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International human rights law and the law of armed conflict in the context of counterinsurgency: With a particular focus on targeting and operational detention

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Chapter V LOAC

After having identified the availability of valid norms in IHRL pertaining to targeting and operational detention and their applicability in the situational contexts of counterinsurgency, this chapter carries out a similar exercise. Paragraph 1 concerns the identification of valid norms, whereas paragraph 2 turns to the issue of applicability in the various situational contexts of counterinsurgency.

1. Valid Norms

As in the previous chapter, the first question to be addressed here is whether LOAC offers valid norms governing the concepts of targeting and operational detention. Given the traditional dichotomy between the law of IAC and the law of NIAC, this chapter will examine the availability of valid norms pertaining to targeting and operational detention within each regime. Thus, paragraph 3.1 examines the law of IAC, whereas paragraph 3.2 addresses the law of NIAC.

1.1. Targeting

1.1.1. The Law of IAC

In respect of the valid normative framework in the law of IAC governing the concept of targeting recourse can be had, *firstly*, to the treaty-based law of IAC.

Within this body of law, and relative to the concept of hostilities, the law of hostilities ‘occupies’ a crucial part of the full ‘territory’ of treaty-based norms of LOAC. The principal conventional sources are found in 1907, HIVR and AP I. Additional rules may be found in more specific treaties, mainly in the domain of weapons.⁸⁹⁷ With respect to 1907, HIVR, only one of three sections concerns hostilities (Section II: Hostilities). As for AP I, that consists of seven sections, only Part III, Section I (Means and Methods of Warfare), and Part IV, Section I (General Protection against Effects of Hostilities) regulate hostilities. Large parts of the relevant sections of HIVR – which also reflect customary law – have been complemented by AP I (except where there are clear differences). HIVR, however, remains relevant for States not party to AP I. Overall, the norms found in the law of hostilities are connected to the fundamental principles underlying LOAC, i.e. distinction, proportionality, military necessity and humanity.

Besides offering protection against direct attack in the context of hostilities, both conventional⁸⁹⁸ and non-conventional LOAC,⁸⁹⁹ stipulate, in sum, that parties to the conflict are

⁸⁹⁷ Admittedly, the 1954 HPCP also contains rules regarding hostilities vis-à-vis cultural property (see Article 4), but this treaty will not be further addressed for lack of relevancy to the present study.

⁸⁹⁸ Article 46, 1907 HIVR (“the lives of persons [...] must be respected”); Article 23(1)(c), 1907 HIVR (prohibiting “to kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion”); Articles 12(1) and (2) GC I and GC II (wounded, sick, and shipwrecked “shall be respected and protected in all circumstances” and “any attempts upon their lives, or violence to their persons shall be strictly prohibited; in particular, they shall not be murdered or ex-

under an obligation to respect and protect the lives of protected persons falling within the authority, or exposed to the conduct of a party to the conflict and provide a general prohibition against the willful killing of protected persons in situations of IAC, including belligerent occupation. These norms relate to the deprivation of life in armed conflict not having a nexus with the hostilities, but to *law enforcement*.

Notwithstanding the availability within conventional LOAC of a comprehensive normative framework governing the deprivation of life, it remains of importance to emphasize the relevance of the non-conventional normative framework, for two reasons. *Firstly*, AP I has not been ratified by all States, with the US, Israel, Iran, Pakistan, India, and Turkey being notable exceptions. *Secondly*, the conventions may not cover certain situations, in which case customary law functions as a safety net.⁹⁰⁰

In 2005, the ICRC finalized and published a comprehensive study to the customary status of norms of LOAC, including the law of hostilities. While both the method applied and the material content of the Customary Law Study have been criticized,⁹⁰¹ in large part it confirmed what had been earlier concluded in case-law and doctrine, namely that in view of the scope of customary law of hostilities it is today generally accepted that most of its substantive rules have attained the status of customary law.⁹⁰² These customary rules are derived from the vast majority of rules provided for in the four GCs and the HIVR (except for

terminated”); Article 13(1) GC III (“[a]ny lawful act or omission by the Detaining Power causing death [...] of a prisoner of war in its custody is prohibited”); Article 27(1) GC IV (with respect to ‘protected persons’ under GC IV (see Article 4 GC IV) “all acts of violence” are prohibited and “any measure of such a character as to cause the [...] extermination of protected persons in their hands” to include “murder [...] whether applied by civilian or military agents”); Article 32 GC IV, prohibiting the “murder” of protected persons under GC IV; Article 75(2) AP I (prohibiting in relation all persons ‘affected’ by an international armed conflict who find themselves in the power of a party to the conflict, to include any person who has taken part in the hostilities “violence to life” and “murder” committed by civilian or military agents of a party to the conflict).

⁸⁹⁹ (1996f), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, *Advisory Opinion of 8 July 1996*, § 75; (2004k), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion of 9 July 2004*, § 89; (2005a), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, *Judgment of 19 December 2005*, § 217, all confirming the customary nature of Articles 23(1)(c) and Article 46 HIVR; Rule 89 (murder) and 100 (extrajudicial execution), ICRC (2005a), 311 ff. and 352 ff. Confirming the customary nature of CA 3, see (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Judgment of 27 June 1986 (Merits)*, § 218; (1995h), *The Prosecutor v. Tadic*, *Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber)*, § 102 (both confirming the normative content of CA 3 as to reflect ‘elementary considerations of humanity’ and its applicability in both IAC and NIAC). On the customary nature of Article 75 AP I, see Dörmann (2003b), ; Aldrich (2002), 893; IACiHR (2002), § 76.

⁹⁰⁰ See Article 1(2) of AP I, which states that “in cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.” This is a recodification of the Martens clause, which will be examined below. See also Article 49(4) AP I, which states that the rules of Part IV, Section 1 (General Protection against the Effects of Hostilities) apply in addition to “other rules of international law relating to the protection of civilians and civilians objects on land [...] against the effects of hostilities.”

⁹⁰¹ On the methodological framework of the ICRC Customary Law Study and the approach to customary international law, see Bethlehem (2007) and Scobbie (2007) respectively. On the subject of targeting, see Schmitt (2007).

⁹⁰² Meron , < <http://www.crimesofwar.org/a-z-guide/customary-law/> >. For jurisprudence: (1995h), *The Prosecutor v. Tadic*, *Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber)* ; For doctrine: Dinstein (2010), 10; Sassòli & Bouvier (2006), 109.

administrative, technical and logistical rules), as well as many, if not most, of the rules of AP I. In view of their material content, the CLS concludes that the identified rules of customary nature are not more restrictive than their conventional counterparts.⁹⁰³ However, as concluded by Schmitt, while “in nearly every case, the Rules are likely to be accepted by States as a correct enunciation of the targeting norm in question” at the same time, the CLS “occasionally brushes over, or neglects altogether, discussion of those matters about which uncertainty or disagreement exists.”⁹⁰⁴ Aspects of particular contention, as we will see below, are related to (but not limited to) the requirements of distinction, proportionality and precautionary measures.

In sum, it may be concluded that the law of IAC offers a comprehensive treaty-based and customary normative framework.

1.1.2. The Law of NIAC

In contrast to the law of IAC, the law of NIAC is (generally) limited to two conventional sources: CA 3 and AP II.⁹⁰⁵ While both sources together provide an important legal framework for NIAC, they ‘merely’ offer a rudimentary framework of minimum safeguards for the protection of victims of armed conflict. As such, the normative content of both sources is essentially a reflection of Geneva-law, i.e. aimed at the protection of individuals not or no longer directly participating in the hostilities. Both conventional⁹⁰⁶ and non-conventional LOAC⁹⁰⁷ expressly prohibit the ‘murder’ of protected persons in situations of NIAC.⁹⁰⁸

⁹⁰³ ICRC (2005a), Introduction, available at <http://www.icrc.org/customary-ihl/eng/docs/v1_cha_in_in>.

⁹⁰⁴ Schmitt (2007), 168.

⁹⁰⁵ Additional conventions applicable to NIACs are the Convention on Certain Conventional Weapons, as amended; the Statute of the International Criminal Court; the Ottawa Convention banning anti-personnel landmines; the Chemical Weapons Convention; and the Hague Convention for the Protection of Cultural Property and its Second Protocol.

⁹⁰⁶ CA 3 prohibits “at any time and in any place whatsoever [...] (a) violence to life and person, in particular murder of all kinds [and] (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples” with respect to “persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause.”

Article 4(2)(a) AP II prohibits “at any time and in any place whatsoever [...] violence to the life [...], in particular murder [...]” of “[a]ll persons who do not take a direct part or who have ceased to take a part in hostilities.” In addition, Article 6(2) AP II, while not explicitly prohibiting the death penalty for offences related to the armed conflict, requires that “no sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality.” Nor shall the death penalty “be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children” (Article 6(4) AP II).

⁹⁰⁷ Rule 89 (murder) and Rule 100 (extrajudicial execution), ICRC (2005a), 311 ff. and 352 ff; IACommHR (2002), § 76; (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986 (Merits), § 218 (referring to CA 3 as “elementary considerations of humanity”; (1995i), *The Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber (2 October 1995), § 98; (1997n), *Tadić*, § 615; (2000o), *The Prosecutor v. Blaskić*, Case No. IT-95-14-T, Judgment of 3 March 2000 (Trial Chamber), § 166; (2002m), *The Prosecutor v. Kunarac and Others*, Case Nos. IT-96-23 & IT-96-23/1, Appeals Chamber (June 12, 2002), § 68; (1998k), *The Prosecutor v. Akayesu*, Case No. 96-4-T, Trial Chamber Judgment (2 September 1998), §§ 608 ff; United Nations (2000a), § 14.

However, in so far it concerns *hostilities* both CA 3 and AP II remain virtually silent. As guidance is of the essence, both for the benefit of the protection of individuals and military operators, the question arises where guidance is to emanate from instead. Two views may be distilled.

A *first* view contends that the primary eligible source to fill this gap is the customary law of hostilities, which is also applicable in NIAC.⁹⁰⁹ As held by the ICRC in its Customary Law Study

This study provides evidence that many rules of customary international law apply in both international and non-international armed conflicts and shows the extent to which State practice has gone beyond existing treaty law and expanded the rules applicable to non-international armed conflicts. In particular, the gaps in the regulation of the conduct of hostilities in Additional Protocol II have largely been filled through State practice, which has led to the creation of rules parallel to those in Additional Protocol I, but applicable as customary law to non-international armed conflicts.⁹¹⁰

Other sources confirm the customary nature of the law of hostilities applicable in NIAC, such as the Manual on the Law of Non-International Armed Conflict.⁹¹¹

A *second* view is that the customary law of hostilities cannot readily be used to complement the gap in regulation of the conduct of hostilities. Besides general doubts as to its applicability at all in NIAC, its applicability is arguably limited to AP II-NIACs only.⁹¹² CA 3-NIACs “presumably”⁹¹³ entail the application of domestic law, which implies that the deprivation of life of non-State actors who would normally qualify as lawful military objectives under the law of hostilities would have to comport with the relevant standards under IHRL in order to be lawful. In addition, many aspects of the substantive content of the customary law of hostilities, as identified by the CLS, remain subject to debate, and thus should not provide a basis for the lawfulness of deprivations of life in hostilities in NIAC.⁹¹⁴

⁹⁰⁸ As held by the ICTY in the *Delalic* case, the normative content of the terms ‘wilful killing’ and ‘murder’ is the same and there is no reason to differentiate between IAC and NIAC in so far it concerns the prohibition to intentionally kill protected persons. (1998m), *The Prosecutor v. Delalic, Mucic, Delic and Landzo (the Celebici Case)*, Case No. IT-96-21-T, Judgment of 16 November 1998 (Trial Chamber), § 422-423. See also (2001o), *The Prosecutor v. Kordic & Cerkez*, Case No. IT-95-14/2-T, Judgment of 26 February 2001 (Trial Chamber), § 233 (stressing that the scope of protected persons embraces the term “persons taking no active part in the hostilities” as stipulated in CA 3). Similarly: (1997n), *Tadic*, § 615.

⁹⁰⁹ Oeter (2008), 124-125; Kalshoven (1975), 267-285.

⁹¹⁰ ICRC (2005a), Introduction. Available at <http://www.icrc.org/customary-ihl/eng/docs/v1_cha_in_in>. Support for this conclusion can be found in IHHL (2006). See also Schmitt (2007), 135, pointing at the “inherent uncertainty” in attempting to ascertain that the customary rules on targeting apply in both IAC and NIAC. See also Kreß (2010), 258.

⁹¹¹ IHHL (2006). See also, for example (1995h), *The Prosecutor v. Tadic*, Case No. IT-94-1-AR72, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber)*, § 107 (“Notwithstanding these limitations, it cannot be denied that customary rules have developed to govern internal strife. These rules [...] cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities”) and 8(2)(e), ICC Statute.

⁹¹² Hampson (2011), 204; Garraway (2010), 510; Kretzmer (2009), 1

⁹¹³ Hampson (2011), 204.

⁹¹⁴ Garraway (2010), 504 ff; Hampson (2011), 196 ff; Krieger (2006), 274; Abresch (2005), 746-47.

While this view cannot be ignored, it is one that is largely limited to a certain school of academic opinion. One finds little support for it in actual practice or in the jurisprudence of the *ad hoc* tribunals (or ICC Statute).

While cognizant of the continued applicability of IHRL in armed conflict, the application of the standards underlying the normative framework governing the deprivation of life under IHRL would raise significant issues that call into doubt the appropriateness of such application in NIAC, even in cases of CA 3-NIACs. Among the main issues is the very applicability of the obligation to respect the right to life under IHRL, as not all States are party to human rights treaties; not all States that are party to such treaties have accepted the optional individual complaints procedure; States may have made reservations limiting the jurisdiction of the relevant human rights body;⁹¹⁵ and the extraterritorial applicability of conventional human rights obligations remains controversial, particularly in the area of extra-custodial deprivations of life. Another deficit of the application of IHRL in the realm of hostilities is that obligations arising from IHRL do not bind non-State actors, such as insurgents, so there is an absence of reciprocity that is difficult to overcome.⁹¹⁶ In addition, both from an operational viewpoint as from a legal viewpoint the scale and nature of hostilities may simply overstretch the capabilities of IHRL to regulate hostilities, even in the event of a CA 3-NIAC. A final issue raised by the application of IHRL-based limitations on the deprivation of life in hostilities is that it may adversely affect the outlook of military operators on both IHRL and LOAC if armed forces are going to perceive the obligation to capture following from IHRL-requirements as rules that do not correspond with the situation at hand and are therefore not working.⁹¹⁷ This is particularly worrisome, because IHRL will likely be rejected in cases where it supports the successful execution of a military operation.

While acknowledging that many issues within the law of hostilities remain unresolved, these issues are not limited to customary law only, but also concern treaty-based norms. As follows from the analysis below, the mechanisms underlying LOAC and the law of hostilities in particular are sufficiently flexible to accommodate a reasonable balancing of military and humanitarian imperatives without the help of IHRL. Therefore, it is submitted that, *in principle*, the customary law of hostilities or – at the very minimum – the basic principles underlying this regime⁹¹⁸ fill the gap in conventional regulation of hostilities persistent the law of NIAC.

The above identification of the normative frameworks relevant in IAC and NIAC to the deprivation of life in armed conflict has revealed that there is a significant *quantitative* difference in treaty-based norms in the laws of IAC and NIAC. It is however submitted that the customary rules of LOAC relating to targeting make little distinction between the applicable law in IAC or NIAC.⁹¹⁹

In *qualitative* terms, this means that LOAC provides valid principles and norms that may be commonly applied to any type of armed conflict.

⁹¹⁵ For example, the United States does not accept that the IACiHR or the HRC applies LOAC in determinations of violations of human rights. See for example (2002k), *Response of the United States to Request for Precautionary Measures (Detainees in Guantanamo Bay, Cuba)*; the United States of America (2006).

⁹¹⁶ See, for example, (1997b), *Abella et al. v. Argentina (La Tablada)*, Case No. 11.137, Decision of 18 November 1997, § 175.

⁹¹⁷ Corn (2010), 55-56; Osiel (2009), 131.

⁹¹⁸ U.K. Ministry of Defence (2004), 388-389, § 15.5.

⁹¹⁹ This, notwithstanding the other distinctions in LOAC between the two regimes (e.g. the status of POW as accepted in the law of IAC, but not in NIAC) and also without prejudice to relevant rules of IHRL and national law applicable in NIAC (and in some cases in IAC as well).

1.2. Operational Detention

1.2.1. The Law of IAC

The law of IAC pertaining to operational detention is densely regulated and provides norms to be applied both in the territory of a party to the conflict or in the occupied territory. These norms mainly concern the detention of two groups of people. *Firstly*, a major portion of these norms pertain to the internment of POWs, a classic aspect of warfare since ancient times and today a widely recognized custom aimed to resist the escape of POWs and to prevent their return to their own forces and the battlefield. While in classical and feudal times POWs were recognized to be in the power of the individual who captured them, today, they are held to fall in the power of the detaining State. The internment of POWs belongs to one of the first subjects States were willing to regulate at the level of international law on a reciprocal basis. Chapter II (Prisoners of War) of 1907 HVR contains fifteen provisions dealing with POWs. Today, these norms have been superseded and expanded by the detailed framework set forth in GC III, providing norms aimed to protect POWs from arbitrary conduct by the detaining State, and providing a basis for the detaining State to *intern* POWs for the duration of the conflict, as well as AP I.⁹²⁰

Secondly, the law of IAC regulates the deprivation of liberty of individuals not qualifying as POWs. Most notably, GC IV, pertaining to the protection of civilians recognized as protected persons under the scope *ratione personae* of GC IV,⁹²¹ as well as Article 75 AP I, provide numerous provisions dealing with the deprivation of liberty. These involve requirements relative to both criminal detention and security detention.

The principal guarantees available in the law of IAC specific to *criminal detention* are fair trial rights. Depriving a person of the right to a fair trial is listed as a war crime in the statutes of the ICC, ICTY and ICTR, as well as the SCSL.⁹²² The right to fair trial is set forth in numerous military manuals and its denial in the context of armed conflict is a criminal offence under the legislation of a very large number of States.⁹²³

Articles 65-77 GC IV and Article 75(4) AP I provide fair trial guarantees to criminal detainees. Of additional relevance is CA 3, which contains a provision with guarantees that, given its applicability to all armed conflicts, also pertains to conflicts regulated by the law of IAC. In more general terms, it prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

⁹²⁰ See Articles 43-47 AP I. AP I, however, does not provide an explicit threshold for deprivation of liberty following the determination of combatant-status. It merely presumes that once it has been determined that an individual is entitled to combatant- and POW-status under AP I, upon capture the normative framework of GC III applies and, as concluded above, the POW *may* be interned, subject to a decision to do so by the Detaining/Occupying Power as set out in Article 21 GC III, prompted by considerations of military necessity and humanity.

⁹²¹ I.e. “those who, at any given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals”, Article 4 GC IV.

