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GLOBALIZATION OF NON-INTERNATIONAL ARMED CONFLICTS

*By Pavle Kilibarda and Gloria Gaggioli**

1. Introduction

The decades since the adoption of the 1949 Geneva Conventions and their 1977 Additional Protocols have seen a general increase in the phenomenon of non-international armed conflicts.[1] While the differences in the law applicable to both international (IACs) and non-international armed conflicts (NIACs) are arguably becoming ever more blurry in light of State practice and international jurisprudence,[2] the main instruments of international humanitarian law (IHL) remain grounded in a fundamental separation between the two types.[3] Some substantial differences in the law applicable to IACs and NIACs also remain. These differences notably relate to the status of individuals under the respective legal frameworks. The notion of "combatant privilege", understood as the "the right to participate directly in hostilities," is absent from NIACs, and consequently this body of law does not contain such status as that of prisoner of war (POW).[4] The question of NIACs is also still subject to a number of controversies both with respect to their typology and the geographical scope of application of IHL in such conflicts.

For the purposes of this article, the term "globalization" of NIACs involves two different phenomena. First, it refers to the increasing number of "extraterritorial NIACs", such as the fighting of the International Security Assistance Force (ISAF) against the Taliban in Afghanistan in the years

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[1] According to the Geneva Academy of International Humanitarian Law and Human Rights, out of at least 48 armed conflicts occurring in 2016, 36 were of a non-international character, taking place in the territory of 20 states. See Annyssa Bellal, *The War Report: Armed Conflicts in 2016,* Geneva Academy of International Humanitarian Law and Human Rights, 2017, at p. 15.

[2] The ICRC Customary IHL study identified a total of 161 rules of customary IHL, most of which are considered as applicable in both international and non-international armed conflicts. For a full list, please refer to Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume I: Rules,* ICRC, 2005, available at <https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

[3] In particular, while the 1949 Geneva Conventions (except for Common Article 3) and Additional Protocol I are exclusively applicable to IACs, Additional Protocol II applies to NIACs.

[4] On the combatant's privilege, see Art. 1 of Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907 [Hague Regulations] or Art. 43(2) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 [hereinafter: AP I]. In IHL provisions pertaining to NIACs, there are no equivalent provisions which recognize the combatant privilege. The majority view among scholars is therefore that such a privilege does not exist in NIACs. See e.g. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977: Commentary of 1987*, ICRC, 1987, para. 4441 [hereinafter: 1987 Commentary]; Michael Bothe, Karl Josef Partsch & Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 2nd rev. edn, Martinus Nijhoff Publishers, 2013; Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction,* ICRC, 2016, at p. 83.

since the overthrow of the Taliban Regime and establishment of the Afghan Interim Administration in December 2001, or the involvement of States such as France and the United States in the struggle against the so-called Islamic State (ISIS) in Syria and/or Iraq. All of these involve States fighting non-State armed groups outside their own territory, with or without the consent of the territorial State, and as such give rise to a NIAC.[5] In spite of the fact that the drafters of the Geneva Conventions had in all likelihood an essentially territorial scope of application in mind when adopting Common Article 3 (i.e. limited to "civil wars" taking place in the territory of a High Contracting Party), the majority view among States and scholars today is that armed conflicts involving organized non-State armed groups are NIACs even if they take place outside the territory of the belligerent State. In an attempt to address the complexity arising from the multiplicity of NIACs, the International Committee of the Red Cross (ICRC) has proposed a typology of seven categories of NIACs, among which five involve an extraterritorial element.[6]

The other aspect of globalization present in contemporary NIACs involves legal theories attempting to justify the application of humanitarian law beyond the territory of belligerent parties, wherever a person qualified as a legitimate target under IHL is located, thus justifying for instance drone strikes against members of organized non-State armed groups in peaceful countries.[7] This second aspect of the "globalization" of NIACs concerns the geographical scope of application of IHL.

The evolution of warfare has led to the development of new theories that challenged the traditional understanding that IHL applied essentially on territories controlled by belligerent parties[8] and increasingly began to take into consideration the existence of a link, or *nexus,* between a specific act and an existing armed conflict situation in order to establish the applicability of the laws of armed conflict. Bearing in mind the persistently popular notion of IHL as *lex specialis* with respect to human rights law,[9] as well as the ongoing debate with respect to the extraterritorial application of

[5] The question whether such conflict may at the same time give rise to an IAC if the State where the hostilities are taking place did not agree to the intervention is disputed. See, e.g. ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Report,* Geneva, 2015 [hereinafter: Challenges Report 2015] and Djemila Carron, *L'acte déclencheur d'un conflit armé international,* University of Geneva, 2016.

[6] The ICRC distinguishes the following types of NIAC: "traditional" internal NIACs; spill over NIACs; multinational NIACs; cross border NIACs; and transnational NIACs. See ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Report,* Geneva, 2011 [hereinafter: Challenges Report 2011], at p. 7-13.

[7] The first time a large unmanned combat aerial vehicle (UCAV) was allegedly used outside the scope of the battlefield was in 2002 when the CIA killed six purported Al-Qaeda members in Yemen. At that time, it was quite clear that there were no hostilities between the Government of Yemen and Al-Qaeda and that the US did not intervene in a pre-existing armed conflict on Yemeni soil. See, e.g., David Kretzmer, "Targeted Killing of Suspected Terrorists: Extrajudicial Executions of Legitimate Means of Defence" 16:2 EJIL 171 (2005) at p. 171-172.

[8] See in this sense: Challenges Report 2015, p. 15.

[9] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, I.C.J Rep. 226 [hereinafter: Nuclear Weapons Advisory Opinion], para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, I.C.J. Rep. 136 [hereinafter: Wall Advisory Opinion], para. 106.

the latter body of law, each of these theories has different implications for the protection of the civilian population.

International humanitarian law was initially conceived to protect victims of armed conflicts from unnecessary and/or inhumane conduct on the part of belligerent states in times of IACs. For example, as early as 1899 the Contracting Parties to the original Hague Regulations found that limiting "the evils of war" was in "the interests of humanity and the ever increasing requirements of civilization,"[10] while the drafters of the revised Geneva Convention of 1906 found that they were led by "the desire to lessen the inherent evils of warfare as far as is within their power."[11] Such considerations, and striking a balance between the principles of military necessity and humanity, have therefore been the very *ratio legis* of IHL since its inception.

Thus, in 1949, when Common Article 3 was added to the Geneva Conventions, the objective was to introduce rules regulating hostilities opposing sovereign States to rebels on their own soil, an issue which had until then proven difficult to tackle for reasons of State sovereignty. Subsequent developments, particularly the state of affairs in the post-9/11 world, confirmed the understanding that NIACs were not necessarily confined to the territory of any one State. While this meant that States could not claim to have no obligations under international law when confronting organized armed groups abroad, it has also led to concerns that the fight against terror could generally be equated with armed conflict situation. As a result, IHL has been used to curtail the more generous protection granted by international human rights law (IHRL).

In what follows, we shall attempt to analyse the phenomenon of globalization of NIACs both with respect to their typology and the geographical scope of application of IHL. This will be done by examining the position of key stakeholders – States as well as non-State actors such as the ICRC – with respect to various landmark situations since the adoption of the 1949 Geneva Conventions. We shall examine how various ways of "over-classification" of situations of armed violence as NIACs, particularly in the context of the fight against terrorism, may lead to a lesser scope of protection afforded to the civilian population. Bearing in mind existing conflict situations, we will revisit the question of typology of extraterritorial NIACs and that of the geographical scope of application of IHL and offer our recommendations how to meet persisting challenges to the protection of civilians with reference to other branches of international law such as IHRL.

2. The Evolution of the Typology of Non-International Armed Conflict

[10] Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 29 July 1899, Preamble.
[11] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31 [hereinafter: GC I], Preamble.

2.1. Civil Wars as the Main/Only Type of NIACs in 1949 and 1977 respectively

The atrocities committed during World War II gave the international community unprecedented impetus to take action and prevent such crimes from taking place in the future. Waging wars of aggression in the interest of territorial expansion, depriving the population of occupied territories of even the most basic rights and targeting millions of human beings for extermination on the grounds of their racial or national origin – all of these, and more, had been done on an unprecedented scale by the Nazi regime and its allies in Europe and elsewhere. It was clear that the previously untouchable doctrine of State sovereignty could no longer be used to justify the most heinous atrocities human beings had proven themselves capable of inflicting upon each other. Most disconcertingly, some of the more depraved acts of the Axis powers before and during the war had not, formally legally speaking, been prohibited by existing international law. Discussions about expanding the existing body of IHL began right after the war and culminated in the diplomatic conference that adopted the new Geneva Conventions of 1949.[12] In addition to improving and expanding international legislation, the conference also tackled questions which had not theretofore been regulated.

Beyond World War II, the early 20th century had seen brutal civil wars, such as the ones surrounding the 1921 Upper Silesia plebiscite and, particularly, the Spanish Civil War; in both of these cases, the ICRC – which had long since been engaged with the victims of internal conflicts – managed to bring the belligerents to undertake to respect the principles of the Geneva Conventions then in force,[13] but only a general treaty obligation would suffice in the long term. Thus, the circumstances after World War II allowed the ICRC to spearhead the process that led to the adoption of Common Article 3 to the four Geneva Conventions. For the first time in modern history did the international community agree upon a set of binding legal norms governing hostilities of a non-international character – hostilities that, at the time being, would have been considered primarily a High Contracting Party's internal affair, constituting part of their *domaine réservé.* In the words of the ICRC's 1952 Commentary to Common Article 3:

> "There is nothing astonishing, therefore, in the fact that the Red Cross has long been trying to aid the victims of internal conflicts, the horrors of which sometimes surpass the horrors of international wars by reason of the fratricidal hatred which they engender (...) In a civil war the lawful Government, or that which so styles itself, tends to regard its adversaries as common criminals."[14]

[12] For an assortment of documents relevant to the 1949 Diplomatic Conference, see *Final Record of the Diplomatic Conference of Geneva of 1949, Vols I-III,* Federal Political Department, Bern.
[13] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949: Commentary of 1952*, ICRC, 1952 [hereinafter: 1952 Commentary], at p. 39.
[14] *Idem.*

The *travaux préparatoires* to the 1949 diplomatic conference demonstrate the existence of considerable controversy with respect to the notion of extending the Conventions' scope of application to conflicts not of an international character, to such an extent that certain States were initially openly hostile to the suggestion. For example, the Greek Government emphatically concluded that "it can hardly be imagined that a legal State would, in the case of any armed conflict, be willing to have mutineers, rebels and even outlaws placed under the protection of a foreign Power, which would assume the duties of a Protecting Power, and agree that those who committed acts harmful to the integrity of the State should enjoy the special immunity privileges etc. granted to those engaged in regular warfare."[15]

Certainly much of the aversion came from the initial suggestion of providing for the application of the whole of the Geneva Conventions to non-international armed conflicts. In fact, Common Article 2 of the draft Conventions, which was to regulate their general scope of application and eventually became Common Articles 2 and 3, stated:

> "In all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties the implementing of the principles of the present Convention shall be obligatory on each of the adversaries. The application of the Convention in these circumstances shall in nowise depend on the legal status of the parties to the conflict and shall have no effect on that status."[16]

The idea of fully applying the Conventions to non-international armed conflicts was quickly abandoned, after a number of attempts had been made to limit the actual situations to which they might be applicable. Even certain delegations in favour of extending the application of IHL to all types of armed conflict did not consider it appropriate to extend in full the Geneva Conventions to non-international armed conflicts.[17] The terminology, which at the time made specific reference to "civil wars, colonial conflicts, or wars of religion" as examples of non-international armed conflicts, was particularly controversial, and not because (as it might seem to a 21st century lawyer) they were seen as too narrow, but rather because they were too broad.[18] In the end, the debate was resolved not

[15] *Propositions and Observations of the Governments for the Diplomatic Conference for the Establishment of International Conventions for the Protection of War Victims Convened at Geneva on April 21st, 1949 by the Swiss Federal Council: Memorandum by the Greek Government*, Athens, April 1949, at p. 2.

[16] See, e.g., *Working Document drawn up for the Diplomatic Conference for the Establishment of International Conventions for the Protection of War Victims Convened at Geneva on April 21st, 1949 by the Swiss Federal Council: Draft Convention for the Relief of Wounded, Sick and Shipwrecked Members of Armed Forces on Sea,* Art. 2 (4).

