2001, para. 26 (“[T]he ‘overall control’ test set forth in the *Tadić* Appeal Judgment is thus the applicable criteria for determining the existence of an international armed conflict”); *Prosecutor v. Blaškić*, Trial Judgment, ICTY, 3 March 2000, paras. 96-123; *Prosecutor v. Naletilić and Martinović*, Trial Judgment, ICTY, 31 March 2003, para. 197; *Prosecutor v. Kordić and Čerkez*, Trial Judgment, ICTY, 26 February 2001, paras. 111-15.

³⁸⁷ See *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Judgment, International Criminal Court, 21 March 2016, para. 130 (endorsing the overall control test); *Lubanga* Decision, *supra* note 161, para. 211 (“where a State does *not* intervene directly on the territory of another State through its own troops, the overall control test will be used to determine whether armed forces are acting on behalf of the first State”); *Lubanga* Judgment, *supra* note 147, para. 541 (“As regards the necessary degree of control of another State over an armed group acting on its behalf, the Trial Chamber has concluded that the ‘overall control’ test is the correct approach”); *The Prosecutor v. Germain Katanga*, Trial Judgment, International Criminal Court, 7 March 2014, para. 1178 (“[T]he Chamber must analyse and appraise the degree of control exerted by that State over one of the armed groups participating in the hostilities. In appraising the degree of such control, Trial Chamber I held the ‘overall control’ test to be the correct approach, allowing a determination as to whether an armed conflict not of an international character has become internationalised due to the involvement of armed forces acting on behalf of another State [reference omitted].”).

³⁸⁸ *Prosecutor v. Brima, Kamara, and Kanu*, Trial Judgment, Special Court for Sierra Leone, 20 June 2007, para. 251 (“There is no evidence before the Trial Chamber that proves beyond reasonable doubt that a third State intervened in the conflict, either through its own troops or alternatively by exercising the requisite degree of overall control over some of the conflict’s participants”).

some international bodies such as the UN Commission of Inquiry on Darfur³⁸⁹ and the Independent International Fact-Finding Mission on the Conflict in Georgia.³⁹⁰

Nevertheless, a minority of the literature has been critical of the *Tadić* judgment and the overall control test.³⁹¹ Some scholars have found it “conceptually inappropriate” for the secondary rules of State responsibility to determine the application of the primary rules of IHL, arguing that the test for the internationalization of NIACs and the test for attribution of acts to a State for the purposes of State responsibility would not need to be one and the same. On this view, a test concerning the internationalization of NIACs should be based on IHL instead, but the authors do not provide any proposal as to what such a test might look like.³⁹² Yet others have not questioned the reliance on State responsibility but simply seen the effective control test as the superior standard for classification of conflicts,³⁹³ while others yet have expressed support for the ICJ’s standard only in regard to the issue of State responsibility.³⁹⁴

³⁸⁹ International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the Secretary-General*, S/2005/60 (1 February 2005), p. 39, para. 123, available at: <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/WPS%20S%202005%2060.pdf>.

³⁹⁰ Independent International Fact-Finding Mission on the Conflict in Georgia, *Report: Volume II* (September 2009), p. 303, available at: http://www.mpil.de/files/pdf4/IIFFMCG_Volume_II1.pdf.

³⁹¹ Stefan Talmon, “The Responsibility of Outside Powers for Acts of Secessionist Entities”, *International and Comparative Law Quarterly*, vol. 58, no. 3 (2009), p. 507 (“The Appeals Chamber’s approach was based on a misreading of the ICJ’s *Nicaragua* judgment and a misinterpretation of the rules of customary international law governing State responsibility on which that judgment is grounded.”); Milanovic, “State Responsibility for Genocide”, *supra* note 379, p. 581 (arguing that the ICTY “dramatically misread *Nicaragua*”); Akande, *Classification of Armed Conflicts*, *supra* note 15, p. 59 (“[T]he ICTY misinterpreted the decision in the *Nicaragua* case regarding the test of attribution of acts of non-state groups to a State”).

³⁹² Milanovic and Hadzi-Vidanovic, *supra* note 6, p. 294. *See also* Milanovic, “State Responsibility for Genocide”, *supra* note 379, pp. 584-85 (“The answer to whether an internal armed conflict has become international is not to be found in the law of state responsibility”); Meron, “Classification of Armed Conflict in the Former Yugoslavia”, *supra* note 150, p. 237 (“[t]he problem in the trial chamber’s approach lay [...] in applying *Nicaragua* to *Tadić* at all. Obviously, the *Nicaragua* test addresses only the question of state responsibility. Conceptually, it cannot determine whether a conflict is international or internal.”).

³⁹³ Scobbie, *supra* note 329, pp. 406 (using the effective control test in order to classify the conflict between Israel and Hezbollah on the basis of attributing the acts of Hezbollah to Lebanon); Leach, *supra* note 357, pp. 334-339 (relying on the effective control test to classify the armed conflict between Georgia and South Ossetian forces); Zamir, *Classification of Conflicts in International Humanitarian Law*, *supra* note 157, p. 121 (arguing that ICJ’s effective control is more convincing from the perspective of conflict classification); Dinstein, *War, Aggression and Self-Defence*, *supra* note 70, p. 224.

³⁹⁴ Milanovic and Hadzi-Vidanovic, *supra* note 6, pp. 294-95 (“We submit that the ICJ has the better of this argument”); Akande, *Classification of Armed Conflicts*, *supra* note 15, p. 60 (“A State should only be held to be legally responsible for acts which are really its own”); Talmon, *supra* note 391, p. 517 (arguing that the overall control test is “unsuitable”, for the purpose of attribution, which should “be decided on the basis of the two control tests enunciated by the ICJ”); Milanovic, “State Responsibility for Genocide”, *supra* note 379, pp. 585 (arguing that the ICTY “is simply wrong in its interpretation of the law of state responsibility”).

Another view has been for some scholars to argue that the two tests of effective and overall control are to be regarded as being for different purposes: the effective control test to determine State responsibility and the overall control test to determine the classification of conflicts for the purpose of individual criminal responsibility.³⁹⁵ This stands in contrast, however, to the ICTY Appeals Chamber itself, which stated that the “issue is not the distinction between the two classes of responsibility”, and which found that in both cases—“[l]ogically these conditions must be the same”.³⁹⁶ Moreover, the Chamber specifically portrayed its test of overall control as deriving from the law of State responsibility and hence presented it as applicable in both types of situations. Some scholars have concurred with the Appeals Chamber by questioning the idea that there should be different tests for the required control held by a State over a group in the different areas of law of State responsibility and classification of armed conflicts when determining individual criminal responsibility. According to these authors, since the underlying issue is the same—the attribution of acts by groups to States—the same standard should be used for the two purposes.³⁹⁷ For example, Sassòli has

³⁹⁵ See e.g. William J. Fenrick, “The Development of the Law of Armed Conflict through the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia”, *International Legal Studies*, vol. 71 (1998), pp. 86-88; Del Mar, *supra* note 171, pp. 105, 123-24 (“[T]here should be no underlying assumption that the same test applies for different purposes. Rather, it is to be expected that different tests developed for different purposes are different”); Akande, *Classification of Armed Conflicts*, *supra* note 15, pp. 60-61; Milanovic and Hadzi-Vidanovic, *supra* note 6, p. 295.

³⁹⁶ *Tadić* Appeals Judgment, *supra* note 147, para. 104.

³⁹⁷ See Heinsch, *supra* note 48, p. 344 (“[I]t is difficult to understand why in different areas of law (State responsibility and classification of armed conflicts when determining individual criminal responsibility) there should be different requirements for the control exercised by the third State”). See also *ibid.*, p. 352 (“although the Court and international criminal courts and tribunals were concerned with different legal regimes [...] the legal standards for attributing the behavior of private individuals or groups should be decided through the application of the same standards.”); Marina Spinedi, “On the Non-Attribution of the Bosnian Serbs’ Conduct to Serbia”, *Journal of International Criminal Justice*, vol. 5, no 4 (2007), p. 831 (“[T]he rules (or criteria) applicable to determine whether a certain conflict is of an international or an internal character are the same whether the tribunal is called upon to decide on the criminal responsibility of an individual or the international responsibility of a state”); *ibid.*, p. 837 (arguing that the issue of whether a conflict can “be characterized as an international armed conflict is not totally separate from and independent of the question whether the FRY could be held responsible for the acts of the VRS. [...] *The issue is the same*”); Cassese, “The Nicaragua and *Tadić* Tests Revisited”, *supra* note 356, pp. 651, 663 (rejecting the “flimsy argument” that the test for determining the nature of an armed conflict should differ from the test for establishing State responsibility, arguing instead that the ICTY was right to consider the test for the determination of the two different questions was to be the same); Paulus and Vashakmadze, *supra* note 70, pp. 111-12 (arguing that when military operations by armed groups are attributable to States, the law of IAC applies); Marco Sassòli and Laura M. Olson, “Prosecutor v. *Tadić* (Judgement). Case No. IT-94-1-A. 38 ILM 1518 (1999). International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, July 15, 1999.”, *American Journal of International Law*, vol. 94, no. 3 (2000), p. 575 (“In our view the appeals chamber was correct in rejecting the argument made by eminent authors, an ICTY Trial Chamber, and the prosecution that the test used for establishing state responsibility does not determine whether the “grave breaches” provisions apply. Indeed, before state responsibility or individual responsibility can be

dismissed the notion that the issues of internationalization of conflicts and State responsibility should require different solutions, noting that the acts of the defendant Mr. Tadić could have served to internationalize the conflict in Bosnia-Herzegovina “only if those acts could be legally considered as acts of another State, namely the Federal Republic of Yugoslavia.”³⁹⁸

For its part, the ICJ has continued to use the effective control test, employing it again in the *Armed Activities* case in 2006 to assess whether Uganda had controlled an armed group operating in the DRC.³⁹⁹ In 2007, the ICJ held in the *Bosnian Genocide Convention* case that while the overall control test might be applicable and suitable to determine whether or not a conflict is international (although it declined to render a judgment on this), it maintained the correctness of its use of the “complete dependence” and “effective control” tests for the purpose of State responsibility, finding the overall control test for this purpose to be “unpersuasive”.⁴⁰⁰ Adding to the continued controversy, in Art. 8 of its Draft Articles on State responsibility, which deals with attribution of acts of individuals and groups “acting on the instructions of, or under the direction or control of” a State, the ILC did not put forward which test it found to be the correct one, writing only that “[i]n any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it.”⁴⁰¹ However, some scholars have considered the ILC’s inclusion of the words “instructions” and “direction” as signaling the ILC’s tacit endorsement of the effective control test.⁴⁰²

determined in a given case, the rules according to which the state or the individual should have acted need to be established [reference omitted].”); Remy Jorritsma, “Ukraine Insta-Symposium: Certain (Para-)Military Activities in the Crimea: Legal Consequences for the Application of International Humanitarian Law”, *Opinio Juris*, 9 March 2014 (available at: <http://opiniojuris.org/2014/03/09/ukraine-insta-symposium-certain-para-military-activities-crimea-legal-consequences-application-international-humanitarian-law/>) (see the discussion between Remy Jorritsma and Manuel Ventura in the comments section).

³⁹⁸ Marco Sassòli, “State responsibility for violations of international humanitarian law”, *International Review of the Red Cross*, vol. 84, no. 846 (2002), p. 408.

³⁹⁹ *Armed Activities*, *supra* note 340, para. 160.

⁴⁰⁰ *Genocide Convention Case*, *supra* note 377, paras. 399-404. *But see ibid.*, Dissenting Opinion of Vice-President Al-Khasawneh, para. 39 (stating that the overall control test is more appropriate when the commission of international crimes is the common objective of the controlling State and the non-State actors).

⁴⁰¹ International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts*, *supra* note 31, pp. 47-48.

⁴⁰² Heinsch, *supra* note 48, p. 347 (interpreting the language in the Draft Articles to refer to the effective control test); Cassese, “The Nicaragua and Tadić Tests Revisited”, *supra* note 365, pp. 663-64; Milanovic, “State Responsibility for Genocide”, *supra* note 379, p. 582-83 (“The ILC endorses the effective control test for responsibility under Article 8, and dismisses the test of overall control.”); Dinstein, *War, Aggression and Self-Defence*, *supra* note 70, pp. 222-23 (“The Commission seems to have fully endorsed the International Court of Justice’s line of approach”).

The current state of the law and the literature can therefore be summed up as follows: The conventional view has been that it is the law of State responsibility that decides the issue of internationalization in cases of indirect intervention. While the majority of scholars seem to have embraced the overall control test, it is not uniformly accepted, with some supporting the effective control test. Outside of these two standards, however, the literature is largely bereft of any other alternative approaches.⁴⁰³ And in the sphere of international jurisprudence, the ICTY and ICJ remain committed to their own respective tests.⁴⁰⁴

5.2. *The Way Forward?*

From the outset, it should be noted that *Tadić* is right to state that if the acts of an armed group are attributable to a State, then a conflict with that group would surely be international as the conflict would not be between a State and an armed group at all but between a State and *de facto* agents of another State.⁴⁰⁵ This does not mean, however, that the question of internationalization is *solely* answered by reverting to the rules of State responsibility.

It is submitted that, in the view of this author, the test for determining the relationship between a non-State armed group and a State for the purposes of classification of armed conflicts ought not to be the same as the tests used for attributing the acts of non-State groups to a State for the purposes of State responsibility for those acts. The ICJ therefore got it right in the *Bosnian Genocide Convention* case when it held that "logic does not require the same test to be adopted in resolving the two issues, which are very different in nature".⁴⁰⁶ However, the issue is not simply one of *lex*

⁴⁰³ For example, in a major study on the classification of conflicts, in the 9 case studies a majority of the scholars opted for the overall control test, while a few utilized the effective control test, or did explicitly not take a view on which test where the correct one for the purpose of conflict classification, see Elizabeth Wilmschurst (ed.), *International Law and the Classification of Conflicts*, 2012. A handful of scholars, however, have proposed alternative approach. Some have proposed that the issue should be decided with reference to the *jus ad bellum* instead of State responsibility (see Akande, *Classification of Armed Conflicts*, *supra* note 15, pp. 61-62; Sivakumaran, *The Law of Non-International Armed Conflict*, *supra* note 12, p. 227), while others have sought to rely on international human rights law (Szesnat and Bird, *supra* note 309, pp. 223-24).

⁴⁰⁴ ICRC, *Commentary on the First Geneva Convention*, 2nd edition, 2016, para. 272.

⁴⁰⁵ *Tadić* Appeals Judgment, *supra* note 147, para. 104.

⁴⁰⁶ *Genocide Convention* case, *supra* note 377, para. 405 ("It should first be observed that logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict"). See also International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful*

specialis, where the overall control standard could be seen as a special standard under the law of State responsibility that are to be used only for the purpose of classifying conflicts. Rather, the issue is that the *secondary rules* of State responsibility should not determine the scope and content of the *primary rules* of IHL. It should be borne in mind that we are here faced with two distinct questions: 1) whether a State is responsible for the acts committed by an armed group, and 2) whether or not the armed conflict is international under the *jus in bello*. The *jus in bello* is a set of primary rules that lay down the conditions of their own applicability. The law of State responsibility, on the other hand, consists of secondary rules that set out general conditions and criteria for holding States responsible for violations of international law.⁴⁰⁷ In other words, it is not the law of State responsibility that determines the general applicability of IHL or what parts of IHL that apply in the first place. Rather, the provision that determines whether the primary law of IAC applies is CA2. Thus, the legal standard for transforming a NIAC into an IAC due to indirect involvement by an outside State should be deduced from IHL itself, rather than being predicated on the law of State responsibility.

An illustrative example of this unfortunate blurring of the distinction between primary and secondary rules can be seen in the debate on the right to self-defense against non-State actors located in the territory of another State. It is often claimed in the literature that whether a State can exercise its right of self-defense against a non-State group turns on whether or not the group is under either the overall or effective control of a State—in other words, that it turns on attribution under the law of State responsibility.⁴⁰⁸ This may also have been the view that the ICJ took in its

Acts, *supra* note 31, p. 48 (“But the legal issues and the factual situation in the *Tadić* case were different from those facing the [ICJ] in that case [i.e. *Nicaragua*]. The tribunal’s mandate is directed to issues of individual criminal responsibility, not State responsibility, and the question in that case concerned not responsibility but the applicable rules of international humanitarian law”).