⁹²² See Article 8(2)(a)(vi) and (c)(iv), ICC Statute; Article 2(f), ICTY Statute; Article 4(g), ICTR Statute; Article 3(g), SCSL Statute.

⁹²³ For an overview of States mentioning the right to fair trial in military manuals and its denial as a criminal offence, see footnotes 6 and 7 accompanying the commentary to Rule 100 of the ICRC’s CLS.

The treaty-based fair trial guarantees can be categorized in three groups. A *first* group concerns guarantees set out in *both* GC IV and Article 75(4) AP I.⁹²⁴ A *second* group concerns guarantees *exclusively* recognized by Article 75(4) AP I, and includes the right of the accused to be presumed innocent;⁹²⁵ the right of the accused to be present at the trial;⁹²⁶ and the right of the accused not to be compelled to testify against himself or to confess guilt.⁹²⁷ A *third* group concerns guarantees *exclusively* recognized by GC IV, i.e.

- the safeguard of the accused that a penalty shall be proportionate to the offence;⁹²⁸
- the right to trial without undue delay;⁹²⁹
- the right of the accused to present evidence necessary to his defense;⁹³⁰
- the right of the accused to be assisted by a qualified advocate or counsel of his own choice;⁹³¹

⁹²⁴ The safeguards that both sources have in common are: the right of the accused to trial by an independent, impartial and regularly constituted court (Article 66 GC IV; CA 3; Article 75(4)(chapeau) AP I); the right of the accused to be informed of the nature and the cause of accusation (Article 71(2) GC IV; Article 123(2) GC IV, with respect to the internees who commit offences *during* internment (Article 117 GC IV); Article 75(4)(a) AP I); the prohibition of collective punishment (individual criminal responsibility) (Article 33 GC IV. See also Article 50, 1907 HIVR; Article 75(4)(b) AP I); the prohibition of retroactive application of criminal laws (*nullem crimen nulla poena sine lege*) (Articles 65 and 67 GC IV; Article 75(4)(c) AP I); the right of the accused to examine witnesses or the right to have witnesses examined (Article 72(1) GC IV; Article 123(2) GC IV (accused internees); Article 75(4)(g) AP I); the right of the *convicted* to be informed of available remedies and of their time-limits (Article 73 GC IV; Article 75(4)(j) AP I); the freedom of the accused from double jeopardy (*ne bis in idem*) (Article 117(3) GC IV; Article 75(4)(h) AP I); the right of the accused to public hearings (Article 74(1) GC IV; Article 75(4)(i) AP I)

⁹²⁵ Article 75(4)(d) AP I. It is absent in GC IV, nor mentioned in CA 3, although in the latter case it may be presumed to fall under the wider phrase of “all the judicial guarantees which are recognized as indispensable by civilized peoples.” This right is widely recognized to have customary status in international law. ICRC (2005a), 357-358.

⁹²⁶ Article 75(4)(e) AP I; It has also been recognized in Article 63(1) and Article 67(1) ICC Statute; and Article 21(4)(d) ICTY Statute; Article 20(4)(d) ICTR Statute; Article 17(4)(d) Statute of the Special Court for Sierra Leone, Article 17(4)(d). While recognized by the ICRC as to have customary status, one may question the existence of State practice to that effect, although argued otherwise by the ICRC. As noted by the ICRC in its Customary Law Study, “[u]pon ratification of the Additional Protocols, several States made a reservation to this right to the effect that this provision is subject to the power of a judge to exclude the accused from the courtroom, in exceptional circumstances, when the accused causes a disturbance and thereby impedes the progress of the trial.” However, the statutes of the international criminal courts prohibit trials *in absentia*. See Article 63(1) and Article 67(1) ICC Statute; and Article 21(4)(d) ICTY Statute; Article 20(4)(d) ICTR Statute; Article 17(4)(d) Statute of the Special Court for Sierra Leone, Article 17(4)(d).

⁹²⁷ Article 75(4)(f) AP I. It is recognized by the ICRC to have customary status under LOAC, ICRC (2005a), Rule 100. The ICRC points specifically at the influence of IHRL in the development of this right in the context of armed conflict. Correlating to this right is the right to remain silent. While fully accepted as a right under IHRL, it is not expressly mentioned by either the GC IV or AP I. Neither is it mentioned in the ICRC Customary Law Study. It was incorporated in the CPA Memorandum No. 3 in occupied Iraq, which demonstrates State practice to its acceptance as a rule of customary law in armed conflict (at least in occupied territory). See Arai-Takahashi (2010), 543.

⁹²⁸ Article 67 GC IV.

⁹²⁹ Article 71(2) GC IV.

⁹³⁰ Article 72(1) GC IV; Article 123(2) GC IV (accused internees).

⁹³¹ Article 72(1) and (2) GC IV. Also: Article 67(1)(d) ICC Statute; Article 21(4)(d) ICTY Statute; Article 20(4)(d) ICTR Statute; Article 17(4)(d) Statute of Sierra Leone If the accused fails to choose a legal counsel, he may be appointed one by the protecting power. In case of a serious charge and a non-functioning protecting power, the Occupying Power will appoint a legal counsel with the approval of the accused. While the ICRC recognizes the right to *free* counsel to be customary of nature, Arai-Takashi places

- the right of the advocate or counsel to freely visit the accused;⁹³²
- the right of the advocate or counsel to enjoy the necessary facilities for preparing the defense;⁹³³
- the right of the internee to have recourse to a qualified interpreter.⁹³⁴

The latter five guarantees all concern rights relating to the means of defense. Article 75(4) AP I does not specifically set out these rights, but it may be argued that they are included in the phrase “all necessary rights and means of defence” in Article 75(4)(a) AP.

Besides treaty-based fair trial rights, such rights arguably have attained customary law-status, as recognized by the ICRC in its CLS.⁹³⁵

It is to be noted here that IHRL-treaties function as a principle source for these customary norms. The ICRC has relied heavily on its documents and case-law to justify its recognition of these rules as customary under LOAC.⁹³⁶

As regards *security detention*, GC IV and Article 75 AP I provide norms providing the *legal basis* for security detention (Article 42 and Article 78 GC IV) and norms affording *procedural guarantees*, to include the requirement of prompt information on the grounds for the internment (Article 75(3) AP I), and the requirement to carry out an initial and periodic review of the lawfulness of the internment by an independent and impartial body (Articles 43 and 78 GC IV).

The law of IAC also provides norms pertaining to the *treatment* of detainees (regardless of the type of detention) (see *inter alia* Article 27 GC IV and Article 75 AP I). Also GC IV provides an extensive list of norms concerning the material conditions of treatment (see Article 76 GC IV relative to criminal detainees) and (Section IV) of GC IV (i.e. Articles 79-

doubts as to whether the ICRC could have reasonably come to that conclusion as it solely relies on the practice in IHRL. Arai-Takahashi (2010), 538, including footnote 263.

⁹³² Article 72(1) GC IV. Also: Article 67(1)(b) ICC Statute; Article 21(4)(b) ICTY Statute; Article 20(4)(b) ICTR Statute; Article 17(4)(b) Statute of Sierra Leone.

⁹³³ Article 72(1) GC IV. Also: Article 67(1)(b) ICC Statute; Article 21(4)(b) ICTY Statute; Article 20(4)(b) ICTR Statute; Article 17(4)(b) Statute of Sierra Leone. It must be noted that, in contrast to IHRL, this right only extends to facilities, and not to time. Arai-Takahashi argues that Article 72 embraces the time-element as well: “[t]his interpretation can be attended by the argument that the corresponding customary norm equipped with the same material elements has already been shaped and grafted onto the relevant treaty norm under IHL (namely, the norm embodied under Article 72 GC IV). The cogency of such argument can be reinforced by the express recognition of this right in the instruments of international human rights law and international criminal law. Arai-Takahashi (2010), 539.

⁹³⁴ Article 72(3) GC IV; Article 123(2) GC IV (in relation to internees); Article 67(1)(f) ICC Statute; Article 21(4)(f) ICTY Statute; Article 20(4)(f) ICTR Statute; Article 17(4)(f) Statute of Sierra Leone.

⁹³⁵ Rule 100, ICRC (2005a) mentions the following fair trial guarantees: the right of a trial by an independent, impartial and regularly constituted court; the presumption of innocence; information on the nature and cause of the accusation; necessary rights and means of defense, to include the right to defend oneself or to be assisted by a lawyer of one’s own choice, the right to free legal assistance if the interests of justice so require, the right to sufficient time and facilities to prepare the defense, the right of the accused to communicate freely with counsel; the right of trial without undue delay; the right of examination of witnesses; assistance of an interpreter; the right of presence of the accused at the trial; the freedom of the accused from forcible self-incrimination or confession of guilt; the right to public proceedings; the right to be advised of available remedies and of their time-limits; *non bis in idem*.

⁹³⁶ This method has been criticized. Arai-Takahashi, for example, argues that “[f]irst, it fails to determine the normative status and weight of such sources. Second, it has not addressed the question whether, and if so, to what extent, it is methodologically defensible to transfer the elements and principles developed in relation to those fair trial guarantees which are yet to be declared non-derogable even in the documents or the case-law of the human rights monitoring bodies.” Arai-Takahashi (2010), 516. But see Hampson (2007a), 299.

135) (relative to civilian internees). Finally, GC IV also provides express guidance on the *transfer* of internees (see Articles 45, 49, 127 and 128 GC IV).

As for the valid *non-conventional* normative framework, it is generally accepted that the rules of GC III and IV all have hardened into customary law.⁹³⁷ These rules have been identified in the ICRC's CLS.⁹³⁸ In addition, the CLS relies extensively on principles and norms deriving from IHRL in the area of fundamental guarantees to be afforded to detainees.⁹³⁹

In view of the present study, it is impossible to ignore at this stage the references made in the relevant conventional framework regarding IHRL. A first important source in this respect is Article 72 AP I, which stipulates that

the provisions of this Section [“Treatment of persons in the power of a party to the conflict”] are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Convention, particularly Parts I and III thereof, *as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.*

This provision clearly authorizes the reliance on sources of IHRL in addition to rules set out in LOAC in relation to persons “in the power of a party to the conflict.”⁹⁴⁰ Additionally,

⁹³⁷ On the customary nature of GC III and IV, see Meron (2005); (1995h), *The Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber)*, § 137; (1997n), *Tadić*, § 577; (1998m), *The Prosecutor v. Delalić, Mucić, Delić and Landžo (the Celebici Case), Case No. IT-96-21-T, Judgment of 16 November 1998 (Trial Chamber)*, §§ 305 and 316; (1996f), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996*, § 82; (2003m), *Partial Award in Eritrea's Prisoner of War Claims (Eritrea v. Ethiopia), Eritrea-Ethiopia Claims Commission (1 July 2003)*, § 38; (2004d), *Civilians Claim - Ethiopia's Claim 5 (Ethiopia v. Eritrea), Eritrea-Ethiopia Claims Commission (17 December 2004)*, § 28; United Nations (1993a), § 35.

⁹³⁸ See Chapter 32 (Fundamental Guarantees), governing the following subjects: humane treatment (Rule 87); non-discrimination (Rule 88); violence to life (Rule 89); torture and cruel, inhuman or degrading treatment (Rule 90); corporal punishment (Rule 91); mutilation and medical, scientific or biological experiments (Rule 92); rape and other forms of sexual violence (Rule 93); slavery and slave trade (Rule 94); forced labour (Rule 95); hostage-taking (Rule 96); human shields (Rule 97); enforced disappearance (Rule 98); deprivation of liberty (Rule 99); fair trial guarantees (Rule 100); the principle of legality (Rule 101); individual criminal responsibility (Rule 102); collective punishments (Rule 103); respect for convictions and religious practices (Rule 104); respect for family life (Rule 105). See also Chapter 37 (Deprivation of Liberty), governing the following subjects: provision of basic necessities to persons deprived of their liberty (Rule 118); accommodation for women deprived of their liberty (Rule 119); accommodation for children deprived of their liberty (Rule 120); location of internment and detention centres (Rule 121); pillage of personal belongings of persons deprived of their liberty (Rule 122); recording and notification of personal details of persons deprived of their liberty (Rule 123); ICRC access to persons deprived of their liberty (Rule 124); correspondence of persons deprived of their liberty (Rule 125); visits to person deprived of their liberty (Rule 126); respect for convictions and religious practices of persons deprived of their liberty (Rule 127); release and return of persons deprived of their liberty (Rule 128).

⁹³⁹ It is submitted that the ICRC has relied on IHRL in two ways. *Firstly*, as explained by Hampson, norms of IHRL have been relied upon not as direct sources of obligation in situations of armed conflict – which would have required the ICRC to demonstrate that the norms had independent status of customary law. Instead, the ICRC has used IHRL “as evidence of state practice and *opinion [sic] iuris* merely to provide *additional support* for a principle established by humanitarian law evidence.” In such cases, “it is legitimate to use material derived directly or indirectly from human rights treaties, provided that there is evidence that the *essence* of the treaty norm is to be found in customary human rights law” (Hampson (2007b), 72). *Secondly*, the ICRC has made use of IHRL to clarify the meaning of rules or concepts left unexplained or ambiguous in LOAC.

⁹⁴⁰ Sandoz, Swinarski & Zimmerman (1987), §§ 2927-2935.

Article 75 AP I, in two instances indicates a complementary role for IHRL. In its first paragraph, it is stressed that the protective framework offered in Article 75 AP I function “as a minimum” guarantee, which suggests that it may be supplemented by other, more protective norms of LOAC and, arguably, IHRL. The complementary role of the latter regime is more also envisaged in Article 75(8) AP I, which states that “[n]o provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, *under any applicable rules of international law*, to persons covered by paragraph 1.”

1.2.2. The Law of NIAC

As with the conduct of hostilities, the relevant conventional normative framework governing the deprivation of liberty in NIAC is limited to two principal sources: CA 3 and AP II.⁹⁴¹ *Quantitatively*, both sources contain only few rules on the deprivation of liberty.⁹⁴² However, unlike the law of hostilities, where customary law on hostilities closes the gap in treaty-based norms resulting from the traditional dichotomy between IAC and NIAC, this same dichotomy demonstrates to be the principal cause for a disbalance in normative density and the question of how to solve this, particularly in the area of security detention. Indeed, as regards *criminal detention*, the treaty-based law of IAC and NIAC almost converge, and any remaining gaps in the list of fair trial guarantees found in treaty-based law of NIAC are complemented by those guarantees that are viewed to have attained the status of customary law, and which can be found in the ICRC’s CLS.⁹⁴³

CA 3 refers to “judicial guarantees which are recognized as indispensable by civilized peoples” but otherwise remains silent on what precisely those guarantees are.⁹⁴⁴ Largely based on the ICCPR,⁹⁴⁵ Article 6 AP II sets forth a number of fair trial guarantees to individuals prosecuted and punished for *criminal offences* related to the armed conflict. This list is not as extensive as the list of guarantees stipulated throughout GC IV and in Article 75(4) AP I applicable in the context of an IAC. Nonetheless, it provides for a wide variety of fair trial guarantees.⁹⁴⁶ Technically, this list does not apply to NIACs that do not trigger the applicability of AP II.

⁹⁴¹ As noted previously, given the situational focus on NATCOIN only, the relevance of AP II is limited, and most attention is directed to CA 3.

⁹⁴² Besides CA 3, AP II deals with the deprivation of liberty principally in its Articles 4-6.

⁹⁴³ Rule 100, ICRC (2005a) mentions the following fair trial guarantees: the right of a trial by an independent, impartial and regularly constituted court; the presumption of innocence; information on the nature and cause of the accusation; necessary rights and means of defense, to include the right to defend oneself or to be assisted by a lawyer of one’s own choice, the right to free legal assistance if the interests of justice so require, the right to sufficient time and facilities to prepare the defense, the right of the accused to communicate freely with counsel; the right of trial without undue delay; the right of examination of witnesses; assistance of an interpreter; the right of presence of the accused at the trial; the freedom of the accused from forcible self-incrimination or confession of guilt; the right to public proceedings; the right to be advised of available remedies and of their time-limits; *non bis in idem*.

⁹⁴⁴ During the drafting stage of CA 3, some States proposed such a list to be added, but this was not accepted. See Diplomatic Conference, Geneva, Final Record, Vol II-B, 78 and 84 (France); 49 and 84 (Italy); 83 (US).

⁹⁴⁵ Commentary AP II, , 1397.

⁹⁴⁶ See Article 6(2) AP II. These rights involve the right of the accused to a trial by an independent, impartial and regularly constituted court; the right of the accused to be promptly informed of the nature and the cause of accusation; the prohibition of collective punishment (individual criminal responsibility); the prohibition of retroactive application of criminal laws (*nullem crimen nulla poena sine lege*); the right of the

However, it is submitted that even if the armed conflict would ‘only’ constitute a CA 3-NIAC, the link with Article 6 AP II is so strong that its guarantees nonetheless may find application. This link has been acknowledged already during the drafting stage,⁹⁴⁷ as well as in the ICC Elements of Crimes.⁹⁴⁸

As regards *security detention*, neither CA 3 nor AP II provides treaty-based grounds or procedural guarantees comparable to those afforded by the law of IAC (or IHRL). The only notable exception is Article 5(2)(b) AP II, which provides the right “to send and receive letters and cards, the number of which may be limited by competent authority if it deems necessary.” As explained by Pejic,

[t]his is presumably because the drafters of the Geneva Conventions, i.e. of Common Article 3, had in mind that domestic law would govern the due process aspect of deprivation of liberty, and because they chose not to take into account that internment might in practice be carried out by non-state armed groups.⁹⁴⁹

When looking for customary rules to fill this treaty-based gap, the ICRC’s CLS lists only two procedural requirements, namely (1) the “obligation to inform a person who is arrested of the reasons for arrest;” and (2) an “obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention” (*habeas corpus*).⁹⁵⁰ These rules derive from Article 75(3) AP I, and are generally held to reflect customary law applicable in all types of armed conflict.

The scarcity of customary norms on security detention in comparison to those recognized as customary LOAC in the context of an IAC triggers the question as to whether and, if so, how this gap is to be filled.

Two possibilities can be identified to close the gaps in the treaty-based law of NIAC *by reference to LOAC* itself.

Firstly, the absence of rules may be resolved by the parties to the conflict by virtue of arrangements mentioned in CA 3(3), or when the government of the State affected by the non-international armed conflict claims for itself belligerent rights. In both cases, captured non-State fighters should benefit from the same treatment as granted under GC III to POWs in IACs, while detained civilians should benefit from the same treatment as granted to civilian persons protected by GC IV in IACs.

Secondly, several proposals have been made to strengthen the normative paradigm of security detention in NIAC through the *policy*-based application of the main principles underlying the normative framework of security detention in the law of IAC. As is argued by its propo-

accused to be presumed innocent; the right of the accused to be present at the trial; the right of the accused not to be compelled to testify against himself or to confess guilt; the right of the convicted to be informed of available remedies and of their time-limits; the right of the accused before and during his trial of all necessary rights and means of defence. The phrase “all necessary rights and means of defence” can be said to include: the right to be brought promptly before a judge or other officer authorized by law to exercise judicial power; the right to be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release; the right to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; the right to defend himself/herself in person or through legal assistance; the right to be tried without undue delay; the right to present and examine witnesses; the right to an interpreter.