[17] This position was summed up by the French representative, Mr. Lamarle, who stated that he "did not feel it was possible to extend automatically all the clauses of the Conventions to internal conflicts." His concerns were echoed by the Soviet delegate, Mr. Morosov. See *Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II, Section B, supra* 12, at p. 47, 98.

[18] During the diplomatic conference, a special committee was convoked consisting of representatives of Australia, the USA, France, Greece, Italy, Monaco, Norway, the UK, Switzerland, and the USSR; Burma and Uruguay were later also included in order to provide representation to Asian and Latin American States. The special committee was tasked with examining paragraph four of what was then draft Article 2 concerning the application of the Conventions in times of non-international armed conflicts. Some delegations, notably Australia, called for substituting the term "conflicts not of an

by limiting the Conventions' scope of application, but rather the substantive law to be applied,[19] leading to the text of Common Article 3 as we know it today.[20] References to specific types of armed conflict ("civil wars, colonial conflict, or wars of religion") were dropped because, according to the ICRC, "too much detail risked weakening the provision because it was impossible to foresee all future circumstances and because the armed conflict character of a situation was independent of its motives."[21] On the whole, discussions at the diplomatic conference of 1949 indicate that the question of extraterritorial NIACs was not specifically considered at the time. Nevertheless, the final decision by the delegates not to commit to a definition of such conflicts which was too precise ultimately left room for interpreting Common Article 3 as being applicable to such conflicts.

Long before the ICTY developed the most widely accepted criteria for determining the existence of a non-international armed conflict in the oft-quoted *Tadić* case,[22] the ICRC had suggested its own list of what it considered to "constitute convenient criteria" for the determination of the existence of such a conflict.[23] These criteria include "that the Party in revolt against the *de jure* government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention; that the legal government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory; that the insurgents have been recognized as belligerents (…);" or that they "have an organization purporting to have the characteristics of a State, that the insurgent civil authority exercises de facto authority over persons within a determinate territory, that the armed forces act under the direction of the organized civil authority and are prepared to observe the ordinary laws of war, and the insurgent civil authority agrees to be bound by the provisions of the Convention." [24] All of these criteria seem to principally relate to a situation of widespread insurgency against a national government, presumably taking place in the territory of the High Contracting Party in question. In the words of Jelena Pejić, senior legal advisor at the ICRC: "When the Geneva Conventions (i.e. common Article 3 thereto) were being drafted, the negotiators essentially had one, 'traditional', type of NIAC in mind: that between

international character" with "civil war in any part of the home or colonial territory of a Contracting Party", but these suggestions were ultimately dismissed when the idea to fully extend the application of the Conventions was abandoned. For more detail on these discussions, see *Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II, Section B, supra* 12, at p. 120-127.

[19] 1952 Commentary, *supra* 13, at p. 46-48.

[20] The final text of Common Article 3, which has occasionally been referred to as a "mini-convention" in its own right, obliges belligerent parties in a NIAC to apply, "as a minimum", certain standards of conduct with respect to persons *hors de combat* and prohibits acts such as the taking of hostages and summary executions.

[21] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949: Commentary of 2016*, ICRC, 2016 [hereinafter: 2016 Commentary], para. 373.

[22] ICTY, *Prosecutor v. Duško Tadić,* IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 [Appeals Chamber] [hereinafter: Tadić Jurisdiction Decision], para. 70.

[23] 1952 Commentary, *supra* 13, at p. 49.

[24] *Idem,* at p. 49-50.

government armed forces and one or more organized armed groups within the territory of a single State."[25]

When the two Additional Protocols to the Geneva Conventions were adopted almost thirty years later, fears similar to the ones expressed in the process of the drafting of Common Article 3 persisted. While the drafters strove to expand the regime of Common Article 3, the scope of application of Additional Protocol II (regulating NIACs) was eventually made even more restrictive. As foreseen by Article 1 (1), the Protocol applies to all NIACs which "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement [the] Protocol."[26] Apart from excluding armed conflicts fought between non-State armed groups without government involvement, the Protocol sets a high threshold with respect to organization and intensity[27] and introduces the requirement of control over the territory of the belligerent State by the dissident. Logically, all of these requirements were subordinate to the overarching and realistic necessity of having the non-State belligerent party able to implement the Protocol in the first place, which should in equal measure be seen as an implicit requirement of Common Article 3 (although the obligations under the latter are admittedly more limited in scope and basically come down to fundamental guarantees, which should not be difficult even for less well-organized groups to implement). Of course, to the extent that Additional Protocol II is nowadays still read in a geographically restrictive manner, it does not in any way alter the scope of Common Article 3.[28] This is important to highlight considering the evolution warranting the latter article's application.

Finally, some of the greatest breakthroughs in interpreting the law of NIACs came not by means of treaty law, but rather the jurisprudence of international criminal tribunals, specifically the International Criminal Tribunal for the former Yugoslavia (ICTY). In the above-mentioned *Tadić*

[25] Jelena Pejić, "Extraterritorial targeting by means of armed drones: Some legal implications" 96:893 IRRC 67 (2015), at p. 80.

[26] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609 [hereinafter: AP II], Art. 1 (1).

[27] According to the ICRC's 1987 Commentary, "The three criteria that were finally adopted on the side of the insurgents i.e. -- a responsible command, such control over part of the territory as to enable them to carry out sustained and concerted military operations, and the ability to implement the Protocol -- restrict the applicability of the Protocol to conflicts of a certain degree of intensity. This means that not all cases of non-international armed conflict are covered, as is the case in common Article 3." in 1987 Commentary, *supra* 4, para. 4453; the ICTY has taken a similar position: "Additional Protocol II requires a higher standard than Common Article 3 for establishment of an armed conflict. It follows that the degree of organisation required to engage in 'protracted violence' is lower than the degree of organisation required to carry out 'sustained and concerted military operations'." ICTY, *Prosecutor v. Ljube Boškoski & Johan Tarčulovski,* IT-04-82-T, Judgement of 10 July 2008 [Trial Chamber] [hereinafter: Boškoski Trial Judgement], para. 177.

[28] However, it should be pointed out that authors such as Robert Kolb and Richard Hyde consider, "The guarantees of Additional Protocol II apply today, as part of customary international law, under the same conditions as Common Article 3. Therefore, in order to properly reflect the current conditions of applicability, Additional Protocol II would have to be amended to align it to the conditions of application expressed in Common Article 3." Robert Kolb & Richard Hyde, *An Introduction to the International Law of Armed Conflicts,* Hart Publishing, 2008, at p. 79.

case, the ICTY found that a non-international armed conflict exists whenever there is "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[29] The Trial Chamber subsequently interpreted the Appeals Chamber's notion of "protracted armed violence" as referring to the "intensity of the conflict,"[30] providing us with the contemporary formula of examining the thresholds of intensity and organization in order to ascertain the existence of a non-international armed conflict.[31] Clearly, this proposed definition of NIACs based on two essential criteria – intensity and organization – does not take into account territory (in contradistinction with APII) and thus does not exclude the existence of extraterritorial NIACs.

To summarize the above, it is safe to say that, in 1949, the drafters of Common Article 3 contemplated primarily internal conflicts, although they did not exclude the possibility of extraterritorial NIACs. This is demonstrated by the decision to use the term "non-international" rather than "internal" armed conflicts in the final text of the Conventions. In 1977, the drafters of AP II preferred to set a more restrictive scope of application for the new treaty, but nonetheless did not modify the criteria for the application of Common Article 3, as further indicated by the jurisprudence of the ICTY.

2.2. Post 9/11: Multiplication of NIACs in the framework of the fight against terror and the issue of over-classification

In today's post 9/11 world, the struggle against terrorism is increasingly described using the language of IHL, and a number of bonafide non-State armed groups engaged in armed conflict against various governments have indeed been described as "terrorist" by one or more credible stakeholders.[32] Even before 9/11, a number of States engaged in NIACs had tried to label dissident movements as "terrorists", usually in order to diminish any real or potential political legitimacy such groups may have, and particularly to deny the existence of an armed conflict on their soil.[33] However,

[29] Tadić Jurisdiction Decision, *supra* 22, para. 70.
[30] ICTY, *Prosecutor v. Duško Tadić,* IT-94-1-T, Opinion and Judgement of 7 May 1997 [hereinafter: Trial Chamber] [Tadić Trial Judgement], para. 562.
[31] In its various case law, the ICTY has enumerated a number of indicators that the intensity threshold for a NIAC has been met. In the *Boškoski & Tarčulovski* case, an ICTY Trial Chamber lists the following: the seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and whether any resolutions on the matter have been passed. With respect to the threshold of organization, the Tribunal has held that, "while the jurisprudence of the Tribunal requires an armed group to have 'some degree of organisation', the warring parties do not necessarily need to be as organised as the armed forces of a State." Boškoski Trial Judgement, *supra* 27, paras 177, 197.
[32] The UN Security Council has repeatedly described certain groups as "terrorist" or "violent extremist" organizations in its resolutions, see, e.g. S/RES/2199 (2015), S/RES/2253 (2015) and S/RES/2255 (2015).
[33] This was the approach of the governments of Russia and Turkey with respect to various cases brought before the European Court of Human Rights concerning the conflicts in Chechnya and against the PKK, respectively. See, e.g. ECHR, *Ergi v. Turkey,* 40/1993/435/514, 28 July 1998; ECHR, *Isayeva v. Russia,* 57950/00, 24 February 2005; ECHR,

after 9/11, the menace of terrorism is ever more frequently invoked in order to claim the existence of an armed conflict and, therefore, broader authority for the executive than would be available under regular peacetime norms. Thus, the fight against Al-Qaeda in Afghanistan, but also outside the "hot battlefield", as well as the fight against Boko Haram in Nigeria or today ISIS in Syria and Iraq, has been described as an armed conflict, to which IHL, rather than just IHRL, is applicable.[34]

Following the 9/11 attacks and the subsequent US-led invasion of Afghanistan, the Western coalition found itself pitted not only against the Taliban Government, but Al-Qaeda militants as well. Whatever the situation may have been in the beginning, there can be little doubt that the intensity of the fighting against Al-Qaeda in Afghanistan remained sufficient to ascertain the existence of a NIAC after the fall of the Taliban Government. The position of the Bush Administration that the "war on terror" – chiefly the engagement against Al-Qaeda – was an armed conflict, but that the captured fighters were excluded from the protection of IHL, sparked debate in the international community as to what extent this body of law was appropriate to deal with these allegedly new armed conflict situations.[35]

Many of the initial discussions concerned the nature of the conflict between the US and Al-Qaeda: if there was an armed conflict, was it an international or non-international armed conflict? The US Government initially maintained that its conflict with Al-Qaeda was international, as it was not an internal armed conflict, but that the *modus operandi* of the group's militants had rendered them illegible for POW status (mainly because of their engaging in terrorist acts and failure to distinguish themselves from the civilian population).[36] Additionally, the Government had maintained that Common Article 3 did not apply because the conflict with Al-Qaeda was "international in scope".[37] The debate was, to a large extent, settled by the US Supreme Court's verdict in the *Hamdan v. Rumsfeld* case, which can be seen as the "breaking point" regarding the extraterritorial application of Common Article 3.[38] The Supreme Court dismissed the US argument that Al-Qaeda was not a "High Contracting Party" and that the Geneva Conventions were

Isayeva v. Russia, Yusupova v. Russia, Bazayeva v. Russia, 57947/00; 57948/00; 57949/00, 24 February 2005; ECHR, *Khatsiyeva and Others v. Russia,* 5108/02, 17 January 2008.

[34] It is the position of the US Government that transnational groups like Al-Qaeda challenge traditional concepts of classification and the geographical scope of IHL and therefore a more flexible position towards the applicability of IHL must be taken. In addition, the official US position is that human rights law does not apply extraterritorially. For more information on the official US stance, see an interview with the US Army Legal Counsel to the Chairman of the Joint Chiefs of Staff in "Interview with Brigadier General Richard C. Gross", 96:893 IRRC 13 (2014) [hereinafter: Richard Gross Interview], at p. 20-24.

[35] For a discussion of the early US position on the "war on terror" and its conformity with international law, see Marco Sassòli, "La « guerre contre le terrorisme », le droit international humanitarie et le statut de prisonnier de guerre" 39 Annuaire canadien de droit international 211 (2001); and Marco Sassòli, "The International Legal Framework for Fighting Terrorists According to the Bush and the Obama Administrations: Same or Different, Correct or Incorrect?" in 104 *Proceedings of the Annual Meeting (American Society of International Law)* 277 (2010), at p. 277-280.