⁴⁰⁷ Cf. Nicholas Tsagourias, “Self-Defence against Non-state Actors: The Interaction between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule”, *Leiden Journal of International Law* vol. 29, no. 3 (2016), p. 807; Milanovic, “State Responsibility for Genocide”, *supra* note 379, p. 585.

⁴⁰⁸ See e.g. Dinstein, *War, Aggression and Self-Defence*, *supra* note 70, pp. 220-24, 228 (arguing that “in matters relating to the unlawful use of force and self-defence, it is still *Nicaragua* – rather than the *Tadić* – interpretation of the degree of effective control that is required of auxiliaries” in order to attribute acts of non-State actors to a State so as to be able to use force in self-defense against them); Scott J. Shackelford and Richard B. Andres, “State Responsibility for Cyber Attacks: Competing Standards for a Growing Problem”, *Georgetown Journal of International Law*, vol. 42, no. 4 (2011), pp. 987-88; Li, *supra* note 378, pp. 202-04.

Wall Advisory Opinion, when it stated that Israel could exercise its of self-defense only if the armed attacks against it “are imputable to a foreign State.”⁴⁰⁹

Unfortunately, this view conflates attribution under the secondary rules of the law of State responsibility with attribution under the primary rules of the law of self-defense and is furthermore inconsistent with other ICJ case law. In the *Nicaragua* and *Armed activities* cases, the Court held that an armed attack includes not only military operations carried out by State organs but also “the sending by, or on behalf of a State of armed bands” to carry out military operations, or a State’s “substantial involvement therein”, if the operations, in their scale and effects, would amount to an armed attack if it was carried out by regular State forces.⁴¹⁰ If this requirement is fulfilled, armed attacks by armed groups may then be imputed to that State for the purpose of self-defense.

Whatever the exact criteria for the fulfillment of this requirement are, it is clear that this test is not the same as the effective control test, which the Court utilized elsewhere in the judgment to answer a very different question—namely whether the violations of IHL and IHRL by the Contras were attributable to the United States under the law of State responsibility. This point is critical, and it underscores the importance of utilizing an approach, such as the one ICJ, albeit implicitly, employed in the *Nicaragua* and *Armed activities* cases, that distinguishes these separate issue: armed attacks by paramilitary groups may be imputed to a State for the purpose of self-defense, allowing the attacked State to respond in self-defense, if another State has sent the armed group that carried out the armed attack, or had substantial involvement therein, while the State would incur international responsibility for the acts and potential violations of IHL by the armed group only if the group is acting on the instructions of, or under the direction or (effective) control of, that State.⁴¹¹

Similarly, for an armed conflict to be classified as international, it is not necessary that all the acts of the participants in the conflict are imputable to States for the purpose of State responsibility.

⁴⁰⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, International Court of Justice, 9 July 2004, para. 139.

⁴¹⁰ *Nicaragua*, *supra* note 14, para. 195; *Armed Activities*, *supra* note 340, para. 146.

⁴¹¹ As set out by Article 8 of ILC’s Draft Articles, see International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts*, *supra* note 31, p. 47. Cf. also Jordan J. Paust, “Armed Attacks and Imputation: Would a Nuclear Weaponized Iran Trigger Permissible Israeli and U.S. Measures of Self-Defense?”, *Georgetown Journal of International Law*, vol. 45, no. 2 (2014), pp. 424-27; Albrecht Randelzhofer and Nolte, *Article 51*, in: Bruno Simma et al., *The Charter of the United Nations: A Commentary*, Vol. II, 3rd edition, 2012, p. 1417; Dino Kritsiotis, *A Study of the Scope and Operation of the Rights of Individual and Collective Self-Defence Under International Law*, in: Nigel D. White & Christian Henderson (eds.), *Research Handbook on International Conflict and Security Law*, 2013, pp. 204-08.

Rather, it is only necessary that the conditions of CA2 are met—namely, the existence of armed violence between two or more States. These two issues, while seemingly alike, are not one and the same. A test aimed at the internationalization of conflicts due to outside involvement is therefore not dependent on the tests of State responsibility set out in *Nicaragua* and *Tadić*, and in fact, such a test should be based on the primary rules of IHL instead, not on the secondary rules of State responsibility.

5.3. A New Approach: The Proxy Test

Obviously, the Geneva Conventions do not expressly provide a basis for a standard that could be used to internationalize conflicts based on IHL. However, in *Prosecutor v. Delalić*, the Appeals Chamber, while confirming the correctness of the overall control test, also stated that the trend towards that test,

may be indicative of a trend simply to rely on the international law on the use of force, *jus ad bellum*, when characterising the conflict. The situation in which a State, the FRY, resorted to the indirect use of force against another State, Bosnia and Herzegovina, by supporting one of the parties involved in the conflict, the Bosnian Serb forces, may indeed be also characterised as a proxy war of an international character.⁴¹²

Along the same lines, Judge Shahabuddeen argued in his Separate Opinion in *Tadić*:

Ex hypothesi, an armed conflict involves a use of force. Thus, the question whether there was an armed conflict between the FRY and BH depended on whether the FRY was using force against BH through the Bosnian Serbian Army of the Republika Srpska (“VRS”). [...] If there

⁴¹² *Prosecutor v. Delalić et al.*, Appeals Judgment, ICTY, 20 February 2001, para. 20.

was such a use of force by one state against another, *ex definitione* the conflict was international...⁴¹³

These *dicta* are consequential in all but one respect. Both opinions rely on the concept of use of force found in the *jus ad bellum* to determine the existence of an IAC, an approach that was examined and rejected in depth in Part 4 above. Instead, the applicability of the Geneva Conventions and the determination of the existence of an IAC are determined by the requirements of CA2. As was shown in Part 2, an IAC within the meaning of CA2 arises when a State resorts to armed force against another State. What is also clear from the commentaries to the conventions and protocols, and from the jurisprudence of the ICTY and ICC, is that an IAC includes not only hostilities between the armed forces of States but also the indirect resort to force by non-State groups who “act on behalf of [a] State.”⁴¹⁴ Thus, the question to answer is therefore not whether the acts of the non-State group can be attributed to the State under the law of State responsibility, but rather whether the State has resorted to armed force against another State *through the use of a proxy*.

What needs to be ascertained, then, is not when the State has incurred responsibility for the acts of the members of the armed group, or when it exercises control over them, be it effective or overall, but rather when the State can be said to have resorted to armed force *through* that group. As shown above, CA2 does not define IACs any further than providing the requirement that two States must be involved and does not give any guidance on the kind of involvement by the States necessary for an IAC to emerge. To help answer this question, recourse may be had to international case law and State practice.

⁴¹³ *Prosecutor v. Tadić*, Appeals Judgment, Separate Opinion of Judge Shahabuddeen, ICTY, 15 July 1999, paras. 7, 24. See also *The Prosecutor v. Blaškić*, Trial Judgment, Declaration of Judge Shahabuddeen, ICTY, 3 March 2000. No page numbers or paragraphs are indicated on the Declaration, but it is attached at the end of the majority decision.

⁴¹⁴ *Tadić* Appeals Judgment, *supra* note 147, para. 84; *Lubanga* Decision, *supra* note 161, para. 209; *Lubanga* Judgment, *supra* note 147, para. 541; Jean Pictet (ed.), *Commentary on the Third Geneva Convention*, 1960, Common Article 2, footnote 8, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=07B4DAD7719E37E4C12563CD00424D17>; Jean Pictet (ed.), *Commentary on the First Geneva Convention*, 1952, Common Article 2, footnote 7, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=02A56E8C272389A9C12563CD0041FAB4>.

In *Nicaragua*, the Court found that the United States was guilty of “training, arming, equipping, financing and supplying the *contra* forces”.⁴¹⁵ It further found that the actions of the United States “in and against Nicaragua” created an IAC between Nicaragua and the United States.⁴¹⁶ It is therefore a plausible interpretation of *Nicaragua* that the acts of arming, training, and financing armed groups create an IAC between the foreign and assailed State.⁴¹⁷ However, the Court did not use this finding to internationalize the conflict between Nicaragua and the Contras, as it found instead that two different conflicts existed—a NIAC between Nicaragua and the Contras in addition to the aforementioned IAC between Nicaragua and the U.S.⁴¹⁸ Ultimately, this position is untenable: the United States was resorting to armed force against Nicaragua *through* the Contras, not through any of its own organs. In such cases of indirect intervention, it would make little sense for the conflict to be separated into two parallel conflicts along the lines of the “mixed view”, as the existence of a separate IAC would have little consequence for the intervening State since it is not present in the territorial State with its own armed forces.⁴¹⁹

Such an approach also seems to correspond with some of the literature concerning the issue of when indirect use of force leads to an IAC. For example, Yoram Dinstein has opined that the while “the mere supply of arms by a foreign State to the insurgents“ does not bring about an IAC, “there comes a point – for instance, when the weapons are accompanied by instructors training the rebels – at which the foreign State is deemed to be waging warfare against the local Government.”⁴²⁰ While these authors did not make these pronouncements with respect to internationalization of NIACs, and while they in these and other works express support for either the overall or effective control standard,⁴²¹ this incongruity is illustrative of the exact contention made in this Part of the paper: that the focus in the literature on internationalization has been on the wrong question altogether—namely, on when a foreign State has control over an group as defined by the international law of

⁴¹⁵ *Nicaragua*, *supra* note 14, paras. 292(3)-(4).

⁴¹⁶ *Ibid.*, para. 219.

⁴¹⁷ However, it also possible that the Court considered the mining of Nicaraguan ports by the U.S. the act that triggered an IAC, as the Court is not clear on this, *see* Zamir, *Classification of Conflicts in International Humanitarian Law*, *supra* note 157, p. 115.

⁴¹⁸ *Nicaragua*, *supra* note 14, para. 219.

⁴¹⁹ *But see* Spinedi, *supra* note 397, p. 838.

⁴²⁰ Dinstein, *War, Aggression and Self-Defence*, *supra* note 70, p. 10. *See also* Detter, *supra* note 70, pp. 86-92; Solis, *supra* note 5, p. 155.

⁴²¹ Dinstein, *War, Aggression and Self-Defence*, *supra* note 70, pp. 219-24; Dinstein, *Non-International Armed Conflicts*, *supra* note 83, pp. 84-86; Solis, *supra* note 5, pp. 155-56. Note that Solis seems to conflate the attribution tests under the *jus ad bellum* and State responsibility/*jus in bello* (*Ibid.*, p. 155).

responsibility, rather than on when certain activities qualify as an actual use of indirect armed force that would trigger an IAC between States.

Additionally, there is some practice on point to support such an approach. In the case of the Civil War in Syria, where the Syrian rebels reportedly have received arms and training from foreign States, Bashar al-Assad, the president of Syria, has commented on the effect of foreign involvement on the conflict, stating that due to this involvement the conflict is “not a civil war; what we have is a war”.⁴²² Similarly, Syria seems to have taken the position at the UN that U.S. support for opposition groups amounts to an IAC. In a Security Council meeting in April 2017, the Syrian representative denounced the American strategy of providing “all types of assistance to what the United States calls the ‘moderate armed opposition’”.⁴²³ This assistance, in the view of the Syrian representative, made the United States a partner of the armed groups that are waging an “unjust war against Syria”.⁴²⁴

In the NIAC currently ongoing in Yemen, the UK has financed and supported the Saudi-led Coalition with money and precision-guided weaponry as well as providing military trainers to the Coalition. Despite the fact that this level of support is considerably below that required by either the effective or overall control standard, the UK Foreign Secretary nonetheless took the view in 2015 that the UK efforts against the Houthis, who have territorial control over Yemen and claim to be its government, amounted to “an international armed conflict”.⁴²⁵ Along the same lines, during the Second Congo War, Rwanda and Uganda supported the RCD and MLC rebels by financing, arming, and training them. Based on this level of involvement by Rwanda and Uganda, the DRC was of the view that the “rebel movements were mere proxies” of those States.⁴²⁶

⁴²² See President Al-Assad’s Interview with Fox News, *Fox News*, 19 September 2013 (available at: www.presidentassad.net/index.php?option=com_content&view=article&id=1159:president-al-assad-s-interview-with-fox-news&catid=105&Itemid=468).

⁴²³ United Nations Security Council, Meeting record, *7919th Meeting: The Situation in the Middle East, S/PV.7919* (7 April 2017), p. 18, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.7919.

⁴²⁴ *Ibid.*

⁴²⁵ B. Quinn and D. Smith, “Calls for investigation into Saudi Arabia’s actions in Yemen”, *The Guardian*, 11 November 2015 (available at: <http://www.theguardian.com/world/2015/nov/11/calls-for-investigation-into-saudi-arabias-actions-in-yemen>); Amnesty International, *The Lawfulness of the Authorisation by the United Kingdom of Weapons and Related Items for Export to Saudi Arabia in the Context of Saudi Arabia’s Military intervention in Yemen*, 11 December 2015, para. 2.7, available at: https://www.amnesty.org.uk/files/webfm/Documents/issues/legal_opinion_on_saudi_arms_exports_16_december_2015_correction.pdf.

⁴²⁶ Quoted in: Louise Arimatsu, *The Democratic Republic of the Congo 1993-2010*, in: Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, 2012, p. 172.

It is submitted that, in accordance with the judicial precedents and State practice outlined above, a State has resorted to armed force against another State through a proxy when it has, at a minimum, armed, trained, and financed that proxy group with the intention of harming that other State and with the intention of helping the proxy to use armed force against the other State.⁴²⁷ That is the test that needs to be met in order to find that an outside State's involvement in a NIAC has had the effect of internationalizing the conflict. Evidently, this test bears some semblance with the overall control test, as many of the same criteria are regarded as determinative. However, this test would be a less strict test, as it would differ from the overall control standard in that the Appeals Chamber found the mere "financing, training and equipping" of a group by a State to be insufficient for attribution, requiring an additional role by the State in "organizing, coordinating or planning the military actions of the military group".⁴²⁸

It might be debatable what level of support, short of effective or overall control, should render indirect interventions subject to internationalization. Supporters of the traditional approach might find the approach presented here to be too loose a test, perhaps arguing that it would be detrimental to the interests of States by limiting the States' options for indirectly intervening in NIACs without becoming a party to the conflict, and thus avoiding the corresponding responsibilities that status as a party to a conflict entails. Such a State-centric approach would clash with a more human-centric, or protection-oriented, approach supported here.

This potential criticism notwithstanding, it is submitted that this approach is to be preferred for three principal reasons. First, if the internationalization of NIACs were to be subjected to the stringent requirements of the law of State responsibility, it would defeat the very object and purpose of IHL, which is to protect civilians and those *hors de combat* and "to protect the dignity of the human person."⁴²⁹ In addition to being methodologically flawed, making the application of the law of IAC contingent upon a finding under the rules of State responsibility ignores the fact that the purpose of IHL is quite different from that of the law on responsibility of States. The stringent requirements of the international law on responsibility are not well suited to ensure the protection of

⁴²⁷ Thus, in situations where a group that has been armed, trained, and financed by a State with one purpose, but then uses those resources for a different purpose, the acts of the group against another State would not create an IAC between those two States.

⁴²⁸ *Tadić* Appeals Judgment, *supra* note 147, para. 137 [emphasis removed].