⁹⁴⁷ Diplomatic Conference, Geneva, Official Records, Volume 8, 357, par. 3.

⁹⁴⁸ Dormann, Preparatory Commission for the International Criminal Court: the Elements of War Crimes, 82 IRRC, 771.

⁹⁴⁹ Pejic (2012), 90.

⁹⁵⁰ ICRC (2005a), 348-351.

nents, the differences between IAC and NIAC are not so fundamental that they would bar the application of provisions of IAC to NIAC, provided that the rules are applied based on a person's *function* (based on his activities as a civilian or a person directly participating in hostilities) rather than his *status*.⁹⁵¹ The idea of analogous application finds support with the ICRC, which proposes to apply GC III to 'combatants', and GC IV to civilians.⁹⁵² Indeed, in view of the 'membership-approach' and the concept of CCF as introduced in the Interpretive Guidance, analogous application of GC III would make sense, particularly so because it would not introduce combatant immunity, or impose on the Occupying Power a duty to carry out any review of internment, as would be otherwise mandated under GC IV. However, it also reveals practical downsides, most notably the difficulty in determining who is a fighter and when a NIAC ends, such that it has been suggested that not GC III, but only GC IV should apply in analogy.⁹⁵³ The major difference, then, lies in the fact that combatants in an IAC may be interned for the duration of the armed conflict without review of their status, whereas in a NIAC, in analogy of GC IV, they are entitled to such review.

A *first* area where the policy-based application of the LOAC of IAC may take effect concerns the very grounds for security detention. As noted, none of the relevant IHRL treaties provides such ground. To solve this issue recourse may be had to the LOAC of IAC and the Article 78 GC IV-formula of "necessary for imperative reasons of security". This formula has been widely used by States, and has been accepted by the ICRC to apply as the minimum standard in *all* situations of violence that "strikes a workable balance between the need to protect personal liberty and the detaining authority's need to protect against activity that is seriously prejudicial to its security."⁹⁵⁴ It is particularly apt for application in extraterritorial forms of NIAC, such as SUPPCOIN, as security detentions there demonstrate similarities with internment in occupied territory.⁹⁵⁵ It is to be stressed, however, that, as Article 78 GC IV only applies to IAC, even as a rule of customary law, its formula can only be relied upon *as a matter of policy*, and not law.

A *second* area that would particularly benefit from this approach is the area of procedural guarantees, in which case GC IV offers useful guidance.⁹⁵⁶ As explained by Deeks,

the core procedures contained in the Fourth Geneva Convention are battle-tested and serve as an excellent basis for administrative detention during all types of armed conflict. These procedures impose a high standard for a state to initially detain, require the state to immediately review that detention, permit the detainee to appeal the initial detention decision, require the state to review the detention periodically, and obligate the state to release the detainee when the reasons for his detention have ceased. Coupled with a requirement to inform a detainee of the reasons for his detention, this collection of procedures would offer a strong and operationally-sustainable standard for administrative detention. Adopting such baseline rules (as matter of clearly-stated policy, if not legal obligation) would ensure that all states strike the proper balance between national security and personal liberty, would let states

⁹⁵¹ Sassòli & Olson (2008), 623; Sassòli & Bouvier (2006), 258.

⁹⁵² ICRC (2005a), 352. This finds support with the current Obama administration. See (2009d), *In Re: Guantanamo Bay Detainee Litigation, Respondents' Memorandum Regarding the Government's Authority Relative to Detainees Held at Guantanamo Bay, Misc. No. 08-442 TFH*.

⁹⁵³ Sassòli & Olson (2008), 625.

⁹⁵⁴ Dörmann (2012), 356. See also ICRC & Chatham House (2008), 3: "it flows from the practice of armed conflict and the logic of IHL that parties to a conflict may capture persons deemed to pose a serious security threat and that such persons may be interned as long as they continue to pose a threat. Otherwise the alternatives would be to either release or kill captured persons."

⁹⁵⁵ Dörmann (2012), 356

⁹⁵⁶ Deeks (2009); Oswald (2007); Rose (2012), 3; Pejic (2005), 377.

avoid answering hard questions about the type of armed conflicts they are fighting, and might facilitate multi-national operations among allies with different detainee policies.⁹⁵⁷

A *third* area concerns the *transfer of detainees*. In recent State practice, examples can be found of arrangements between States whereby they agree that detainees will be treated in accordance with the standards set out in GC III.⁹⁵⁸

As regards both forms of detention, CA 3 provides that “persons taking no active part in the hostilities,” to include persons deprived of their liberty must be treated *humanely* and in a *non-discriminatory* manner. In addition, they may not be made subject to violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; be taken hostage; or become subject to outrages upon personal dignity, in particular humiliating and degrading treatment.

Article 4 AP II embodies similar rules, and, in addition to CA 3, prohibits collective punishments; acts of terrorism; slavery and the slave trade in all their forms; pillage and threats to commit any of the acts prohibited in Article 4(2) AP II.

The aforementioned guarantees also find protection under customary law, as indicated in the CLS.⁹⁵⁹

In addition to Article 4 AP II, Article 5 contains a list of material conditions, which “shall be respected *as a minimum* with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.”⁹⁶⁰ As noted previously, requirements pertaining to the material conditions of treatment also find regulation in customary law, as indicated by chapter 37 of the CLS.

In contrast to the law of IAC, which contains detailed provisions on the transfer of persons deprived of their liberty, such provisions are entirely absent in the treaty-based and customary law of NIAC. However, as argued by Kleffner,

As far as humanitarian law is concerned, the transfer of a person by a State to another State despite the former State’s knowledge that the person is likely to face inhumane treatment may incur the responsibility under international law of that State since it may be qualified as aid or assistance in the commission of an internationally wrongful act, provided that the person concerned will indeed be subjected to inhumane treatment subsequent to the transfer.⁹⁶¹

As such, transfer of an individual in control or under the authority of a State to another State may violate the explicit prohibitions of CA 3 when it amounts to murder, torture, or other forms of ill treatment.

⁹⁵⁷ Deeks (2009), 405.

⁹⁵⁸ See, for example, the 2005 Arrangement between Canada and Afghanistan, which qualifies as a Memorandum of Understanding and therefore is not a legally binding document.

⁹⁵⁹ See Rules 87-98,

⁹⁶⁰ These include the treatment of the wounded and sick; food and drinking water; health and hygiene; protection against the rigors of the climate and the dangers of the armed conflict; the reception of individual and collective relief; the practice of religion and the reception of spiritual assistance from persons upon request and when appropriate; in case of work: working conditions and safeguards similar to those enjoyed by the civilian population the separation of men and women; the sending and reception of cards and letters (albeit subject to restriction based on military necessity); the location of places of internment and detention away from the combat zone; the evacuation of internees and detainees away from dangers arising out of armed conflict; the benefit of medical examinations; the freedom from danger to physical and mental health and integrity by any unjustified act or omission, such as medical procedures not indicated by the state of health of the person concerned; the taking of measures necessary to ensure the safety of released persons.

⁹⁶¹ Kleffner (2010c), 478.

In light of the question of interplay, it must also be mentioned that both CA 3 and AP II expressly leave open the possibility of strengthening the protective status of its provisions by resort to other bodies of law, most notably IHRL and domestic law.⁹⁶²

2. Applicability

For valid norms under the law of IAC or the law of NIAC to become relevant to the conduct of the counterinsurgent State vis-à-vis the insurgents, it needs to be established whether these frameworks at all apply. In other words, it needs to be ascertained whether the conflict between the counterinsurgent State and the insurgents in a particular situational context of counterinsurgency is governed by the law of IAC or the law of NIAC as a corollary of the existence of an armed conflict that falls within the scope of applicability of the concept of IAC or NIAC. The question of applicability of the law of IAC or NIAC is subject to two issues. A *first* issue concerns the question whether the conflict between the counterinsurgent State and the insurgents takes place in the context of an armed conflict. As already indicated in the introduction, in order to limit the scope of the present study, the very assumption is that in all situations of counterinsurgency examined here the conflict between the counterinsurgent State and insurgents takes place in the context of an armed conflict. There is thus no further need at this stage to deal with this first issue of applicability of the law of IAC or the law of NIAC.

This, however, leaves open a *second* issue, namely whether it is the law of IAC or the law of NIAC that governs the relationship between the counterinsurgent State and insurgents.

Paragraph 2.1 examines the applicability of the law of IAC; paragraph 2.2 examines the applicability of the law of NIAC.

2.1. Applicability of the Law of IAC to Counterinsurgency Operations

As has been previously established, the law of IAC may find application in a range of situations. It has also been established that, of these situations, this study limits its examinations to inter-State armed conflict and belligerent occupation only.

2.1.1. Inter-State Armed Conflict

As noted, underlying the concept of ‘armed conflict’ is the need for a factual determination of the existence of an armed conflict. In the context of an inter-State armed conflict, it has been argued “States generally recognise one when they see it.”⁹⁶³ In some instances, such as intense hostilities, there is little doubt that the threshold to armed conflict has been crossed. Other situations are less clear. This may concern (low-intensity) border clashes, the extra-territorial deployment of armed forces for counter-terrorist purposes, or the involvement in hostilities of a State’s armed forces as a participant in a peace-support force.⁹⁶⁴ Two views with respect to the objective parameters to determine the crossing of the vertical threshold of IAC can be discerned.

⁹⁶² The Preamble of AP II makes a specific reference to IHRL as a venue of reinforcement, stipulating that “international instruments relating to human rights offer a basic protection to the human person”, to include the ICCPR, CAT and regional human rights treaties. As confirmed by Sandoz, Swinarski & Zimmerman (1987), §§ 4428-4430.

⁹⁶³ Moir (2002), 33.

⁹⁶⁴ Ducheine (2008), 470.

The first (majority) view, reflected *inter alia* in the practice of ICRC and the ICTY, supports a low threshold, implying that “[a]ny *difference* arising between two States and leading to the *intervention* of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war.”⁹⁶⁵ Elements such as the degree of the intensity of the fighting, or the duration, are of little relevance.⁹⁶⁶ The mere fact that unilateral or mutual hostilities take place that prompt the *raison d’être* of LOAC is sufficient, how minor they may appear. At the basis of the concept of inter-State armed conflict lies the premise that two or more belligerent States are in a relationship of *conflicting* interests by which one or all express a belligerent intent or *animus belligerendi*.⁹⁶⁷ According to Melzer, such belligerent intent

must be presumed to exist as soon as there is an armed interference by one State with another’s ‘sphere of sovereignty’, that is to say, with the whole body of rights and attributes, which a State possesses in its territory and in its international relations to the exclusion of all other States.⁹⁶⁸

The belligerent intent need not cross the threshold of hostilities (as the concept of declaration of war signifies), nor does the concept of IAC demand the active resistance of the State affected by the armed interference. However, as stressed by Kleffner

[i]t may be obvious, however, that a minor incursion by the armed forces of one State into another State, for instance, will not bring into operation the whole plethora of rules of international humanitarian law. Rather, the factual circumstances of a military operation amounting to an international armed conflict will determine which of the rules are practically relevant and, as a consequence, the extent to which the law applies.⁹⁶⁹

Another school of thought considers the view explained above as too simplistic and takes a narrower view.⁹⁷⁰ Although IAC offers few space for ambiguous situations in which hostilities take place, in the view of this school, they exist and demand thorough consideration before they are marked as armed conflicts. If the threshold is too lenient, it increases the risk of an escalation of the conflict due to the “psychological” impact that merely the involvement of armed forces may have.⁹⁷¹ Thus, minor incidents, such as border clashes involving a State’s armed forces (mentioned earlier) or naval incidents, should not always be viewed as an armed conflict.⁹⁷² Generally speaking, elements such as intensity and duration of the hostilities are to be included in the determination. Both elements suggest the presence of a minimum threshold.⁹⁷³

⁹⁶⁵ Pictet (1952a), 6-7. See also (1995h), *The Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber)*, § 70, according to which an inter-State armed conflict arises whenever there is a “resort to armed force between States.”

⁹⁶⁶ United Nations General Assembly (2010), 16, § 51; Kleffner (2010b), 54, § 4.01.

⁹⁶⁷ Melzer (2008), 247.

⁹⁶⁸ Melzer (2008), 250, referring to (1949a), *Corfu Channel Case (United Kingdom v. Albania), Judgment of 9 April 1949 (Merits)*, 43.

⁹⁶⁹ Kleffner (2010b), 54.

⁹⁷⁰ ICRC & IHL (2003),
[www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5UBCVX/\\$File/Interplay_other_regimes_Nov_2003.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5UBCVX/$File/Interplay_other_regimes_Nov_2003.pdf), 3.

⁹⁷¹ ICRC & IHL (2003), 3.

⁹⁷² Greenwood (2008b), 48; Kleffner (2010b), 54, § 4.01.

⁹⁷³ See, for example, Gill (2002) (“[o]nce military force of any intensity beyond the level of the maintenance or restoration of law and order is used, at least some of [the] basic principles [of LOAC] will become applicable”); Greenwood (2008b), 48 (arguing that an armed conflict exists when “the fighting reaches a level of intensity which exceeds that of [...] isolated clashes”); Gill & Van Sliedregt (2005), 30 (in relation

In sum, the determination of inter-State armed conflict is a matter of objective judgment, to be based on the facts. Other criteria may be added, as long as they are objectively verifiable. The incorporation of overly subjective elements would undermine the system of ‘armed conflict’ put in place in 1949 and may jeopardize the intended wide applicability of humanitarian law.

As noted in the introduction, the assumption is that all of the counterinsurgency situations examined in this study take place in the context of an armed conflict. It may therefore be assumed that, in so far it has been established that the law of IAC applies to a particular situational context of counterinsurgency, the threshold as set out above has been crossed. An issue that remains, however, is whether the law of IAC may at all regulate the conflict between a counterinsurgent State and insurgents, since the very concept of inter-State armed conflict is limited to conflicts between States. As noted, the assumption in this study is that, in those situational contexts of counterinsurgency to which the law of IAC applies, the threshold of IAC as explained above has been crossed.

The principal question before us, however, remains whether the law of IAC applies because a conflict between a counterinsurgent State and insurgents qualifies as an inter-State armed conflict. In its horizontal scope, inter-State armed conflict by definition takes place *between* two or more *States*, provided they are High Contracting Parties to the GCs.⁹⁷⁴ In *participational* terms, *only* States may qualify as ‘parties’ to an inter-State armed conflict. An additional feature of the horizontal scope of inter-State armed conflict is that, in *geographical* terms, an inter-State armed conflict by definition involves *extraterritorial* State conduct, from one or all parties to the conflict.

In view of its definition for the purposes of this study, the above is an additional ground for disqualifying NATCOIN as an inter-State armed conflict (apart from its incompatibility with the horizontal scope in participational terms).

It also follows that the limited participational scope of the concept of inter-State armed conflict obstructs the qualification of a conflict between counterinsurgent State and insurgents as inter-State armed conflict. It is recalled that the concept of insurgency, as understood in this study, is limited to “more or less organized networks composed of *non-State actors*.” In view of the *lex lata*, insurgents cannot be a High Contracting Party to the GCs, and by definition cannot become a party to an inter-State armed conflict.⁹⁷⁵ Thus, *based on its*

to duration: “[i]nternational armed conflicts occur when the armed forces of one party are engaged in hostilities of a reasonably sustained nature against another party”).

⁹⁷⁴ (1999m), *The Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment of 15 July 1999 (Appeals Chamber)*; ICRC (2008c); Dinstein (2004), 14. See also Article 2 HIVR, which also restricts its applicability to armed conflicts between two or more contracting parties. Today, all States are party to the GCs, and therefore they would apply to every inter-State armed conflict irrespective of their customary status. In general, it remains irrelevant whether a State or its regime is recognized under international law by all or a majority of States. It is also irrelevant whether a the States involved act alone or upon the authorization or under cover of an international organization, be it regional or universal. The mere fact that a State is a Contracting Party to the Geneva Conventions and AP I is sufficient to consider it as a party to an IAC. Thus, the US government’s initial argument that the Taliban regime was not recognized as the legitimate regime of Afghanistan and that as a result it was not bound to treat its fighters in accordance with GC II was unfounded. See also Schindler (1979), 129; (2004k), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, §§ 90-92*, concerning the applicability of GC IV to Israel despite Jordan’s position towards recognition of Israel.

⁹⁷⁵ It has been suggested that a norm of customary international law has developed that permits transnational non-State actors to qualify as parties to an IAC. It is, however, submitted that, to date, there is insufficient *opinio juris*, nor State practice from which to conclude that the law of IAC applicable to inter-State

failure to qualify as an inter-State armed conflict, the law of IAC does not regulate a conflict between a counterinsurgent State and an insurgent movement irrespective of the situational context in which it takes place, and regardless of the international character thereof. It thus follows that in establishing whether a conflict constitutes an inter-State armed conflict, it is the very *nature of the parties* to the conflict, and not the geographical scope of the conflict that is determinative.

This does not, however, preclude the possibility that a conflict between the counterinsurgent State and insurgents could *evolve into* an inter-State armed conflict. This would occur when it can be established that the insurgent's hostile activities against the counterinsurgent State are legally attributable to another State due to that State's exercise of control over the insurgents, such that the insurgency movement can be regarded to belong to the other State, party to the IAC. We have dealt with this construct in the previous section.

Dinstein submits another basis for the existence of an inter-State war between a counterinsurgent State and insurgents. In view of the invasion in Afghanistan 2001 and the subsequent military operations against the ousted Taliban government, he holds that

[c]ontrary to conventional opinion, I believe that the inter-State war in Afghanistan that started on October 7, 2001 continues unabated to this very day, despite the transformation in the status of the Taliban (who no longer form the *de facto* government of Afghanistan). When American and allied troops are fighting the Taliban (and their al Qaeda ally) on Afghan or adjacent (Pakistani) soil, this is direct sequel to the hostilities that led to the ouster of the Taliban from the seat of power in Kabul. Both segments (past and present) of the hostilities are consecutive scenes in the same drama unfolding in Afghanistan. The inter-State war will not be over until it is over. And it will only be over once the Taliban are crushed.⁹⁷⁶

However, (as Dinstein himself acknowledges) this is a minority view which, it is submitted, is flawed as the Taliban, once ousted as the government of Afghanistan, can no longer be viewed to represent the State of Afghanistan and as such constitutes from that moment an organized armed group of non-State actors the actions over which Afghanistan as a State no longer exercises effective control.

Whereas the nature of the insurgents prevents the law of IAC to become applicable to the conflict between them and the counterinsurgent State on the mere basis of its qualification as an inter-State armed conflict, this, however, does not exclude the applicability of the *law of IAC* to the conduct of counterinsurgent forces vis-à-vis an insurgent movement, and vice-versa.