[36] See the press conference of then-US Secretary of Defense Donald Rumsfeld of 8 February 2002, available in Marco Sassòli, Antoine A. Bouvier & Anne Quintin, *How Does Law Protect in War?,* 3rd edn, ICRC, 2011, at p. 2338-2346..

[37] US Supreme Court, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) [Opinion of Justice Stevens], at p. 67.

[38] *Idem*.

inapplicable to the fight against them. It found that at least one provision of the Geneva Conventions was applicable "even if the relevant conflict was not between signatories", and that was Common Article 3, which governed the conflict against Al-Qaeda.[39] The Court also highlighted that the phrase "not of an international character" refers to conflicts which are not between nations (and therefore, not necessarily limited to the territory of a single State Party).[40] Although the *Hamdan* judgement was crucial and positive in altering US practice with respect to suspected Al-Qaeda detainees,[41] it also granted further legitimacy to the idea that the fight against international terrorism is governed by IHL rather than (just) human rights law. It is not to be contested that the fighting against an organized armed group labelled as "terrorist" may be sufficiently intense in order to reach the threshold of a NIAC. In the 2008 Trial Judgement in the *Boškoski and Tarčulovski* case, the ICTY – having taken into consideration the findings of the US Supreme Court in *Hamdan v. Rumsfeld* – found that "the view that terrorist acts may be constitutive of protracted violence is also consistent with the logic of international humanitarian law" and that "it would be nonsensical that international humanitarian law would prohibit such acts if these were not considered to fall within the rubric of armed conflict."[42] There can be little doubt that the struggle against well-organized groups such as ISIS in Syria and Iraq amounts to an armed conflict situation.[43]

Nevertheless, there are several ways in which the contemporary fight against terrorism has led to an "over-classification" of NIACs. By "over-classification" we refer to treating as governed by IHL situations more appropriately regulated by IHRL:

(1) *Treating terrorism as* ipso facto *giving rise to a NIAC.* The fact that terrorist acts are being perpetrated does not as such mean that there is an ongoing armed conflict and that IHL is applicable. Such acts should be considered in light of the requirements of intensity and organization, and only if these conditions have been met will there be a NIAC. There is therefore an ongoing and serious risk that IHL and the conduct of hostilities paradigm will be erroneously applied to fighting against alleged terrorists under circumstances where the factual conditions for a NIAC have not been met and where the law enforcement paradigm is fully applicable. In brief, not all terrorist activities are the result of organized armed groups. For instance, if a "lone wolf" is conducting a terrorist attack in London or Paris, this is not an "act of war" but mainly a criminal act under domestic law that must

[39] *Idem*, at p. 66.
[40] *Idem,* at p. 67.
[41] See Memorandum of 7 July 2006 of the US Secretary of Defense on the Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense, available at <https://fas.org/sgp/othergov/dod/geneva070606.pdf>.
[42] Boškoski Trial Judgement, *supra* 27, para. 187.
[43] There have been many sources attesting the high organization of ISIS. See, e.g. Ben Hubbard & Eric Schmitt, "Military Skill and Terrorist Technique Fuel Success of ISIS", *The New York Times,* 27 August 2014. Also, several scholars have discussed if ISIS actually meets the criteria of statehood under international law, see Yuval Shany, Amichai Cohen & Tal Mimran, "ISIS: Is the Islamic State Really a State?", The Israel Democratic Institute, 14 September 2014, available at <https://en.idi.org.il/articles/5219>.

be dealt with as part of the law enforcement powers and duties of States;[44] the issues of attribution and membership in an organized armed group, as well as the notion of "affiliated/associated forces", will be discussed further below.

(*2) The notion of "transnational NIACs".* In spite of the *Hamdan* judgement, the US conflict with Al-Qaeda continues to draw the attention of scholarship with respect to its classification. Sivakumaran sums up the situation very well,

> "Dispute has also arisen as to whether there is one armed conflict – a global conflict without defined territorial limits – between the United States and Al-Qaeda; multiple armed conflicts between the United States and Al-Qaeda, for example in Afghanistan, in the Arabian Peninsula, and the like; an armed conflict between the United States and Al-Qaeda in one country but not another; or no armed conflicts aside from those in Afghanistan and Iraq, rather law-enforcement operations against Al-Qaeda. The issue is important as terrorist attacks in and of themselves do not amount to an armed conflict."[45]

The first part of this quotation highlights a second over-classification issue, i.e. the idea of a global or *"transnational" NIAC* that is believed by some to currently exist between al-Qaeda and the United States.[46] This position means that, as a result of Al-Qaeda's transnational nature and the existence of cells in many countries across the world, the engagement against Al-Qaeda should be seen overall as governed by IHL regardless of where it takes place.[47] It may be difficult to discern whether this is, strictly speaking a classification issue (wherein the threshold of organization of armed group is understood to be met throughout multiple countries and regions), or a question of the geographical scope of application of IHL (where it is maintained that, while the criteria of organization and intensity have been met in a single country, any operations undertaken against legitimate targets under IHL will be guided by the conduct of hostilities paradigm regardless of where they take place). This second possible interpretation will be dealt with further below.

There have been dissident voices with respect to the organizational threshold necessary for a NIAC to come into existence. Referring to the ICTY's *Limaj* case,[48] Peter Margulies argues that the

[44] On the growing trend of lone wolves, see Raffaello Pantucci, "A Typology of Lone Wolves: Preliminary Analysis of Lone Islamist Terrorists", The International London Center for the Study of Radicalisation and Political Violence, March 2011, at p. 39; Ramon Spaaji, "The Enigma of Lone Wolf Terrorism: An Assessment", 33:9 Studies in Conflict and Terrorism 854; and Sarah Teich, "Trends and Developments in Lone Wolf Terrorism in the Western World: An Analysis of Terrorist Attacks and Attempted Attacks by Islamic Extremists, International Institute for Counter-Terrorism", IDC Herzliya, 2013, at p. 23.

[45] Sandesh Sivakumaran, *The Law of Non-International Armed Conflicts,* 1st edn, Oxford University Press, 2012, at p. 233.

[46] Challenges Report 2011, *supra* 6, at p. 10.

[47] The position is summarized by Brigadier General Richard C. Gross as follows: "Commentators will often say, 'There is action being taken in Yemen, but we are not at war with Yemen.' Well, of course we are not at war with Yemen, but the Yemeni authorities have given permission/consent for us to partner with them in actions taken there and so the conflict is not with Yemen or Yemen's enemies; the conflict is with Al-Qaeda. Of course, geography matters in some instances. But we cannot tie ourselves to one country and say that combat will only take place in that country, and not outside." Richard Gross Interview, *supra* 34, at p. 21.

[48] ICTY, *Prosecutor v. Fatmir Limaj, Haradin Bala & Isak Musliu,,* IT-03-66-T, Judgement of 30 November 2005 [Trial Chamber] [hereinafter: Limaj Trial Judgement].

ICTY ended up taking a more flexible approach to this criterion, meaning that what is required is actually only minimal organization rather than a high degree of organization:

> "In *Limaj* (…) the ICTY found that the Kosovo Liberation Army (KLA) was organized even though evidence of discipline was 'scant' by the court's own admission. Witnesses differed widely on when the military police cited by the tribunal had been established. If the military police were a salient symbol of organizational discipline, this divergence in recollection seems odd. Moreover, as the ICTY acknowledged, there was no record of any imposition of discipline among KLA members."[49]

Margulies further argues that "terrorist groups are more organized than their historical image suggests" and that "today's terrorist groups, including Al Qaeda, also display far more organization than is commonly understood."[50] Therefore, the "network" of organizations such as Al-Qaeda should be taken as constituting a single armed group no matter where individual groups constituting the network may be found.

Although there has been limited case law indicating a more flexible threshold of organization for the purposes of a NIAC,[51] the level required has traditionally been seen as set higher than just minimal organization. For example, when Additional Protocol II makes reference to "organized armed groups", it sees them as being "under responsible command" and as "exercis[ing] such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."[52] While the threshold of organization in AP II may allegedly be different from that of Common Article 3,[53] it remains indicative of the level of organization necessary for an armed group to be considered "organized".[54] It is submitted that the very *raison d'être* of the organization criterion is to ensure that the armed group is capable of complying with IHL and that this is also inherent in the scope of Common Article 3. A key element to determine whether the level of organization is met is thus, in our view, the existence of a certain *accountability structure* within the group.[55] To that end, in the *Limaj* case quoted by Margulies, the ICTY even took the existence of a "military police" responsible for the discipline of the fighters as indicative

[49] Peter Margulies, "Networks in Non-International Armed Conflicts: Crossing Borders and Defining 'Organized Armed Group' [2013] 89:54 International Law Studies 54-76, at p. 63.
[50] *Idem,* at p. 65-66.
[51] In the case of *Juan Carlos Abella v. Argentina (La Tablada),* the Inter-American Commission on Human Rights accepted that the siege of a military base by around forty armed attackers amounted to a NIAC in spite of the brevity of the attack (which only lasted about 30 hours) – an issue that could be seen as relevant both with respect to the criteria of intensity and organization. See *Juan Carlos Abella v. Argentina*, Case 11.137, Report Nº 55/97, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 271 (1997).
[52] AP II, *supra* 26, Art. 1.
[53] Boškoski Trial Judgement, *supra* 27, para. 177.
[54] According to Pejić, "It is widely recognized that a non-state party to a NIAC means an armed group with a certain level of organization that would essentially enable it to implement international humanitarian law." Jelena Pejić, "The protective scope of Common Article 3: more than meets the eye" 93:881 IRRC 189 (2011), at p. 191-192.
[55] The organizational level should also be sufficient to enable the group to engage in a continuum of attacks rather than isolated strikes, which is a direct link with the threshold of intensity required for a NIAC.

that the threshold of organization has been met.[56] This case certainly seems to set a quite high (rather than low) standard of organization; one which most terrorist groups simply do not achieve.

Therefore, it has generally been the stance of legal scholarship that the conflict between the US and Al-Qaeda is not "transnational".[57] The ICRC itself has explicitly rejected the actual existence (but not possible existence in the future) of such "transnational armed conflicts" since "[a] single NIAC across space and time would, *inter alia,* require the existence of a 'unitary' non-State party opposing one or more States"; [58] something which has never been really demonstrated. In fact, some of the evidence offered by authors such as Margulies could just as readily (and perhaps more convincingly) be used to argue the existence of separate armed conflicts against different groups (members of the Al-Qaeda "network"), rather than a single, "transnational" one.[59]

To be sure, there is nothing in IHL which would negate the existence of extraterritorial NIACs, including possibly "transnational" NIACs. Indeed, there have been cases of a single armed group being based in the territory of more than one State: one need only think of ISIS in Syria and Iraq, where it forms a single entity across two countries.[60] However, the capacity of this entity as a single, unified command structure to exercise control over purported cells in countries as far as Libya, Afghanistan, France or Belgium is dubious, at best. The distinction is not based on law, but rather on facts: the conditions for a non-State armed group to exercise a sufficient level of control over its individual members in numerous and distant parts of the world are difficult to meet. Whereas there is no consensus on whether the fight against Al Qaeda or ISIS constitute actual transnational NIACs (whereby the global network is equated with the armed group), nothing indicates that this category of extraterritorial NIAC may not materialize in the future.

(3) *The notion of "associated forces / affiliates".* Another aspect of transnational NIACs is to consider, for instance, that al-Qaeda, as an armed group operating in one or more States, is supported by several "associated forces" operating globally. In this sense, Richard Gross, a senior US army

[56] Limaj Trial Judgement, *supra* 48, para. 113.

[57] "Subsequent intelligence assessments, representing a significant portion of the United States' overall knowledge on terrorism networks, point to decentralized groups that spring up independently and operate with little, if any, connection to Al Qaeda. The burgeoning number of groups gather strategy, tactics, and inspiration from more than five thousand radical Islamic websites. The Central Intelligence Agency's Director offered in April 2006 that 'new jihadist networks and cells, sometimes united by little more than their anti‐Western agendas, are increasingly likely to emerge'. Arguably, this cannot be a sufficient basis for classifying all these acts as part of a single, non‐international armed conflict under existing international humanitarian law." Marco Sassòli, "Transnational Armed Groups and International Humanitarian Law" 6 Harvard Program on Humanitarian Policy and Conflict Research 1 (2006), at p. 10-11. See also Jens David Ohlin, "Targeting Co-Belligerents", in Claire Finkelstein, Jens David Ohlin & Andrew Altman (eds), *Targetted Killings: Law and Morality in an Asymmetrical World,* Oxford University Press, 2012, 60-89.