⁴²⁹ *Prosecutor v. Delalić et al.*, Appeals Judgment, ICTY, 20 February 2001, para. 172. See also ICRC, *Commentary on the First Geneva Convention*, 2nd edition, 2016, para. 216 ("The very object and purpose of international humanitarian law – to protect those who are not or no longer taking part in the hostilities during armed conflict").

civilians during IACs. In this context, it bears recalling the Martens Clause, one of the cardinal principles of IHL. The Clause is found in Article 1(2) of AP I, which provides that “[i]n cases not covered by this Protocol or by international agreements, civilians [...] remain under the protection of [...] the principles of humanity”.⁴³⁰ In short, one interpretation of this Clause is that in cases where IHL does not explicitly provide an answer, the protection of civilians remains the paramount concern—not the interests of States.⁴³¹

Second, international courts and tribunals engage in the classification exercise in order to determine the applicable provisions of international criminal law (ICL). The standard articulated by the ICTY is therefore designed specifically for that purpose. In the ICL context, a determination on the potential internationalization of NIACs due to outside involvement is done long after the end of the conflict, when more of the applicable evidence of the links between the State and the armed group has normally come to light than is the case during the conflict. Accordingly, the standards of both the ICTY and ICJ rely much on evidence that is usually only available *ex post facto*. This includes the evidence of the issuance of direct orders or the evidence of State participation in planning the military operations of the group. The requirement of this type of evidence is well suited to an assessment *post facto* such as during judicial proceedings. In terms of the practical application of IHL, however, the criteria required by the overall and effective control standards will inevitably lead to uncertainty during the actual conflict as to the classification of the hostilities since that type of evidence is usually only available after the fact. In that respect, the detailed requirements laid down in ICL are not suitable for the present purpose, given that the combatants on battlefield, in order to obey the correct law, need clarity as to whether the conflict is an IAC or NIAC.

On the other hand, for the purpose of determining the IHL framework that applies during the actual conflict, the evidence of the involvement of States in the arming, training, and financing of a group is normally more reliably available during the conflict itself, as such support is often an open secret. The approach presented in this Part would therefore be a more workable standard to apply “in real time”, so that States and military forces would know what law to apply when they are actually in the situation. Since armed conflicts are often marked by confusion and lack of information, a less strict test akin to the one presented here, which requires less criteria to be met than the overall control test, is preferable. This is especially so in the view of the fact that the main group of people

⁴³⁰ Quoted in: Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, *supra* note 157, p. 13.

⁴³¹ *Ibid.*

that stand to benefit from the application of the law of IAC in real time to situations of indirect intervention are civilians.⁴³²

In this same regard, it should be noted that the alternative standard presented here is not necessarily in conflict with the overall control test. Even if the test advanced here were applicable, the overall control test could still be used in ICL to determine individual criminal responsibility. The standards of IHL and ICL do not infrequently differ from each other, ICL at times providing a weaker standard of protection than that afforded by IHL.⁴³³ For example, according to Art. 13(2) of AP II and Art. 51(2) of AP I, making civilians the object of attack is as such proscribed, regardless of the result, while the equivalent war crime has been interpreted by the ICTY as requiring the attack to “result[] in serious injury to body or health to incur criminal responsibility”.⁴³⁴ Similarly, whereas AP II contains an absolute prohibition on the participation of child soldiers in hostilities in NIACs, the prohibition in international criminal law contains a narrower standard, prohibiting only the use of child soldiers to “participate *actively* in hostilities”.⁴³⁵ It may well be, then, that the overall control test is appropriate for the purpose of international criminal law and the assignment of individual criminal responsibility. This, of course, would require that a central premise of the *Tadić* decision be ignored: that the overall control test was derived from, and equally applicable under, the law of State responsibility. This paper, however, is solely concerned with the determination of whether the law of IAC and NIAC applies to situations of armed conflict in the first place, and in that context, the test is still too restrictive.

Third, from a normative point of view, it would seem appropriate that when a State decides to arm, train, and finance an armed group, knowing that the group will use those resources to attack another

⁴³² See also Chatham House, *Classification of Conflicts: The Way Forward* (1 October 2012), pp. 5-7, available at: <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/011012summary.pdf>; Noam Zamir, “Minding the Gap between Scholarly Discourse and State Practice in International Humanitarian Law”, *supra* note 13, p. 372.

⁴³³ See Darryl Robinson, “The Identity Crisis of International Criminal Law”, *Leiden Journal of International Law*, vol. 21, no. 1 (2008), p. 946 (“ICL [i.e. international criminal law] practitioners often assume that the ICL norms are coextensive with their human rights or humanitarian law counterparts, and uncritically transplant concepts and jurisprudence from other domains to flesh out their content. Such assumptions overlook the fact that these bodies of law have different purposes and consequences and thus entail different philosophical commitments.”); Sivakumaran, *The Law of Non-International Armed Conflict*, *supra* note 12, pp. 79-81.

⁴³⁴ *Prosecutor v. Kordić and Čerkez*, Appeals Judgment, ICTY, 17 December 2004, para. 57. *Accord: Prosecutor v. Kordić and Čerkez*, Trial Judgment, ICTY, 26 February 2001, para. 328; *Prosecutor v. Blaškić*, Trial Judgment, ICTY, 3 March 2000, para. 180. See also Sivakumaran, *The Law of Non-International Armed Conflict*, *supra* note 12, p. 339.

⁴³⁵ *Rome Statute of the International Criminal Court*, Rome, 17 July 1998, *United Nations Treaty Series*, vol. 2187, No. 38544, Article 8(2)(vii), available at: <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> [emphasis added]; Sivakumaran, *The Law of Non-International Armed Conflict*, *supra* note 12, p. 339.

State, those acts should trigger an IAC. States will often opt for the waging of these “proxy wars” rather than war through their own forces, precisely because to do so is a way of forcibly furthering their political goals without suffering the consequences of both the legal responsibility and obligations, in addition to the costs, involved in direct military interventions.⁴³⁶ By insisting on applying the strict conditions of State responsibility to the issue of internationalization, it allows for States to hide behind proxies by having them do their fighting. In cases where the State and the proxy share a common objective (such as the overthrow of a government), the State does not need to exercise the kind of control over the proxy that would entail international responsibility since the need for issuing direct orders to the group is not as imperative. In the end, the decision to resort to indirect armed force against a State is not fundamentally different than the decision to resort to direct armed force by attacking via the State’s own forces. Essentially, in both scenarios the State decides to deliberately harm the attacked State, even though in the former scenario the violence is carried out through the State’s proxy, the armed group. In the end, the difference is one of degree rather than type.

Such a conclusion can also be reached through a second line of reasoning. An IAC emerges in cases of hostilities between States.⁴³⁷ Put differently, while an armed conflict might exist without hostilities (for example, in cases of declaration of war or occupation without resistance), the reverse is not true, as hostilities between States will invariably trigger an IAC.⁴³⁸ The ICRC has defined

⁴³⁶ See generally Michael A. Newton, “War by Proxy: Legal and Moral Duties of ‘Other Actors’ Derived from Government Affiliation”, *Case Western Reserve Journal of International Law*, vol. 37, no. 2-3 (2006), pp. 249-65.

⁴³⁷ O’Connell, “Combatants and the Combat Zone”, *supra* note 68, p. 856 (“In other words, there must be ‘hostilities’ for there to be an armed conflict.”); Greenwood, “Development of International Humanitarian Law”, *supra* note 157, p. 120 (“In order to characterize a conflict as an international armed conflict, it is necessary only to show that there are hostilities between two or more States.”); International Law Association, *Final Report on the Meaning of Armed Conflict in International Law*, 2010, p. 9.

⁴³⁸ According to an ICRC report, “hostilities” mean the actual prosecution of the fighting in an armed conflict, and the term is therefore to be understood as very broad, with “military operations” and “attacks” constituting subsets of hostilities. Thus, since there is only a nominal threshold for IACs, meaning that all military operations against another State amount to an IAC, it is clear that an IAC emerges in cases of hostilities. See ICRC, *Third Expert Meeting on the Notion of Direct Participation in Hostilities*, Summary Report (Geneva, 23 – 25 October 2005), pp. 18-19, available at: <https://www.icrc.org/eng/assets/files/other/2005-09-report-dph-2005-icrc.pdf>. This is also implicitly acknowledged in the treaty law, See *Convention (III) relative to the Treatment of Prisoners of War*, Geneva, 12 August 1949, Article 118, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/375?OpenDocument> (stating that “[p]risoners of war shall be released [...] after the cessation of active hostilities [emphasis added].”); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, Geneva, 8 June 1977, Article 44(3), available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/475?OpenDocument> (acknowledging the link between armed conflict and hostilities when it states “that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself...”).

hostilities as “the (collective) resort by the parties to the conflict to means and methods of injuring the enemy”.⁴³⁹ Elsewhere, in an ICRC report, it was noted by experts that “[t]he term ‘hostilities’ also included [...] essentially all the activities of a belligerent aimed at ultimately winning the war.”⁴⁴⁰ Arguably, knowingly arming, training, and financing a group that is waging warfare against the government of another State—and that is thereby injuring the State—amount to a resort by the outside State to means and methods of injuring that latter State and hence fall within the definitions of hostilities given by the ICRC.

Lastly, the consequences of the practice cited above should not be overstated. State practice in general, and practice with regard to internationalization in particular, can be ambiguous and diverse and is admittedly often open to competing interpretations. Therefore, the approach advocated here is probably situated somewhere in the space between *lex lata* and *lex ferenda*.

5.4. Summary

In sum, this Part has argued that neither the effective control nor the overall control standard is the appropriate test for determining when an NIAC has been internationalized due to indirect intervention. Instead, under the “proxy test” suggested here, a NIAC will transform into an IAC in cases where a State arms, trains, and finances an armed group that is engaging in a NIAC with another State.

⁴³⁹ ICRC, *Interpretive Guidance*, *supra* note 123, p. 43.

⁴⁴⁰ ICRC, *Third Expert Meeting on the Notion of Direct Participation in Hostilities*, *supra* note 438, p. 19.

Syria as an Internationalized Armed Conflict?

6.1. Factual Background

As part of the broader Arab Spring, anti-regime demonstrations broke out across Syria in February 2011. As protests spread throughout the country, the Syrian regime increasingly resorted to violent reprisals as a response. As Human Rights Watch has documented, Syrian security services engaged in widespread assaults on protesters, which included arbitrarily arrests and detentions, beatings, sexual assault, and other forms of torture as well as extrajudicial executions of people associated with the opposition.⁴⁴¹ In the spring of 2011, the character of the turmoil changed when the Syrian Government started employing its military forces to quell the protests, starting in April with an assault on the city of Daraa. This was followed by successive military operations in May against protesters in the cities of Tal Kalakh and Baniyas of western Syria, which led to the protest movement increasingly taking up arms against the regime, further fueling the militarization of the conflict. Bashar al-Assad escalated the conflict even further in early 2012 when Syrian forces started using artillery bombardment, air strikes, tanks, landmines, and the deployment of ground troops to an even larger extent than previously.⁴⁴² The conflict entered yet another phase in early 2013 as the first foreign intervention into the civil war occurred, when the United States started to provide the Syrian opposition with military aid intended to help the rebels in their fight against both ISIL and the Assad regime.⁴⁴³ Turkey and member States of the Arab League likewise started to provide the Syrian rebels with arms and training, and by the end of 2013, several foreign States were involved in the Syrian conflict in what has been described as essentially “proxy wars” over the

⁴⁴¹ Human Rights Watch, *Death from the Skies: Deliberate and Indiscriminate Air Strikes on Civilians* (April 2013), p. 11-12, available at: https://www.hrw.org/sites/default/files/reports/syria0413webwcover_1_0.pdf.

⁴⁴² *Ibid.*; Unknown Author, “Why is there a war in Syria?”, *BBC*, 7 April 2017 (available at: <http://www.bbc.com/news/world-middle-east-35806229>).

⁴⁴³ Eric Schmitt, “C.I.A. Said to Aid in Steering Arms to Syrian Opposition”, *The New York Times*, 21 June 2012 (available at: <http://www.nytimes.com/2012/06/21/world/middleeast/cia-said-to-aid-in-steering-arms-to-syrian-rebels.html>).

geopolitical future of Syria, with Western and Gulf States supporting the opposition and Russia and Iran taking the side of the regime.⁴⁴⁴

During 2014 and 2015, the conflict saw the introduction of more direct military engagement by outside States. In the fall of 2014, the Syrian conflict experienced a further escalation of violence in when the United States and its coalition partners began their campaign of air strikes against ISISL in Syria. This came as a response to ISIL's advance into Syria from Iraq in the summer of 2014, when the terrorist group in a shocking pace gained control of large swathes of Syria.⁴⁴⁵ In 2015, as Damascus lost control of vast areas of the country, Russia intervened directly with its air force and a limited number of land troops.⁴⁴⁶ With Russia's assistance, the Assad regime had by early 2016 managed to halt the momentum of the opposition forces and stabilize the situation.⁴⁴⁷ More recently, with the continued help of Russia, the regime has turned the tide of the conflict, most notably by having retaken the city of Aleppo, the formerly largest city of Syria, from the rebels.⁴⁴⁸ As things currently stand, the conflict has no apparent end in sight. In August 2015, the UN reported that at least 250,000 people had been killed the previous five years.⁴⁴⁹

⁴⁴⁴ Michael Weiss, "Syrian rebels say Turkey is arming and training them", *The Telegraph*, 22 May 2012 (available at: <https://web-beta.archive.org/web/20160305014329/http://blogs.telegraph.co.uk/news/michaelweiss/100159613/syrian-rebels-say-turkey-is-arming-and-training-them/>); As'ad AbuKhalil, "The 8 Proxy Wars Going On in Syria Right Now", *Huffpost*, 2 December 2014 (available at: http://www.huffingtonpost.com/asad-abukhalil/syria-proxy-wars_b_5874488.html); Lucy Rodgers, David Gritten, et al., "Syria: The story of the conflict", *BBC*, 11 March 2016 (Available at: <http://www.bbc.com/news/world-middle-east-26116868>).

⁴⁴⁵ Jim Sciutto, Mariano Castillo, and Holly Yan, "U.S. airstrikes hit ISIS inside Syria for first time", *CNN*, 23 September 2014 (available at: http://edition.cnn.com/2014/09/22/world/meast/u-s-airstrikes-isis-syria/index.html?hpt=hp_t1).

⁴⁴⁶ Unknown Author, "Russia launches media offensive on Syria bombing", *BBC*, 1 October 2015 (available at: <http://www.bbc.com/news/world-europe-34411653>).

⁴⁴⁷ Jonathan Landay & Warren Strobel, "U.S. sees bearable costs, key goals met for Russia in Syria so far", *Reuters*, 28 December 2015 (available at: <http://www.reuters.com/article/us-usa-russia-syria-idUSKBN0UB0BA20151229>); Patrick Cockburn, "Who is Russia bombing in Syria? The militant groups determined to fight to the death", *The Independent*, 1 October 2015 (available at: <http://www.independent.co.uk/news/world/middle-east/who-is-russia-bombing-in-syria-the-groups-set-for-fight-to-the-death-isis-al-nusra-a6675751.html>); Lizzie Dearden, "Russian air strikes in Syria: Vladimir Putin's spokesperson admits targeting rebel groups that aren't Isis", *The Independent*, 1 October 2015 (available at: <http://www.independent.co.uk/news/world/middle-east/russian-air-strikes-in-syria-vladimir-putins-spokesperson-admits-groups-other-than-isis-being-a6674996.html>).

⁴⁴⁸ Kareem Shaheen & Patrick Wintour, "Final evacuees leave eastern Aleppo as Assad regime takes control", *The Guardian*, 22 December 2016 (available at: <https://www.theguardian.com/world/2016/dec/22/final-evacuees-leave-eastern-aleppo-as-assad-regime-takes-control>).

⁴⁴⁹ United Nations, Department of Public Information, *Alarmed by Continuing Syria Crisis, Security Council Affirms Its Support for Special Envoy's Approach in Moving Political Solution Forward*, SC/12008, 17 August 2015, available at: <http://www.un.org/press/en/2015/sc12008.doc.htm>; Internal Displacement Monitoring Centre, "New and total internal displacement by conflict and violence Provisional estimates 2016", available at: <http://www.internal-displacement.org/database/country/?iso3=SYR>.

Before examining whether the conflict can be said to have been internationalized due to outside involvement, it needs to be established first at what point the fighting reached the requisite levels of intensity and organization so as to qualify as a NIAC in the first place. Human Rights Watch determined in May 2012 that the fighting had reached the level of armed conflict.⁴⁵⁰ A few months later, in July 2012, the ICRC publicly stated that the conflict in Syria now amounted to a NIAC.⁴⁵¹ We can therefore conclude that the conflict reached the threshold of NIAC, at the latest, in July of 2012.