For example, an insurgent movement may become a party to an IAC, *firstly*, because the belligerency of the group is formally recognized by the opposing State, and *secondly*, when the movement represents a national liberation movement as meant in Article 1(4) AP I. However, while the two exceptions to this rule are, in theory, possible, today they find no application in practice. The application of the law of IAC on this basis is therefore not realistic.

Also, (parts of) the law of IAC may become applicable in the relationship between the counterinsurgent and the insurgents based on declaratory statements on the side of the latter that it considers itself bound by (certain parts of) the law of IAC, or by means of special arrangements, as set forth in CA 3.

armed conflicts should also apply to situations outside the periphery of that scope. Melzer (2008), 267; Sassòli (2006), 4.

⁹⁷⁶ Dinstein (2009b), 51.

Finally, while a minority standpoint, there is growing support for the view that the law of IAC also regulates the conduct of a counterinsurgent State vis-à-vis the insurgents in so far as a counterinsurgent State's operations against insurgents exercised in the territory of another State B qualify as an inter-State armed conflict with that State.⁹⁷⁷ Given the condition of *animus belligerenti* underlying the concept of inter-State armed conflict, an inter-State armed conflict does not arise when a State genuinely and unambiguously⁹⁷⁸ invites, or consents – explicitly or tacitly – to the execution of military operations of another State on its territory, as there is no interference with the consenting State's sovereignty.⁹⁷⁹ It would therefore follow that the inter-State relationship between a counterinsurgent State and a 'host' State in the contexts of SUPPCOIN and *consensual* TRANSCOIN do not qualify as inter-State armed conflicts, and that as a consequence the law of IAC has no bearing on the conduct of the counterinsurgent vis-à-vis the insurgents.

Of the situational contexts examined in this study, an inter-State armed conflict could arise in the context of *non-consensual* TRANSCOIN. In *non-consensual* TRANSCOIN the law of IAC applies in the conflict between a counterinsurgent State and insurgents not because *that* conflict qualifies as an inter-State armed conflict, but rather as a corollary of the inter-State conflict between the counterinsurgent State and State B in which territory the TRANSCOIN operations take place. As a result, the law of IAC regulates the vertical relationship between the counterinsurgent State and the insurgents, in which the latter are to be viewed not as party to the conflict, but as civilians protected from direct attack unless and for such time as they DPH. As explained by Akande, the principal argument underlying this construct is that

[i]t may well be that a conflict between a State and a non-state group is not to be regarded as an international armed conflict in and of itself. However, that contention does not itself resolve the matter under consideration. It is important to recall that the purpose of classification of conflicts is so that one can determine the law which applies to the actions of participants in the conflict. Therefore, the essential question in such a case is which law applies to the conflicts between a foreign State and a non-state group in the territorial State. Where the conflict between the foreign State and the non-state group is inextricably bound up with

⁹⁷⁷ Akande (2012a), 72 ff. See also (2005d), HCJ 769/02, *The Public Committee Against Torture in Israel v. The Government of Israel* (11 December 2005), § 40, which relies on a section from Antonio Cassese's book '*International Law*' principally focusing on situations of belligerent occupation. The Israel HCJ extends Cassese's interpretation to all armed conflicts taking place outside the borders of a state. See, for criticism of the HCJ's conclusion, also Schöndorf (2007), 304.

⁹⁷⁸ Ago (1979), § 68. Consent under duress obtained in violation of Article 2(4) UN Charter is not a valid basis for a legal agreement, see Article 52, VCLT, with the exception of threat or use of force authorized by the UN Security Council.

⁹⁷⁹ Clearly, the consent must be valid and genuine. As argued by some experts, a request for support may be unlawful, both under international law and, in most cases, national law in the case of an emerging civil war, when the control of the State may have crumbled to the extent that there is possibly no longer a legitimate authority competent to issue a lawful request for external assistance to other States.⁹⁷⁹ In other instances, the concept of consent may be used as "a mere device used by the neighbouring state to mask an invasion, or be made by an individual not constitutionally capable or speaking for the State." Byron (2001), 82. In the words of Reisman and Silk, every State could arguably "maintain a stable of political would-bes and has-beens of varying national pedigrees then at the appropriate time, one with the right nationality would be saddled and bridled and brought to the ring to issue the necessary 'invitation'." See Reisman & Silk (1988), 472-74 Examples are the arguably doubtful 'invitation' to the Soviet Union by the puppet-government of Afghanistan in 1979; the Hungarian Uprising in 1956; the Czechoslovak case in 1968; the Grenada case in 1983. See Harris (2004), 917-20. Similar doubts have been raised in respect of the invitation by the Afghan Interim Government in 2002, and the invitation by the Iraqi government following the end of the occupation phase of the Iraq war in 2004. See Turns (2010).

another conflict (notably a conflict between two States) such that acts under the two conflicts (to the extent the conflicts can be distinguished) cannot be separated, that participants will, in reality, be bound to observe the law of international armed conflict.⁹⁸⁰

Whether in the context of a TRANSCOIN an inter-State armed conflict arises must be determined on the facts, but it cannot be *merely* concluded from the fact that the counterinsurgent State operates on the territory of State B. As noted, inter-State armed conflict is characterized by the existence of *conflicting* interests by which one or all express a belligerent intent vis-à-vis the other State.⁹⁸¹ A determinative factor is the issue of consent. Where such consent is absent, an inter-State armed conflict undoubtedly arises when State B actively resists the application of combat power in TRANSCOIN, even when this is strictly limited to operations against the insurgents. It may also be argued that an inter-State armed conflict arises where the application of combat power in TRANSCOIN, while strictly limited to operations against the insurgents, takes place when in response to a request for permission by the counterinsurgent State, State B explicitly refused the consent but otherwise refrains from active resistance. Finally, some argue that an inter-State armed conflict is said *not* to arise when consent was not at all sought prior to the operations, but the *animus belligerendi* was only directed against the insurgents, and not in any way against the territorial State.⁹⁸² (While a minority view) some, however, contend that the *mere* fact that TRANSCOIN takes place on the territory of another State *without that State's consent* triggers an IAC, regardless of the reasons for the absent of that consent, and regardless of whether the *animus belligerendi* was aimed at the insurgents of State B.⁹⁸³ Support for this contention is said to be found in the obligations arising from Article 2(4) UN Charter, which prohibits the use or threat of force directed *against* the territorial integrity or political independence of another State. As a consequence of acts violating this fundamental obligation of the law of inter-State force, “a situations of armed conflict between the two automatically arises,” and it “[it] matters not (and ought to matter not) whether the territorial State responds by using force against the foreign State.”⁹⁸⁴ After all, following Article 2 GC IV, an inter-State conflict also arises in the absence of a formal acknowledgment of war. In that light, it is also *not relevant* for a violation of Article 2(4) UN Charter – and an inter-State armed conflict to arise between the counterinsurgent State and State B – whether the TRANSCOIN operations were directed against the government of State B, and/or solely served other objectives, for example to eradicate an insurgent stronghold in State B.⁹⁸⁵ This was also the view of the UN Commission of Inquiry regarding the Israeli military operations against Hezbollah in Lebanon. It concluded that, notwithstanding the fact that “the hostilities in actual fact and in the main

⁹⁸⁰ Akande (2012a), 72-73.

⁹⁸¹ Melzer (2008), 247.

⁹⁸² Szesnat & Bird (2012), 236-237, in respect of Operation Phoenix, the Colombian TRANSCOIN directed against the FARC in Ecuador, in which case no consent was requested at all prior to the operations.

⁹⁸³ Vöneky (2004), 944; Cassese (2005), 420; Dinstein (2009c), 100; Akande (2012a), 72-73;

⁹⁸⁴ Akande (2012a), 74.

⁹⁸⁵ Support is found in the ICJ's decision in *DRC v. Uganda*, in which it held that [...] the obligations arising under the principles of non-use of force and non-intervention were violated by Uganda even if the objectives of Uganda were not to overthrow President Kabila, and were directed to securing towns and airports for reason of its perceived security needs, and in support of the parallel activity of those engaged in civil war(2005a), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment of 19 December 2005, § 163. See also (1999), *The Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment of 15 July 1999 (Appeals Chamber, Separate Opinion of Judge Shahabuddeen. See also the resolution adopted by the OAS following operation 'Phoenix', constituting a TRANSCOIN by Colombia on the territory of Ecuador, which was held to violate the territorial sovereignty of Ecuador.

only” took place between the IDF and Hezbollah, Lebanon was to be viewed as a party to an inter-State armed conflict as it

was the subject of direct hostilities conducted by Israel, consisting of such acts, as an aerial and maritime blockade that commenced on 13 July 2006, until their full lifting on 6 and 8 September 2006, respectively; a widespread and systematic campaign of direct and other attacks throughout its territory against its civilian population and civilian objects, as well as massive destruction of its public infrastructure, utilities, and other economic assets; armed attacks on its Armed Forces; hostile acts of interference with its internal affairs, territorial integrity and unity and acts constituting temporary occupation of Lebanese villages and towns by IDF.⁹⁸⁶

In sum, in the minds of those supporting this approach, what matters is that non-consensual TRANSCOIN operations against insurgents in the territory of State B, while perhaps intended to be solely directed against the insurgents, constitute the use of non-consensual armed force that at all times establishes a link with State B, because it violates its sovereignty.⁹⁸⁷ The two conflicts can therefore not be separated and thus any deprivation of life occurring resulting from TRANSCOIN operations must comply with the law of IAC. Assuming the conflict between the counterinsurgent State and the territorial State constitutes an inter-State armed conflict, the follow-up question is whether the law of IAC – as a consequence – governs the relationship between the counterinsurgent State and the insurgents.

While the majority view is that this is not the case (and that the law of NIAC applies), when following the IAC-approach set out above the argument could be made that the insurgents are to be principally viewed not as parties to the conflict bearing horizontal obligations vis-à-vis the counterinsurgent State (in the context of a separate NIAC), but must be regarded as civilians present in the geographical space of an IAC, and must be treated as subjects in the vertical relationship with the counterinsurgent State in accordance with their conduct (just as any other civilian having nothing whatsoever to do with the insurgency). For the question of their targetability, this implies that, in the absence of their DPH, they are to be viewed as mere criminal suspects to be treated under the normative paradigm of law enforcement. In contrast, following their DPH, they may be directly attacked, but only “for such time,” under the normative paradigm of hostilities, and in conformity with the remaining principles, prohibitions and restrictions.⁹⁸⁸ Here, the law of IAC differs significantly from the law of NIAC, for, as we will see in Chapter VII, under the latter regime insurgents qualifying as members of the armed forces of an insurgency movement in a continuous combat function may be attacked continuously. Nonetheless, it is in the area of detention that the applicability of the law of IAC is of importance, for it offers a quite comprehensive framework of valid norms practically all of which are missing in the law of NIAC.

We will now turn to the question of the applicability of the law of IAC in the context of belligerent occupation. This exclusively relates to the situation of OCCUPCOIN.

2.1.2. Belligerent Occupation

This paragraph examines the applicability of the law of IAC to OCCUPCOIN. Traditionally, belligerent occupation was understood to follow an inter-State war following a declara-

⁹⁸⁶ UNHRC (2006), §§ 55, 58.

⁹⁸⁷ Akande (2012a), 77.

⁹⁸⁸ For an analysis of the concept of DPH, see Chapter VII.

tion of war, or following a capitulation or armistice (neither of which ends the state of war). CA 2, paragraph 1 covers this situation. Taking into account the virtually non-resisted occupations of Denmark and Czechoslovakia by Nazi Germany in World War II, in its paragraph 2, CA 2 opens the applicability of the Geneva Conventions to “*all* cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.” The only form of occupation excluded from the scope of CA 2 is treaty-based occupation.⁹⁸⁹ The principal question before us is therefore whether the legal relationship between the counterinsurgent State and insurgents following the latter’s targeting or operational detention is governed by the law of IAC by virtue of the fact that it takes place in occupied territory. In addition, it is of essence to briefly introduce the concept of belligerent occupation, notwithstanding the assumption that the concept of OCCUPCOIN, as defined in this study, already presumes the existence of a situation of belligerent occupation. Nonetheless, in operational practice, this is a question of crucial importance, for clearly it determines the normative framework to which a State is bound. In addition, it is submitted that the concept of belligerent occupation for it also assumes that an Occupying Power exercises *authority* over territory.⁹⁹⁰ Such exercise of authority is, as will be discussed in more detail in Chapter VIII, of practical relevance for the question of the interplay between IHRL and LOAC and the issue whether a targeting operation is to be governed by the normative paradigm of law enforcement or hostilities. It is to this issue that we will first briefly turn.

2.1.2.1. The Concept of Belligerent Occupation

As argued by Paulus, “it should be sufficient for the establishment of ‘authority’ if the occupying power has established general control over the occupied territory.”⁹⁹¹ Such exercise of authority is temporary, in the sense that “the occupying power does not hold enemy territory by virtue of any legal right.”⁹⁹² It may, however, be long lasting.⁹⁹³

Effective control is *not* established by the mere formal proclamation of occupation. Nor is the mere non-consensual presence of military forces in foreign territory sufficient for effective control to take effect. Thus, patrols or hit-and-run actions by units that withdraw from the foreign territory do not amount to the occupation of the territory in which they operate. The same may be concluded in the case of invading airborne or mechanized units.⁹⁹⁴ While

⁹⁸⁹ Kelly (1999), 149; Roberts (1984), 250; Dinstein (2009c), 31-32, 35; Pictet (1958a), 22; Arai-Takahashi (2010), 27, referring to Stein (1948), 353; Colby (1925), 911; Feilchenfeld (1942), 12.

⁹⁹⁰ Following Article 42 HIVR, belligerent occupation implies that foreign territory “[...] is actually placed under the *authority* of the hostile army” of a State – thereby becoming – Occupying Power. The occupation extends only to the territory where such *authority* has been established and can be exercised. This may involve the territory of an adverse party to the conflict, as well as territory of neutral States or even co-belligerents. Roberts (1984), 300; Dinstein (2009c), 34. Arai-Takahashi (2010), 8, suggests that the law of belligerent occupation also applies to States exercising effective control over disputed areas formally part of their own territories, such as Kashmir or Nagorno-Karabav. This view must be rejected. As made clear by Dinstein (2009c), 34, “the law of belligerent occupation is *inapplicable* to non-international armed conflicts (so called ‘civil wars’). [...] [I]n an internal conflict, neither territory controlled by insurgents nor that preserved or regained by the central government can be regarded as belligerently occupied.” This is limited to cases in which the insurgents are not recognized as party to an armed conflict in the sense of Article 1(4) AP I, or where they are recognized as belligerents. In both cases, the armed conflict will be governed by LOAC regulating IAC.

⁹⁹¹ Paulus (2012), 134.

⁹⁹² (1948d), *USA v. Otto Ohlendorf et al. (Einsatzgruppen Trial) (10 April 1948)*, 492-493.

⁹⁹³ As exemplified by Turkey’s occupation of northern-Cyprus, which began in 1974.

⁹⁹⁴ U.K. Ministry of Defence (2004), 276, § 11.3.2.

they may 'hold' territory after combat, it does not automatically entail the crossing of the thresholds of effective control required by the law of belligerent occupation, as appears to be the view of the ICRC and the ICTY.⁹⁹⁵

Instead, the exercise of effective control is generally perceived to commence once, and for so long an invading State has the *capability* "to exercise the level of authority over enemy territory necessary to enable it to discharge all the obligations imposed by the law of occupation,"⁹⁹⁶ irrespective of a State's willingness to exercise authority. According to the UK Manual of the Law of Armed Conflict, a two-prong test applies.

Firstly, that the former government has been rendered incapable of publicly exercising its authority in that area; and *secondly*, that the occupying power is *in a position to substitute* its own authority for that of the former government.⁹⁹⁷

Whether control is *sufficiently* 'effective' cannot be answered in the abstract, but is a factual determination. As argued by Dinstein, occupation cannot take effect by air supremacy or naval power, but requires "boots' on the ground."⁹⁹⁸ Occupation does not take effect if continuing combat obstructs a sufficient degree of stabilization, and when it remains impossible to determine who exercises effective control over the particular part of territory. Some general guidelines that apply to every situation of occupation are, as stated in the UK's Manual of the Law of Armed Conflict that

[f]or occupation of an area it is not necessary to keep troops permanently stationed throughout that area. It is sufficient that the national forces have withdrawn, that the inhabitants have been disarmed, that measures have been taken to protect life and property and to secure order, and that troops are available, if necessary to enforce authority in the area.⁹⁹⁹

⁹⁹⁵ For the ICRC, see Thürer, arguing that "a situation of occupation exists whenever a party to a conflict is exercising some level of authority or control over territory belonging to the enemy," which may imply that the state of belligerent occupation may arise already in the invasion phase of hostilities. See Thürer (2005), available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/occupation-statement-211105?opendocument>. See also Pictet (1958a), 60. As for the ICTY, see (2003i), *Naletilic, aka Tuta and Martinovic, aka Stela, IT-98-34-T, Trial Chamber Judgment (31 March 2003)*, § 221-222. While acknowledging the requirement of effective control for the purposes of Article 42 1907 Hague Regulations, it held that, in so far it concerned the issues relating to the protection of "individuals" as civilians under GC IV, such effective control is not required. The threshold to be applied is the determination that the individuals in question have fallen into "the hands of the Occupying Power." Zwanenburg criticizes this viewpoint, arguing that the ICTY "appears to conflate the determination of "protected person" with the determination of an occupation, and does not recognize that the Convention contains a number of provisions that apply specifically to occupied territories." Zwanenburg (2004), 749. See also Naert (2005), 24. It is submitted that this interpretation merely seeks to ensure the early applicability of GC IV, so as to enhance the protection of civilians in the early stages of armed conflict. It is therefore not to be viewed as reflecting the *lex lata* for the establishment of effective control as meant in Article 42 HVR.

⁹⁹⁶ Thürer (2005), available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/occupation-statement-211105?opendocument>.

⁹⁹⁷ U.K. Ministry of Defence (2004), 275, § 11.3 (emphasis added). The US Field Manual on the Law of Land Warfare, takes a narrower approach in relation to the second requirement, and demands that the Occupying Power must have "successfully substituted" authority; a phrasing which implies a higher threshold. U.S. Department of Army (1956), rules 352-356. See also (2003i), *Naletilic, aka Tuta and Martinovic, aka Stela, IT-98-34-T, Trial Chamber Judgment (31 March 2003)*, § 217; Dinstein (2009c), 39; Roberts (1984), 300-301; Schmitt (2003) (<http://www.crimesofwar.org/print/onnews/iraq5-print.html>); Faite (2004), 72; (2005a), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Judgment of 19 December 2005*, 310

⁹⁹⁸ Dinstein (2009c), 44; also Gasser (2008), 274. But see the situation of Gaza, and the question of whether Israel's supremacy of the air and control over the borders entails occupation.