[58] Jelena Pejić, *supra* 25, at p. 83. See also the section on transnational NIACs in Challenges Report 2011, *supra* 6, at p. 10-11.

[59] Marguiles considers Al-Qaeda's affiliates in Pakistan, Afghanistan, Iraq, the Arabian Peninsula, North Africa, Somalia (Al Shabab), Yemen and elsewhere as forming a single organization. See Peter Margulies, *supra* 49, at p. 71-75.

[60] See Charles C. Caris and Samuel Reynolds, "ISIS Governance in Syria", Institute for the Study of War, July 2014, available at <http://www.understandingwar.org/sites/default/files/ISIS_Governance.pdf>.

legal counsel, explains that the term "associated forces" refers to "a co-belligerent who has entered the fight alongside Al-Qaeda against the United States or its coalition partners. So, it is not just any group that shares Al-Qaeda's ideology and it is not just any group that may be fighting the US somewhere in the world. It has to be a co-belligerent; this component is critical."[61] According to Margulies, the key criterion to consider regional groups as "affiliates" (for the purpose of targeting) is whether Al-Qaeda is exercising "strategic influence" over such groups, i.e. that it is able to influence their choice of targets.[62] This could allegedly be inferred from as many factors as financing, training or exchange of information about operations.[63]

This aspect is not without its problems either. As highlighted by the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, in his 2010 Study on Targeted Killings:

> "With respect to the existence of a non-state group as a "party" [to an armed conflict], al-Qaeda and other alleged 'associated' groups are often only loosely linked, if at all. Sometimes they appear to be not even groups, but a few individuals who take 'inspiration' from al Qaeda. The idea that, instead, they are part of continuing hostilities that spread to new territories as new alliances form or are claimed may be superficially appealing but such 'associates' cannot constitute a 'party' as required by IHL – although they can be criminals, if their conduct violates US law, or the law of the State in which they are located."[64]

The notion of "associated forces" or "affiliates" remains entirely undefined and its implications can be grave. When does an armed group become an "associate" or "co-belligerent" of another armed group such as Al-Qaeda and thus a party to the ongoing armed conflict with al-Qaeda? IHL does not provide a clear-cut answer to this question. Proposals such as the ones just presented comport the risk of including under the umbrella of "affiliates" civilians who are not participating at all in hostilities (or only indirectly) such as persons who receive general training or who are financed/or who finance al Qaeda.

One may argue that terrorist cells become co-belligerents – and a party to a pre-existing NIAC – as soon as they *support* an armed group such as Al-Qaeda or ISIS based on an analogy with the so-called "support-based approach". The support-based approach was specifically developed to determine under which conditions IHL applies to multinational forces in a pre-existing NIAC, essentially what level of support to a party to the conflict is necessary for those forces to be considered as having become a party themselves.[65] It shall be highlighted notably here that the

[61] Richard Gross Interview, *supra* 34, at p. 22.
[62] Peter Margulies, *supra* 49, at p. 75.
[63] Ibid.
[64] UN Human Rights Council*, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum: Study on targeted killings*, 28 May 2010 (A/HRC/14/24/Add.6), para. 55.
[65] Under the support-based approach, these conditions are: there is a pre-existing NIAC ongoing in the territory where multinational forces intervene; actions related to the conduct of hostilities are undertaken by multinational forces in the context of that pre-existing conflict; the multinational forces' military operations are carried out in support of a party to that pre-existing conflict; and the action in question is undertaken pursuant to an official decision by the troop-contributing countries or international organization in question to support a party involved in that pre-existing conflict. See Tristan

multinational force must undertake "actions related to the conduct of hostilities" for such a support to exist.[66] If the support-based approach were to be accepted in the context of non-State actors, this may lead to an expansion of existing NIACs as the threshold of intensity required for the existence of NIAC would not need to be met by the actions from and against small groups that are mere associates. So long as the latter support a belligerent party, they immediately become a party to a pre-existing NIAC. It is submitted, nevertheless, that – at the very least – for a group to be capable of becoming a "co-belligerent" for the purposes of IHL, it must first meet the organizational criterion required by that body of law on its own.[67] Moreover, the baseline should be that "co-belligerency" may be inferred only if the organized armed group undertakes actions that amount to direct participation in hostilities in support of another non-State organized armed group, which is already involved in a pre-existing NIAC.[68]

(4) *Membership and attribution to an organized armed group*. A last major issue in terms of over-classification that has arisen in the context of the fight against terror relates to excessively "generous" interpretations in relation to *individual membership* in an armed group as well as *attribution* of initially private conduct to a non-State armed group.[69] It is not the place here to solve general (and unsettled) matters such as membership into and attribution to non-state armed groups.[70] A few comments will suffice here.

Membership in armed groups is difficult to determine as it has no basis in domestic law (in contradistinction with membership in armed forces) and it is not necessarily visible (through uniforms, fixed distinctive signs, or identification cards).[71] The only real attempt at legally defining membership has been made by the ICRC in the context of its Guidance on Direct Participation in Hostilities. According to the ICRC, are members of an armed group – for the purpose of targeting –

Ferraro, "The applicability of international humanitarian law to multinational forces", 95:891/892 IRRC 561 (2014), at p. 584.

[66] *Ibid*.

[67] Some of the proponents of the notion of "associated forces" themselves seem to make reference to this requirement, for example, former US Department of Defense General Counsel Jeh Johnson: "An 'associated force,' as we interpret the phrase, has two characteristics to it: (1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners. In other words, the group must not only be aligned with al Qaeda. It must have also entered the fight against the United States or its coalition partners. Thus, an 'associated force' is not any terrorist group in the world that merely embraces the al Qaeda ideology." Jeh Charles Johnson, "National Security Law, Lawyers, and Lawyering in the Obama Administration", 31:1 Yale Law & Policy Review 141, at p. 146.

[68] See footnote 65 *mutatis mutandis*.

[69] It remains controversial whether an organized non-State armed group may assume responsibility for an act in the same way a State may in line with Article 11 of the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts (i.e. by acknowledging or adopting conduct which is otherwise not attributable to it).

[70] The only real attempt to legally define membership in an armed group has been made by the ICRC in the context of its Guidance on Direct Participation in Hostilities. According to the ICRC, are members of an armed group – for the purpose of targeting – persons having a "continuous combat function". Members such as recruiters, trainers, financiers and propagandists would not be targetable under this position. See Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law,* ICRC, 2009 [hereinafter: DPH Guidance], p. 27-36.

[71] *Idem*, at p. 32-33.

persons having a "continuous combat function". Members such as recruiters, trainers, financiers and propagandists would not be targetable under this position.[72] This position remains however very controversial. A number of States and experts consider notably that membership should be more broadly defined as encompassing anyone who belongs to the military wing of the group (including for instance the cook).[73] Irrespective of such debates, it is quite clear that mere claims by alleged terrorists that they belong to Al-Qaeda or ISIS should not be sufficient to consider them as part of those groups.

In the same vein, the fact that groups like ISIS acknowledge *ex post facto* apparently independent terrorist attacks should not be considered as sufficient to establish membership or even attribution except in exceptional circumstances. It may be interesting to consider a limited analogy with the ICJ's 1980 judgement in the *USA v. Iran* case.[74] In this case, the Court determined that the occupation of US diplomatic and consular premises in Tehran and the hostage-taking of US diplomatic and consular personnel performed by students (as private persons) became attributable to Iran after the State had acknowledged and encouraged their actions.[75] However, three issues need to be borne in mind in this analogy: first, Iran is a State, and attribution of unlawful conduct to a State is not controversial, which is not the case with non-State actors. The issue of attribution to organized non-State armed groups remains indeed a field almost completely unexplored in international law.[76] Second, the hostage-taking in that case represented a continuous act, which the State of Iran encouraged while it was still taking place. Had the acts already been finished by the time Iran acknowledged them, it is difficult to foresee if they would have equally been attributable to Iran.[77] Using this analogy with attribution of unlawful conduct to States with non-State actors, we

[72] *Idem*, at p. 27-36.

[73] See Michael N. Schmitt, "Deconstructing Direct Participation in Hostilities: The Constitutive Elements", 49 N.Y.U. J. Int'l L. & Pol. 697 (2010). The Israeli Government is also of the opinion that members of OAGs may be targeted solely by virtue of their membership unless they are *hors de combat* or entitled to special protection, as is the case with medical personnel. State of Israel, *The 2014 Gaza Conflict: 7 July – 26 August 2014: Factual and Legal Aspects,* May 2015, available at <http://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf>, para. 264. See also "Chief Military Advocate General Mag. Gen. Dan Efrony's Comments on Contemporary Armed Conflict", IDF Blog, 17 February 2015, available at <https://www.idfblog.com/chief-military-advocate-general-mag-gen-dan-efronys-comments-contemporary-armed-conflict/>.

[74] *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran*, Judgement, 1980 I.C.J. Rep. 3, para. 25 (24 May 1980).

[75] *Idem,* para. 74.

[76] This is understandable from a "responsibility perspective" since there is no law/mechanism relating to the responsibility of organized non-State armed groups. To date, responsibility in this context is only based on individual criminal responsibility of members of the group. In any case, it is submitted that attribution issues remain important from an IHL perspective in order to assess for instance the intensity of violence (continuum of attacks performed by the armed group) and possibly to determine the legal regime applicable in relation to acts that have been performed for an armed group and in the context of an armed conflict (e.g. possibility for security detention).

[77] See ILC Commentary on Art. 11 of the Draft Articles on State Responsibility, at p. 53:"In that case it made no difference whether the effect of the "approval" of the conduct of the militants was merely prospective, or whether it made the Islamic Republic of Iran responsible for the whole process of seizure of the embassy and detention of its personnel ab initio. The Islamic Republic of Iran had already been held responsible in relation to the earlier period on a different legal basis, viz. its failure to take sufficient action to prevent the seizure or to bring it into an immediate end. In other cases no such prior

could say that situations wherein ISIS (for instance) assumes responsibility for an attack by "lone wolves" in Paris is not the same if that attack is finished by the time they do so (this is the case with most attacks), or if it is an on-going act (e.g. a hostage crisis). Third, even if private acts may become attributable to a State, this does not mean that the private individuals become *de facto* organs of the State.[78] By analogy, even if a terrorist armed group acknowledges and adopts the acts of a lone wolf, this does not make him/her *ipso facto* member of the group, at least certainly not for the purposes of targeting. Although these arguments are still very much exploratory, one thing is certain: membership and attribution must be based on facts, not mere allegations for propaganda purposes.

In brief, the fight against international terrorism has, without doubt, contributed towards the present "globalization" of NIACs, with many such conflicts being fought precisely against groups considered terrorist organizations.[79] It has constituted a fertile ground for "over-classification" issues, with the consequence (intended or not) of lowering the protection of individuals suspected of terrorism and surrounding civilians by potentially applying an IHL framework to law enforcement situations.

2.3. A typology of NIACs in light of contemporary practice – is territory really irrelevant?

The above analysis of different situations governed by Common Article 3 to the Geneva Conventions demonstrates the necessity of producing a general typology of NIACs that would assist scholars and practitioners examining these situations. NIACs had previously usually been classified on the basis of the applicable law – primarily based on whether or not Additional Protocol II was applicable in addition to Common Article 3.[80] More recently, the ICRC offered a general typology which may be seen as "fact-based", rather than "law-based", insofar as it relies on different sets of circumstances where Common Article 3 is said to apply.[81] The ICRC's seven-member typology concerns both internal and extraterritorial NIACs and is not based on any single criterion of differentiation, but rather lists all possible situations that have been referred to as NIACs whether the ICRC agrees with them or not. The US Department of Defense's 2015 Law of War Manual similarly differentiates between different situations amounting to a NIAC, with interesting results,

responsibility will exist. Where the acknowledgement and adoption is unequivocal and unqualified there is good reason to give it retroactive effect, which is what the tribunal did in the Lighthouses arbitration."

[78] See *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* 2007 I.C.J. Rep. 43, para. 397 and ff.

[79] For an overview of on-going NIACs in 2016 and their actors, see Annyssa Bellal, *supra* 1, at p. 29-30.