As the conflict currently stands, the Syrian Government and the Syrian opposition are the two main parties to the conflict. Rather than being a monolithic group, however, the Syrian opposition is in reality composed of thousands of disparate armed groups; according to the think tank Carter Centre, the opposition actually comprises up to 7,000 different groups.⁴⁵² A number of outside States have indirectly intervened in the conflict by providing financial and military aid to opposition groups, although the level of support that these States have provided is inadequate under the traditional criteria to find them to be parties to the conflict. A third, distinct party to the conflict is ISIL, which is not counted as part of the opposition even though the group is fighting against the Government.⁴⁵³

6.2. Applying the Law to the Facts

In the following section, the processes of internationalization examined throughout the paper will be applied to the facts of the Syrian conflict in order to ascertain whether the conflict can, under any of the processes, can be said to have been internationalized.

6.2.1. Direct military intervention

⁴⁵⁰ Human Rights Watch, *Death from the Skies: Deliberate and Indiscriminate Air Strikes on Civilians* (April 2013), p. 11-12, available at: https://www.hrw.org/sites/default/files/reports/syria0413webwcover_1_0.pdf.

⁴⁵¹ ICRC, "Syria: ICRC and Syrian Arab Red Crescent maintain aid effort amid increased fighting," 17 July 2012 (available at: <http://www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm>).

⁴⁵² Unknown Author, "Down but not yet out", *The Economist*, 10 October 2015 (available at: <http://www.economist.com/news/middle-east-and-africa/21672031-what-russian-intervention-means-opposition-down-not-yet-out>).

⁴⁵³ Gill, *supra* note 19, p. 374.

While the U.S.-led Coalition has primarily conducted air strikes against ISIL, it has at times used direct armed force against Syrian armed forces as well. For example, on September 17, 2016, an air strike involving American, British, Australian, and Danish forces killed 62 Syrian troops.⁴⁵⁴ Did this attack create an IAC with Syria? Most likely not. By all accounts, the air strike was intended to target ISIL but mistakenly hit Syrian forces instead. The U.S. military stated that the strike was an accident, expressing regret for the “unintentional loss of life of Syrian forces”⁴⁵⁵ As the *2016 ICRC Commentary* makes clear, acts that are a “result of a mistake” are excluded from the scope of CA2.⁴⁵⁶

However, on April 7, 2017, the U.S. military did intentionally target Syrian forces. After the Syrian Government carried out a chemical attack on its own people a few days before,⁴⁵⁷ the United States responded by launching 59 cruise missiles at a Syrian air force base in western Syria, killing around 13 people, including 5 Syrian soldiers.⁴⁵⁸ In a UN Security Council meeting following the missile strike, the Syrian representative scolded the United States for “commit[ing] a flagrant and barbaric act of aggression against a Syrian Arab Air Force base”, which he further described as a grave violation of the UN Charter and a violation of “all international norms and laws.”⁴⁵⁹ The representative from Russia also stated that Russia “describe that attack as a flagrant violation of international law and an act of aggression.”⁴⁶⁰ All of the other 15 member States did not indicate

⁴⁵⁴ Time Hume, Steve Almasy, Barbara Starr, et al., “Syria ceasefire under threat after US-led strikes kill regime troops, Russia says”, *CNN*, 18 September 2016 (available at: <http://www.cnn.com/2016/09/18/middleeast/syria-claims-coalition-airstrike-hit-regime-forces/>).

⁴⁵⁵ *Ibid.*; Patrick Wintour, “RAF Reaper drones used in airstrike that killed Syrian troops, MoD says”, *The Guardian*, 19 September 2016 (available at: <https://www.theguardian.com/world/2016/sep/19/raf-reaper-drones-used-airstrike-killed-syrian-government-troops#https://www.theguardian.com/world/2016/sep/19/raf-reaper-drones-used-airstrike-killed-syrian-government-troops>).

⁴⁵⁶ ICRC, *Commentary on the First Geneva Convention*, 2nd edition, 2016, para. 241; See also UK Ministry of Defence, *Joint Service Manual of the Law of Armed Conflict*, *supra* note 72, p. 29 (“[A]n accidental border incursion by members of the armed forces would not, in itself, amount to an armed conflict, nor would the accidental bombing of another country”); *But see* Paul Berman, “When Does Violence Cross the Armed Conflict Threshold: Current Dilemmas”, Proceedings of the 13th Bruges Colloquium 18-19 October 2012, Scope of Application of International Humanitarian Law, *Collegium*, no. 43 (Autumn 2013), pp. 39-40 (arguing that accidents are not excluded from the threshold if IACs).

⁴⁵⁷ Kareem Khadder, Schams Elwazer, et al., “Suspected gas attack in Syria reportedly kills dozens”, *CNN*, 7 April 2017 (available at: <http://edition.cnn.com/2017/04/04/middleeast/idlib-syria-attack/index.html>).

⁴⁵⁸ Dan Lamothe, Missy Ryan, and Thomas Gibbons-Neff, “U.S. strikes Syrian military airfield in first direct assault on Bashar al-Assad’s government”, *The Washington Post*, 7 April 2017, p. 18 (available at: https://www.washingtonpost.com/world/national-security/trump-weighing-military-options-following-chemical-weapons-attack-in-syria/2017/04/06/0c59603a-1ae8-11e7-9887-1a5314b56a08_story.html?utm_term=.1a820e5f7d24).

⁴⁵⁹ United Nations Security Council, Meeting record, *7919th Meeting: The Situation in the Middle East*, S/PV.7919 (7 April 2017), p. 18, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.7919.

⁴⁶⁰ *Ibid.*, p. 10.

any views on the classification of the U.S. strike, restricting their comments to vague calls for adherence to international humanitarian law and the UN Charter from both sides. In any case, under the dominant view presented in Part 2, “the U.S. attack on Syrian military infrastructure [...] amounts to an international armed conflict”.⁴⁶¹

If an IAC erupted on April 7, 2017, between Syria and the United States, it raises the possibility of whether this could have had the effect of internationalizing the rest of the American operations in Syria. This possibility has been briefly contemplated by at least one commentator.⁴⁶² However, this author rejects this possibility. The U.S. strike was an isolated event that was not “continuous”, as the standard from *Rajić* laid out in Part 2 above requires.⁴⁶³ The U.S. also carried out its operation alone and does not seem to have coordinated or cooperated with any rebel group. Thus, the global approach would seem the most appropriate solution here, which would mean that the military intervention by the U.S. did not have the consequence of internationalizing the separate conflict between the U.S. and ISIL—rather, it simply created another distinct conflict between Syria and the U.S.

Another State, outside of the Coalition, has also been engaged in direct hostilities with Syria, that State being Turkey. Since 2012, Turkish and Syrian forces have occasionally been engaging in border clashes. For example, in June 2012, Syria shot down a Turkish airplane, alleging that the plane was in Syrian airspace.⁴⁶⁴ And during October 2012, several clashes occurred along the border, with Turkey responding with artillery against Syrian military targets after Syrian shells

⁴⁶¹ Stephanie Nebehay, “Exclusive: Situation in Syria constitutes international armed conflict - Red Cross”, *Reuters*, 7 April 2017 (available at: <http://www.reuters.com/article/us-mideast-crisis-syria-redcross-idUSKBN17924T?il=0>).

⁴⁶² Nancy Simons, “The Legality Surrounding the US Strikes in Syria”, *Opinio Juris*, 25 April 2017 (available at: <http://opiniojuris.org/2017/04/25/the-legality-surrounding-the-us-strikes-in-syria/>) (“The second potential consequence [of the U.S. attacks] relates to the law applicable to the conflict that is affecting Syria. [...] Depending on the position adopted, this could lead to either the internationalization of the conflict in Syria, meaning that there would be an IAC between all the actors (including ISIL) or that there would be a situation of mixed conflicts, IAC between the US and Syria and a NIAC for all the other actors, which in turn would lead to different applicable rules. It remains to be seen how this will materialize.”).

⁴⁶³ *Prosecutor v. Ivica Rajić*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Trial Chamber, ICTY, 13 September 1996, para. 21.

⁴⁶⁴ Unknown Author, “Syrian military says it downed Turkish fighter jet”, *BBC*, 23 June 2012 (available at: <http://www.bbc.com/news/world-middle-east-18561219>).

repeatedly, but inadvertently, were fired into Turkey. The deadliest of these incidents occurred on October 3, where 5 Turks died as a result of the Syrian shelling.⁴⁶⁵

In contrast to the United States' direct intervention, there seems to be some level of cooperation and coordination between Syrian rebels and Turkey in their military operations. According to reports, the head of the Free Syrian Army (FSA)—one of the largest opposition groups in Syria—resides in Turkey.⁴⁶⁶ There are also reports that Turkey, throughout the conflict but especially since 2015, has closely coordinated operations with the FSA and other militias.⁴⁶⁷ It has even been reported that the FSA are taking direct orders from Turkey.⁴⁶⁸ Thus, if the reporting about the FSA receiving direct orders from Turkey is correct, there are some indications that the level of cooperation between Turkey and especially the FSA would justify treating the two as one fighting force, thereby internationalizing the NIAC between the FSA and Syria. However, the information in this regard is still too scant, and a conclusive finding does not seem possible at the moment.

6.2.2. *Lack of consent*

Since the summer of 2014, the U.S.-led Coalition has targeted ISIL in Syria, primarily through air strikes and special operation missions.⁴⁶⁹ As of May 29, 2017, the Coalition has conducted a total of 10,701 air strikes in Syria, the vast majority of them carried out by the United States.⁴⁷⁰ Syria has not officially expressed its consent for the Coalition's operations. According to the ILC's Draft Articles on State Responsibility, consent does not have to be publicly promulgated, but it must have been clearly given and established without coercion.⁴⁷¹ While it cannot be ruled out that the

⁴⁶⁵ Unknown Author, "Turkish artillery strikes back after Syrian mortar bomb hit", *The Daily Star*, 17 October 2012 (available at: <http://www.dailystar.com.lb/News/Middle-East/2012/Oct-17/191756-turkish-artillery-strikes-back-after-syrian-mortar-bomb-hit.ashx#axzz29b0Hl3Wh>).

⁴⁶⁶ Zeina Karam, "Syrian dissident colonel takes refuge in Turkey", *The Guardian*, 5 October 2011 (available at: <https://www.theguardian.com/info/2015/dec/09/removed-news-agency-feed-article>).

⁴⁶⁷ Unknown Author, "Turkey's Erdogan plans to expand Syrian military op, wants 'safe zones'", *RT*, 19 September 2016 (available at: <https://www.rt.com/news/359859-syria-turkey-erdogan-isis/>).

⁴⁶⁸ Zvi Bar'el, "The Free Syrian Army Follows Orders From Turkey", *Haaretz*, 26 November 2016 (available at: <http://www.haaretz.com/middle-east-news/.premium-1.755348>).

⁴⁶⁹ Combined Joint Task Force-OIR, *FACT SHEET*, available at: <http://www.inherentresolve.mil/Portals/14/Documents/Mission/History.pdf?ver=2016-03-23-065243-743>.

⁴⁷⁰ U.S. Department of Defense, "Operation Inherent Resolve: Targeted Operations Against ISIS" (available at: https://www.defense.gov/News/Special-Reports/0814_Inherent-Resolve/).

⁴⁷¹ International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts*, *supra* note 31, pp. 72-74.

Coalition has some kind of agreement with Syria—something the U.S. denies—the publicly known information points to Syria not having given its consent to the operations.⁴⁷²

Part 4 rejected the argument that any NIAC that crosses the borders of a State and continues into another State without that State’s consent will then turn into an IAC due to the lack of consent. An IAC requires actual fighting between two States, and therefore, the lack of Syrian consent does not, in the view of this author, have the effect of internationalizing the parts of the NIAC with ISIL that take place in Syria. Rather, by virtue of the argument advanced in Part 4, the air strikes and operations against ISIL in Syria by the Coalition would best be classified as a spillover NIAC instead, a transnational continuation of the NIAC between ISIL and the Coalition that is taking place in Iraq. Syrian forces have not been involved in the hostilities between the Coalition and ISIL, so the situation is not one of conflict between States.⁴⁷³ As part of the campaign against ISIL, the Coalition has not deliberately targeted Syrian forces, governmental targets, or Syrian civilians, and several of the States in the Coalition have specifically stated that the operations are not directed at the Syrian Government or the Syrian people.⁴⁷⁴ In other words, the anti-ISIL Coalition has not shown an *animus belligerendi* towards Syria.⁴⁷⁵ While the lack of hostile intent on the part of the parties should not be seen as conclusive as to the existence of an IAC, in this case it is a further indication that the conflict against ISIL should not be regarded as international.

Furthermore, as was shown in Part 4, neither Syria nor any of the parties to the conflict have characterized the hostilities with ISIL as an IAC, and some have stated to the contrary that they

⁴⁷² Zamir, “The Armed Conflict(s) Against the Islamic State”, *supra* note 19, pp. 114-15.

⁴⁷³ Schöndorf, *supra* note 104, p. 27.

⁴⁷⁴ UN Security Council, *Letter dated 9 September 2015 from the Permanent Representative of Australia*, *supra* note 252 (“These operations [against ISIL in Syria] are not directed against Syria or the Syrian people”); UN Security Council, *Letter dated 31 March 2015 from the Chargé d’affaires a.i. of the Permanent Mission of Canada*, *supra* note 241 (“Canada’s military actions against ISIL in Syria [...] are not aimed at Syria or the Syrian people”).

⁴⁷⁵ Cf. Szesnat and Bird, *supra* note 309, p. 237; US DoD, *Department of Defense Law of War Manual* (Washington, DoD, 2016), p. 78, available at:

<https://www.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190> (“Jus in bello rules apply when a party intends to conduct hostilities”);

Sean Watts, “The Updated First Geneva Convention Commentary, DOD’s Law of War Manual, and a More Perfect Law of War, Part I”, *Just Security*, 5 July 2016 (available at:

<https://www.justsecurity.org/31749/updated-geneva-convention-commentary-dods-lowm-perfect-law-war/>);

Christopher Greenwood, “War, Terrorism, and International Law”, *Current Legal Problems*, vol. 56, no. 1 (2003), p. 513 (“The creation of a state of war required the manifestation by one of the belligerents of an *animus belligerendi*, an intention to create a state of war between itself and its opponent”). *But see* Dinstein, *War, Aggression and Self-Defence*, *supra* note 70, p. 14 (arguing that an *animus belligerendi* is not an intrinsic part of the definition of war); Edwin M. Borchard, “‘War’ and ‘Peace’”, *American Journal of International Law*, vol. 27, no. 1 (1933), pp. 114-16 (differentiating between a legal “state of war” which shows an intention to engage in armed conflict and a “*de facto* war”).

view it as a NIAC. Syria has also not responded militarily to the operations. For these reasons, the operations against ISIL in Syria should be classified as a spillover NIAC, forming part of the NIAC against ISIL in Iraq, and hence the lack of Syrian consent cannot be regarded as having internationalized the campaign against ISIL in Syria. However, it should be acknowledged that the ICRC does not share the opinion that the operations by the Coalition in Syria should be classified as a NIAC and has in relation to the U.S. operations in Syria publicly concluded that the United States is in an IAC with Syria by restating its view that “[a]ny military operation by a state on the territory of another without the consent of the other amounts to an international armed conflict”.⁴⁷⁶ Proponents of the ICRC view have likewise concluded that the military operations against ISIL in Syria amount to an IAC.⁴⁷⁷

6.2.3. Indirect intervention

The conflict in Syria has widely been described as a proxy war by commentators and journalists alike.⁴⁷⁸ The Syrian Government has been supported heavily by Iran, which provides financial assistance as well as military assistance in the form of military advisers and weaponry, and Russia and Hezbollah have directly intervened militarily, with Russia providing mostly air support and Hezbollah assisting Syrian troops on the ground. The rebels, on the other hand, have received outside support of varying degrees from several States, including States from the region such as Turkey, Saudi Arabia, Jordan, and Qatar as well as from Western States such as the U.S., the UK,

⁴⁷⁶ Stephanie Nebehay, “Exclusive: Situation in Syria constitutes international armed conflict - Red Cross”, *Reuters*, 7 April 2017 (available at: <http://www.reuters.com/article/us-mideast-crisis-syria-redcross-idUSKBN17924T?il=0>).