⁹⁹⁹ U.K. Ministry of Defence (2004), 276, § 11.3.2. The US Field Manual on the Law of Land Warfare contains similar language, and opens the possibility for remote effective control, holding that "[i]t suffi-

More specific parameters that may be taken into consideration are the size of the occupying forces, the manner in which they operate, the particular terrain, the density of the population, the degree of opposition, *et cetera*.

Of particular relevance to the situation of OCCUPCOIN, it is generally acknowledged that the occupation does not end¹⁰⁰⁰ because of the mere “existence of a rebellion or the activity of guerrilla or paramilitary units”¹⁰⁰¹ or “[...] a temporarily successful rebellion in part of the area under occupation,”¹⁰⁰² even when characterized by almost continuous hostilities.¹⁰⁰³ Determinative elements for the verification of the existence of a situation of occupation met with resistance are “the extent of the area controlled by the movement and the length of time involved, the intensity of the operations, and the extent to which the movement is internationally recognized.”¹⁰⁰⁴ Locally, the Occupying Power’s degree of effective control may be temporarily reduced or ceased to insurgents, but this too does not end the occupation.¹⁰⁰⁵ The state of belligerent occupation will remain in effect as long as the Occupying Power is *capable* of assuming control of any part of the territory, at its own will.¹⁰⁰⁶ Thus, a State continues to be an Occupying Power while it does not exercise effective control in

cient that the occupying force can, within a reasonable time, *send detachments of troops to make its authority felt* within the occupied district. It is immaterial whether the authority of the occupant is maintained by fixed garrisons or flying columns, whether by small or large forces, so long as the occupation is effective. See U.S. Department of Army (1956), 139(emphasis added). The ICTY relied on this passage in (2003i), *Nalčić, aka Tuta and Martinović, aka Stela, IT-98-34-T, Trial Chamber Judgment (31 March 2003)*, § 217.

¹⁰⁰⁰ Occupation *terminates* when the Occupying Power ceases to exercise effective control over the occupied territory. Schwarzenberger (1968b), 317. This, too, is a factual determination. This takes place, firstly, when it evacuates the occupied area, either at its own accord or involuntarily (due to such resistance that effective control no longer sufficiently exists and the occupying power is forced to retreat); Secondly, occupation terminates when, and in so far, effective control transfers to another (military) authority; U.K. Ministry of Defence (2004), 277, § 11.7. On 28 June 2004, the so-called Coalition Provisional Authority formally handed over full governmental control to the Interim Government of Iraq. It is argued by some that, when applying the factual test of effective control, the continued presence of the multinational force in Iraq, based on the latter’s consent, after 28 June 2004 suggests continued occupation. For this argument, see Arai-Takahashi (2010), 11; Roberts (2005), 37-39. However, it must be borne in mind that the Interim Iraqi Government enjoyed the right, expressly recognized, to demand the withdrawal of the coalition troops. In that respect, the situation differs fundamentally from occupation. See Roberts (2006), 617. Thirdly, occupation terminates in the case of subjugation or conquest, which “implies a transfer of sovereignty, which generally takes the form of annexation and is normally effected by a treaty or peace.” See U.S. Department of Army (1956), 139, § 353. Occupation *does not terminate* following a declaration aimed at that effect. Neither does occupation terminate “if the occupant, after establishing its authority, moves forward against the enemy, leaving a smaller force to administer the affairs of the district.” U.S. Department of Army (1956), § 360. The UK LOAC Manual adds that the occupying power must have disarmed the inhabitants, and that the “authority of the occupying power should be presented by the presence of a commissioner or civil officials.” U.K. Ministry of Defence (2004), 277, § 11.6.

¹⁰⁰¹ U.S. Department of Army (1956), § 360.

¹⁰⁰² U.K. Ministry of Defence (2004), 277, § 11.7.1.

¹⁰⁰³ Roberts (2005), 34. An example is the fierce resistance met by coalition forces in Iraq in 2004, which was in certain respects not under control.

¹⁰⁰⁴ U.K. Ministry of Defence (2004), 277, § 11.7.1.

¹⁰⁰⁵ Graber (1949), 69; Dinstein (2009c), 43; Zwanenburg (2004), 748.

¹⁰⁰⁶ (1948b), *United States v. Wilhelm List, et al. (Hostages Case), UNWCC (8 July 1947-19 February 1948)*, 56. See also U.S. Department of Army (1956), § 360. The United Kingdom Manual of the Law of Armed Conflict appears to demand actual military action (“[...] so long as the occupying power takes the steps to deal with the rebellion and re-establish its authority or the area in question is surrounded and cut off”). U.K. Ministry of Defence (2004), 277, § 11.7.1.

terms of Article 42, 1907 HIVR in *all* parts of the occupied territory.¹⁰⁰⁷ As made clear by Dinstein, effective control may “ebb and flow”, and “the fluctuations may be egregious.”¹⁰⁰⁸ It is not until “the power of the occupant is effectively displaced for any length of time, [...]” that the state of belligerent occupation as a result of violent confrontations ends.¹⁰⁰⁹ The crossing of the vertical threshold of belligerent occupation implies the applicability of the law of belligerent occupation, and thus places the counterinsurgent Occupying Power under the obligations and subsequent limitations commensurate to it.

2.1.2.2. The Applicability of the Law of IAC to OCCUPCOIN?

As may be concluded from the above, the concept of belligerent occupation entails that, at least in the relationship between the counterinsurgent Occupying Power and the occupied State, the law of IAC, and the law of belligerent occupation, applies. The question before us is, however, whether the law of IAC also governs the relationship between the counterinsurgent Occupying Power and the insurgents. This is a controversial subject, and principally two approaches can be discerned: (1) those viewing that the law of IAC applies and (2) those, opposing the first approach, but arguing that conflicts between the Occupying Power and insurgents constitute a CA 3-NIAC. This paragraph addresses the first view. The NIAC-approach will be subject of examination in paragraph 4.2.

In both doctrine¹⁰¹⁰ and case law¹⁰¹¹ support can be found for the view that a conflict between an Occupying Power and insurgents is governed by the law of IAC *as a consequence* of an existing IAC between the Occupying Power and the occupied State.¹⁰¹² Cassese, for example, argues:

as belligerent occupation is governed by the Fourth Geneva Convention and customary international law, it would be *contradictory* to subject occupation to norms relating to international conflict while relating the conduct of armed hostilities between insurgents and the Occupant on the strength of the norms relating to *internal* conflicts.¹⁰¹³

It has been held by the ICJ that the law of belligerent occupation – as a subset of the law of IAC – even applies to occupied area that is not a State.¹⁰¹⁴ The underlying motiva-

¹⁰⁰⁷ This was arguably the case in Iraq, 2003. While the United Kingdom was, *de iure*, an Occupying Power, it did not exercise effective control over the city of Basra. It must be emphasized, however, that the notion of effective control was here examined in light of the applicability of the ECHR. (2005r), *Al Skeini*, § 124, per Lord Justice Brooks.

¹⁰⁰⁸ Dinstein (2009c), 45.

¹⁰⁰⁹ U.S. Department of Army (1956), § 360.

¹⁰¹⁰ Cassese (2005), 420; Dinstein (2009c), 100; Akande (2012b); Akande (2012a), 46 ff.

¹⁰¹¹ (2005d), HCJ 769/02, *The Public Committee Against Torture in Israel v. The Government of Israel* (11 December 2005), §§ 16-22; (2004k), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004*; (2005a), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment of 19 December 2005; (2007h), *The Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, *Décision sur la confirmation des charges* (29 January 2007), § 200; (2007g), *The Prosecutor v. Katanga and Chui*, Case No. ICC-01/04-02/07, *Décision sur la confirmation des charges* (26 September 2008), § 240.

¹⁰¹² Discussing this issue: University Centre for International Humanitarian Law (2005), 20; Naert (2010), 490; Lubell (2010), 252; Paulus & Vashakmadze (2009), 115; Melzer (2008), 157; Ferrero (2012), 122 ff.

¹⁰¹³ Cassese (2005), 420.

¹⁰¹⁴ (2004k), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004*, §§ 144-177. In regards Israel’s conduct vis-à-vis the Palestinian territories, it held that, notwithstanding the fact that the Palestinian territories are not a State, the conflict between Israel and the Palestinians falls under the umbrella of CA 2(1), as it concerns a situation of occupation arising from a conflict between Israel and its neighbouring countries.

tion for these conclusions is that in respect of OCCUPCOIN the question is not whether a conflict between the Occupying Power and the insurgents qualifies as IAC or NIAC, but to what law the Occupying Power is bound in its relationship with individuals present in the occupied territory. In that light, “it is the law of occupation and other rules of international armed conflict (including the law of targeting) that conditions how the occupier may respond to an uprising in the foreign territory of which it has temporary occupation. [...] To determine otherwise would be to ignore much of the protections to which occupied people are entitled.”¹⁰¹⁵

Following this approach, as with TRANSCOIN, the insurgents do not qualify as a party to an IAC, and the conduct of the counterinsurgent Occupying Power vis-a-vis insurgents is regulated by the relevant law of IAC designed to govern the vertical relationship between, on the one hand, a party to the conflict and, on the other hand, civilians.¹⁰¹⁶ This implies that the counterinsurgent Occupying Power must view insurgents as civilians who either engage in criminal conduct or in conduct amounting to DPH. In other words, the question is not whether the insurgents are a party to an armed conflict, but whether they are a party to the hostilities.¹⁰¹⁷

2.2. Applicability of the Law of NIAC to Counterinsurgency Operations

This paragraph examines the applicability of the law of NIAC to counterinsurgency operations. This is relatively straightforward in the context of NATCOIN as it constitutes a conflict that by definition is non-international as it not only takes place between the counterinsurgent State and non-State insurgents, but is limited to the territory of the counterinsurgent State.

SUPPCOIN and consensual TRANSCOIN both constitute cases of foreign intervention with the consent or at the invitation of another State B which itself is already engaged in NATCOIN operations against insurgents. It is widely accepted,¹⁰¹⁸ despite attempts to the contrary,¹⁰¹⁹ that the mere fact that foreign States intervene on the territory of State B does not cause a shift in the existing character of the conflict in State B, i.e. it remains non-international. The consent and invitation indicate that the two States are not opposing enemies whose relationship demonstrates *animus belligerendi*.

It is, for example, therefore that in respect of Afghanistan, as of 19 June 2002, the majority opinion is that a NIAC has been taking place¹⁰²⁰ between, on the one hand, the government of Afghanistan, with support of international military forces combined in ISAF,¹⁰²¹ and, on the other hand, “individuals and armed groups of diverse backgrounds, motivations and

¹⁰¹⁵ Akande (2012a), 47-48.

¹⁰¹⁶ This may explain why the Israel Supreme Court arrived at a similar conclusion in the *Targeted Killings* case when holding that “[...] the fact that the terrorist organisations and their members do not act in the name of a state does not turn the struggle against them into a purely internal state conflict.” (2005d), HCJ 769/02, *The Public Committee Against Torture in Israel v. The Government of Israel* (11 December 2005), § 21. See also Cassese (2005), 420.

¹⁰¹⁷ ICRC (2009), 84; Melzer (2008), 273.

¹⁰¹⁸ Fleck (2008b), 605; Kleffner (2010b), 59; (2009h), *The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Confirmation of Charges Decision* (15 June 2009), § 246.

¹⁰¹⁹ Aldrich (2000), 62-63.

¹⁰²⁰ Duffy (2005), 256; UNAMA & Afghanistan Independent Human Rights Commission (2010); Schmitt (2009), 309; Ducheine & Pouw (2009), 65; Human Rights Watch (2007), 79; Hampson (2012), 265,

¹⁰²¹ ISAF supports the government of Afghanistan on the basis of Security Council Resolution 1386 of 20 December 2001, which endorsed the Bonn Agreement, in which Afghan political factions had agreed to the stationing of ISAF.

command structures including those characterized as the Taliban, the Haqqani network, Hezb-e-Islami and al-Qaida affiliates such as the Islamic Movement of Uzbekistan, Islamic Jihad Union, Lashkari Tayyiba and Jaysh Muhammad.”¹⁰²²

More controversial, however, is the applicability of the law of NIAC to the relationship between the counterinsurgent State and insurgents in the contexts of non-consensual TRANSCOIN and OCCUPCOIN.

To recall, it was previously concluded that arguments could be made that it is the law of IAC that governs the relationship between the counterinsurgent State and insurgents in those situations. However, the majority view is that hostilities between the counterinsurgent State and members of the armed forces of insurgency movements in both contexts should be regarded as separate armed conflicts that qualify as NIAC when such insurgency movements can be viewed as a party to a separate armed conflict when they operate *independently* from another State.¹⁰²³ Arguments in favor of this conclusion differ. Criticism has been expressed, for example, on the Israel HCJ’s conclusion in the *Targeted Killings* case that “[t]he fact that the terrorist organizations and their members do not act in the name of a State does not turn the struggle against them into a *purely internal state conflict*” and thus that “[c]onfronting the dangers of terrorism constitutes part of the international law dealing with armed conflicts of international character.”¹⁰²⁴ In his comment on this case, Schöndorf remarks that “the fact that a conflict is not an internal one is not sufficient to substantiate the conclusion that it is an international armed conflict. Articles 2 and 3 of the Geneva Conventions appear inconsistent with the line of argument adopted by the Court on this point.”¹⁰²⁵ Indeed, among commentators, the most common argument is that in view of their non-State nature, it follows that the conflict cannot qualify as an IAC, as this would upset the State-oriented party-structure of the concept of IAC, and thus would have to qualify as a NIAC.¹⁰²⁶ As argued by the ICRC, “any other view would discard the dichotomy in all armed conflicts between the armed forces of the parties to the conflict and the civilian population; it would also contradict the definition of international armed conflicts as confrontations between States and not between States and non-State actors.”¹⁰²⁷

In addition, it has been argued that the applicability of the relevant framework of LOAC pertaining to CA 3-NIACs is preferable over the applicability of the law of IAC, as it is thought that non-State organized armed groups are unable to comply with the many demands set forth in the law of IAC, which may eventually undermine their willingness at all to comply with LOAC. CA 3, instead, is designed for armed conflicts in which non-State organized armed groups are a party as it contains basic obligations.¹⁰²⁸

¹⁰²² UNAMA & Afghanistan Independent Human Rights Commission (2010),

¹⁰²³ Support for this view can be found in (1999m), *The Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment of 15 July 1999 (Appeals Chamber)*, § 84, in which it was held that each separate armed conflict has to be qualified on its own merits, and (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986 (Merits)*, § 219, where the ICJ held that, besides the IAC between the US and Nicaragua, a NIAC existed between Nicaragua and the *contras*.

¹⁰²⁴ (2005d), *HCJ 769/02, The Public Committee Against Torture in Israel v. The Government of Israel (11 December 2005)*, § 21 (emphasis added).

¹⁰²⁵ Schöndorf (2007), 304.

¹⁰²⁶ Ferrero (2012), 124, 125 and 128; Milanovic (2007), 383-386; Arai-Takahashi (2010), 300-303; Lubell (2012), 434; Sassòli (2006), 8-9; Murphy (2007), 14-32; Jinks (2004), 189; Paulus & Vashakmadze (2009), 111; Kreß (2010), 245;

¹⁰²⁷ ICRC (2009), 23-24.

¹⁰²⁸ Ferrero (2012), 124, 125 and 128; Lubell (2012), 434.

Having addressed the principal reasons for qualifying the situational contexts as NIACs, it is of relevance to recall that the concept of NIAC itself involves two types recognized under LOAC, namely (1) CA 3-NIACs and (2) AP II-NIACs.

In view of the above, two important issues require examination. *Firstly*, does the horizontal scope of CA 3 or Article 1 AP II accommodate all of the situational contexts that seemingly qualify as NIACs? *Secondly*, when is the threshold of CA 3 or AP II crossed, allowing the relevant law of NIAC to become applicable at all? While the latter is an assumption in the present study, it is nonetheless of relevance given the difficulty in establishing the crossing of the thresholds of CA 3 and AP II in the context of insurgency.

Both questions will be addressed consecutively in respect of CA 3 and AP II respectively.

2.2.1. CA 3-NIACs

2.2.1.1. The Applicability of the Law of CA 3-NIAC to Counterinsurgency Operations

CA 3 delineates its scope of applicability to “armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties,” to be determined in each single case.¹⁰²⁹ This provision constitutes a major deviation from the traditional, sovereignty-focused view on war, for CA 3 recognized that non-State actors who were not formally recognized as belligerents, and who could not be considered as agents of a State as a result of their affiliation therewith could become a party to a conflict.¹⁰³⁰

However, this phrase has been subject of much debate in respect of its ability to accommodate so-called transnational use of force, i.e. situations where a State applies combat power on the territory of another State not against that State, but against a non-State armed group. In the context of this study, this situation is encapsulated in the concept of TRANSCOIN. As noted previously, examples of such situations are commonplace: the use of force by Uganda and Rwanda against rebels in the Democratic Republic of the Congo, the Israel intervention in Lebanon to attack Hezbollah; operation ‘Phoenix’ by Colombia in Ecuador against the FARC; Turkish military operations on the territory of Iraq against the PKK; US drone attacks in Pakistan against Al Qaeda and the Taliban, and so forth. The principal issue is that, when interpreting both CA 2 and CA 3 (as well as Article 1 AP II) in a strict fashion, these situations fall outside the concepts of both IAC and NIAC. As to the former, transnational operations by a counterinsurgent State against insurgents on the territory of another State cannot qualify in and by itself as an inter-State armed conflict or belligerent occupation as the insurgents are not a State. As to the latter, these conflicts are not strictly of a ‘non-international’ nature, as they are carried out on the territory of another State, so there is an international element. In addition, when reading CA 3 (and Article 1 AP II), it could be concluded that the applicability of both provisions is, in geographical terms, limited to conflicts taking place on the territory of one Contracting Party.

This conundrum has been subject of much debate in the past years, and was raised mostly as a result of the US position vis-à-vis its perceived global armed conflict against Al Qaeda and terrorism in general. Many have proposed new approaches,¹⁰³¹ including new types of conflicts, but these have mostly been rejected. The majority view is that the traditional di-

¹⁰²⁹ (2003n), *Rutaganda v. The Prosecutor, Case No. 96-3-A, ICTR, Appeals Chamber Judgment (26 May 2003)*, § 93: “The definition of an armed conflict is termed in the abstract, and whether or not a situation can be described as an ‘armed conflict’, meeting the criteria of Common Article 3, is to be decided upon on a case by-case basis.”

¹⁰³⁰ Moir (2002), 1 ff.

¹⁰³¹ See, for example, Corn (2007), 295; Schöndorf (2004), 26.

chotomy between IAC and NIAC persists and that LOAC is sufficiently flexible to face these ‘new’ conflict-constructs.¹⁰³²

In light of the horizontal scope of CA 3, two issues are attached to this phrase: (1) for a situation to qualify as a CA 3-NIAC, when is a situation of conflict “an armed conflict *not of an international character*”; and (2) what is the meaning of the word “one” in the phrase “occurring in the territory of *one* of the High Contracting Parties”?