[80] This is the approach adopted by a number of legal scholars, e.g. Sylvain Vité, "Typology of armed conflicts in international humanitarian law: legal concepts and actual situations" [2009] 91:873 IRRC 69-94 and Marco Sassòli, Antoine A. Bouvier & Anne Quintin, *supra* 36, at p. 123-124.

[81] The typology was published in Challenges Report 2011, *supra* 6, at p. 9-11.

although the purpose of the analysis is to compare circumstances that may give rise to a NIAC rather than to give an actual typology.[82]

There are different ways of sorting NIACs depending on the criteria chosen. One way is to differentiate between internal and extraterritorial, and this difference is certainly relevant. It is nevertheless useful to further break down various types of extraterritorial NIACs. This could be done based on whether the host State has given its consent to the foreign State's presence or not: one possible consequence of a lack of consent would be the parallel existence of an IAC between the two States, if we accept the double classification approach as espoused in the ICRC's 2016 Commentaries to the Geneva Conventions.[83] Nevertheless, as this would have little bearing on the NIAC itself, we do not find that the issue of consent would play a very significant role in further distinguishing between different types of extraterritorial NIACs. Ultimately, the factor of geographical distance may be the most practical to describe and differentiate between different types of NIACs.

A. **Internal NIACs.** These are "traditional" NIACs, confined to the borders of a single State, whether they are fought between that State and one or more local non-State armed groups, or between such groups without State involvement. As examples of the former, we may give the fighting between the forces of the Federal Republic of Yugoslavia and the Kosovo Liberation Army (KLA) during the Kosovo War; the engagement of Russian forces against Chechen insurgents during both Chechen Wars; and the conflict (or conflicts) between Turkey and the Kurdistan Workers' Party (PKK) in its various stages since at least the beginning of the first insurgency in 1984. The conflicts between left-wing and right-wing militias in Colombia and nationalists and Islamists in Northern Mali are illustrative of NIACs fought between non-State armed groups. In addition Common Article 3, some internal NIACs fought between States and dissident forces could also be governed by Additional Protocol II where the conditions for its application have been met.

B. **Extraterritorial NIACs.** These NIACs have in common that they take place beyond the borders of a single State. As shown previously, NIACs are not confined to internal conflicts: it is the fact that at least one of the belligerent parties is a non-State organized armed group that makes them a conflict "not of an international character". The following distinct situations may be considered extraterritorial NIACs:

[82] The Law of War Manual specifically examines civil wars, internal armed conflicts, transnational or internationalized NIACs, guerrilla or unconventional warfare, rebellion or insurrection, terrorism and small wars or low-intensity conflicts. See *Law of War Manual,* US Department of Defense, June 2015 (updated May 2016), at p. 1001-1004.

[83] 2016 Commentary, *supra* 21, para. 477. See contra: Djemila Carron, *supra* 5; and James Stewart, "Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict" [2003] 85:850 IRRC 313-350.

1) **Cross-border or "short-distance" NIACs.** They usually involve situations when an armed group fighting a State is primarily (or to a large extent) based and operates from the territory of a neighbouring State (the "host State"). It is crucial that the armed group may not be considered as an agent of the host State, as the conflict would otherwise become international. Examples of such conflicts are seldom. Insofar as Hezbollah was not an agent of the Lebanese Government at the material time, the 2006 war between Hezbollah and Israel, which primarily took place on Lebanese territory, may be considered a cross-border NIAC.[84]

Cross-border NIACs should be distinguished from so-called "spill-over" situations. "Spill-over" conflicts are situations wherein a NIAC has erupted and takes place in the territory of a single State, but hostilities extend to the territory of neighbouring countries – as often happens in armed conflict situations – in a quite limited manner.[85] Such a situation has been portrayed by the ICRC as a type of NIAC.[86] In our view, however, spill-over is not a specific type of NIAC, but rather a phenomenon pertaining to the geographical scope of application of IHL. Actually, any type of NIAC may in practice "spill-over" into the territory of a neighbouring State. Therefore it is not so much the existence of an armed conflict that is at stake here (classification issue) but rather the question whether IHL rules may apply beyond the territory of the belligerent State if the armed conflict spills-over in the territory of the neighbouring State. Despite of the fact that the spill-over phenomenon requires further scrutiny, we will reserve this discussion for the next section on the geographical scope of application of IHL.

2) **Trans-border or "long-distance" NIACs.** These armed conflicts involve one or more States fighting an armed group which is present neither on their own territory, nor that of a neighbouring State.[87] Such conflicts may also involve international organizations, such as when multinational forces fight an armed group in a host country under a UN mandate.[88] The non-State armed group is based in the territory

[84] Here, the lack of consent by Lebanon to Israel's intervention implies the existence of a parallel IAC between Israel and Lebanon.
[85] See Challenges Report 2011, *supra* 6, at p. 9-10; and Jelena Pejić, *supra* 54, at p. 194.
[86] Challenges Report 2011, *supra* 6, at p. 9-10.
[87] It is to be noted that a hypothetical trans-border NIAC limited to non-State armed groups can be imagined, although, to our knowledge, such conflicts have not occurred to date.
[88] In its typology, the ICRC has proposed two categories of "multinational" NIACs to cover "armed conflicts in which multinational armed forces are fighting alongside the armed forces of a 'host' state - in its territory - against one or more organized armed groups." It also distinguishes the category of multinational NIACs in which UN forces, or forces under the aegis of a regional organization (such as the African Union) are sent to support a 'host' government involved in hostilities against one or more organized armed groups in its territory. Although it is useful to specify that these conflicts remain non-international ones despite the important international component, they do not differ substantially from other trans-border or long-distance NIACs involving just one state. The difference merely pertains to the number of actors

of one, or several States which are distant from the belligerent State(s). The conflict between Western States such as the US and Taliban and Al-Qaeda in Afghanistan after the fall of the Taliban regime constituted a trans-border NIAC. This is also the case with the operations of the Russian Federation against rebel forces in Syria. However, in both of these situations, it may also be maintained that there existed a primary internal NIAC between the host State and local non-State organized armed groups, and that foreign Powers merely became co-belligerents in those rather "traditional" internal NIACs. This is also the case with air strikes launched by Western States against ISIS in Iraq, but not in Syria, as they may not be considered co-belligerents of the Syrian Government (they do not have its consent to fight ISIS on its territory). Therefore, the situation in Syria may be considered prototypical of a "trans-border" or "long-distance" NIAC. It should be noted, however, that the fight opposing the coalition to ISIS in Syria has also sometimes been portrayed as a spill-over from Iraq, since the US and its allies initially supported the fight of the Iraqi Government in Iraq against ISIS, which afterwards "spilled-over" in Syrian territory.[89]

3) **Transnational NIACs.** This highly controversial category, which has already been discussed in the previous section in relation to the fight against Al-Qaeda and ISIS, bears superficial resemblance to trans-border NIACs, but is based on different legal considerations. While trans-border NIACs rest on the idea that a non-State armed group may achieve the sufficient level of organization to engage in a NIAC while based in the territory of a single State (or neighbouring States in a localized manner), a transnational NIAC relies on the idea that the armed group is a transnational one – i.e. a single identity with a worldwide scope. Consequently, it would not be necessary to prove, for instance, that Al-Qaeda in Yemen or Pakistan are sufficiently organized as armed groups on their own (and no additional authority to use force against them at the national level may therefore be needed[90]), since they form part

involved, and also their nature when the multinational forces act under the command and control of an international organization. Challenges Report 2011, *supra* 6, at p. 10.

[89] This is notably how the Geneva Academy's Rule of Law in Armed Conflict (RULAC) Project treats this situation. See Geneva Academy, *RULAC: Non-international armed conflicts in Syria*, 28 July 2017 (update), available at <http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-syria#collapse1accord>.

[90] Just after the 9.11 attacks, the US Congress passed the Authorization for Use of Military Force, which authorized the US President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." US Congress, *Authorization for Use of Military Force*, Pub. L. No. 107-40, 18 September 2001, Art. 2 (a). This has been understood as covering al Qaeda, the Talibans and "associated forces" within and outside Afghanistan. See *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations,* The White House, December 2016, available at https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf.

of the same Al Qaeda worldwide transnational armed group. In the same vein, a terrorist cell of 5 persons in Switzerland loosely connected to ISIS may be considered as part of this allegedly transnational armed group. This approach, which principally depends on a more flexible reading of the threshold of organization, practically allows for ignoring territorial factors, thus possibly giving rise to a truly "global" armed conflict against alleged transnational armed groups.[91] From an IHL perspective, nothing indicates that "transnational armed groups" – i.e. groups that are transnationally organized – cannot exist. In other words, IHL requires that the armed group be sufficiently organized but does not "localize" the assessment of this criterion. However, the criterion of organization should not be interpreted too loosely as discussed above.[92] A thorough and careful empirical study of the structure and functioning of entities such as al Qaeda and ISIS would be needed to definitively negate or confirm their transnational character, at least beyond regions (such as Afghanistan/Pakistan in relation to al Qaeda or Iraq/Syria in relation to ISIS).

This typology has shown that extraterritorial NIACs are indeed numerous in our contemporary world. But, at the same time, it has also somehow questioned the pervasive conception that the classification of a situation of violence as a NIAC is completely disconnected from territorial notions and relies only on the identity of the parties. By far and large, contemporary extraterritorial NIACs are nothing more than a variation of traditional internal armed conflicts in which a third State (a coalition or an international organization) intervenes at the request or with the consent of the host State. Wars are still mainly fought on the territory of States and not merely between abstract entities in a vacuum. Concepts of borders and State sovereignty still have implications – as a matter of fact and law – for classification purposes.

3. Contemporary Perspectives on the Geographical Scope of Application of International Humanitarian Law

Closely related to the issue of the classification of armed conflicts is the question of the geographical scope of application of IHL in extraterritorial NIACs. Whereas the first aspect concerned the very existence, in the legal sense, of an armed conflict, the latter refers to the territory where IHL is applicable once an armed conflict is deemed to exist.

[91] According to Brigadier General Gross, the possibility of a global war is nevertheless precluded by considerations of sovereignty: "(…) Carefully constrained by law and policy, we have to be able to go to the enemy, wherever the enemy may be. Now, that does not mean a global war. That does not mean we are everywhere. There are certainly principles of sovereignty. We have to respect the principles of international law, so you are not going to see a global war *per se,* but it is not just war confined to Afghanistan either"; Richard Gross Interview, *supra* 34, at p. 21.
[92] See above discussion on transnational NIACs in section 2.2 (2) of this article.

The IHL treaties themselves do not specify their geographical scope of application, although Common Article 1 requires High Contracting Parties "to respect and to ensure respect for the present Convention in all circumstances."[93] While the ICRC interprets this as covering "not only the provisions applicable to international armed conflict, including occupation, as defined by common Article 2, but also those applicable to non-international armed conflict under common Article 3,"[94] it nevertheless does not provide us with much information on the territory within which IHL is applicable. Again, the jurisprudence of international tribunals is relevant in this regards.

As we have seen above, in the *Tadić* case, the ICTY held that "international humanitarian law continues to apply (…) in the case of internal conflicts, [in] the whole territory under the control of a party, whether or not actual combat takes place there."[95] Similarly, the ICTR found that "[Common Article 3] must be applied in the whole territory of the State engaged in the conflict."[96] However, the ICTY never determined that IHL may not be applicable beyond the borders of the State engaged in a NIAC, and the ICTR's own Statute foresees its jurisdiction over "persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States."[97]

Controversies persist with respect to the geographical scope of application of Common Article 3. These controversies relate to two different questions that we may portray as internal *versus* external: (1) Does IHL – and in particular conduct of hostilities rules – apply in the whole of the territories controlled by the belligerent parties? (internal aspect); (2) May IHL – and in particular conduct of hostilities rules – apply beyond the territories controlled by the belligerent parties? (external aspect)

(1) Regarding the internal aspect of the geographical scope of application of IHL, the ICRC's 2016 Commentary acknowledges the issue by noting that,

> "(…) The question has arisen as to whether humanitarian law applies in the whole of the territory of the State concerned or only in areas where hostilities are occurring. In areas of a State where hostilities are few and far between or even non-existent it may seem questionable whether humanitarian law applies. There is concern that humanitarian law, and especially the rules on the conduct of hostilities, should not apply in regions where

[93] GC I, *supra* 11 / Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85 [hereinafter: GC II] / Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135 [hereinafter: GC III] / Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287 [hereinafter: GC IV], Article 1. For a discussion of the obligations under Common Article 1, see Knut Dörmann and Jose Serralvo, "Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations", 96:895/896 IRRC 707 (2015).
[94] 2016 Commentary, *supra* 21, para. 125.
[95] Tadić Jurisdiction Decision, *supra* 22, para. 70.
[96] ICTR, *The Prosecutor v. Jean-Paul Akayesu,* ICTR-96-4-T, Judgement of 2 September 1998 [Trial Chamber], para. 635.
[97] UN Security Council, *Statute of the International Criminal Tribunal for Rwanda* (as last amended on 13 October 2006), 8 November 1994, Art. 1.