⁴⁷⁷ Dapo Akande, “When Does the Use of Force Against a Non-State Armed Group trigger an International Armed Conflict and Why does this Matter?”, *EJIL: Talk!*, 18 October 2016 (available at: <http://www.ejiltalk.org/when-does-the-use-of-force-against-a-non-state-armed-group-trigger-an-international-armed-conflict-and-why-does-this-matter/>); Adil Ahmad Haque, “The United States is at War with Syria (according to the ICRC’s New Geneva Convention Commentary)”, *EJIL: Talk!*, 8 April 2016 (available at: <https://www.ejiltalk.org/the-united-states-is-at-war-with-syria-according-to-the-icrcs-new-geneva-convention-commentary/>); Ryan Goodman, “Is the United States Already in an ‘International Armed Conflict’ with Syria?”, *Just Security*, 11 October 2016 (available at: <https://www.justsecurity.org/33477/united-states-international-armed-conflict-syria/>); *But see* Deborah Pearlstein, “A Syrian IAC?”, *Opinio Juris*, 14 October 2016 (available at: <http://opiniojuris.org/2016/10/14/a-syrian-iac/>).

⁴⁷⁸ *See e.g.* ARK Group DMCC, *The Syrian conflict: A systems conflict analysis*, 2016, pp. 12-15, available at: <http://cdacollaborative.org/wordpress/wp-content/uploads/2016/03/The-Syrian-conflict-A-systems-conflict-analysis.pdf>; Simon Mabon, “How to understand Syria’s ‘proxy war’ – and who’s fighting for whom”, *The Conversation*, 29 September 2016 (available at: <http://theconversation.com/how-to-understand-syrias-proxy-war-and-whos-fighting-for-whom-65685>); Lucy Rodgers, David Gritten, et al., “Syria: The story of the conflict”, *BBC*, 11 March 2016 (available at: <http://www.bbc.com/news/world-middle-east-26116868>); As’ad AbuKhalil, “The 8 Proxy Wars Going On in Syria Right Now”, *Huffpost*, 2 December 2014 (available at: http://www.huffingtonpost.com/asad-abukhalil/syria-proxy-wars_b_5874488.html).

and France.⁴⁷⁹ Due to space limitations, however, only the support provided by United States will be examined below.

The first indirect intervention by the U.S. in the Syrian civil war appears to have been in June 2012. Here it was reported that CIA agents in Turkey were assisting other allies in deciding which Syrian opposition group to provide arms to, despite the U.S. itself providing only non-lethal aid to the opposition.⁴⁸⁰ However, since at least 2013, the Obama administration decided to directly arm the Syrian rebels. It was announced that the arms would go to the main opposition group, the Supreme Military Council.⁴⁸¹ This lethal aid included small arms, ammunition, and antitank weapons, but not, initially at least, antiaircraft weaponry.⁴⁸² Later in the year, the arming of Syrian rebels started to include the FSA, the largest opposition group in the country.⁴⁸³ In 2013, the U.S. started to train rebel forces in Jordan through a CIA-run program. In April 2014, the U.S. increased its delivery of more powerful weaponry to Syrian rebel groups, such as TOW missiles, and it increased its training of opposition forces in Jordan as well, with the hope of being able to counter recent regime advances in the war.⁴⁸⁴ Later in 2014, it was also reported that the U.S. was training rebel groups in Qatar, possibly in cooperation with Qatari authorities.⁴⁸⁵ As part of the training program in early 2015, the U.S. planned to provide some rebels with the ability to call in U.S. air strikes, and U.S. authorities also planned to train 1,000 rebels in Jordan and other countries to fight both the Assad regime and ISIL.⁴⁸⁶ In 2015, the U.S. further expanded its program of arming of Syrian rebels,

⁴⁷⁹ Lucy Rodgers, David Gritten, et al., "Syria: The story of the conflict", *BBC*, 11 March 2016 (available at: <http://www.bbc.com/news/world-middle-east-26116868>).

⁴⁸⁰ Eric Schmitt, "C.I.A. Said to Aid in Steering Arms to Syrian Opposition", *The New York Times*, 21 June 2012 (available at: <http://www.nytimes.com/2012/06/21/world/middleeast/cia-said-to-aid-in-steering-arms-to-syrian-rebels.html>).

⁴⁸¹ Aamer Madhani, Jim Michaels, & Tom Vanden Brook, "Source: Obama approves arming Syrian rebels", *USA Today*, 13 June 2013 (available at: <https://www.usatoday.com/story/news/politics/2013/06/13/us-confirms-chemical-weapons-syria/2420763/>).

⁴⁸² Mark Mazzetti, Michael R. Gordon, & Mark Landler, "U.S. Is Said to Plan to Send Weapons to Syrian Rebels", *The New York Times*, 13 June 2013 (available at: <http://www.nytimes.com/2013/06/14/world/middleeast/syria-chemical-weapons.html?pagewanted=all&r=0>).

⁴⁸³ Mark Memmott, "As Talks Continue, CIA Gets Some Weapons To Syrian Rebels", *NPR*, 13 September 2013 (available at: <http://www.npr.org/sections/thetwo-way/2013/09/13/222020019/as-talks-continue-cia-gets-some-weapons-to-syrian-rebels>).

⁴⁸⁴ Tom Bowman, "CIA Is Quietly Ramping Up Aid To Syrian Rebels, Sources Say", *NPR*, 23 April 2014 (available at: <http://www.npr.org/sections/parallels/2014/04/23/306233248/cia-is-quietly-ramping-up-aid-to-syrian-rebels-sources-say>).

⁴⁸⁵ Nancy A. Youssef, "Syrian Rebels Describe U.S.-Backed Training in Qatar", *FRONTLINE*, 26 May 2014 (available at: <http://www.webcitation.org/6SidZu5ZR>).

⁴⁸⁶ Julian E. Barnes & Adam Entous, "U.S. to Give Some Syria Rebels Ability to Call Airstrikes", *The Wall Street Journal*, 17 February 2015 (available at: <https://www.wsj.com/articles/u-s-to-give-some-syria-rebels-ability-to-call-airstrikes-1424208053>); Tara McKelvey, "Arming Syrian rebels: Where the US went wrong", *CNN*, 10 October 2015 (available at: <http://www.bbc.com/news/magazine-33997408>).

primarily to forces fighting along the Turkish border such as the Syrian Arab Coalition.⁴⁸⁷ As a result of the Russian intervention in the conflict on the side of the regime and its targeting of Syrian opposition forces, the White House announced a further increase in the supply of weapons to the rebels, primarily to Syrian Kurds and Arab-Syrian opposition groups. The weapons included heavy artillery as well as BM-30 multiple-launch rocket systems.⁴⁸⁸

Furthermore, it has been reported that the Free Syrian Army in the south of Syria is coordinating its operations with American-Jordanian authorities based in Jordan.⁴⁸⁹ By 2015, the CIA program to train and arm rebels in the fight against Assad was one of the largest covert operations programs of the agency, with a budget of one billion dollars. CIA agents expressed optimism that significant progress had been made towards the ultimate goal: the ouster of Assad. U.S. officials commented further that the CIA had trained and equipped almost 10,000 anti-Assad fighters who had been sent back into Syria over the past several years. It was also reported that the CIA was engaged in intelligence gathering in order to help guide the operations of the U.S.-armed rebels, who also received logistics assistance.⁴⁹⁰ The U.S. reportedly ended their parallel training of rebels to fight ISIL in 2015, but the program to train insurgents fighting the Syrian regime continued, despite being cut by 20 percent.⁴⁹¹

The public information available shows that the United States does not appear to have exerted a level of control that rise to the level of either overall or effective control. There is no evidence that the U.S. authorities has had a significant role in “organizing, coordinating or planning” the military operations of rebel groups, although some reports indicate that the U.S. has had some role in guiding and coordinating certain operations by the rebels. Similarly, there is nothing that indicates that the U.S. has given specific instructions to Syrian rebels on how to conduct their fighting or what targets to attack, or that rebels were in “complete dependence” of American aid. The limited

⁴⁸⁷ Phil Stewart and Kate Holton, “U.S. pulls plug on Syria rebel training effort; will focus on weapons supply”, *Reuters*, 9 October 2015 (available at: <http://www.reuters.com/article/us-mideast-crisis-syria-usa-idUSKCNOS31BR20151009>).

⁴⁸⁸ Barbara Starr, Elise Labott, & Jim Acosta, “Obama authorizes resupply of Syrian opposition”, *CNN*, 5 October 2015 (available at: <http://edition.cnn.com/2015/10/05/politics/russia-ground-campaign-syria-isis/>).

⁴⁸⁹ Zvi Bar’el, “The Free Syrian Army Follows Orders From Turkey”, *Haaretz*, 26 November 2016 (available at: <http://www.haaretz.com/middle-east-news/.premium-1.755348>).

⁴⁹⁰ Greg Miller and Karen DeYoung, “Secret CIA effort in Syria faces large funding cut”, *The Washington Post*, 12 June 2015 (available at: https://www.washingtonpost.com/world/national-security/lawmakers-move-to-curb-1-billion-cia-program-to-train-syrian-rebels/2015/06/12/b0f45a9e-1114-11e5-adece82f8395c032_story.html?utm_term=.20ffda268bf1).

⁴⁹¹ *Ibid.*

scholarship there has been on the indirect intervention in Syria has therefore logically concluded that the outside foreign support for rebel groups has so far not internationalized the conflict.⁴⁹²

However, by adopting the alternative approach presented in this paper, this conclusion changes. As it has been seen above, the United States has financed, armed, and provided training to opposition forces fighting in a NIAC against the Syrian Government. Under the proxy test presented in Part 5, this would mean that the fighting between the U.S.-trained and equipped rebels and the Syrian armed forces would have been internationalized since 2013 when the training and arming began, forming part of an IAC between Syria and the United States. It is not clear how many rebels have been or are being trained by the U.S. In 2015, it was revealed that only 5 trained rebels were currently fighting in Syria, but this was from a separate training program designed to train fighters to engage in the fight against ISIL.⁴⁹³ But in any case, as long as rebels trained and armed by the U.S. are engaged in the fight against the Assad regime, the conflict between those rebels and the Assad regime would in reality constitute an IAC between the U.S. and Syria.

6.3. Consequences of Internationalization of the Conflict in Syria

The internationalization of the conflict in Syria would have many consequences. One major consequence of internationalization relates to the status of the fighters in the conflict. In IACs, members of the armed forces have combatant status, which confers them with combatant privilege. Pursuant to this privilege (also called combatant immunity), combatants in IACs have the right to participate in hostilities and cannot be prosecuted for their participation or for any lawful acts committed during hostilities.⁴⁹⁴ In contrast, combatant status, and its accompanying combatant privilege, does not exist in NIACs, as confirmed by the ICRC *Customary International*

⁴⁹² Gill, *supra* note 19, p. 375 ("The operations have not resulted in overall or effective control of an armed group active in the conflict by a State within the coalition [...] which would have internationalized the conflict."); Louise Arimatsu and Mohbuba Choudhury, *The Legal Classification of the Armed Conflicts in Syria, Yemen and Libya* (March 2014), p. 18, available at: https://www.chathamhouse.org/sites/files/chathamhouse/home/chatham/public_html/sites/default/files/20140300_ClassificationConflictsArimatsuChoudhury1.pdf ("However, there is inadequate evidence, if any, to suggest that those states, or indeed any others, are organizing, coordinating or planning the military actions of the FSA. Since no state appears to have overall control over the FSA, the NIAC (on the available evidence) is not internationalized.").

⁴⁹³ Nick Paton Walsh, "Syrian rebels: This is what almost \$1m of U.S. training looks like", *CNN*, 18 August 2015 (available at: <http://www.cnn.com/2015/08/18/middleeast/new-syria-force-fighter-abu-iskander/>).

⁴⁹⁴ Jelena Pejić, *Status of Armed Conflicts*, in: Elizabeth Wilmshurst and Susan Breau, *Perspectives on the ICRC Study on Customary International Humanitarian Law, 2007*, pp. 77-80; Sivakumaran, *The Law of Non-International Armed Conflict*, *supra* note 12, p. 69.

Humanitarian Law Study.⁴⁹⁵ This discrepancy has a couple of consequences. First of all, since fighters in NIACs lack combatant immunity, they remain liable to criminal prosecution under domestic law for taking up arms against the government.⁴⁹⁶ Consequently, if the conflict in Syria were found to have been internationalized, the Syrian rebels could not be prosecuted for their mere participation in the conflict, only for any violations of the laws of war.

A second consequence of internationalization in Syria arising from the lack of combatant status in NIACs pertains to detention. There are substantial differences between the law of IAC and NIAC in this regard. If Syria transformed into an IAC, the detention regimes found in the Geneva Conventions are applicable—GC IV dealing with the detention of civilians and GC III dealing with the detention of combatants. Combatants in an IAC would have to be granted POW status, whereas fighters in a NIAC would only receive the rudimentary protections of CA3.⁴⁹⁷ The rules governing detention in NIACs are therefore mainly left to domestic law, which is (hopefully) informed by IHRL. For example, Israel deals with captured fighters not entitled to POW status under its *Incarceration of Unlawful Combatants Law*.⁴⁹⁸ In the Syrian context, this difference is significant. Reports of widespread torture and ill treatment of captured opposition fighters by the Syrian regime illustrate the massive consequences that the lack of any substantive law pertaining to detention in NIACs has for those detained. If the conflict were found to have been internationalized, those issues would be partially alleviated—granting, of course, that the Syrian regime would actually abide by the relevant IAC law.

A third consequence of the internationalization of the Syrian conflict would be the expansion of the legal geography of the conflict. As seen in Part 2 above, the reach of the laws of war in IACs extend to the full territory of the parties involved. This means that, even though the conflict is likely to be confined to Syria, the territories of the United States would, in principle, form part of the overall geographic space of the conflict where the laws of war would apply. This would mean that attacks

⁴⁹⁵ See ICRC, *Customary IHL Database*, Rule 3, accessed on 25 May 2017 (available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule3).

⁴⁹⁶ *Ibid.*

⁴⁹⁷ Sivakumaran, *The Law of Non-International Armed Conflict*, *supra* note 12, pp. 292-3; Dapo Akande, “When Does the Use of Force Against a Non-State Armed Group trigger an International Armed Conflict and Why does this Matter?”, *EJIL: Talk!*, 18 October 2016 (available at: <http://www.ejiltalk.org/when-does-the-use-of-force-against-a-non-state-armed-group-trigger-an-international-armed-conflict-and-why-does-this-matter/>).

⁴⁹⁸ *Incarceration of Unlawful Combatants Law*, No. 5762, 14 March 2002, unofficial translation available at: <https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/7A09C457F76A452BC12575C30049A7BD>. See section 1: “This Law is intended to regulate the incarceration of unlawful combatants not entitled to prisoner-of-war status, in a manner conforming with the obligations of the State of Israel under the provisions of international humanitarian law”.

by Syria on military targets on U.S. soil would not, in and of itself, be a violation of the *jus in bello*.⁴⁹⁹

A fourth consequence of internationalization relates to the law on targeting. While most targeting law of IAC is believed to be equally applicable in NIACs through customary law, this might not necessarily be the case for all of the rules. According to ICRC's *Customary International Humanitarian Law Study*, for example, Article 35(3) of AP I, which prohibits the use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment, has achieved the status of a norm of customary international law applicable in IACs. However, the Study acknowledges that the applicability of this rule in NIACs is "less clear".⁵⁰⁰ Indeed, the proposal to include the rule in AP II was rejected by States in 1977.⁵⁰¹ For its part, the United States has rejected the applicability of the rule altogether in both IACs and NIACs alike.⁵⁰²

More generally, the United States has denied "the assertion that a significant number of rules contained in the Additional Protocols to the Geneva Conventions have achieved the status of customary international law" as well as "the assertion that certain rules contained in the Geneva Conventions and the Additional Protocols have become binding as a matter of customary international law in internal armed conflict".⁵⁰³ Moreover, the United States has challenged the applicability of certain norms pertaining to targeting thought to be applicable as a matter of customary law, such as the prohibition of the use of anti-personnel bullets that explode within the human body (in particular its applicability in the case of NIACs), in disagreement with the determination made to the contrary by the ICRC Study.⁵⁰⁴

A final consequence pertains to ICL. In an international criminal law setting, the choice of the appropriate charge, and the court's application of the correct body of law, depends upon the classification of the conflict as an IAC or NIAC. For example, the ICC operates with two different categories of war crimes depending on whether the conflict in question is classified as an IAC or a

⁴⁹⁹ Solis, *supra* note 5, pp. 170-72.