2.2.1.1.1. “In the Territory of *One* of the High Contracting Parties”

CA 3 states that it applies to armed conflicts “in the territory of one of the High Contracting Parties”. The phrase contains a *geographical* element, the scope of which is disputed. It is uncontroversial that this phrase refers to *internal* NIACs, i.e. armed conflicts between a State Party to the Geneva Conventions and a non-State opponent taking place on the territory of that State. The language of CA 3 strongly suggests so and such a reading would logically follow from the drafting history of CA 3.¹⁰³³ In contrast to some persistent views to the contrary,¹⁰³⁴ it may, however, also be concluded from the preparatory works to CA 3 that its wording was not chosen to *exclude* its applicability to situations of armed conflicts between States and non-State armed groups taking place on another State’s territory, or on more than one State’s territory.¹⁰³⁵ All that is required is a territorial link with a State Party to the GCs. As explained by Melzer,

“[...], as the applicability of Article 3 GC I to IV, contrary to Article 2 GC I to IV, does not require the involvement of a contracting State as a party to the conflict, it is only logical that this criterion was replaced by the prerequisite of a territorial link to a contracting State. The legislative novelty of Article 3 GC I to IV was that each contracting State established binding rules not only for its own conduct, but also for that of the involved non-State parties. The authority to do so derives from the contracting State’s domestic legislative sovereignty, wherefore a territorial requirement was incorporated in Article 3 GC I to IV.”¹⁰³⁶

¹⁰³² Akande (2012a), 71; Lubell (2012), 439; Bethlehem (2012), 464 ff.

¹⁰³³ Murphy (2007), 10; Bartels (2009), 63; Cerone (2007), 12, arguing that a reading limiting the applicability of CA 3 to internal NIACs only “[...] comports with the notion that the provisions of Common Article 3 were drafted against the backdrop of state authority and jurisdiction over the battlefield, an authority and jurisdiction which would not exist (or would exist to a much lesser extent) outside of the state’s authority.” It may be noted that the draft text of CA 3 that appeared before the Diplomatic Conference of 1949 referred to “all cases of armed conflict which are not of an international character which may occur in the territory of *one or more* of the High Contracting Parties, [...]”.¹⁰³³ The words “or more” were eventually omitted from the final text. As explained by Bartels, in the Final Record “no mention is made of the reason for omitting ‘or more’. It is possible that so-called off-the-record ‘hallway diplomacy’ gave rise to this change, but it seems more plausible, in view of the recorded discussion in the Special Committee, that at some point the words ‘or more’ were felt to be void because everyone seemed to agree that the type of armed conflict being discussed was *purely internal in character*” (Bartels (2009), 63 (emphasis added)).

¹⁰³⁴ In relation to its conflict with Al Qaeda, the US Administration has supported this restrictive reading of CA 3 to conclude that CA 3 could not apply to Al Qaeda operatives detained by the US, arguing that the conflict did not take place “in the territory of *one* of the High Contracting Parties” (i.e. the US alone), but, potentially, on the territory of *any* High Contracting Party. Bybee (2005), 86. See also (1998), *The Prosecutor v. Alfred Musema, Case No. ICTR-96-13-A, Judgment of 27 January 2000 (Trial Chamber)*, § 248 (“non-international armed conflicts are situations in which hostilities break out between armed forces or organized armed groups within the territory of a *single* State” (emphasis added)).

¹⁰³⁵ For evidence, see the statements of the Mexican and Soviet delegates, (1949b), 336 and 327. See also Melzer (2008), 258. In contrast: Moir (2002), 31.

¹⁰³⁶ Melzer (2008), 258.

This extensive view finds widespread support among *inter alia*, legal scholars,¹⁰³⁷ the Statute of the ICTR,¹⁰³⁸ the U.S. Supreme Court,¹⁰³⁹ the ICRC¹⁰⁴⁰ as well as the ICJ,¹⁰⁴¹ and finds further corroboration by State practice.¹⁰⁴² The interpretation therefore, adhered to in the present study, is that the word “one” is to be read as “a”. “[B]ased on a textual reading and on a contextual approach that considers the reasoning and objective of the article”¹⁰⁴³ the applicability of CA 3 then stretches to an armed conflict between a State and non-State organized armed groups (or between such organized armed groups) as long as it takes place on the territory of a High Contracting Party to the GCs. As today (nearly) every State is a party to the Geneva Conventions, CA 3 has universal application. In addition, given the customary status of CA 3,¹⁰⁴⁴ any territorial limitation following from the text of CA 3 is rendered meaningless. In sum, CA 3 does not require (1) that the State in which the conflict occurs should also be a party to the conflict; (2) that a NIAC cannot take place in the territory of more than one State; and (3) that the State on which territory the conflict takes place is a High Contracting Party to the GCs.

2.2.1.1.2. “Armed Conflict Not of an International Character”

The phrase “armed conflict not of an international character” has been subject to much attention since the drafting stage. In the words of Farer: “[o]ne of the most assured things that might be said about the words ‘armed conflict not of an international character’ is that no one can say with assurance precisely what meaning they were intended to convey.”¹⁰⁴⁵ However, most attention was given to the meaning of the words “armed conflict” in the context of the vertical scope of CA 3 (see below), and not so much to the words “not of an international character.” It was quite clear from the outset that CA 3, as “an almost un-hoped for extension of Article 2” covering wars between States, was to cover “civil wars and internal conflicts, the dangers of which are sometimes even greater than those of international wars.”¹⁰⁴⁶ While on the one hand the reference to civil wars and internal conflicts may be viewed to exclude the applicability of CA 3 from situations of less gravity in terms

¹⁰³⁷ Moir (2002), 36 (“there is no question of the application of [Common] Article 3 being dependent upon any criteria other than the existence of an armed conflict in the territory of a High Contracting Party”); Sassòli (2006), 9; Murphy (2007); Bassiouni (2002); Jinks (2004), 189.

¹⁰³⁸ See Articles 1 and 7, extending the jurisdiction of the ICTR to violations of LOAC committed in Rwanda and its neighbouring States.

¹⁰³⁹ (2006b), *Hamdan v. Rumsfeld (Judgment of 26 June 2006)*

¹⁰⁴⁰ ICRC (2008c), 3: “Indeed, any armed conflict between governmental armed forces and armed groups or between such groups cannot but take place on the territory of one of the Parties to the Convention.”

¹⁰⁴¹ (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986 (Merits)*, § 218, referring to its ruling in (1949a), *Corfu Channel Case (United Kingdom v. Albania), Judgment of 9 April 1949 (Merits)*, 22, that CA 3 reflects “elementary considerations of humanity, even more exating in peace than in war,” pointing at the universal applicability of the provision (arguably even to IAC).

¹⁰⁴² Brown (1996).

¹⁰⁴³ Lubell (2010), 101.

¹⁰⁴⁴ (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986 (Merits)*, § 218, referring to its ruling in (1949a), *Corfu Channel Case (United Kingdom v. Albania), Judgment of 9 April 1949 (Merits)*, 22, that CA 3 reflects “elementary considerations of humanity, even more exating in peace than in war,” pointing at the universal applicability of the provision (arguably even to IAC).

¹⁰⁴⁵ Farer (1971), 43.

¹⁰⁴⁶ Pictet (1960), 28.

of the vertical scope of NIAC,¹⁰⁴⁷ at the same time it could be understood to mean that, in terms of its horizontal scope, the words “not of an international character” would exclude armed conflicts on the territory of another State party to the conflict or involving another State. In fact, a draft version of CA 3, presented at the XVIIth International Red Cross Conference in Stockholm, specifically referred to “cases of *civil war, colonial conflicts, or wars of religion*,”¹⁰⁴⁸ as forms of conflict “not of an international character;” words that eventually were omitted. However, at the same time, this also corroborates that from the outset the drafters viewed the words “armed conflict not of an international character” to be essentially *limited* to internal armed conflicts.¹⁰⁴⁹ This limited applicability may also be concluded from the ICRC Commentary on CA 3, which interprets the phrase “not of an international character” to mean armed conflicts “which are in many respects similar to an international war, but take place *within the confines of a single country*,” despite its call that CA 3 was to be applied as wide as possible.¹⁰⁵⁰ Nowhere in the *travaux préparatoires*, nor in the ICRC Commentary is there any indication that the words “armed conflicts not of an international character” were to include conflicts between a State and a non-State armed group taking place in the territory of another State.

Today, there is, however, increasing support for the view that the phrase “armed conflict not of an international character” is to be understood to go beyond the limits of internal war. A *first* basis for support can be found in the removal from the draft text of CA 3 of “civil war, colonial conflicts, or wars of religion.” Rather than weakening the text, the removal can be said to have enlarged its scope.¹⁰⁵¹ Indeed, such extension would be quite logical. As explained by Cerone

[i]t could be argued that use of the term “non-international,” instead of internal, was a conscious choice intended to ensure that all armed conflicts were covered. Under that reading of “non-international” armed conflict, the phrase would encompass any armed conflict other than one that was international in the sense of Common Article 2 (i.e. interstate). This position rests on the logic of the Convention regime in the context of the international legal system. If Common Article 3 would apply even in the context of a purely internal conflict, then *a fortiori* it would apply to a conflict with a transnational dimension, in which the principle of non-intervention would have less force.¹⁰⁵²

A *second* basis for support is the practice of the ICJ and ICTY. Both institutions view the rules of CA 3 as ‘elementary considerations of humanity’ that constitute a minimum yardstick under customary international law for any armed conflict, to include IACs.¹⁰⁵³ It logically follows that if its norms apply to IACs – which by definition are international – CA 3 clearly applies extraterritorially. Also, in *Tadic*, the ICTY explained that an armed conflict transfers from a NIAC to an IAC in two cases only:

in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops,

¹⁰⁴⁷ See below.

¹⁰⁴⁸ Pictet (1960), 31.

¹⁰⁴⁹ See also Cullen (2010), 7-61, and his analysis of the origins of NIAC.

¹⁰⁵⁰ Pictet (1960), 36.

¹⁰⁵¹ Pictet (1952b), 43.

¹⁰⁵² Cerone (2007), 11-12.

¹⁰⁵³ (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986 (Merits), § 218 (citing (1949a), *Corfu Channel Case (United Kingdom v. Albania)*, Judgment of 9 April 1949 (Merits), 22); confirmed in (1995h), *The Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber), § 102.

or alternatively if (ii) some of the participants in the internal armed conflicts act on behalf of that state.

This implies that in situations other than the two cited by the ICTY, an armed conflict involving a State and a non-State armed group is to be viewed as a NIAC. This was also the position of the US Supreme Court in *Hamdan v. Rumsfeld*.¹⁰⁵⁴ It strengthened the view that, naturally, the phrase “not of an international character” refers firstly to internal armed conflicts, but that it should not be interpreted to limit the scope of application of CA 3 merely to such armed conflicts. According to the US Supreme Court, the phrase should be taken literally, i.e. CA 3 covers any armed conflict that “does not involve a clash between nations (whether signatories or not),”¹⁰⁵⁵ thus affirming the residual function of CA 3.¹⁰⁵⁶ Such types of conflict include also conflicts between States and non-State armed groups taking place on the territory of another State.¹⁰⁵⁷ This position finds support among numerous legal scholars.¹⁰⁵⁸ In sum, it may therefore be concluded that what distinguishes CA3-NIAC from IAC lies in the *nature* of the parties to the conflict, and not in the territorial location of the armed conflict.¹⁰⁵⁹ As a result, it follows that a CA 3-NIAC involves all armed conflicts that cannot qualify as an IAC. As such, it accommodates all situational contexts under examination in this study.

2.2.1.2. The CA 3-Threshold

The issue of when an armed conflict arises in the meaning of CA 3 has proven to be a major source of controversy. The drafting history and the ICRC Commentary to CA 3 clearly point out that the phrase “armed conflict not of an international character” was quite controversial from the outset, received a great deal of attention, and was eventually deliberately kept vague. The phrase is the outcome of a compromise between unease over too much precision – restricting the application of CA 3 to certain situations only, and excluding others¹⁰⁶⁰ – on the one hand, and the desire for deliberate ambiguity – in an attempt to encour-

¹⁰⁵⁴ (2006b), *Hamdan v. Rumsfeld* (Judgment of 26 June 2006).

¹⁰⁵⁵ (2006b), *Hamdan v. Rumsfeld* (Judgment of 26 June 2006).

¹⁰⁵⁶ In addition to its intended focus on armed conflicts other than IACs, it is also generally accepted that the material content of Common Article 3, in a supplementary manner, applies to IACs. In the *Nicaragua Case*, the ICJ held that there is “no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called ‘elementary considerations of humanity’.” See (1986b), *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Merits, Judgment of 27 June 1986, 113-114. (1986a), *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Judgment of 27 June 1986 (Merits) This position of the ICJ has been confirmed by the ICTY in the *Tadic* Case, leading it to conclude that, “at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant.” See (1995h), *The Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber), § 102.

¹⁰⁵⁷ In addition, nor the text of CA 3, neither the Commentary limit the applicability of CA 3 to conflicts waged between governmental armed forces and non-State armed groups. In fact, CA 3 remains silent on a definition of the parties to the NIAC. Neither does it demand that the government is a party to the conflict. This opens the way for the conclusion that, as put by Moir, “[i]t is certainly not the case that, in order for Article 3 to be applicable to a situation, the conflict must simply be between government forces and some rebel organization. An armed conflict between two or more insurgent factions, whether or not it involves government troops or the police, can thus still be regulated by the Article” (Moir (2002), 39). Thus, in contrast to Additional Protocol II, CA 3 applies to situations of failed States, such as Somalia.

¹⁰⁵⁸ Kretzmer (2005), 195; Arai-Takahashi (2010), 302.

¹⁰⁵⁹ Zegveld (2002), 136 (emphasis added).

¹⁰⁶⁰ Castrén (1966), 85.

age the application of CA 3 in dubious cases¹⁰⁶¹ – on the other hand.¹⁰⁶² The controversy over CA 3-applicability relates to two issues: (1) when does an “armed conflict not of an international character” arise? (2) Which situations of conflict does the phrase “armed conflict not of an international character” cover? The latter question is particularly controversial in view of conflicts between a State and insurgents not taking place on the territory of that State. This will be dealt with in more detail in Chapter V, when addressing the question of applicability of the law of CA 3-NIACs to counterinsurgency situations.

The first issue – when does a CA 3-NIAC arise – is equally of relevance. During the drafting stage of CA 3 the State delegates expressed their concern that the term “armed conflict” “[...] might be taken to cover *any act* committed by force of arms - any form of anarchy, rebellion, or even plain banditry.¹⁰⁶³ For example, if a handful of individuals were to rise in rebellion against the State and attack a police station, would that suffice to bring into being an armed conflict within the meaning of the Article?” The ICRC Commentary points out that the drafters left little doubt that CA 3 is to be applied to “genuine armed conflict” only, i.e. “armed conflicts, with armed forces on either side engaged in hostilities - conflicts, in short, which are *in many respects similar to an international war*, but take place within the confines of a single country. In many cases, each of the Parties is in possession of a portion of the national territory, and there is often some sort of front.” For an accurate understanding, the comparison with “international war” serves to indicate that “an armed conflict not of an international character” for the purposes of CA 3 has certain *de facto* characteristics that typically belong to an IAC, but certainly not to situations of “a mere act of banditry or an unorganized and short-lived insurrection.”¹⁰⁶⁴

While it is clear that “armed conflicts not of an international character” does not refer to “any act committed by force of arms – any form of anarchy, rebellion, or even plain banditry,” “[...] the line separating an especially violent situation of internal disturbances from the “lowest” level Article 3 armed conflict may sometimes be blurred and, thus, not easily determined.”¹⁰⁶⁵

Today, two major conclusions may be drawn regarding the vertical threshold of an “armed conflict not of an international character” as meant in CA 3. *Firstly*, despite the references to that extent in the drafting history of CA 3 and the ICRC Commentary, the phrase “armed conflict not of an international character” in CA 3 does not implicate that the applicability

¹⁰⁶¹ Pictet (1975), 16-17. See also Moir (2002), 32.

¹⁰⁶² Pictet (1985), 47. See also Moir (2002), 32-33, stating that “the open texture of common Article 3 [can be seen] as a strength rather than a weakness, permitting humanitarian protection in as many situations as possible through a broad interpretation of its provisions.” See also Cullen (2005), 189.

¹⁰⁶³ This concern must be viewed in light of States’ outlook on international law and State sovereignty. States would subject their response to situations of domestic unrest and conflict only to the international laws of war upon recognition of belligerency, which required the fulfillment of quite stringent conditions. As such, the adoption of CA 3 was a major step for States as they were anxious that the threshold of CA 3 would include situations that normally would have belonged to the sovereign prerogative of domestic law enforcement.

¹⁰⁶⁴ Pictet (1958a), 35-36 (emphasis added). See also the list of “convenient criteria” seemingly introducing a high threshold approximating that of situations of *civil war* in the traditional sense (Pictet (1960), 35-36). However, the ICRC Commentary emphasizes that “[t]he above criteria are useful as a means of distinguishing a genuine armed conflict from a mere act of banditry or an unorganized and short-lived insurrection” and are not to be viewed as excluding the applicability of CA 3 to “cases where armed strife breaks out in a country, but does not fulfil any of the [conditions of the list] [...]” (Pictet (1958a), 36).

¹⁰⁶⁵ (1997c), *Abella v. Argentina, Case 11.137, IACtHR, Report No. 55/97, OEA/Ser.L/V/II.98, doc. 6 rev.*, § 153.

of CA 3 does not arise in situations of conflict not constituting a civil war.¹⁰⁶⁶ *Secondly*, it is now generally accepted that in its vertical scope, CA 3 extends to all armed conflicts falling within the horizontal scope of CA 3 provided: (1) that the clashes of violence are *protracted*, i.e. not sporadic, isolated and short-lived, but of a certain duration and intensity such that it requires a response of governmental armed forces; and (2) that the non-State armed group engaged in the conflict upholds a *level of organization* sufficient to qualify it as “party” to the conflict.¹⁰⁶⁷

The two parameters ensure that, as desired by the ICRC, CA 3’s scope of applicability is “as wide as possible,”¹⁰⁶⁸ while at the same time excluding its applicability from “banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law”, i.e. acts that are sporadic and unilateral, carried out by individuals or *ad hoc* groups and that do not necessitate the engagement of armed forces.¹⁰⁶⁹

2.2.1.2.1. Protracted Armed Violence

In *Tadić*, the ICTY Appeals Chamber did not further specify how ‘protracted’ should be interpreted. At first sight, the element of ‘protracted’ on the surface points at a *temporal* element to the definition of armed conflict, i.e. it suggests that the violence must have reached a certain *duration*.¹⁰⁷⁰ There is no requirement, however, that the hostilities are taking place on a *continuous* basis.¹⁰⁷¹ In other words, interruptions in the fighting do not necessarily interrupt the applicability of CA 3.¹⁰⁷² As suggested by the *Abella*-case, neither is there

¹⁰⁶⁶ The phrase “armed conflict not of an international character” was originally intended to refer to “civil wars and internal conflicts, the dangers of which are sometimes even greater than those of international wars,” (Pictet (1960), 28).