> hostilities are not taking place, even in a State in which an armed conflict is occurring. In the more peaceful regions of such a State, the State's criminal law and law enforcement regimes, within the boundaries set by the applicable international and regional human rights law, may provide a sufficient legal framework."[98]

Concretely, this issue becomes quite concerning in light of the contemporary fight against terror. Consider, for instance, an alleged ISIS cell located in Paris. Since France is involved in an extraterritorial NIAC in Syria against ISIS, would the French Government be allowed to engage this cell under a conduct of hostilities paradigm or is the more protective human rights law enforcement paradigm the only one applicable in such a situation (or else, the prevailing one)? When asked by a journalist if France was at war with ISIS, former French intelligence officer Alain Chouet replied: "We are at war in the territories controlled by Daesh in the Middle East, but not in the Hexagon."[99]

In order to subject this type of issue to further scrutiny, the ICRC summoned already in 2012 an expert meeting on the question of the use of force in armed conflict situations – particularly the interplay between the law enforcement and conduct of hostilities paradigms. The meeting resulted in a detailed expert meeting report,[100] which includes notably questions relevant to the geographical scope of application of IHL in its internal aspect. This question is, of course, of tremendous relevance to the present article, as the law enforcement paradigm, based on human rights law, is almost universally seen as more protective than the IHL-based conduct of hostilities paradigm.[101] The ICRC's report focuses on a number of case studies where the interplay between IHL and human rights is controversial, such as the "isolated sleeping fighter example", wherein, in the context of an internal armed conflict, the Government's forces locate "a fighter belonging to [the dissident armed group] is sleeping at home with his family in a part of the territory controlled by the government."[102] Under the circumstances, the fighter is arguably not an imminent threat, and the issue has been raised that, while a traditional interpretation of IHL would allow the fighter to be killed provided the principles of proportionality and precautionary measures have been respected, the law enforcement paradigm may appear more appropriate. For the purpose of this article, a crucial aspect of this thought experiment lies in the fact that the fighter is located outside of what has been referred to as the "conflict zone", which "is neither defined nor used in IHL treaties (…) [but is] frequently used, in practice, to describe an area where active hostilities are taking place."[103] The ICRC takes note that, "by a small margin," the majority of experts gathered at the meeting considered that IHL applies

[98] 2016 Commentary, *supra* 21, para. 456.
[99] "Terrorisme: La France est-elle vraiment en guerre contre Daech?", *LCI,* 27 July 2016, available at: <http://www.lci.fr/international/terrorisme-la-france-est-elle-vraiment-en-guerre-contre-daech-1514033.html>, last accessed 21 August 2017.
[100] Gloria Gaggioli, *The Use of Force in Armed Conflicts: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms,* ICRC, 2013 [hereinafter: Use of Force Study].
[101] For a comparison of the two, see *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston: Study on targeted killings,* A/HRC/14/24/Add.6, 2010, paras 28-92.
[102] Use of Force Study*, supra* 100, at p. 13.
[103] *Idem,* at p. 17.

in the whole of the territory of the belligerent party and that the conduct of hostilities paradigm was, as a consequence, applicable to the use of force against a legitimate target under IHL in times of armed conflict and, as *lex specialis,* prevailing over IHRL.[104]

While it will certainly remain controversial for the time being, the majority of experts' opinion as stated above may be seen as consistent with the ICTY's approach in *Tadić* (although in that case the Tribunal did neither make a conclusive statement on the geographical scope of application of IHL nor on the interplay between IHL and HRL– it merely found that IHL continued to apply beyond the immediate battlefield). From a protection aspect, there may be an alternative solution to the "isolated sleeping fighter problem", such as the one raised in Chapter IX of the ICRC's *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law.*[105] There, the ICRC finds that "while operating forces can hardly be required to take additional risks for themselves or the civilian population in order to capture an armed adversary alive, it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force. In such situations, the principles of military necessity and of humanity play an important role in determining the kind and degree of permissible force against legitimate military targets."[106] This approach is based on an interpretation of the principles of military necessity and humanity, and has the advantage of remaining within the conduct of hostilities paradigm, while limiting its material scope. This approach has however been extremely controversial even among legal scholarship.[107] On the other hand, some States that do not consider themselves legally bound by considerations highlighted in Chapter IX of the ICRC Guidance on Direct Participation in Hostilities have nevertheless adopted a kind of "capture rather than kill approach" for policy reasons; for example, this has allegedly been the US practice during the counterinsurgency in Afghanistan.[108]

(2) The external aspect of the geographical scope of application of IHL is not less debated. The ICRC summarizes this debate with the following question:

> "A person who would constitute a lawful target under IHL moves from a State in which there is an ongoing NIAC into the territory of a non-neighbouring non-belligerent State, and continues his or her activities in

[104] *Idem,* at p. 19.
[105] DPH Guidance, *supra* 70, at p. 77-82.
[106] *Idem,* at p. 82.
[107] While authors such as Michael Schmitt, William Boothby and Kenneth Watkin have critized various aspects of the ICRC's study, a particularly vehement attack against the ICRC's position in Chapter IX of the study was launched by Colonel W. Hays Parks; see W. Hays Parks, "Part IX of the ICRC 'Direct Participation in Hostilties' Study: No Mandate, No Expertise, And Legally Incorrect" 42 N.Y.U. J. Int'l L. & Pol. 770 (2010). For Nils Melzer's response to these various lines of criticism, see Nils Melzer, "Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities" 42 N.Y.U. J. Int'l L. & Pol. 831 (2010).
[108] See Use of Force Study, *supra* 100, at p. 85-87 ("Appendix 5: Summary of the presentation by Richard Gross").

> relation to the conflict from there. Can such a person be targeted under the rules of IHL by a third State in the territory of the non-belligerent State?"[109]

Very broadly and in the interests of clarity, most views on the scope of IHL *ratione loci* may be seen as grounded either in the notion of control over territory (territory-based approach), or by establishing a link between the operation *in casu* and an existing armed conflict (*nexus*-approach).

The **territory-based approach** limits the applicability of IHL to territory controlled by the belligerent parties *stricto sensu;* this territory may, or may not be restricted to the borders of a single State. It would preclude the possibility of applying the conduct of hostilities paradigm to persons who may otherwise constitute legitimate targets under IHL, but who are located in the territory of non-belligerent States where the law enforcement paradigm would be much more appropriate under the circumstances.[110] This is the position of the ICRC, which does, however, allow for an exception whereby the scope *ratione loci* of IHL may expand to the territory of an adjacent non-belligerent State "on an exceptional and *sui generis* basis."[111] This is the "spill over" situation.

According to the ICRC, the spillover approach

> "is based on the understanding that the spill over of a NIAC into adjacent territory cannot have the effect of absolving the parties of their IHL obligations simply because an international border has been crossed. The ensuing legal vacuum would deprive of protection both civilians possibly affected by the fighting, as well as persons who fall into enemy hands."[112]

At first blush, this may seem contradictory with the territory-based approach. Sasha Radin points out, for instance, that "[c]onsiderable support exists for the position that borders do not matter when establishing Common Article 3 and the Tadić test's applicability to spill-over conflicts, and even to cross-border conflicts. The logic, however, seems to change when the discussion turns to "global" conflicts. There appears to be a reluctance to accept that Common Article 3 and relevant customary international law may apply to 'global' conflicts without regard to State borders."[113] Nevertheless, this inconsistency is not as significant as it might seem. Actually, the spill-over theory still relies somehow on notions of territory and geographical proximity, rather than on nexus. The spill-over theory also provides a pragmatic solution to situations where borders between neighboring States are not clearly defined or identifiable.

[109] The ICRC goes on to argue that there are two ways to answer the question, first by resorting to *nexus,* which may potentially lead to a "global battlefield" scenario, and second, by finding that IHL is not applicable to such situations in the first place – which is preferable. See Challenges Report 2015, *supra* 5, at p. 14-15.
[110] Challenges Report 2015, *supra* 5, at p. 15.
[111] Challenges Report 2015, *supra* 5*,* footnote 13.
[112] Challenges Report 2011, *supra* 6, at p. 9-10.
[113] Sasha Radin, "Global Armed Conflict?: The Threshold of Extraterritorial Non-International Armed Conflicts" 89 Int'l L. Stud. 696 (2013), at p. 719-720.

Another potential criticism of "spill-over" is that there is actually very little legal grounds for justifying this approach. In the words of Jelena Pejić, "[t]here is, admittedly, no readily accessible or detailed explanation for the legal reading that has been recognized by States and scholarly opinion with respect to spillover NIACs."[114] While the practical attractiveness of resorting to this interpretation is evident, we submit that additional research should be undertaken into the question of legal basis for spill-over.

For example, some States, notably the US, have occasionally justified spill-over by invoking the notion of "hot pursuit", a term borrowed from the vocabulary of the law of the sea.[115] This concept basically involves the extension of a State's criminal jurisdiction for acts committed on its sovereign territory and allows pursuit of the offending vessel beyond such territory, subject to limitations with respect to other States' sovereignty.[116] It is important to note that, in situations where the "hot pursuit" analogy was made in armed conflict situations, it was always used as an argument to justify intrusion upon another State's territory rather than to claim the applicability of international humanitarian law – which is not in line with the way this concept exists in the law of the sea. The latter posits that the right of hot pursuit expires once the pursued vessel reaches another State's territorial waters.[117] Be that as it may, the hot pursuit analogy may – as a factual rather than legal analogy, and subject to a number of considerations – be an interesting and useful way of filling the "spill-over gap". Bearing in mind that this notion is completely absent from IHL treaties, it may cover situations which, in practice, normally lead to spill over: for example, when the parties to a NIAC are fighting in the vicinity of a border of a neighbouring non-belligerent State, it is easy to imagine how they may "wander off" into that State's territory. On the other hand, the hot pursuit analogy would prevent the targeting of fighters who are located in that neighbouring State's territory, but are neither currently involved in the fighting, nor are located in the proximity of the border itself. This understanding of spill-over would probably be more restrictive than the one adopted by the ICRC. With respect to norms on State sovereignty and the overarching principles of human rights law, we posit that this is an advantage of the hot pursuit analogy, which merits to be further examined and elaborated upon elsewhere.

An alternative approach to the geographical scope of application lies in the concept of *nexus* (the **nexus-approach)**. The idea that a specific act may be linked to an existing armed conflict and

[114] Jelena Pejić, *supra* 25, at p. 80-81.

[115] See CNN, "Pakistan fury over U.S. 'hot pursuit' attack", 11 June 2008, available at <http://edition.cnn.com/2008/WORLD/asiapcf/06/11/pakistan.troops.killed/>.

[116] Under the UN Convention on the Law of the Sea, "Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted." UN Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397, Art. 111 (1).