⁵⁰⁰ ICRC, *Customary IHL Database*, Rule 45, accessed on 25 May 2017 (available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule45).

⁵⁰¹ *Ibid.*

⁵⁰² John B. Bellinger and III and William J. Haynes I, *supra* note 29, pp. 455-60.

⁵⁰³ *Ibid.*, p. 448.

⁵⁰⁴ *Ibid.*, pp. 460-65; ICRC, *Customary IHL Database*, Rule 78, accessed on 26 May 2017 (available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule78).

NIAC. For example, while the targeting of civilian objects is a war crime in IACs under the ICC Statute, this is not the case in NIACs. Therefore, the classification of the hostilities in Syria will have important consequences for the post-conflict prosecution of war crimes, whether it be at the ICC or at another judicial body.⁵⁰⁵

⁵⁰⁵ Dapo Akande, “When Does the Use of Force Against a Non-State Armed Group trigger an International Armed Conflict and Why does this Matter?”, *EJIL: Talk!*, 18 October 2016 (available at: <http://www.ejiltalk.org/when-does-the-use-of-force-against-a-non-state-armed-group-trigger-an-international-armed-conflict-and-why-does-this-matter/>).

Conclusion

In contrast to the previous academic literature and public discourse on the classification of the Syrian conflict, this paper has reached the conclusion that parts of the overall conflict in Syria should be regarded as having been internationalized. It has been argued that under the internationalization process of indirect intervention, the involvement of the United States in the activities of the Syrian rebels is of such nature that it should render those aspects of the conflict international. In contrast, it was found that the conflict in Syria cannot definitively be said to have been internationalized under any of the other processes of internationalization analyzed in this paper. While there seems to be some level of interaction between Turkey and the FSA, it is unclear whether that relationship has been of such a character as to cause an internationalization of the conflict.

Obviously, the relevance of the findings of this paper goes beyond the context of Syria. Throughout the paper, the practice of States has been included in the analysis. This attempt to engage with States practice has demonstrated the great difficulty that researching State practice in relation to conflict classification entails due to States often being unclear about their legal views. The practice of States should not be ignored, however, since it is States that are responsible for the application of IHL in practice. Moving forward, it would be preferable if States attempted to more clearly articulate their views on the law of internationalization. This could be done in various ways; for example, through the States' own military manuals, or perhaps through official statements of *opinio juris* made at the international level. As this paper has shown, the law on internationalization needs greater clarity if States are to realistically apply it on the battlefield. While this paper has tried to shed light on the processes of internationalization, it is only when States become more transparent on this issue that the law can be settled for good.

Bibliography

Books, book chapters, and journal articles

Abi-Saab, Georges, *Non-International Armed Conflicts*, in: UNESCO, *International Dimensions of Humanitarian Law*, 1988, pp. 217-239

Akande, Dapo, "Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities", *International and Comparative Law Quarterly*, vol. 59, no. 1 (2010), pp. 180-92

Akande, Dapo, *Classification of Armed Conflicts: Relevant Legal Concepts*, in: Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, 2012, pp. 32-79

Aldrich, George H., "The Laws of War on Land", *American Journal of International Law*, vol. 94, no. 1 (2000), pp. 42-64

Arimatsu, Louise, "Territory, Boundaries and the Law of Armed Conflict", *Yearbook of International Humanitarian Law*, vol. 12 (2009), pp. 157-192.

Arimatsu, Louise, *The Democratic Republic of the Congo 1993-2010*, in: Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, 2012, pp. 146-202

Bellinger III, John B, and Haynes I, William J., "A US government Response to the International Committee of the Red Cross Study *Customary International Humanitarian Law*", *International Review of the Red Cross*, vol. 89, no. 866 (2007), pp. 443-47

Best, Geoffrey, *War and Law since 1945*, 1994

Bethlehem, Daniel, *Foreword*, in: Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, 2012, pp. v-vii

Blank, Laurie R., "Complex Legal Frameworks and Complex Operational Challenges: Navigating the Applicable Law Across the Continuum of Military Operations", *Emory International Law Review*, vol. 26, no. 1 (2012), pp. 87-135

Blank, Laurie and Farley, Benjamin R., "Characterizing US Operations in Pakistan: Is the United States Engaged in an Armed Conflict?", *Fordham International Law Journal*, vol. 34, no. 2 (2011), pp. 151-189

Blank, Laurie, and Farley, Benjamin R., "Identifying The Start of Conflict: Conflict Recognition, Operational Realities and Accountability in the Post-9/11 World", *Michigan Journal of International Law*, vol. 36, no. 3 (2016), pp. 467-539

Boothby, William, "'And for Such Time As': The Time Dimension to Direct Participation in Hostilities", *New York University Journal of International Law and Politics*, vol. 42, no. 3 (2010), pp. 741-768

Byron, Christine, "Armed Conflicts: International or Non-International?", *Journal of Conflict and Security Law*, vol. 6, no. 1 (2001), pp. 63-90

Cassese, Antonio, "The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia", *European Journal of International Law*, vol. 18, no. 4 (2007), pp. 649-668

Corn, S., "Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict", *Vanderbilt Journal of Transnational Law*, vol. 40, no. 2 (2007), pp. 295-355

Cullen, Anthony, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, 2010

D'Amato, Anthony, *Concept of Custom in International Law*, 1971

Daskal, Jennifer C., "The Geography of the Battlefield: A Framework for Detention and Targeting Outside the "Hot" Conflict Zone", *University of Pennsylvania Law Review*, vol. 161, no. 5 (2013), pp. 1165-1234

Del Mar, Katherine, "The Requirement of 'Belonging' under International Humanitarian Law", *The European Journal of International Law*, vol. 21, no. 2 (2010), pp. 105-124

Detter, Ingrid, *The Law of War*, 3rd edition, 2013

Dinstein, Yoram *War, Aggression and Self-Defence*, 5th edition, 2012

Dinstein, Yoram, *Non-International Armed Conflicts in International Law*, 2014

Dinstein, Yoram, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd edition, 2016

Dinstein, Yoram, *The International Law of Belligerent Occupation*, 2009

Dixon, Martin, *Textbook on International Law*, 7th edition, 2013, pp. 73-75

- Dörr, Oliver, *General Rule of Interpretation*, In: Oliver Dörr and Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, 2012, pp. 521-570
- Droege, Cordula, "Elective Affinities? Human Rights and Humanitarian Law", *International Review of the Red Cross*, vol. 90, no. 871 (2008), p. 501-548
- Eichensehr, Kristen E., "On Target? The Israeli Supreme Court and the Expansion of Targeted Killings", *The Yale Law Journal*, vol. 116, no. 8 (2007), pp. 1873-1881
- Elder, David A., "The historical background of Common Article 3 of the Geneva Conventions of 1949", *Case Western Reserve Journal of International Law*, vol. 11, no. 1 (1979), pp. 37-69
- Elsa, Jennifer, *Treatment of "Battlefield Detainees" in the War on Terrorism*, Congressional Research Service, Report for Congress (13 Jan. 2005)
- Farer, Tom, "Humanitarian Law and Armed Conflicts: Toward the Definition of 'International Armed Conflict'", *Columbia Law Review*, vol. 71, no. 1 (1971), pp. 37-72
- Fenrick, William J., "The Development of the Law of Armed Conflict through the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia", *International Legal Studies*, vol. 71 (1998), pp. 77-118
- Ferraro, Tristan, "The applicability and application of international humanitarian law to multinational forces", *International Review of the Red Cross*, vol. 95, no. 891/892 (2013), pp. 561-612
- Ferraro, Tristan, "The ICRC's legal position on the notion of armed conflict involving foreign intervention and on determining the IHL applicable to this type of conflict", *International Review of the Red Cross*, vol. 97, no. 900 (2015), pp. 1227-1252
- Fleck, Dieter, *The Law of Non-International Armed Conflicts*, In: Dieter Fleck (eds.), *The Handbook of International Humanitarian Law*, 2008, pp. 606-7.
- Gasser, Hans-Peter, "Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon", *The American University Law Review*, vol. 33, no. 1 (1983), pp. 145-161
- Gasser, Hans-Peter, *International Humanitarian Law: An Introduction*, in: Hans Haug (ed.), *Humanity for All: The International Red Cross and Red Crescent Movement*, 1993, p. 510-40
- Gill, Terry D., "Classifying the Conflict in Syria", *International Law Studies*, vol. 92 (2016), pp. 353-380

Green, Leslie C., *The Contemporary Law of Armed Conflict*, 2nd edition, 2000

Greenwood, Christopher, "Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia", *Max Planck Yearbook of United Nations Law*, vol. 2 (1998), pp. 97-140

Greenwood, Christopher, Scope of Application of Humanitarian Law, in: Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd edition, 2008, pp. 45-78

Griebel, Jörn, and Plücken, Milan, "New Developments Regarding the Rules of Attribution? The International Court of Justice's Decision in Bosnia v. Serbia", *Leiden Journal of International Law*, vol. 21, no. 3 (2008), pp. 602-20.

Hampson, Françoise J., *Afghanistan 2001-2010*, in: Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, 2012, pp. 242-279

Hartmann, Jacques, Sangeeta Shan, & Colin Warbrick, "United Kingdom Materials on International Law 2014", *The British Yearbook on International Law*, vol. 85, no 1 (2016), pp. 301-727

Heinsch, Robert, "Conflict Classification in Ukraine: The Return of the 'Proxy War'?", *International Law Studies*, vol. 91 (2015), pp. 323-60

Heyns, Christof, et al., "The International Law Framework Regulating the Use of Armed Drones", *International and Comparative Law Quarterly*, vol. 65, no. 4 (2016), pp. 791-827

Hoffmann, Tamás, *Squaring the Circle? – International Humanitarian Law and Transnational Armed Conflicts*, in: Michael J. Matheson and Djamchid Momtaz (eds.), *Rules and Institutions of International Humanitarian Law Put to the Test of Recent Armed Conflicts*, 2007, pp. 217-274

ICRC, *Commentary on Additional Protocol I*, 1987, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=7125D4CBD57A70DDC12563CD0042F793>

ICRC, *Commentary on the First Geneva Convention*, 2nd edition, 2016

ICRC, *Customary IHL Database*, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>)

ICRC, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949: Commentary*, 1973,

- Janaby, Mohamed Ghazi, "The Legal Status of Hezbollah in the Syrian Conflict: An International Humanitarian Law Perspective", *Arizona Journal of International & Comparative Law*, vol. 33, no. 2 (2016), pp. 383-422
- Jefferson Adams, Michael, "Jus Extra Bellum: Reconstructing the Ordinary, Realistic Conditions of Peace", *Harvard National Security Journal*, vol. 5, no. 2 (2014), pp. 377-460.
- Jennings, Robert Yewdall, "The Caroline and McLeod Cases", *The American Journal of International Law*, vol. 32, no. 1 (1938), pp. 82-99
- Jinks, Derek, "September 11 and the Laws of War", *The Yale Journal of International Law*, vol. 28, no. 1 (2003), pp. 1-49.
- Johnston, Katie A., "Transformations of Conflict Status in Libya", *Journal of Conflict and Security Law*, vol. 17, no. 1 (2012), pp. 81-115
- Kaczorowska, Alina, *Public International Law*, 4th edition, 2010
- Kälin, Walter and Künzli, Jörg, *The Law of International Human Rights Protection*, 2009
- Kirsch, Philippe, *Foreword*, in: Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, 2003, pp. i-xiii
- Kolb, Robert, and Hyde, Richard, *An Introduction to the International Law of Armed Conflicts*, 2008
- Koutroulis, Vaios, "International Organisations Involved in Armed Conflict: Material and Geographical Scope of Application of International Humanitarian Law", *Proceedings of the 12th Bruges Colloquium 20-21 October 2011, International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility*, *Collegium*, no. 42 (Autumn 2012), pp. 29-40
- Kreß, Claus, "Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts", *Journal of Conflict and Security Law*, vol. 15, no. 2 (2010), p. 245-274.
- Kritsiotis, Dino, "The Tremors of Tadić", *Israel Law Review*, vol. 43, no. 2 (2010),
- Kritsiotis, Dino, *A Study of the Scope and Operation of the Rights of Individual and Collective Self-Defence Under International Law*, in: Nigel D. White & Christian Henderson (eds.), *Research Handbook on International Conflict and Security Law*, 2013, pp. 170-228
- Leach, Philip, *South Ossetia (2008)*, in: Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, 2012, pp. 317-355

Li, Sheng, "When Does Internet Denial Trigger the Right of Armed Self-Defense?", *The Yale Journal of International Law*, vol. 38, no. 1 (2013), pp. 179-216

Lubell, Noam, and Derejko, Nathan, "A Global Battlefield? Drones and the Geographical Scope of Armed Conflict", *Journal of International Criminal Justice*, vol. 11, no. 1 (2013), pp. 65-88

Lubell, Noam, *Extraterritorial Use of Force against Non-State Actors*, 2010

Lubell, Noam, *The War (?) against Al-Qaeda*, in: Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, 2012, pp 421–454

Malgosia Fitzmaurice, *The Practical Workings of the Law of Treaties*, in: Malcolm D. Evans (ed.), *International Law*, 4th edition, 2014, p. 179.

Meron, Theodor, "Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout", *The American Journal of International Law*, vol. 92, no. 2 (1998), pp. 236-42.

Meron, Theodor, "The Humanization of Humanitarian Law", *American Journal of International Law*, vol. 94, no. 2 (2000), pp. 239-278

Milanovic, Marko, "Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings Case", *International Review of the Red Cross*, vol. 89, no. 866 (2007), pp. 373-93

Milanovic, Marko, "State Responsibility for Genocide", *European Journal of International Law*, vol. 17, no. 3 (2006), pp. 553-604.

Milanovic, Marko, and Hadzi-Vidanovic, Vidan, *A Taxonomy of Armed Conflict*, in: Nigel D. White & Christian Henderson (eds.), *Research Handbook on International Conflict and Security Law*, 2013, pp. 256-314.

Milanovic, Marko, *The Applicability of the Conventions to "Transnational" and "Mixed" Conflicts*, in: Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds.), *The 1949 Geneva Conventions: A Commentary*, 2015, pp. 27-50

Moir, Lindsay, *The Law of Internal Armed Conflict*, 2002

Murphy, Sean D., "Evolving Geneva Convention Paradigms in the 'War on Terrorism': Applying the Core Rules to the Release of Persons Deemed 'Unprivileged Combatants'", *The George Washington Law Review*, vol. 75, no. 5-6 (2007), pp. 1105-1164

Newton, Michael A, "War by Proxy: Legal and Moral Duties of 'Other Actors' Derived from Government Affiliation", *Case Western Reserve Journal of International Law*, vol. 37, no. 2-3 (2006), pp. 249-65

Nils Melzer, *Targeted Killing in International Law*, 2008

O'Connell, Mary Ellen, "Combatants and the Combat Zone", *University of Richmond Law Review*, vol. 43, no. 3 (2009), pp. 845-864

O'Connell, Mary Ellen, "Defining Armed Conflict", *Journal of Conflict & Security Law*, vol. 13, no. 3 (2008), pp. 393-400

O'Connell, Mary Ellen, "Saving Lives Through a Definition of International Armed Conflict", Proceedings of the 10th Bruges Colloquium 22-23 October 2009, Armed Conflicts and Parties to Armed Conflicts under IHL: Confronting Legal Categories to Contemporary Realities, *Collegium*, no. 40 (Autumn 2010), pp. 19-27

Okimoto, Keiichiro, "The Relationship Between a State and an Organised Armed Group and its Impact on the Classification of Armed Conflict", *Amsterdam Law Forum*, vol. 5, no. 3 (2013), pp. 33-51

Paulus, Andreas, and Vashakmadze, Mindia, "Asymmetrical war and the notion of armed conflict – a tentative conceptualization", *International Review of the Red Cross*, vol. 91, no. 873 (2009), pp. 95-125

Paust, Jordan J., "Armed Attacks and Imputation: Would a Nuclear Weaponized Iran Trigger Permissible Israeli and U.S. Measures of Self-Defense?", *Georgetown Journal of International Law*, vol. 45, no. 2 (2014), pp. 411-443

Paust, Jordan J., "Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan", *Journal of Transnational Law & Policy*, vol. 19, no. 2 (2010), pp. 237-80

Pejic, Jelena, "Terrorist Acts and Groups: A Role for International Law?", *British Yearbook of International Law*, vol. 75, no. 1 (2005), p. 71-100.