¹⁰⁶⁷ The origin for these conditions is found in (1999m), *The Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment of 15 July 1999 (Appeals Chamber)*, § 70) and has been further developed in other cases of the *ad hoc* tribunals of the ICTY and ICTR. It may be concluded that the *Tadić*-formula is also adopted in Article 8(2)(d) and (f)¹⁰⁶⁷ of the Rome Statute of the International Criminal Court (ICC). For an extensive analysis of the meaning of both provisions for the meaning of the concept of non-international armed conflict in LOAC, see Cullen (2010), 159-185. Specifically on the debate of whether Article 8(2)(f) reflects the *Tadić*-formula, or creates another threshold, see also Sassòli & Bouvier (2006), 110; Provost (2002), 268-269; Schabas (2007a), 116 and 131; Meron (1999), 54; Meron (2000a), 260; Bothe (2002), 423. See also (2004t), *The Prosecutor v. Slobodan Milosevic, Decision on Motion for Judgment of Acquittal (Milosevic Rule 98bis Decision), Case No. IT-02-54-T, (16 June 2004)*, § 20; (2005o), *The Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment of 30 November 2005 (Trial Chamber)*, § 87 for confirmation by the ICTY that Article 8(2)(f) reflects the *Tadić*-formula.

¹⁰⁶⁸ Pictet (1958a), 36. According to the ICRC, such wide applicability is justified, as it does not, on the one hand, hamper in any way a State’s sovereign right to quell situations of internal conflict, nor does it grant non-State fighters more authority. On the other hand, such wide applicability of CA 3 facilitates a smooth transition of essential rules of treatment that already existed in domestic law, when dealing with situations of internal disturbances and tensions, to situations of armed conflict. This broad range of applicability has been criticized by some authors as expanding “its scope further than intended.” See Moir (2002), 35-6; Cullen (2005), 84.

¹⁰⁶⁹ (1997n), *Tadić*, § 562. See also (2005o), *The Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment of 30 November 2005 (Trial Chamber)*, § 89.

¹⁰⁷⁰ (2008l), *The Prosecutor v. Boskoski & Tarculovski, IT-04-82-T, Judgment of 10 July, 2008 (Trial Chamber)*, § 186.

¹⁰⁷¹ (2008l), *The Prosecutor v. Boskoski & Tarculovski, IT-04-82-T, Judgment of 10 July, 2008 (Trial Chamber)*, § 185: “what matters is whether the acts are perpetrated in isolation or as part of a protracted campaign that entails the engagement of both parties in hostilities.”

¹⁰⁷² Zimmermann (1999), 285. This should not be confused with the situation in which the use of violence is sporadic, followed by a period of relative calmness. In other words, there is a breaking point between situations in which the use of violence is exceptional and situations in which a period of calmness is exceptional.

a requirement that an armed conflict should be of a certain minimum duration.¹⁰⁷³ In other words, even isolated incidents, with a high degree of intensity and organization of the parties involved may arguably involve an armed conflict. The emphasis on duration to determine whether hostilities are protracted is, moreover, problematic, as it would jeopardize the applicability of CA 3 to hostilities in the early stages of conflict, “irrespective of the degree of armed violence or the number of armed confrontations.”¹⁰⁷⁴

Instead, the ICTY, has shifted towards a focus on the *intensity* of the armed conflict.¹⁰⁷⁵ In the cases of *Haradinaj* and *Boskoski and Tarculovski* the ICTY relied on a number of indicative factors, to include:¹⁰⁷⁶

- 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;
- whether the conflict has attracted the attention of the UNSC, and whether any resolutions on the matter have been passed;
- the number of civilians forced to flee from the combat zones;
- the type of weapons used, in particular the use of heavy weapons, and other military equipment, such as tanks and other heavy vehicles;
- the blocking or besieging of towns and the heavy shelling of these towns;
- the extent of and the number of casualties caused by shelling or fighting;
- the quantity of troops and units deployed; existence and change of front lines between the parties;
- the occupation of territory, and towns and villages;
- the deployment of government forces to the crisis area;
- the closure of roads; cease fire orders and agreements, and the attempt of representatives from international organisations to broker and enforce cease fire agreements.¹⁰⁷⁷

¹⁰⁷³ (1997b), *Abella et al. v. Argentina (La Tablada)*, Case No. 11.137, Decision of 18 November 1997, § 152, in which the IACiHR accepted the existence of a NIAC lasting 36 hours.

¹⁰⁷⁴ Cullen & Öberg (2008).

¹⁰⁷⁵ (2008m), *The Prosecutor v. Ramush Haradinaj et. al.*, IT-04-84-T, Judgment of 3 April, 2008 (Trial Chamber), § 49; (2008l), *The Prosecutor v. Boskoski & Tarculovski*, IT-04-82-T, Judgment of 10 July, 2008 (Trial Chamber), § 175. The focus on intensity does not imply that the protractedness in terms of duration of the hostilities has become an irrelevant aspect. To the contrary, “care is needed not to lose sight of the requirement for protracted armed violence in the case of [an, sic] internal armed conflict, when assessing the intensity of the conflict.” However, protractedness now appears to have a function as an additional supportive factor for the determination of the level of intensity. (2008l), *The Prosecutor v. Boskoski & Tarculovski*, IT-04-82-T, Judgment of 10 July, 2008 (Trial Chamber), § 175. See also (1998m), *The Prosecutor v. Delalic, Mucic, Delic and Landžo (the Celebici Case)*, Case No. IT-96-21-T, Judgment of 16 November 1998 (Trial Chamber), § 184; (2005o), *The Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment of 30 November 2005 (Trial Chamber), § 84; (2008m), *The Prosecutor v. Ramush Haradinaj et. al.*, IT-04-84-T, Judgment of 3 April, 2008 (Trial Chamber), § 38. See also (1997b), *Abella et al. v. Argentina (La Tablada)*, Case No. 11.137, Decision of 18 November 1997, § 152, in which the IACiHR held that “[...] it is important to understand that application of Common Article 3 does not require the existence of large-scale and generalized hostilities or a situation comparable to civil war in which dissident armed groups exercise control over parts of national territory.” Instead, “[c]ommon article 3 is generally understood to apply to low intensity and open armed confrontations between relatively organized armed forces or groups that take place within the territory of a particular state.”

¹⁰⁷⁶ (2008l), *The Prosecutor v. Boskoski & Tarculovski*, IT-04-82-T, Judgment of 10 July, 2008 (Trial Chamber), § 177 ff.

¹⁰⁷⁷ (2008l), *The Prosecutor v. Boskoski & Tarculovski*, IT-04-82-T, Judgment of 10 July, 2008 (Trial Chamber), § 177.

This is not an all-inclusive list of factors; other facts may also provide an indication of the intensity of the

Interestingly, particular for the purposes of the present study, the ICTY also focused on the use of force by governmental authorities, in particular, *how certain human rights are interpreted*, such as the right to life and the right to be free from arbitrary detention, *in order to appreciate if the situation is one of armed conflict*.¹⁰⁷⁸

2.2.1.2.2. Organized Armed Groups

The second criterion for recognition of a CA 3-NIAC involves the organization of non-State armed groups. A reasonable interpretation of CA 3 implicates that, in order to recognize a non-State armed group as a “party” to the armed conflict, a certain *minimum* level of organization must be present. The question, however, arises as to what level of organization is required. The Israel HCJ, in its *Targeted Killings*-decision, held that the mere facts that “a terrorist organization is likely to have considerable military capabilities,” and that “[a]t times, they have military capabilities that exceed those of states’ support the need to characterized hostilities between a state and such terrorist organizations as an armed conflict. Such characterization would address the Court’s expressed need to take the struggle beyond ‘the state and its penal laws’.”¹⁰⁷⁹ Even when the HCJ had stated this to support a conclusion that the conflict under scrutiny was governed by the law of NIAC (as noted, it did not: it held it was governed by the law of IAC) it may however be doubted whether this is sufficient.¹⁰⁸⁰ Indeed, neither CA 3, nor the ICRC Commentary (except for the list with indicative criteria) require an organization under a responsible authority and with the ability to implement LOAC to the extent required by AP II or the requirements of belligerency.¹⁰⁸¹ In addition, CA 3 does not require that non-State armed groups have control over a part of the territory of the State to an extent that they are able to carry out sustained and concerted military operations to implement CA 3,¹⁰⁸² let alone that they act as a *de facto* government, as required by the concept of belligerency.¹⁰⁸³ Control over territory undoubtedly strengthens the (progress towards) existence of an armed conflict. However, and despite arguments to the contrary,¹⁰⁸⁴ “the lack of territorial control [...] need not necessarily preclude its application.”¹⁰⁸⁵

Nevertheless, the requirement of organization, as put by Moir

hostilities. Neither is the list cumulative; if one of the factors indicated by the Trial Chamber cannot be established, other factors may provide sufficient evidence of the intensity required.

¹⁰⁷⁸ (2008I), *The Prosecutor v. Boskoski & Tarculovski*, IT-04-82-T, *Judgment of 10 July, 2008* (Trial Chamber), § 178 (emphasis added).

¹⁰⁷⁹ (2005d), *HCJ 769/02, The Public Committee Against Torture in Israel v. The Government of Israel* (11 December 2005), § 21.

¹⁰⁸⁰ Schöndorf (2007), 304.

¹⁰⁸¹ (2008I), *The Prosecutor v. Boskoski & Tarculovski*, IT-04-82-T, *Judgment of 10 July, 2008* (Trial Chamber), § 197.

¹⁰⁸² This is required by Article 1(1) of AP II.

¹⁰⁸³ Technically, this requirement under the traditional laws of war could never be a requirement for application of CA 3, as the Geneva Conventions (as the principle successor of the laws of war) are not applicable to it. Provost (2002), 266.

¹⁰⁸⁴ During the Diplomatic Conference, some delegates insisted on the continued use, and formal incorporation of the requirements of belligerency, to include territorial control, into Common Article 3. See Pictet (1952b), 49-50. Territorial control also features repeatedly in the “indicative criteria” proposed by Pictet in the Commentary to Common Article 3. Also, Draper insisted on the idea of a minimum degree of organization of the non-State armed group would be insufficient for the insurgents to comply with Common Article 3. In addition, he proposed that the insurgents should control to some degree (a part of) national territory. See Draper (1965), 90.

¹⁰⁸⁵ Moir (2002), 38.

[...] would appear to support the proposition that, in order for insurgents to be a ‘party’ to an internal conflict, the level or organisation required probably must be such that they are capable of carrying out the various obligations imposed upon them by Article 3, which imposes duties and obligations on all sides to the conflict. It is therefore difficult to accept that an armed conflict can exist without the rebels being capable of observing these obligations. This, in turn, seems unlikely without the insurgents being organised (at least to a degree) along military lines, including a responsible command structure and controlling authority.¹⁰⁸⁶

A similar view is expressed by the ICRC: “[a] party to an armed conflict is usually understood to mean armed forces or armed groups with a certain level of organization, command structure and, therefore, the ability to implement international humanitarian law.”¹⁰⁸⁷ This organization-requirement seems no more than reasonable, because without it CA 3 would apply to conflicts with a “[...] a random group of looters and rioters” which are “undoubtedly difficult to accept as being a party to a serious conflict.”¹⁰⁸⁸ Though such an outcome would support the ICRC’s desire that CA 3 must be applied as wide as possible, it cannot go as far as to demand from a loosely and an on *ad hoc*-basis assembled group of rebels to comply with the laws of war in their relation with the government, not even if these laws contain an absolute minimum of obligations.¹⁰⁸⁹

According to the ICTY, a non-State party to the conflict is sufficiently organized for CA 3 to become applicable if it “[...] has a structure, a chain of command and a set of rules as well as the outward symbols of authority” and that its members do not act on their own but conform “to the standards prevailing in the group” and are “subject to the authority of the head of the group”. Thus, for an armed group to be considered organized, it would need to have “some hierarchical structure and its leadership requires the capacity to exert authority over its members.”¹⁰⁹⁰ It is important to stress here that the ICTY does not require that the leadership *de facto* exert authority over its members; it should merely have the *capacity* to do so. An indication thereof is the extent to which the group is able to respect LOAC, even if they show a reluctance to comply.¹⁰⁹¹ There is no requirement that a non-State entity actually acts in conformity with LOAC.¹⁰⁹² However, if the non-State armed group does comply

¹⁰⁸⁶ Moir (2002), 36. See also ICRC (2008c), 3.

¹⁰⁸⁷ ICRC (2003), 18-19. See also Moir (2002), 36; ICRC (2008c), 3; Kolb & Hyde (2008), 78; and (2008m), *The Prosecutor v. Ramush Haradinaj et. al.*, IT-04-84-T, Judgment of 3 April, 2008 (Trial Chamber), § 60 (“an armed conflict can exist only between parties that are sufficiently organized to confront each other with military means”); (2005o), *The Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment of 30 November 2005 (Trial Chamber), § 88-89; 94-134; (1997c), *Abella v. Argentina*, Case 11.137, LACtHR, Report No. 55/97, OEA/Ser.L/V.II.98, doc. 6 rev., § 152 (“[t]he concept of armed conflict, [which], in principle, requires the existence of organized armed groups that are capable of and actually do engage in combat and other military operations against each other”).

¹⁰⁸⁸ Moir (2002), 36.

¹⁰⁸⁹ Moir (2002), 37. See also Bond (1971)270 and Bond (1974), 54, stating that “Pictet apparently believes that even one man brandishing a gun in another’s face is non-international armed conflict within the meaning of Article 3.”

¹⁰⁹⁰ (2008l), *The Prosecutor v. Boskoski & Tarculovski*, IT-04-82-T, Judgment of 10 July, 2008 (Trial Chamber), § 195.

¹⁰⁹¹ Zegveld (2002), 34-5.

¹⁰⁹² This is not even a requirement in Article 1(1) of Additional Protocol II. The condition to implement the substantive rules of Additional Protocol II “*implies that it is not the effective respect for IHL which is required but rather the capacity to respect this body of law as resulting from the organisation of the group.*” A group is considered organized in terms of Article 1(4), if they “[...] are led by a responsible command and the chain of command is sufficiently effective for the implementation of the obligations incumbent on it under IHL.” IIHL & ICRC (2003), 5. Neither is the actual compliance with IHL a condition required of national liberation movements in the context of Article 1(4) of Additional Protocol I.

with LOAC, it of course would only contribute to the existence of an organization.¹⁰⁹³ The same applies to the opposite situation: if a non-State entity violates LOAC in accordance with a military strategy on order of the leadership, rather than on their own accord, this is indicative of a level of organisation sufficient to determine that the group is a party to an armed conflict.¹⁰⁹⁴

The ICTY has provided a list of indicative factors to establish the level of organization.¹⁰⁹⁵ They can be categorized as follows:

- 1) Factors pointing towards the *presence of a command structure* (to include the presence of a headquarters and staff, the dissemination of internal orders and regulations, communiqué's, spokespersons, command relationships, ranks, descriptions of duties of commanders, a chain of military hierarchy);¹⁰⁹⁶
- 2) Factors indicating the *capacity of carrying out operations in an organized manner* (see above);¹⁰⁹⁷
- 3) Factors indicating a *level of logistics* (to include the ability to recruit new members, the providing of military training, the organized supply of military weapons, the supply and use of uniforms and the existence of communications equipment for linking headquarters with units or between units);¹⁰⁹⁸
- 4) Factors indicating a *level of discipline and ability to implement the obligations of CA 3* (to include the establishment of disciplinary rules and mechanisms, training, the existence and effective dissemination of internal regulations);¹⁰⁹⁹
- 5) Factors indicating the *ability to speak with one voice* (to include the capacity to negotiate on behalf of the members of the group with representatives of the international community and the ability to negotiate and conclude cease-fire agreements or peace accords.)¹¹⁰⁰

As noted in the introduction, this study assumes the existence of an armed conflict. Therefore, the assumption is that the parameters of 'armed conflict' identified above have been fulfilled in those instances where it could be reasonably concluded that a conflict between the counterinsurgent State and insurgents is to be governed by the law of NIAC.

2.2.1.2.3. Some Remarks on the Role of the Vertical Scope in Determining the Applicability of the Law of CA 3-NIACs to Counterinsurgency Operations

As noted in the introduction, this study assumes the existence of an armed conflict. Therefore, the assumption is that not only a counterinsurgency situation fits within the horizontal scope of CA 3-NIAC (in so far this has been established above), but also that the parame-

¹⁰⁹³ (2008I), *The Prosecutor v. Boskoski & Tarculovski*, IT-04-82-T, *Judgment of 10 July, 2008 (Trial Chamber)*, § 195. See also Ducheine & Pouw (2009), 24.

¹⁰⁹⁴ (2008I), *The Prosecutor v. Boskoski & Tarculovski*, IT-04-82-T, *Judgment of 10 July, 2008 (Trial Chamber)*, § 205.

¹⁰⁹⁵ They include: "the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords." See (2008m), *The Prosecutor v. Ramush Haradinaj et. al.*, IT-04-84-T, *Judgment of 3 April, 2008 (Trial Chamber)*, § 160.

¹⁰⁹⁶ (2008I), *The Prosecutor v. Boskoski & Tarculovski*, IT-04-82-T, *Judgment of 10 July, 2008 (Trial Chamber)*, § 199.

¹⁰⁹⁷ (2008I), *The Prosecutor v. Boskoski & Tarculovski*, IT-04-82-T, *Judgment of 10 July, 2008 (Trial Chamber)*, § 200.

¹⁰⁹⁸ (2008I), *The Prosecutor v. Boskoski & Tarculovski*, IT-04-82-T, *Judgment of 10 July, 2008 (Trial Chamber)*, § 201.

¹⁰⁹⁹ (2008I), *The Prosecutor v. Boskoski & Tarculovski*, IT-04-82-T, *Judgment of 10 July, 2008 (Trial Chamber)*, § 202.

¹¹⁰⁰ (2008I), *The Prosecutor v. Boskoski & Tarculovski*, IT-04-82-T, *Judgment of 10 July, 2008 (Trial Chamber)*, § 203.

ters of ‘armed conflict’ identified above have been fulfilled. This implies that there is no further need to examine the fulfillment of these parameters when investigating whether the law of CA 3-NIAC applies in the situational contexts of counterinsurgency under examination in this study.

However, it is nonetheless imperative to demonstrate how the characteristics of insurgency complicate the determination of the existence of a NIAC, as a result of which it may have to be concluded that the relationship between the counterinsurgent State and the insurgents is not governed by LOAC at all (a situation which may happen in reality, but which has been excluded in this study given the assumption of the existence of an armed conflict) or that that relationship is not governed by the law of NIAC, but can still be governed by the law of IAC, given the fact that the counterinsurgent State is a party to an inter-State armed conflict (as may be the case in TRANSCOIN) or bound by the law of IAC because it is an Occupying Power.