[117] For a broad discussion of the notion of hot pursuit, see Nicholas M. Poulantzas, *The Right of Hot Pursuit in International Law,* 2nd edn, Martinus Nijhoff Publishers, 2002.

therefore regulated by humanitarian law irrespective of where it takes place has also been accepted in practice by some States[118] and theorized by some prominent legal scholars. For instance, Lubell and Derejko give an example of an extraterritorial NIAC where they find the applicability of IHL established by reference to the *nexus:*

> "Let us assume for the sake of argument that there is no question that state A and group X are engaged in an armed conflict that takes place in numerous parts of state A itself. Group X then sets up command and training camps just across the border in a remote area of state B, and which state B is not sponsoring but is unable to prevent. Group X leaders are based in this camp, their militants are based here and cross the border to carry out attacks before returning to camp, and rockets are even launched from the camp by group X against state A forces. Clearly a nexus exists, and operations by state A against this camp would be considered as part of the armed conflict and governed by IHL."[119]

The authors go on to argue that, were the camp *in casu* located further away from the border, the answer would nevertheless be the same, and that "it is unclear why the precise number of miles should affect the applicability of IHL."[120] They also find that there is no difference if the attack were to take place within State A's territory, but removed from the active battlefield, or in the territory of its neighbour, and that establishing a *nexus* is the best way of explaining this situation. Very importantly, they state that "this approach does not allow for declaring open season on all past or present group X members around the globe. Neither the battlefield nor the hostilities relocate together with any individual who was on it or previously participating in it; if that were the case, it would be impossible to disengage from an armed conflict."[121] Nevertheless, it seems that the authors would allow the targeting, under the conduct of hostilities paradigm, of persons who are a legitimate target under IHL regardless of their location; this is also how the ICRC understands the concept of *nexus*, finding that, "under this approach, what is decisive is not where hostile acts occur but whether, because of their nexus to an armed conflict, they actually represent 'acts of war.'"[122] Apart from

[118] The US approach to transnational conflicts leans towards the nexus-based approach (although territory is not completely discarded either). For example, while the US DOJ memo relating to the targeted killing in Yemen makes an attempt to establish AQAP as an Al-Qaeda faction or co-belligerent with a considerable presence in that country, this seems to be only a supplementary argument to justify the killing. See US Department of Justice, Office of Legal Counsel, *Memorandum for the Attorney General: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi,* available at <https://fas.org/irp/agency/doj/olc/aulaqi.pdf>. See also Richard Gross Interview, *supra* 34, at p. 21.: "Of course, geography matters in some instances. But we cannot tie ourselves to one country and say that combat will only take place in that country, and not outside. Now, the US also has a policy governing operations *outside* of what we call the 'active zone of hostilities' or the 'hot battlefield', in other words Iraq and Afghanistan. So we have policy constraints for such types of operations as well, and I think those are important. They respect other countries' sovereignty and keep the conflict limited and focused on the enemy without being overly broad."

[119] Noam Lubell & Nathan Derejko, "A Global Battlefield? Drones and the Geographical Scope of Armed Conflict" 11:1 JICJ 65 (2014), at p. 81.

[120] *Idem.*

[121] *Idem,* at p. 82.

[122] Challenges Report 2015, *supra* 5, at p. 14.

Noam Lubell,[123] Nils Melzer[124] and Michael Schmitt[125] have also advocated taking the *nexus*-approach with respect to the geographical scope of application of IHL.[126]

While the *nexus*-approach seems to represent a coherent approach to the question of application of IHL *ratione loci,* it suffers from at least two major set-backs. First, while it may be convenient to explain certain situations to which IHL applies by resorting to *nexus* (Lubell and Derejko invoke the situation of drone pilots, who are, according to them, legitimate targets under IHL irrespective of the fact that they are usually far-removed from the active battlefield, or "naval personnel who launch missiles from warships located hundreds of miles from their target destination" and who are similarly directly participating in hostilities, as best explained by this approach),[127] there may be simpler ways of explaining by using more well-established IHL concepts. For example, in the passage we quoted above, Lubell and Derejko are referring to what we would consider a cross-border NIAC in our typology. There, IHL would apply in the territory controlled by the belligerent parties; it should not be seen as applicable beyond it, except in very limited situations of spill over (perhaps in line with our tentative analogy with hot pursuit). This also leads us to the second point in contention, which is the very broad scope IHL would have if we were to resort to *nexus*. In our opinion, when fighters in a NIAC are located in territory where IHL is not applicable (e.g. in the territory of a non-neighbouring, non-belligerent State), then the conduct of hostilities paradigm is not the appropriate one. Finally, the argument used by authors such as Melzer that "in the absence of express territorial limitations (…) humanitarian law applies wherever belligerent confrontations occur" [128] does not seem absolutely convincing for two reasons: first, the already-quoted jurisprudence by the ICTY in the *Tadić* case, while indeed it does not limit expressly the application of IHL to any State's borders, nevertheless focuses on the notion of control over territory as the pre-requisite of applying IHL.[129] Second, with respect to the notion that IHL holds no express territorial limitations on its application, it should be added for good measure that IHL provides no explicit basis for *nexus* either.

[123] See also Noam Lubell's remarks at the ICRC's panel on the scope of IHL in *Panel Discussion – Scope of the Law in Armed Conflict,* ICRC, 19 February 2015, available at https://www.icrc.org/en/event/scope-of-law.
[124] Nils Melzer, *Study on the Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare,* European Parliament, 2013, at p. 21.
[125] Michael N. Schmitt, "Extraterritorial Lethat Targeting: Deconstructing the Logic of International Law", 52 Colum. J. Transnat'l L. 77 (2013), at p. 97.
[126] The notion of *nexus* is completely absent from treaty law and is not limited to the geographical scope of application debate. It was first elaborated by the ICTY in the *Tadić* case in order to determine if a particular offense is a war crime or not, by linking it to an ongoing armed conflict. See Tadić Trial Judgement, *supra* 30, para. 573. It also plays a role in defining the notion of direct participation in hostilities (the "belligerent nexus"). For more details on this, see Nils Melzer, *Targeted Killing in International Law,* Oxford University Press, 2008; DPH Guidance, *supra* 70; Nils Melzer, *supra* 107; and Michael N. Schmitt, *supra* 73.
[127] Noam Lubell & Nathan Derejko, *supra* 119, at p. 86.
[128] Nils Melzer, *supra* 124, at p. 21.
[129] Tadić Jurisdiction Decision, *supra* 22, para. 70.

Based on the above considerations, we believe that a limited revival of the territorial criterion with respect to the geographical scope of application of IHL remains the most protective approach in the present context of globalization of NIACs and development in technologies, such as drones and autonomous weapons, continuously expanding targeting options.[130] Bearing in mind the problem of "over-classification" which is certainly present in the contemporary fight against terrorism, the issue would be further amplified by adopting an unlimited understanding of the geographical scope of application of IHL based on the undefined notion of nexus. IHL exists to provide protection in very extreme situations, and should not be invoked in order to diminish the standards of peacetime protection where the latter is the more fitting regime.

4. The Challenges of the Globalization of NIACs for Civilian Protection

As demonstrated above, the globalization of NIACs – understood both as the overall increase in the number of extraterritorial NIACs taking place around the world as well as the theoretical attempts at widening the application of IHL either by means of conflict classification or more flexible approaches to the question of its geographical scope – poses a considerable challenge from a protection aspect.

This challenge mainly lies in the trend of applying IHL too extensively and to the detriment of human rights protection. For example, consider a situation where an alleged cell of Al-Qaeda (or ISIS) is present in a luxury hotel in Geneva, Switzerland, where it is clandestinely planning an attack against US personnel in Afghanistan (or Syria). If Al-Qaeda or ISIS are perceived as transnational groups, engaged in transnational conflicts against Western powers, IHL would be deemed to apply in this scenario and allow (or at least not prohibit) the targeting of this cell in Switzerland, as not only the cell is constituted of individuals having a "continuous combat function"[131], but in any case (even if this concept were to be rejected), there is little doubt that such preparatory measures aiming at carrying out a specific hostile act amount to direct participation in hostilities.[132] The US would thus be entitled – under IHL – to target them under the conduct of hostilities paradigm provided that their expected military advantage from such an attack would outweigh potential civilian collateral damage and that all feasible precautions have been taken to that effect (the issue of Swiss sovereignty notwithstanding). This would also be the result of adopting the *nexus*-approach to the scope of IHL *ratione loci.* In a nutshell, the persons located in the Geneva hotel situated in Switzerland where there is no armed conflict could become the target of a drone strike. It is also often overlooked that the reverse would also be true, as per the principle of equality between belligerents. In other words,

[130] See Gloria Gaggioli, "Lethal Force and Drones: The Human Rights Question", in Steven James Barela (ed.), *The Legitimacy of Drones*, Burlington, Ashgate Publishing, 2015, at p. 91-115
[131] DPH Guidance, *supra* 70, at p. 27-36.
[132] *Ibid*, at p. 66.

expansive interpretations in relation to IHL applicability could well serve the purposes of non-state organized armed groups (such as Al-Qaeda or ISIS), which would not violate IHL if they were to attack for instance US or French soldiers not only on their own territory but also when they are present in the territory of third States.

We disagree with the above approach. In our opinion, over-extending the reach of IHL does not serve the interests of protection of the civilian population; the fact that IHL is not applicable to a particular situation does not imply a "protection gap". To the contrary, operations such as the one above would be covered by human rights law, which is both more protective and more appropriate under the circumstances. The applicability of human rights law does not cease in times of armed conflict[133] (although there remains, again, a minority of opinion challenging this notion).[134] Moreover, although a minority of influential States continue to deny the extraterritorial application of human rights treaties,[135] the extraterritorial application of human rights treaties – at least when there is control over territory (e.g. occupation) or authority over individuals (e.g. detention) – is now well-established in legal practice[136] and scholarship.[137] The customary nature of rights, such as the right to life, has also been raised as an argument to maintain that these rights apply extraterritorially

[133] See Nuclear Weapons Advisory Opinion, *supra* 9; Wall Advisory Opinion, *supra* 9; and *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda),* 19 December 2005, I.C.J. Rep. 168.
[134] Nuclear Weapons Advisory Opinion, *supra* 9*,* para. 24.
[135] For the US position, see e.g. *Statement of State Department Legal Adviser, Conrad Harper,* 53rd session, 1405th meeting of the HRC (CCPR/C/SR 1405, 1995), para. 20; US Department of State, *Second and Third Periodic Report of the United States of America to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, Annex 1* (2005); *United States Responses to Selected Recommendations of the Human Rights Committee* (2007), 1–2. See also Human Rights Committee, *Concluding observations on the fourth periodic report of the United States of America* (CCPR/C/USA/CO/4, 2014), para. 4a. For legal writings on which the US Government rely, see e.g. Michael J Dennis, "Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation", 99 AJIL 119 (2005). However, even within the US Government, there have been dissenting opinions in this regard; see Harold H. Koh, Legal Advisor to the US State Department, "Memorandum Opinion on the Geographical Scope of the International Covenant on Civil and Political Rights", 19 October 2010. For the position of Israel, see e.g. Human Rights Committee, *Sixty-third session. Summary Record of the 1675th meeting: Consideration of the Initial Report of Israel* (CCPR/C/SR.1675, 1998), paras 21, 27; Human Rights Committee, *Addendum to the Second Periodic Report, Israel* (CCPR/C/ISR/2001/2, 2001), para. 8.
[136] In its Wall Advisory Opinion, the ICJ confirmed that the International Covenant on Civil and Political Rights [ICCPPR], the International Covenant on Economic, Social and Cultural Rights [ICESCR], and the Convention on the Rights of the Child [CRC] may apply extraterritorially. Wall Advisory opinion, *supra* 9, paras 107-113. This is also the opinion of the Human Rights Committee; see HRC, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, May 2004 (CCPR/C/21/Rev.1/Add. 1326), para. 11. Similarly, the European Court has established the extraterritorial applicability of the European Convention on Human Rights, see e.g. ECHR, *Issa and Others v. Turkey,* 31821/96, 16 November 2004; ECHR, *Öcalan v. Turkey, 46221/99,* 12 May 2005; and ECHR, *Al-Skeini and Others v. UK,* 55721/07, 7 July 2011. This has also been the approach of the Inter-American System, see *Ecuador v. Colombia,* 21 October 2010, Rep. no. 112/10, IACHR; *Disabled Peoples' International v. USA,* 22 September 1987, Case no. 9213, IACHR; *Salas v. USA,* 14 October 1993, Case no. 10.573, IACHR.
[137] See Marko Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy,* Oxford University Press, 2011; Marko Milanović, "Extraterritorial Derogations from Human Rights Treaties in Armed Conflict", in Nehal Bhuta (ed), *The Frontiers of Human Rights: Extraterritoriality and its Challenges,* Oxford University Press, 2016, 55-88; Gloria Gaggioli, *supra* 136, at p. 91-115; Nils Melzer, *supra* 128, at p. 16-18; Gloria Gaggioli, *supra* 130; Gloria Gaggioli, "Remoteness and Human Rights Law", in Jens David Ohlin, *Research Handbook on Remote Warfare*, Cheltenham UK [etc.], Edward Elgar Publishing (forthcoming).

without jurisdictional limitation,[138] although the position has had detractors.[139] While the interplay between IHL and HRL – and especially the *lex specialis* maxim – remains subject to debate, the majority view revolves around complementarity and reciprocal influence, rather than mutual exclusion.[140] It has also been argued that even when there is a contradiction between applicable IHL and a HR rules, the human rights law rule may under certain circumstances be considered as the *lex specialis.*[141]

Applying the law enforcement paradigm to the above-mentioned hypothetical terrorist cell in Geneva would mean that lethal force may only be used against them as a measure of last resort in the execution of a lawful arrest or the protection of any person from unlawful violence, and then only no more than absolutely necessary and strictly proportionate to such purposes.[142] In a nutshell, there would have to be an attempt to arrest the terrorists, rather than outright kill them. This does not only have a potential impact on the alleged terrorists lives, but also on those of any civilians who may become the collateral damage of a potential lethal strike against them. While IHL allows, under certain circumstances, civilian collateral damage,[143] the status of incidental civilian losses when force is used lawfully under the law enforcement paradigm is less clear.[144] Nevertheless, IHRL remains the more protective branch of international law, as the standards of planning and control in law enforcement operations in order to prevent such losses are arguably higher.[145]

[138] Challenges Report 2011, *supra* 6, at p. 22.