Pejic, Jelena, "The Protective Scope of Common Article 3: More than Meets the Eye", *International Review of the Red Cross*, vol. 93, no. 881 (2011), pp. 189-225

Pejic, Jelena, *Status of Armed Conflicts*, in: Elizabeth Wilmshurst & Susan Breau, Perspectives on the ICRC Study on Customary International Humanitarian Law, 2007, pp. 77-100.

Pictet, Jean (ed.), *Commentary on the First Geneva Convention*, 1952, Common Article 3, available at: <https://ihl->

databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=1919123E0D121FEFC12563CD0041FC08.

Pictet, Jean (ed.), *Commentary on the Fourth Geneva Convention*, 1958, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE12C9954AC2AEC2C12563CD0042A25C>

Pictet, Jean (ed.), *Commentary on the Third Geneva Convention*, 1960, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=07B4DAD7719E37E4C12563CD00424D17>

Randelzhofer, Albrecht and Dörr, Albrecht, *Article 2 (4)*, in: Bruno Simma et al., *The Charter of the United Nations: A Commentary*, Vol. II, 3rd edition, 2012, pp. 200-34

Roberts, Adam, *Land Warfare: From Hague to Nuremberg*, in: Michael E. Howard, George J. Andreopoulos, and Mark R. Shulman (eds.), *The Laws of War: Constraints on Warfare in the Western World*, 1994, pp. 110-130

Roberts, Adam, "The equal application of the laws of war: a principle under pressure", *International Review of the Red Cross*, vol. 90, no. 872 (2008), pp. 931-62

Robinson, Darryl, "The Identity Crisis of International Criminal Law", *Leiden Journal of International Law*, vol. 21, no. 1 (2008), pp. 925-65

Sarooshi, Danesh, and Evans, D. Malcolm, "Command Responsibility and the Blaskic Case", *The International and Comparative Law Quarterly*, vol. 5, no. 2 (2001), p. 452-465.

Sassòli, Marco, "State responsibility for violations of international humanitarian law", *International Review of the Red Cross*, vol. 84, no. 846 (2002), pp. 401-31

Sassòli, Marco, "Transnational Armed Groups and International Humanitarian Law", *Harvard University Program on Humanitarian Policy and Conflict Research: Occasional Paper Series*, no. 6 (2006), pp. 1-43

Sassòli, Marco, and Olson, Laura M. "Prosecutor v. Tadić (Judgement). Case No. IT-94-1-A. 38 ILM 1518 (1999). International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, July 15, 1999.", *American Journal of International Law*, vol. 94, no. 3 (2000), pp. 571-78

Sassòli, Marco, *Ius ad Bellum and Ius in Bello - The Separation Between the Legality of the Use of Force and Humanitarian Rules To Be Respected in Warfare: Crucial or Outdated?*, in: Michael Schmitt and Jelena Pejic (eds.), *International Law and Armed Conflict: Exploring the Faultlines*, 2007, pp. 241-265

- Schachter, Oscar, *The Lawful Use of Force by a State Against Terrorists in Another Country*, in: Henry H. Han (ed.), *Terrorism & Political Violence: Limits & Possibilities of Legal Control*, 1993, pp. 243-60
- Schindler, Dietrich "International Humanitarian Law and Internationalized Internal Armed Conflicts", *International Review of the Red Cross*, vol. 22, no. 230 (1982), pp. 255-64
- Schindler, Dietrich, "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols", *Collected Courses of the Hague Academy of International Law*, vol. 163 (1979), pp. 117-164
- Schmitt, Michael N., "Deconstructing Direct Participation in Hostilities: The Constitutive Elements", *New York University Journal of International Law and Politics*, vol. 42, no. 3 (2010), pp. 697-739
- Schmitt, Michael N., "Wired warfare: Computer network attack and *jus in bello*", *International Review of the Red Cross*, vol. 84, no. 846 (2002), pp. 365-399
- Schmitt, Michael N., "Charting the Legal Geography of Non-International Armed Conflict", *International Law Studies*, vol. 90 (2014), pp. 1-19
- Schmitt, Michael N., *Classification in Future Conflict*, in: Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, 2012, pp. 455-77
- Schöndorf, Roy S., "Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?", *New York University Journal of International Law and Politics*, vol. 37, no. 1 (2004), pp. 1-78
- Shackelford, Scott J., and Andres, Richard B, "State Responsibility for Cyber Attacks: Competing Standards for a Growing Problem", *Georgetown Journal of International Law*, vol. 42, no. 4 (2011), pp. 971-1016
- Sivakumaran, Sandesh, "Re-envisaging the International Law of internal Armed Conflict: A Rejoinder to Gabriella Blum", *European Journal of International Law*, vol. 22, no. 1 (2011), pp. 273-75
- Sivakumaran, Sandesh, *The Law of Non-International Armed Conflict*, 2012
- Solis, Gary D., *The Law of Armed Conflict: International Humanitarian Law in War*, 2010
- Spinedi, Marina, "On the Non-Attribution of the Bosnian Serbs' Conduct to Serbia", *Journal of International Criminal Justice*, vol. 5, no 4 (2007), pp. 829-838.

- Stewart, James G., "Towards a Single Definition of Armed Conflict in International Humanitarian Law: A critique of Internationalized Armed Conflict", *International Review of the Red Cross*, vol. 85, no. 850 (2003), pp. 313-350
- Stigall, Dan E., "The French Military Intervention in Mali, Counter-Terrorism, and the Law of Armed Conflict", *Military Law Review*, vol. 223, no. 1 (2015), pp. 1-40
- Szesnat, Felicity, and Bird, Annie R., *Colombia*, in: Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, 2012, pp. 203-41
- Talmon, Stefan, "The Responsibility of Outside Powers for Acts of Secessionist Entities", *International and Comparative Law Quarterly*, vol. 58, no. 3 (2009), pp. 493-517
- Travalio, Greg, and Altenburg, John, "Terrorism, State Responsibility, and the Use of Military Force", *Chicago Journal of International Law*, vol. 4, no. 1 (2007), pp. 97-119.
- Tsagourias, Nicholas, "Self-Defence against Non-state Actors: The Interaction between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule", *Leiden Journal of International Law* vol. 29, no. 3 (2016), pp. 801-25
- Venturini, Gabriella, *The Temporal Scope of Application of the Conventions*, in: Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds.), *The 1949 Geneva Conventions: A Commentary*, 2015, pp. 51-66
- Vité, Sylvain, "Typology of armed conflicts in international humanitarian law: legal concepts and actual situations", *International Review of the Red Cross*, vol. 91, no. 873 (2009), pp. 69-94
- Watkin, Kenneth, "Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance", *New York University Journal of International Law and Politics*, vol. 42, no. 3 (2010), pp. 641-695
- Wills, Siobhan, "The Legal Characterization of the Armed Conflicts in Afghanistan and Iraq: Implications for Protection" *Netherlands International Law Review*, vol. 58, no. 2 (2011), pp. 173–208
- Wilmshurst, Elizabeth, *Conclusions*, in: Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, 2012, pp. 478-504
- Wood, Michael, and Sender, Omri, *State Practice*, in: Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, 2008

Zamir, Noam, "Minding the Gap between Scholarly Discourse and State Practice in International Humanitarian Law", *Cambridge Journal of International and Comparative Law*, vol. 2, no. 2 (2013) 370-77

Zamir, Noam, "The Armed Conflict(s) Against the Islamic State", *Yearbook of International Humanitarian Law*, vol. 18 (2016), pp. 91-121

Zamir, Noam, *Classification of Conflicts in International Humanitarian Law: The Legal Impact of Foreign Intervention in Civil Wars*, 2017.

Newspaper articles and blogs

Akande, Dapo, "When Does the Use of Force Against a Non-State Armed Group trigger an International Armed Conflict and Why does this Matter?", *EJIL: Talk!*, 18 October 2016 (available at: <http://www.ejiltalk.org/when-does-the-use-of-force-against-a-non-state-armed-group-trigger-an-international-armed-conflict-and-why-does-this-matter/>)

Eisenberg, Daniel, "Secrets of Brigade 055", *Time* (28 October 2001), available at: <http://content.time.com/time/magazine/article/0,9171,1101011105-181591,00.html>

Ferraro, Tristan, "EJIL Talk! Book Discussion: Some Considerations on Intervention Against Non-state Actors in Foreign Territory", *EJIL: Talk!*, 31 May 2017 (available at: <https://www.ejiltalk.org/ejil-talk-book-discussion-some-considerations-on-intervention-against-non-state-actors-in-foreign-territory/>)

Fraser, Suzan, "Turkey strikes Kurds in Iraq, Syria, drawing condemnation", *The Washington Post*, 25 April 2017 (available at: https://www.washingtonpost.com/world/europe/turkey-hits-kurdish-areas-in-irags-sinjar-northeast-syria/2017/04/25/3b9621da-297a-11e7-9081-f5405f56d3e4_story.html?utm_term=.12da7720ea00).

Groeben, Constantin von der, "German Federal Prosecutor Terminates Investigation Against German Soldiers With Respect to NATO Air Strike in Afghanistan", *EJIL: Talk!*, 29 April 2010 (available at: <https://www.ejiltalk.org/german-federal-prosecutor-terminates-investigation-against-german-soldiers-with-respect-to-nato-air-strike-in-afghanistan/#comments>).

Haque, Adil Ahmad, "Triggers and Thresholds of Non-International Armed Conflict", *Just Security*, 29 September 2016 (available at: <https://www.justsecurity.org/33222/triggers-thresholds-non-international-armed-conflict/>)

Hollis, Duncan, "The Empire Strikes Back – Debating the Origins of the Customary Laws of War", *Opinio Juris*, 8 May 2007 (available at: <http://opiniojuris.org/2007/05/08/the-empire-strikes-back-%E2%80%93-debating-the-origins-of-the-customary-laws-of-war/>).

Jefferson Adams, Michael, and Goodman, Ryan, "De Facto and De Jure Non-international Armed Conflicts: Is It Time to Topple Tadić?", *Opinio Juris*, 13 October 2016 (available at: <https://www.justsecurity.org/33533/de-facto-de-jure-non-international-armed-conflicts-time-topple-tadic/>).

Jorritsma, Remy, "Ukraine Insta-Symposium: Certain (Para-)Military Activities in the Crimea: Legal Consequences for the Application of International Humanitarian Law", *Opinio Juris*, 9 March 2014 (available at: <http://opiniojuris.org/2014/03/09/ukraine-insta-symposium-certain-para-military-activities-crimea-legal-consequences-application-international-humanitarian-law/>)

Kirk, Don, "North and South Korea Trade Charges Over Naval Clash", *The New York Times*, 30 June 2002 (available at: <http://www.nytimes.com/2002/06/30/world/north-and-south-korea-trade-charges-over-naval-clash.html>).

Lucy Rodgers, David Gritten et al., "Syria: The story of the conflict", *BBC*, 11 March 2016 (available at: <http://www.bbc.com/news/world-middle-east-26116868>).

Mabon, Simon, "How to understand Syria's 'proxy war' – and who's fighting for whom", *The Conversation*, 29 September 2016 (available at: <http://theconversation.com/how-to-understand-syrias-proxy-war-and-whos-fighting-for-whom-65685>).

Pearlstein, Deborah, "A Syrian IAC?", *Opinio Juris*, 14 October 2016 (available at: <http://opiniojuris.org/2016/10/14/a-syrian-iac/>)

President Al-Assad's Interview with Fox News, *Fox News*, 19 September 2013 (available at: www.presidentassad.net/index.php?option=com_content&view=article&id=1159:president-al-assad-s-interview-with-fox-news&catid=105&Itemid=468)

Quinn, B., and Smith, D. "Calls for investigation into Saudi Arabia's actions in Yemen", *The Guardian*, 11 November 2015 (available at: <http://www.theguardian.com/world/2015/nov/11/calls-for-investigation-into-saudi-arabias-actions-in-yemen>)

Rona, Gabor, "Letter to the Editor: Not So Fast on Calling it an 'Armed Conflict' Between the US and Syria", *Just Security*, 13 October 2016 (available at: <https://www.justsecurity.org/33546/letter-editor-fast-calling-armed-conflict-syria/>).

Unknown Author, "The Cambodian Venture: An Assessment", *TIME*, 6 July 1970 (available at: <http://content.time.com/time/magazine/article/0,9171,878330,00.html>).

Unknown Author, "Iraq warns Turkey over incursion", *BBC*, 23 February 2008 (available at: <http://news.bbc.co.uk/2/hi/7260478.stm>)

Watkin, Kenneth, "The ICRC Updated Commentaries: Reconciling Form and Substance, Part I", *Just Security*, 24 August 2016 (available at: <https://www.justsecurity.org/32538/icrc-updated-commentaries-reconciling-form-substance/>)

Court decisions

Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, Separate Opinion of Judge Simma, International Court of Justice, 19 December 2005

Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, International Court of Justice, 19 December 2005

Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Judgment, International Court of Justice, 27 June 1986

Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, International Court of Justice, 3 February 1994

Case of Ilășcu and Others v. Moldova and Russia, Judgment, European Court of Human Rights, 18 July 2004

Choctaw Nation of Indians v. United States, 318 U.S. 423, 431-432 (1943), online version available at: <https://supreme.justia.com/cases/federal/us/318/423/case.html#431>

Drohneneinsatz vom 4. Oktober 2010 in Mir Ali/Pakistan, Order of the Public Prosecutor General, The Public Prosecutor General of the Federal Court of Justice, 20 June 2013, available at: http://www.generalbundesanwalt.de/docs/drohneneinsatz_vom_04oktober2010_mir_ali_pakistan.pdf

Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 534-35 (1991), online version available at: <https://supreme.justia.com/cases/federal/us/499/530/case.html#534>

Ermittlungsverfahren gegen Oberst Klein und Hauptfeldwebel W. wegen des Verdachts einer Strafbarkeit nach dem VStGB und anderer Delikte, Termination of the Proceedings pursuant to §

170 Abs. 2 Satz 1 StPO, The Public Prosecutor General of the Federal Court of Justice, 16 April 2010, available at:

<http://www.generalbundesanwalt.de/docs/einstellungsvermerk20100416offen.pdf>

GS (Existence of Internal Armed Conflict) Afghanistan v. Secretary of State for the Home Department, CG [2009] UKAIT 00010, UK Asylum and Immigration Tribunal, 23 February 2009, available at: http://www.refworld.org/cases,GBR_AIT,49a3b4242.html

Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, International Court of Justice, 3 February 2012

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, International Court of Justice, 8 July 1996

North Sea Continental Shelf (Federal Republic of Germany/Denmark Federal Republic of Germany/Netherlands), Judgment, International Court of Justice, 20 February 1969

Prosecutor v. Blaškić, Trial Judgment, ICTY, 3 March 2000

Prosecutor v. Boškoski and Tarčulovski, Trial Judgment, ICTY, 10 July 2008

Prosecutor v. Delalić et al., Appeals Judgment, ICTY, 20 February 2001

Prosecutor v. Dusko Tadić, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995

Prosecutor v. Dusko Tadić, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Separate Opinion of Judge Li, ICTY 2 October 1995

Prosecutor v. Haradinaj et al., Trial Judgment, ICTY, 3 April 2008

Prosecutor v. Ivica Rajić, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Trial Chamber, ICTY, 13 September 1996

Prosecutor v. Kordić and Čerkez, Trial Judgment, ICTY, 26 February 2001

Prosecutor v. Kunarac et al., Appeals Judgment, ICTY, 12 June 2002

Prosecutor v. Limaj, Bala, and Musliu, Trial Judgment, ICTY, 30 November 2005

Prosecutor v. Ljube Boskoski, Trial Judgment, ICTY, 10 July 2008

Prosecutor v. Milomir Stakić, Appeals Judgment, ICTY, 22 March 2006

Prosecutor v. Naletilić and Martinović, Trial Judgment, ICTY, 31 March 2003

Prosecutor v. Slobodan Milošević, Decision on Motion for Judgement of Acquittal, Trial Chamber, ICTY, 16 June 2004