To recall, in order to cross the vertical threshold of CA 3-NIAC, two obstacles must be overcome: (1) the armed violence between the counterinsurgent State and the insurgents must be sufficiently protracted and (2) the insurgency movement must be sufficiently organized to qualify as a party to the armed conflict.

In respect of the *first* requirement, it is submitted that the mere qualification of anti-government activities as insurgency does not automatically imply the use of armed violence by the insurgency. An insurgency movement may, particularly in its initial phase of existence, avoid hostilities and only resort to subversive techniques, such as “clandestine radio broadcasts, newspapers or pamphlets that openly challenge the control and legitimacy of the established authority,”¹¹⁰¹ or criminal violence, such as the organization and partaking in violent riots and demonstrations. In other words, the activities of an insurgency movement may be limited to “banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.”¹¹⁰² Illustrative in this respect may be the development of events in Northern Ireland between 1968-1994¹¹⁰³ as well as those in the Arab Spring of 2011, most notably those arising in Tunisia, Egypt, Yemen and some of the Arab Emirates, as well as the early stages of the uprisings in Libya and Syria. While a clear shift from acts belonging to the realm of internal disturbances and tensions to acts that may be considered hostilities is generally noticeable, one of the main difficulties for the counterinsurgent State is that insurgents may use different approaches locally. Thus,

insurgents may use guerrilla tactics in one province while executing terrorist attacks and an urban approach in another. There may be differences in political activities between villages in the same province. The result is more than just a “three-block war”: it is a shifting “mosaic war” that is difficult for counterinsurgents to envision as a coherent whole.¹¹⁰⁴

The main difficulty, in terms of establishing whether ‘the insurgency’ is a party to a NIAC, is that it is not always clear to which group a particular hostile act can be attributed. Obviously, this challenge rises in areas where a counterinsurgent State is confronted with multiple groups or factions that do not form one coherent block, but which even fight among each other, as was the case in Iraq regarding the multiple Sunnist and Shi’ite groups fighting the multinational (counterinsurgent) coalition, as well as themselves.

¹¹⁰¹ U.S. Department of Army & U.S. Marine Corps (2007), 12, § 1–33.

¹¹⁰² (1997n), *Tadić*, § 562. See also (2005o), *The Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment of 30 November 2005 (Trial Chamber)*, § 89.

¹¹⁰³ Haines (2012).

¹¹⁰⁴ U.S. Department of Army & U.S. Marine Corps (2007), 15, § 1–37.

While it may be concluded that, overall, the armed violence between the counterinsurgent State and armed non-State actors is clearly protected, the decisive factor is that it must be the armed violence between the counterinsurgent State and a particular organized armed group that counts.

As regards the *second* condition – organized armed group – it has already been established in Part A that as a concept the term insurgency refers to groups that have attained a level of organization. In fact, in order to survive as an insurgency, a certain minimum degree of organization must be established and maintained. In light of the legal requirement that there must be “some hierarchical structure and [that] its leadership requires the capacity to exert authority over its members,”¹¹⁰⁵ it is of particular relevance to observe that, from the viewpoint of insurgency doctrine, it is generally perceived as imperative for an insurgency movement to have a central strategic command in order to create cohesion or unity within the insurgency. “Although it may delegate the conduct of operations and responsibility to local leaders, a general headquarters that exercises authoritative control over policy, discipline, ethics, and ideology is deemed indispensable.”¹¹⁰⁶ Without it, effective strategy, planning, tactics and organization are not possible. It may therefore be concluded that once the counterinsurgent recognizes an insurgency, it has most likely also detected signs of an organization. The difficulty, however, lies just there. Generally, insurgency movements adopt a policy of secrecy to the outside as well as among the various functional cells, particularly in the subversive stage, but continuing when acting in the open. In addition, insurgents tend to adapt their organizational structures to their needs. Moreover,

[I]nsurgents usually look no different from the general populace and do their best to blend with noncombatants. Insurgents may publicly claim motivations and goals different from what is truly driving their actions. Further complicating matters, insurgent organizations are often rooted in ethnic and tribal groups. They often take part in criminal activities or link themselves to political parties, charities, or religious organizations as well. These conditions and practices make it difficult to determine what and who constitutes the threat.¹¹⁰⁷

Nonetheless, during a conflict the degree of organization may be brought to light by sources outside the counterinsurgent government, such as non-governmental organizations, the ICRC and the media. For example, in 1993 and 1994 evidence as to the degree of organization of parties involved in the hostilities in eastern Zaire was provided “by various UN fact-finding bodies and human rights organizations based in and outside Zaire, as well as media accounts of the conflict, [...]”¹¹⁰⁸

An additional factor which may complicate, or eventually bar a conflict between a counterinsurgent State and insurgents is that a CA 3-NIAC cannot be said to have arisen because the insurgency movement cannot be qualified as sufficiently organized, notwithstanding the fact that the armed violence between them is protracted, or vice versa, i.e. that the insurgency movement is sufficiently organized, but that the armed violence is not or no longer sufficiently protracted.

However, even when it may objectively clear to a State that it is engaged in a CA 3-NIAC with an insurgency movement, it is, exceptions aside, common practice of States to deny the existence of an armed conflict in their territory, or to classify an acknowledged armed con-

¹¹⁰⁵ (2008), *The Prosecutor v. Boskoski & Tarculovski*, IT-04-82-T, Judgment of 10 July, 2008 (Trial Chamber), § 195.

¹¹⁰⁶ O'Neill (2005), 124.

¹¹⁰⁷ U.S. Department of Army & U.S. Marine Corps (2007), 100, § 3-75.

¹¹⁰⁸ Arimatsu (2012), 153.

flict as CA 3 or AP II-NIAC, particularly in grey-area conflicts.¹¹⁰⁹ This reluctance has also been attributed to the fact that States feel no urge to apply CA 3 because it contains merely the “very generally worded principles of humanity which normally ought to be realized by every State and in any circumstances.”¹¹¹⁰

2.2.2. AP II-NIACs

2.2.2.1. The Applicability of the Law of AP II-NIAC to Counterinsurgency Operations

To recall, the horizontal scope of AP II is unambiguously limited to *internal* NIACs only. Following the horizontal scope of Article 1 AP II, the applicability of the law of AP II-NIACs is limited to only one situational context, namely NATCOIN. Examples of AP II-NIAC are the former conflict between the government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE) and the (at the time of this writing) conflict between Colombia and the FARC.¹¹¹¹

It has been asserted by some authors that AP II may also apply extraterritorially in settings like SUPPCOIN, where a State assists another State where both States are party to AP II. One such theory is that the forces of the counterinsurgent State can be considered to be part of the forces of the supported State. Another theory is that AP II becomes applicable to acts of the counterinsurgent State by means of the law of State responsibility, by which the supported State can be held responsible for violations of AP II by the forces of the counterinsurgent State. However, the majority view is that such is not the case, as the conflict does not take place in the territory of the counterinsurgent State, but in that of the supported State.¹¹¹² A possible exception to this outcome could arguably be that norms of AP II apply to the counterinsurgent State on the basis of their being customary law.¹¹¹³

2.2.2.2. The Threshold of AP II-NIAC

As follows from its Article 1(2), AP II does not apply “[...] to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.” The ICRC defined *internal disturbances* as:

[...] situations in which there is no non-international armed conflict as such, but there exists a confrontation within the country, which is characterized by a certain seriousness or dura-

¹¹⁰⁹ See the recent statement by President Assad of Syria, denying the existence of a civil war in Syria, but “but proxy terrorism by Syrians and foreign fighters.” See <http://rt.com/news/assad-interview-exclusive-syria-265/>. Other, historic, examples of State practice denying or ignoring the existence of a CA 3-NIAC are the UK vis-à-vis the (P)IRA in Northern Ireland, Colombia vis-à-vis the FARC, Turkey vis-à-vis the PKK and Russia in regards of rebels in Chechnya. On the classification as CA 3-NIAC in Northern Ireland, see Haines (2012), 134 ff (arguing that at least in the early 1970’s a CA 3-NIAC existed in Northern Ireland to which the UK was a party). On the classification of the conflict in Colombia, see Szesnat & Bird (2012), 214 ff.

¹¹¹⁰ Schindler (1979), 147. The latter effect is even more unfortunate, considering the fact that the narrow field of protection laid down in Common Article 3 was a compromise for the inability to define ‘armed conflict not of an international character’. In other words, had the compromise been reached that CA 3 would cover a limited range of clearly defined internal conflicts in exchange for a wider range of protection, States would arguably have been more motivated to apply CA 3. See Moir (2002), 29.

¹¹¹¹ Szesnat & Bird (2012), 243. See also for an overview of the classification of the other conflicts taking place in Colombia. At the time of this writing, peace negotiations between the government of Colombia and the FARC are taking place in Cuba.

¹¹¹² Akande (2012a), 55.

¹¹¹³ Hampson (2012), 256.

tion and which involves acts of violence. These latter can assume various forms, all the way from the spontaneous generation of acts of revolt to the struggle between more or less organized groups and the authorities in power. In these situations, which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or even armed forces, to restore internal order. The high number of victims has made necessary the application of a minimum of humanitarian rules.¹¹¹⁴

Internal tensions, in turn,

[...] could be said to include in particular situations of serious tension (political, religious, racial, social, economic, etc.), but also the sequels of armed conflict or of internal disturbances” and involve “large scale arrests; a large number of “political” prisoners; the probable existence of ill-treatment or inhumane conditions of detention; the suspension of fundamental judicial guarantees, either as part of the promulgation of a state of emergency or simply as a matter of fact; [and] allegations of disappearances.¹¹¹⁵

While AP II is not applicable to internal disturbances and tensions, the mere protractedness of violence and organization grade of the non-State armed group as required as a minimum by CA 3 is not sufficient to trigger the applicability of AP II. AP II is a compromise with the aim to develop and supplement CA 3 in content by providing more detailed rules in a more restricted range of situations, while at the same time leaving undisturbed CA 3’s narrower substantive content applicable in a wider range of situations.¹¹¹⁶ AP II merely defines the more intense form of NIAC, similar to civil wars.¹¹¹⁷ This is reflected in the conditions that must be fulfilled for AP II to become applicable.

Therefore, in terms of its vertical threshold, it follows from Article 1(1) AP II that (1) the non-State armed group must act under responsible command; (2) the non-State armed group has to exercise control over a part of a State’s territory; (3) the non-State armed group must be *able* to carry out sustained and concerted military operations; (4) the non-State armed group must be able to implement the provisions of Additional Protocol II.

In so far it can be established that a particular counterinsurgency situation qualifies as an AP II-NIAC, the assumption, for the purposes of the study, is that these requirements have been fulfilled in the case of NATCOIN. However, what has been stated previously in relation to the vertical threshold of CA 3 also applies here, namely that operational reality may be such that it is not always easy to conclude upon the fulfillment of these requirements. In

¹¹¹⁴ Sandoz, Swinarski & Zimmerman (1987), 1354, § 4475. See also the IACiHR’s judgment in the *Abella*-case, in which it concluded that a 30 hour clash between members of the *Movimiento Todos por la Patria* (MTP) and the Argentinean army after an armed attack on the military barracks in *La Tablada* (*Abella*-case), killing 39 people and injuring another 60, could not “[...] be properly characterized as a situation of internal disturbances. What happened there was not equivalent to large scale violent demonstrations, students throwing stones at the police, bandits holding persons hostage for ransom, or the assassination of government officials for political reasons – all forms of domestic violence not qualifying as armed conflicts.” (1997c), *Abella v. Argentina, Case 11.137, IACiHR, Report No. 55/97, OEA/Ser.L/V.II.98, doc. 6 rev.*, § 149-156.

¹¹¹⁵ Sandoz, Swinarski & Zimmerman (1987), 1354, § 4476.

¹¹¹⁶ ICRC (1971), 34-6; ICRC (1972), 68-9, § 2.54-64; Provost (2002), 261.

¹¹¹⁷ See also Cullen (2005), 95. Green goes further, asserting that AP II would “probably not operate in a civil war until the rebels were well established and had set up some form of *de facto* government, as has been the case with the nationalist revolution in Spain” (Green (2000), 66-67). However, Green seems to place the threshold of AP II one step too high. Here, Green incorporates into Article 1(1) of AP II two requirements belonging to belligerency as understood in traditional law, according to which insurgents should occupy a substantial part of the State and “establish some semblance of government or administration in the area under their control.” For other support that Article 1(1) AP I reinstates belligerency, see Rwelamira (1984), 234-35. Criticizing this viewpoint as not “entirely accurate”, see Lootsteen (2000), 130, arguing that Additional Protocol II bears a closer resemblance to insurgency.

those cases, the relationship between the counterinsurgent State and the insurgents remains covered by CA 3, which functions as a back-up, provided the vertical threshold of that provision has been crossed.

3. Observations

This chapter has demonstrated that LOAC provides valid norms pertaining to targeting and operational detention. This is the logical result from the fact that in armed conflict the rendering *hors de combat* of enemy fighters by killing, injuring or capturing them is a traditional instrument to bring the enemy into submission.

However, it is not possible to apply this conclusion across the board of armed conflicts. The traditional dichotomy between IAC and NIAC has left its marks in the availability of valid norms, not so much in the area of hostilities, but particularly so in the area of operational detention. The law of IAC relevant to the operational detention of insurgents offers a quite detailed framework not only authorizing both criminal and security detention, but also providing a set of relatively detailed requirements offering not only protection to detained insurgents, but also offering guidance as to how, as a minimum, operational detention is to be carried out. This framework stands in sharp contrast with that of the law of NIAC, which offers very few treaty-based norms, a gap that is only partly filled with customary law, but leaves the grounds for security detention and procedural safeguards to be granted uncovered. This has crucial repercussions given the fact that, as concluded previously, most, if at times not all, types of counterinsurgency operations may qualify as being governed by the law of NIAC. In the absence of specific arrangements under CA 3 to apply, *de iure*, the law of IAC, this body of law only finds application on a policy basis. Particularly the policy-based reliance on the grounds and procedural guarantees found in GC IV finds growing support. This does not, however, necessarily imply that IHRL has no further role to play. CA 3 specifically stipulates that States party a NIAC are bound to apply the provisions of CA 3, *as a minimum*, thus pointing out that where CA 3 shows gaps, these may be filled by norms from other sources (such as IHRL or domestic law). As explained by Pejic, CA 3

thus provides a set of basic guarantees that are absolutely fundamental in nature, but does not provide anywhere near sufficient guidance for the myriad legal and protection issues that arise in conflicts not of an international character. Moreover, the wording itself suggests that the parties will need to rely on additional norms if they are to meet more than the minimum obligations.¹¹¹⁸

A similar invitation to IHRL to complement LOAC where necessary is made in AP II, in its Preamble. The issue of reliance on norms of IHRL will be part of the examination of the interplay between IHRL and LOAC in the Chapter X, where we will examine the interplay of the former regime with the latter.

As to the issue of *applicability*, the above analysis demonstrates that conflict classification is imperative, but highly contextual and complicated, for reasons of fact as well as law. Particularly in the case of non-State actors such as insurgents it could be, and often is, difficult to determine who opposes the counterinsurgent and in which stage of development certain groups are. In addition, it is in practice problematic to establish with certainty whether

¹¹¹⁸ Pejic (2011), 17. This minimum baseline of protection also finds articulation in AP II, which stipulates that, in addition to the protections afforded by Article 4 AP II, the provisions in Article 5 AP II “shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.”

armed violence can be attributed to independent individuals, a loosely organized group of individuals, or involves members of the armed forces of an insurgency, even when a public claim to that effect has been made (such a claim may be used by one movement to discredit another movement with which it is also in conflict).

The above analysis also illustrates why the proper question to be asked is not whether a conflict between a counterinsurgent State and insurgents qualifies *as* an IAC or NIAC, but whether, in view of the lawfulness of deprivations of life resulting from operations carried out under the umbrella of the situational contexts, the legal relationship between both is governed by the law of IAC or the law of NIAC.

Overall, on the basis of that analysis, the following picture emerges:

Firstly, the law of NIAC undoubtedly applies to NATCOIN, SUPPCOIN and consensual TRANSCOIN.

Secondly, in regard of OCCUPCOIN the following may be concluded:

- the law of IAC (including the law of belligerent occupation in regards of OCCUPCOIN) always applies (as some argue) to targeting and operational detention, because the conflict between the counterinsurgent State and the insurgents takes place in the context of an IAC;
- in so far this concerns *targeting in hostilities*, the law of CA 3-NIAC applies, because the conflict between the counterinsurgent State and the insurgents constitutes a CA 3-NIAC. As will be explained in more detail in Chapter VII, this is of particular relevance for insurgents who qualify as members of the armed forces of the insurgency movement by virtue of their so-called continuous combat function. These individuals may be attacked at all times. Other individuals affiliated with the insurgency but not constituting such members qualify as civilians and may only be attacked unless and for such time as they DPH. It remains unclear whether the latter are to be viewed as civilians in a NIAC or in an IAC, although this has no crucial implications for the question of targeting: both the law of IAC and NIAC stipulate that immunity from attack is only lost unless and for such time as a civilian directly participates in the hostilities;
- the law of IAC nonetheless arguably applies in the following situations:
 - o when adhering to the NIAC-view, in those instances where the CA 3-threshold has not been met as a result of which the insurgency is not a party to a CA3-NIAC, but where the relationship between the counterinsurgent State and these individuals is characterized by the exchange of hostilities taking place in an area governed by the law of IAC/law of belligerent occupation;
 - o when adhering to the NIAC-view, in relation to individuals who, while affiliated with the insurgency, are not members of the armed forces of the insurgency movement party to the CA 3-NIAC;
 - o when adhering to the NIAC-view, arguably, in respect of *operational detention*. Members of the armed forces of an insurgency and DPH-civilians captured and detained are in the hands of the counterinsurgent Occupying Power, and it would logically follow that the law of IAC and law of belligerent occupation (as species of the law of IAC) applies.

Thirdly, as regards non-consensual TRANSCOIN:

- the law of IAC always applies (as some argue) to targeting and operational detention, because the conflict between the counterinsurgent State and the insurgents takes place in the context of an IAC;
- the law of NIAC applies (which seems to be the majority view) to targeting and operational detention, as the conflict is to be viewed separately from the IAC between the counterinsurgent State and the territorial State.
- the law of IAC nonetheless arguably applies in the following situations:
 - when adhering to the NIAC-view, in those instances where the CA 3-threshold has not been met as a result of which the insurgency is not a party to a CA3-NIAC, but where the relationship between the counterinsurgent State and these individuals is characterized by the exchange of hostilities taking place in an area governed by the law of IAC/law of belligerent occupation;
 - when adhering to the NIAC-view, in relation to individuals who, while affiliated with the insurgency, are not members of the armed forces of the insurgency movement party to the CA 3-NIAC;
 - when adhering to the NIAC-view, arguably, in respect of *operational detention*. Members of the armed forces of an insurgency and DPH-civilians captured and detained are in the hands of a party to an IAC, and it would logically follow that the law of IAC (as species of the law of IAC) applies.