[139] It is unclear whether states such as the United States of America and Israel agree with this position. Their arguments against the extraterritorial application of human rights law are mostly (if not only) based on the jurisdictional clauses in human rights treaties. According to Professor Michael Schmitt, the United States has never rejected the extraterritorial application of the customary right to life. A counter-argument that could be raised is that, even if the right to life is indeed customary, it is still difficult to establish practice and *opinio juris* to the effect that it is not intrinsically accompanied by any jurisdictional limitation. This caveat is often raised by Professor Marco Sassòli, notably in his teachings and conferences. The fact that a number of non-binding human rights instruments such as the American Declaration on the Rights and Duties of Man or the Universal Declaration of Human Rights recognize the right to life without establishing jurisdictional limitation might nevertheless be seen as elements of relevant practice and *opinio juris.*

[140] See Marco Sassòli & Laura M. Olson, "The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts" 90:871 IRRC 599 (2008); and Marko Milanović, "Norm Conflicts, International Humanitarian Law and Human Rights Law" in Orna Ben-Naftali (ed), *Human Rights and International Humanitarian Law,* Oxford University Press, 2010; see also Gloria Gaggioli, *L'influence mutuelle entre les droits de l'homme et le droit international humanitaire à la lumière du droit à la vie*, Paris, Pedone, 2013.

[141] Gloria Gaggioli and Robert Kolb, "A Right to Life in Armed Conflicts? The Contribution of the European Court of Human Rights" (2007) 37 Israel Yearbook on Human Rights 118–24; Gloria Gaggioli, *supra* 146, at p. 42–60.

[142] These requirements are shared by universal and regional human rights treaties, e.g. International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 [hereinafter: ICCPR], Art. 6 and European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 [hereinafter: ECHR], Art. 2, as elaborated under the relevant jurisprudence.

[143] See AP I, *supra* 4, Art. 51 (5) (b). The principle of proportionality is considered by the ICRC to reflect a norm of customary law that is also applicable in times of NIAC, see Jean-Marie Henckaerts & Louise Doswald-Beck, *supra* 2, at p. 46-50.

[144] Human rights bodies have accepted very limited and unforeseen casualties among bystanders in rare cases. See ECtHR, *Andronicou and Constantinou v. Cyprus*, 25052/94, 10 September 1997, para. 194; ECHR, *Kerimova and Others v. Russia,* 17170/04, 3 May 2011, para 246; and ECHR, *Finogenov and Others v. Russia,* 18299/03 and 27311/03, 20 December 2011.

[145] See ECHR, *McCann and Others v. UK,* 27 September 1995, 18984/91, paras 146-214.

Another difference in the regimes of IHL and IHRL that would be relevant in such situations concerns detention. In times of IAC, IHL permits detention of prisoners of war[146] and the internment of civilians for security reasons,[147] acting as legal basis for such deprivation of liberty and providing grounds and certain procedural safeguards such as regular review of the reasons for security internment.[148] With respect to NIAC, the situation is less clear, and it remains to be seen if IHL may be provided as a sufficient legal basis for security detention in such circumstances.[149] In any case, IHL certainly does not say anything about the grounds for detention and procedure to be followed with respect to persons deprived of liberty in the context of a NIAC.[150] On the other hand, IHRL proclaims the right to liberty and security of person and that no one shall be subjected to arbitrary arrest or detention,[151] and goes on to lay out procedural safeguards which are considered higher than those provided by IHL, such as the right to challenge before a judge the lawfulness of the detention (*habeas corpus)*.[152] While universal treaties such as the ICCPR may be seen as allowing security detention under certain limited circumstances,[153] this is not true of the ECHR, which provides an exhaustive list of grounds for lawful deprivation of liberty, and security detention is not listed among them.[154] Outside the context of an armed conflict, in order for such detention to be undertaken lawfully a proper derogation to the right to liberty would previously have to be made.[155]

In a recent high-profile case, the European Court compared the regime of the IHL of IACs and that of the European Convention and determined that, while the Convention remained applicable to persons deprived of liberty in times of IAC, the Geneva Conventions may be taken as providing legal bases and grounds for detention even in the absence of a derogation from the Convention.[156] However, the Court has never yet taken such a position with respect to NIACs. Nevertheless, if we were to accept the interpretation that the IHL of NIACs provides legal basis and grounds for security

[146] GC III, *supra* 93, Art. 21.
[147] GC IV, *supra* 93, Arts 42 and 68.
[148] *Idem*, Arts 43 and 78.
[149] Both Common Article 3 and AP II take into consideration the position of persons deprived of liberty and extend them such guarantees as humane treatment, but they do not provide an explicit legal basis such as those that exist in IACs. This topic remains subject to intense debate amongst scholars and practitioners; for example, compare the ICRC's position on detention in armed conflict in ICRC, *Internment in Armed Conflict: Basic Rules and Challenges,* November 2014, with the position taken by the UK Supreme Court in UK SC, *Abd Ali Hameed Al-Waheed (Appellant) v Ministry of Defence (Respondent); Serdar Mohammed (Respondent) v Ministry of Defence (Appellant)*, Judgement, 17 January 2017.
[150] The ICRC, which interprets the IHL of NIACs as providing a legal basis for security detention, nevertheless accepts that "additional authority" in domestic law, an international treaty or UN Security Council resolution or even army standard operating procedures (SOPs) would still be necessary with respect to the grounds and procedures of such detention. ICRC, *supra* 149, at p. 8.
[151] ICCPR, *supra* 142, Art. 9 (1); ECHR, *supra* 142, Art. 5 (1); American Convention on Human Rights ("Pact of San José"), 22 November 1969, OAS Treaty Series No. 36, Art. 7 (2-3); and African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, Art. 6.
[152] *Idem,* Art. 9 (4).
[153] Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of Person),* 16 December 2014, (CCPR/C/GC/35), para. 15.
[154] ECHR, *supra* 142, Art. 5 (1).
[155] *Idem,* Art. 15.
[156] See ECHR, *Hassan v. UK,* 16 September 2014, 29750/09, paras 65-111.

detention, it is *ipso facto* less protective than the corpus of human rights. Without additional international case law to clarify this issue, we submit that decreased standards of detention (including an overall increase in arbitrary and unlawful deprivations of liberty) are one of the potential consequences of the ongoing globalization of NIACs. The problem of over-classification could then lead to IHL being invoked in order to justify potentially indefinite internment for security reasons of alleged members of terrorist groups, as was allegedly the case of many persons detained by the US in Guantánamo.[157]

Additionally, IHL does not provide equivalent monitoring mechanisms to the bodies established by various human rights treaties. Although human rights bodies have shown an increasing willingness to examine armed conflict situations under their respective mandates,[158] and to take into consideration IHL when doing so, they will always be limited to examining applications under the scope of the treaties they have been created to monitor.[159] Therefore, the more developed institutional structure of IHRL is submitted as an additional argument in favour of a more restrictive approach to the applicability of IHL to the fight against terrorism.

Finally, while the notion of State sovereignty is usually put aside when discussing *jus in bello* (and has therefore not been developed in the present article), we submit that an excessively fragmented approach to international law actually risks endangering individuals. *Jus ad bellum* considerations and State sovereignty remain an additional (or even a primary) protective layer that should not be overlooked. Jonathan Horowitz and Naz Modirzadeh[160] give an excellent example of how the notion of sovereignty can actually prove more protective than IHL itself. In a hypothetical situation wherein the Syrian Government is considering launching a strike against a Syrian rebel commanders meeting US personnel on US soil – and provided that we accept that the rebels would

[157] See Human Rights Committee, *supra* 135, para. 21.

[158] E.g. ECHR, *Georgia v. Russia (II),* 13 December 2011, 38263/08, para. 72; ECHR, *supra* 162; and Inter-Am. C.H.R, *supra* 49. However, the European Court has generally refused to apply IHL in situations which were arguably NIACs, but where the Government did not invoke this body of law, see ECHR, *Ergi v. Turkey,* 40/1993/435/514, 28 July 1998; ECHR, *Isayeva v. Russia,* 57950/00, 24 February 2005; ECHR, *Isayeva v. Russia, Yusupova v. Russia, Bazayeva v. Russia*, 57947/00; 57948/00; 57949/00, 24 February 2005.

[159] The Inter-American Court explained this approach as follows: "When a State is a Party to the American Convention and has accepted the contentious jurisdiction of the Court, the Court may examine the conduct of the State to determine whether it conforms to the provisions of the Convention, even when the issue may have been definitively resolved by the domestic legal system. The Court is also competent to determine whether any norm of domestic or international law applied by a State, in times of peace or armed conflict, is compatible or not with the American Convention. In this activity, the Court has no normative limitation: any legal norm may be submitted to this examination of compatibilityIn order to carry out this examination, the Court interprets the norm in question and analyzes it in the light of the provisions of the Convention. The result of this operation will always be an opinion in which the Court will say whether or not that norm or that fact is compatible with the American Convention. The latter has only given the Court competence to determine whether the acts or the norms of the States are compatible with the Convention itself, and not with the 1949 Geneva Conventions." *Las Palmeras v. Colombia (Preliminary Objections)*, Inter-American Court of Human Rights (IACrtHR), 4 February 2000, paras 32-33.

[160] Jonathan Horowitz & Naz Modirzadeh, "Guest Post: How International Law Could Work in Transnational Non-International Armed Conflicts: Part I of a Two-Part Series", Opinio Juris, 11 April 2013, available at <http://opiniojuris.org/2013/04/11/guest-post-how-international-law-could-work-in-transnational-non-international-armed-conflicts-part-i-of-a-two-part-series/>.

remain targetable under IHL under such circumstances – such an attack may be lawful under IHL if the principles of distinction, proportionality and precautions were all respected. However, they argue that, in spite of that, the Syrian Government should take into consideration that – even if *jus ad bellum* self-defense against non-State actors were an accepted notion – the rebels do not represent an "immediate threat" for Syria.[161] At risk of legitimately being accused of unlawfully breaching US sovereignty, the authors argue that the Syrian Government would be wise not to undertake the attack regardless of its lawfulness under IHL. Thus, with respect to the lives of the rebels and civilians who might be caught up in such an attack, it is the sovereignty of the US which provides greater protection than IHL. This example reminds us of the necessity of taking into consideration more than a single branch of the law when determining the lawfulness of any particular conduct.

Based on all of the above, we consider that the over-application of IHL may have a negative impact on the regime of protection provided by international law. We find little merit to arguments submitted in order to prove the existence of an ongoing "transnational" NIAC. We similarly hold that the concept of *nexus* should not be used in order to expand the geographical scope of application of IHL. With respect to the notion of "spill over", while it may indeed be necessary to use such notions to explain certain strictly-defined situations which occur in practice, it should be used in a restrictive manner, as well as better conceptualized and circumscribed with additional legal arguments. Finally, the approach which seems to be most sound in a legal sense, as well as most protective overall, is to insist on the extraterritorial application of human rights law in light of existing case law by human rights bodies and to uphold the sovereignty of States as an indirect barrier to the over-application of IHL.

[161] In the famous *Caroline* case, the right to self-defense was understood to mean "a necessity of self-defence, instant, overwhelming, and leaving no choice of means, and no moment for deliberation." This is still seen as a fundamental principel of international law. See Malcolm N. Shaw, *International Law,* 6th edn, Cambridge University Press, 2008, p. 1131.