Prosecutor v. Tadić, Appeals Judgment, Declaration of Judge Nieto-Navia, ICTY, 15 July 1999

Prosecutor v. Tadić, Appeals Judgment, ICTY, 15 July 1999

Prosecutor v. Tadić, Trial Judgment, ICTY, 7 May 1997

Societe Nationale v. District Court, 482 U.S. 522, 534 (1987), online version available at:

<https://supreme.iustia.com/cases/federal/us/482/522/case.html#534>

The Hostage Trial: Trial of William List and others, Judgment, United States Nuremberg Military Tribunal, 8 July 1947-19 February 1948, reprinted in: Law Reports of Trials of War Criminals, Vol. VIII, 1949, pp. 34-92, Case no. 47, available at: https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-8.pdf

The People v. McLeod, Judgment, Supreme Court of Judicature of the State of New-York, July 1841, reprinted in: John L. Wendell, *Reports of Cases Argued and Determined in the Supreme Court of Judicature and in the Court for the Trial of Impeachments and the Correction of Errors of the State of New-York, [1828-1841]*, vol. 25, 1842, pp. 483-603, available at:

<https://babel.hathitrust.org/cgi/pt?id=mdp.35112102516343;view=1up;seq=589>

The Prosecutor v. Ahmad Al Faqi Al Mahdi, Trial Judgment, International Criminal Court, 27 September 2016

The Prosecutor v. Bagilishema, Trial Judgment, ICTR, 7 June 2001

The Prosecutor v. Germain Katanga, Trial Judgment, International Criminal Court, 7 March 2014

The Prosecutor v. Jean-Paul Akayesu, Appeals Judgment, International Criminal Tribunal for Rwanda, 1 June 2001

The Prosecutor v. Jean-Paul Akayesu, Trial Judgment, International Criminal Tribunal for Rwanda, 2 September 1998

The Prosecutor v. Jean-Pierre Bemba Gombo, Decision on the Confirmation of Charges, Pre-Trial Chamber II, International Criminal Court, 15 June 2009

The Prosecutor v. Jean-Pierre Bemba Gombo, Trial Judgment, International Criminal Court, 21 March 2016

The Prosecutor v. Rutaganda, Appeals Judgment, International Criminal Tribunal for Rwanda, 26 May 2003

The Prosecutor v. Rutaganda, Trial Judgment, International Criminal Tribunal for Rwanda, 6 December 1999

The Prosecutor v. Thomas Lubanga Dyilo, Decision on the confirmation of charges, Pre-Trial Chamber I, International Criminal Court, 29 January 2007

The Prosecutor v. Thomas Lubanga Dyilo, Trial Judgment, International Criminal Court, 14 March 2012

The Prosecutor v. Zlatko Aleksovski, Trial Judgment, Dissenting Opinion of Judge Rodrigues, ICTY, 25 June 1999

Treaty law

Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/365?OpenDocument>

Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/375?OpenDocument>

Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, available at: <https://ihl-databases.icrc.org/ihl/WebART/195-200052?OpenDocument>

Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 27 July 1929, available at: <https://ihl-databases.icrc.org/ihl/INTRO/300?OpenDocument>.

Convention on the Safety of United Nations and Associated Personnel, New York, 9 December 1994, *United Nations Treaty Series*, vol. 2051, No. 35457, p. 393, available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%202051/v2051.pdf>

Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954, (available at: <http://unesdoc.unesco.org/images/0008/000824/082464mb.pdf>).

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/470>

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 8 June 1977, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/475?OpenDocument>

Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, Geneva, 2 May 1996, *United Nations Treaty Series*, vol. 2048, No. 22495 (available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%202048/v2048.pdf>)

Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, International Court of Justice, 28 May 1951, ICJ Reports 1951

Rome Statute of the International Criminal Court, Rome, 17 July 1998, *United Nations Treaty Series*, vol. 2187, No. 38544, available at: <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>

Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999, *United Nations Treaty Series*, vol. 2253, No. 3511, available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%202253/v2253.pdf>)

Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, *United Nations Treaty Series*, vol. 1155, No. 18232, p. 340, available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>.

Documents, reports, and miscellaneous

Advisory Committee on Issues of Public International Law, *Advisory Report on Armed Drones*, Advisory Report No. 23, The Hague (July 2013), available at: [http://cms.webbeat.net/ContentSuite/upload/cav/doc/CAVV_advisory_report_on_armed_drones_\(English_translation_-_final\)_2\).pdf](http://cms.webbeat.net/ContentSuite/upload/cav/doc/CAVV_advisory_report_on_armed_drones_(English_translation_-_final)_2).pdf)

Advisory Committee on Issues of Public International Law, *Advisory Report on Armed Drones*, Advisory Report No. 23, The Hague (July 2013), available at: [http://cms.webbeat.net/ContentSuite/upload/cav/doc/CAVV_advisory_report_on_armed_drones_\(English_translation_-_final\)_2\).pdf](http://cms.webbeat.net/ContentSuite/upload/cav/doc/CAVV_advisory_report_on_armed_drones_(English_translation_-_final)_2).pdf)

Afghanistan Independent Human Rights Commission (AIHRC), *From Hope to Fear: An Afghan Perspective on Operations of Pro-Government Forces in Afghanistan* (December 2008), available at: http://www.aihrc.org.af/media/files/Research%20Reports/english/Eng_Pro_G_2.pdf

Afghanistan Independent Human Rights Commission (AIHRC), *From Hope to Fear: An Afghan Perspective on Operations of Pro-Government Forces in Afghanistan* (December 2008), available at: http://www.aihrc.org.af/media/files/Research%20Reports/english/Eng_Pro_G_2.pdf

Black's Law Dictionary 1336 (10th ed. 2014).

Canadian Department of National Defence, *Joint Doctrine Manual: Law of Armed Conflict at the Operational and Tactical Levels (B-GJ-005-104/FP-021)* (Ottawa, Office of the Judge Advocate General, 2001), available at: https://www.ficnl.org/fileadmin/migrated/content/uploads/Canadian_LOAC_Manual_2001_English.pdf.

Chatham House, *Classification of Conflicts: The Way Forward* (1 October 2012), available at: <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/011012summary.pdf>

Danish Ministry of Defense and Defence Command Denmark, *Militærmanual om folkeret for danske væbnede styrker i internationale militære operationer* [in Danish] (Copenhagen, DK MoD, 2016), available at: <http://www2.forsvaret.dk/omos/publikationer/Publications/Attachments/34/Milit%C3%A6rmanual%20AF%20SEPT%202016.pdf>

Federal Foreign Office of Germany, *Zur volkerrechtlichen Beurteilung der Deportationen im Kosovo*, reported in: Avril McDonald (ed.), "Correspondents' Reports: A guide to state practice concerning International Humanitarian Law", *Yearbook of International Humanitarian Law*, vol. 2 (1999), pp. 327-429

French Ministry of Defense, *Manuel de Droit des Conflits Armés* (2012), available at: http://www.cicde.defense.gouv.fr/IMG/pdf/20130226_np_cicde_manuel-dca.pdf

German Federal Ministry of Defence, *Humanitäres Völkerrecht in bewaffneten Konflikten – Handbuch (ZDv 15/2)* [In German] (Berlin, Bundesministerium der Verteidigung, 2013), available at: <http://www.humanitaeres-voelkerrecht.de/Hb15.2Mai2013.pdf>

Government of France, *Décret n° 2013-364 du 29 avril 2013 portant publication de l'accord sous forme d'échange de lettres entre le Gouvernement de la République française et le Gouvernement du Mali déterminant le statut de la force « Serval », signées à Bamako le 7 mars 2013 et à*

Koulouba le 8 mars 2013 (29 April 2013), available at:

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027376103>.

Holder, Eric, United States Attorney General, *Speech at Northwestern University School of Law*, 5 March 2012, available at: <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law>.

Human Rights Watch, *LRA Conflict in Northern Uganda and Southern Sudan, 2002* (29 October 2002), available at: <https://www.hrw.org/report/2002/10/29/lra-conflict-northern-uganda-and-southern-sudan-2002>

ICRC, “How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?”, *ICRC Opinion Paper* (2008), available at: <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>

ICRC, “The relevance of IHL in the context of terrorism”, *ICRC*, 1 January 2011 (available at: <https://www.icrc.org/eng/resources/documents/faq/terrorism-ihl-210705.htm>)

ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May – 12 June 1971): Report on the Work of the Conference* (Geneva, August 1971), available at: http://www.loc.gov/rr/frd/Military_Law/pdf/RC-Report-conf-of-gov-experts-1971.pdf.

ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Second Session 3 May - 3 June 1972: Report on the Work of the Conference, Volume I* (Geneva, July 1972), available at: https://www.loc.gov/rr/frd/Military_Law/pdf/RC-Report-conf-of-gov-experts-1972_V-1.pdf.

ICRC, *Draft Revised or New Conventions for the Protection of War Victims* (Stockholm: August, 1948), available at: http://www.loc.gov/rr/frd/Military_Law/pdf/RC_Draft-revised.pdf.

ICRC, *International Humanitarian Law and the challenges of contemporary armed conflicts*, 31st International Conference of the Red Cross and Red Crescent Movement, 31IC/11/5.1.2 (Geneva, Switzerland 28 November – 1 December 2011), available at: <https://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf>.

ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Nils Melzer ed.), 2009, available at: <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

ICRC, *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims* (Geneva: April 14-26, 1947), available at: https://www.loc.gov/rr/frd/Military_Law/pdf/RC_report-1947.pdf.

ICRC, *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* (Geneva: July 26-August 3, 1946), available at: https://www.loc.gov/rr/frd/Military_Law/pdf/RC_report-1946.pdf.

Institut de Droit international, *The Principle of Non-Intervention in Civil Wars*, Resolution, Session of Wiesbaden (1975), available at: http://www.idi-il.org/app/uploads/2017/06/1975_wies_03_en.pdf

Inter-American Commission on Human Rights, *Case 11.137: Juan Carlos Abella (Argentina)*, 18 November 1997, OEA/Ser.L/V/II.98, doc. 6 rev., 13 April 1998, available at: <https://www.cidh.oas.org/annualrep/97eng/Argentina11137.htm>

Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. (22 October 2002), available at: <http://www.cidh.org/terrorism/eng/intro.htm>

International Institute of Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict With Commentary* (Michael N. Schmitt, Charles H.B. Garraway, and Yoram Dinstein eds.), 2006, available at: <http://www.iihl.org/wp-content/uploads/2015/12/Manual-on-the-Law-of-NIAC.pdf>

International Law Association, *Final Report on the Meaning of Armed Conflict in International Law*, 2010

International Law Association, *Statement of Principles Applicable to the Formation of General Customary International Law*, Final Report of the Committee on Formation of Customary (General) international Law, 2000,

International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 2001, p. 34, available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

Letter from Philip Spoerri, Legal Adviser, International Committee of the Red Cross, to Mr. Doherty, Clerk of the International Development Committee of the House of Commons, 20 December 2002, available at: <https://publications.parliament.uk/pa/cm200203/cmselect/cmintdev/84/84ap09.htm>

Marisa Sullivan, "Hezbollah in Syria", *Middle East Security Report 19*, (April 2014), pp. 9-41, available at: http://www.understandingwar.org/sites/default/files/Hezbollah_Sullivan_FINAL.pdf

Ministry of National Defense of the Republic of Korea, The Naval Clash on the Yellow Sea on 29 June 2002 between South and North Korea - The Situation and ROK's Position (1 July 2002), available at: <http://www.globalsecurity.org/wmd/library/news/dprk/2002/dprk-020701-1.htm>

Norwegian Armed Forces, *Manual i krigens folkerett* (Oslo, Forsvarets stabsskole, 2013), available at: https://brage.bibsys.no/xmlui/bitstream/id/201436/manual_krigens_folkerett.pdf

Royal Australian Air Force (AAP 1003), *Operations Law for RAAF Commanders* (Tuggeranong, RAAF, 2004), available at: http://usnwc.libguides.com/ld.php?content_id=2998112

The Office of the Prosecutor of the International Criminal Court, *Situation in Mali: Article 53(1) Report* (16 January 2013), available at: https://www.icc-cpi.int/itemsDocuments/SASMaliArticle53_1PublicReportENG16Jan2013.pdf.

U.S. Department of Justice, Office of Legal Counsel, 'Protected Person' Status in Occupied Iraq Under the Fourth Geneva Convention, Memorandum Opinion for the Counsel to the President (18 March 2004), available at: <http://nsarchive2.gwu.edu//torturingdemocracy/documents/20040318.pdf>.

U.S. Department of Justice, Office of Legal Counsel, Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* (22 January 2002), available at: <http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf>

U.S. Department of Justice, Office of Legal Counsel, Memorandum for the Attorney General, *Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi* (16 July 2010), available at: <https://www.justsecurity.org/wp-content/uploads/2014/06/OLC-Awlaki-Memo.pdf>

U.S. Department of Justice, Office of Legal Counsel, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees*, Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense (22 January 2002), available at: <http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf>

U.S. DoD, *Department of Defense Law of War Manual* (Washington, DoD, 2016), available at: <https://www.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190>

UK Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict*, JSP 383 (23 October 2004), available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf

UK Ministry of Justice, *The Governance of Britain: War Powers and Treaties: Limiting Executive Powers (CP26/07)* (25 October 2007), available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243164/7239.pdf

UN Commission on Human Rights, *Report on the situation of human rights in Somalia, prepared by the Independent Expert of the Commission on Human Rights, Mona Rishmawi, pursuant to Commission resolution 1996/57 of 19 April 1996*, E/CN.4/1997/88 (3 March 1997), available at:

<http://www.refworld.org/docid/3ae6b0700.html>.

UN General Assembly, *Identification of customary international law*, A/CN.4/L.872 (30 May 2016), p. 2, Draft conclusion 6 [7], available at: <http://legal.un.org/docs/?symbol=A/CN.4/L.872>.

UN Human Rights Council, *Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1**, A/HRC/3/2 (23 November 2006), available at:

<http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Lebanon%20A%20HRC%203%202.pdf>

UN Security Council Resolution 2249, S/RES/2249 (20 November 2015), available at:

[http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2249\(2015\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2249(2015)).

UN Security Council Resolution 955, *Statute of the International Tribunal for Rwanda*, S/Res/955 (8 November 1994), available at: http://legal.un.org/avl/pdf/ha/ictt_EF.pdf

UN Security Council, *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, S/1994/674 (27 May 1994), p. 13, para. 44, available at:

http://www.un.org/en/ga/search/view_doc.asp?symbol=S/1994/674

UN Security Council, *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, S/1994/674 (27 May 1994), available at:

http://www.un.org/en/ga/search/view_doc.asp?symbol=S/1994/674.

UN Security Council, *Letter dated 31 March 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council*, S/2015/221 (31 March 2015), available at:

http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2015/221

United Nations Assistance Mission in Afghanistan, *Afghanistan Annual Report on Protection of Civilians in Armed Conflict: 2016* (February 2017), pp. 1-130, available at: https://unama.unmissions.org/sites/default/files/protection_of_civilians_in_armed_conflict_annual_report_8feb_2016.pdf

United Nations Assistance Mission in Afghanistan, *Afghanistan Annual Report on Protection of Civilians in Armed Conflict: 2016* (February 2017), available at: https://unama.unmissions.org/sites/default/files/protection_of_civilians_in_armed_conflict_annual_report_8feb_2016.pdf

United Nations, General Assembly, *Report of the Preparatory Committee on the Establishment of an International Criminal Court: Volume I (Proceedings of the Preparatory Committee during March-April and August 1996)*, A/51/22 (13 September 1996), available at: <https://www.legal-tools.org/doc/e75432/pdf/>

United States Department of State, *U.S. Department of State Country Report on Human Rights Practices 1998 - Democratic Republic of Congo*, (26 February 1999), available at: <http://www.refworld.org/docid/3ae6aa5710.html>.

US Department of Defense, Directive 5100.77, *DoD Law of War Program*, 9 December 1998

Wilmshurst, Elizabeth, "Principles of International Law on the Use of Force by States In Self-Defence", ILP WP 05/01, *Chatham House Working Paper* (1 October 2006), pp. 1-70, available at: <https://www.chathamhouse.org/publications/papers/view/108106>