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TRANSNATIONAL ARMED CONFLICT: DOES IT EXIST?

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Résumé

Les conflits armés transnationaux existent-ils ? La réponse à cette question est, oui en tant que phénomène, mais pas en tant que catégorie légale.

Les conflits armés transnationaux peuvent être décrits comme des conflits armés transfrontaliers entre, d'une part, un groupe armé non étatique et, d'autre part, les forces armées d'un Etat. Bien que ne constituant pas un phénomène nouveau, ce type de conflit est devenu de plus en plus fréquent ces dernières années et n'entre dans aucune des deux catégories traditionnelles de conflits reconnues par le droit international humanitaire (DIH), à savoir les conflits armés internationaux (CAI) et les conflits armés non internationaux (CANI). Parce que ces conflits ne sont pas régulés par le DIH, les personnes affectées semblent également tomber en dehors des protections garanties par cette législation. En effet, telle a été la position prise par le Gouvernement des Etats-Unis avant que la Cour suprême ne décide que l'article 3 commun aux Conventions de Genève, qui offre des garanties minimales de traitement humain et qui, à l'origine, était destiné à ne couvrir que les conflits de nature interne, devait s'appliquer à ce type de conflits.

La question qui se pose alors est la suivante : devrait-il exister une troisième catégorie légale dotée d'un régime juridique propre régissant ce type de conflit ? Une telle création n'est ni désirable ni nécessaire et risquerait en outre d'avoir un impact négatif sur la protection de ceux affectés par de tels conflits et plus particulièrement ceux se trouvant dans l'Etat territorial concerné. Les règles actuelles du DIH peuvent être appliquées aux conflits armés transnationaux sans qu'il soit nécessaire de les adapter ou d'en atténuer les protections qu'elles garantissent. Il convient de se baser non pas sur la nature des parties au conflit, mais sur les frontières territoriales d'un Etat afin de caractériser le conflit comme international ou interne. Partant, le droit des CANI régulerait le recours à la force par un Etat contre un groupe armé sur son propre territoire. Le recours transnational à la force par un Etat contre un groupe armé se trouvant sur le territoire d'un autre Etat ne consentant pas à ce recours à la force serait, quant à lui, régulé par le droit des CAI.

A l'heure actuelle, la majorité des conflits armés transnationaux sont régis par le droit des conflits armés internationaux. En pratique, des difficultés surgissent lorsque ce n'est que le droit des conflits armés non-internationaux qui s'applique aux situations transnationales. Ces difficultés se manifestent principalement dans les domaines de la privation de liberté et de vie.

Introduction

Transnational armed conflict: does it exist? The short answer is yes, it does exist as a phenomenon, but it does *not* exist as a legal category. The follow-up question then becomes: should it exist as a separate category for the purposes of identification of the applicable legal regime?

Transnational armed conflicts can be loosely described as transboundary armed conflicts between a non-State armed group on the one hand, and the armed forces of a State, on the other. Confusion as to the applicable legal regime has arisen because non-State entities operate beyond the borders of a single State. Although not a new phenomenon, these types of conflicts have become increasingly prevalent in recent years, and do not fit neatly into either of the two traditional existing types of armed conflict contemplated by International Humanitarian Law (IHL): (1) international armed conflicts between States and (2) non-international armed conflicts between a State and a non-State party or between two non-State parties, within the territory of a State.¹ Such non-traditional conflicts all share what can be called an 'extra-State' element² and raise issues to international law because traditionally, the reference point for distinguishing between the international and non-international armed conflicts was a State's internationally recognised border. As a result, in the past decade, there has been an extensive discussion in academic literature, judicial decisions, and in the policy positions of States concerning the specific characteristics of such conflicts and the legal regime under IHL applicable to them. The debate as to whether these transnational armed conflicts should be considered as one of the traditional types of armed conflict, or perhaps as a new third type, is ongoing.

One may wonder whether there is a need at all to distinguish between the types of armed conflict. Indeed, in recent years calls have been made for the exclusion of the traditional dichotomy between international and non-international armed conflicts.³ However, today the distinction is still relevant. The *Hamdan* case, for example, in which the United States' Supreme Court identified the international fight against *Al-Qaida* (not limited to Afghanistan or Iraq) as covered by common Article 3 to the Geneva Conventions,⁴ which originally was meant to cover only conflicts of an internal nature, is a striking example of the problems the present classification poses not only to lawyers, but also to policymakers and to members

1 Although academic disciplines other than law have a variety of names for the situations of armed conflict, International Humanitarian Law only acknowledges these two types.

2 'Extra-State' in this context means that the conflicts take place in the territory of more than one State, or that one of the parties has to cross a State border in order to engage in hostilities with the other party or parties.

3 For example, Emily Crawford, "Unequal before the law: The case for the elimination of the distinction between international and non-international armed conflict", in: *Leiden Journal of International Law*, Vol. 20, Issue 2, 2007.

4 United States Supreme Court, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

of the military. Major General (ret.) Anthony Rogers notes, for example, that the division of particular situations into international and non-international armed conflicts is important for the ‘military lawyer who has to advise a commander or the military chain of command [on the] applicable law’.⁵ The qualification is relevant also ‘after the fact’, namely in (international) criminal trials. The International Criminal Tribunal for the former Yugoslavia (ICTY) has held that the grave breaches regime of the Geneva Conventions only applies to international armed conflicts,⁶ and the Rome Statute of the International Criminal Court retains the divide between international and non-international armed conflicts.⁷

As mentioned above, IHL recognises only two types of armed conflict. And although the IHL instruments from before the Second World War did not specify their scope of application, it was clear that they applied only to wars between States. Unless a non-State party was recognised as a belligerent, the laws of war did not apply to the fighting between a State’s armed forces and such a belligerent armed group. The division was created in 1949 with the inclusion of common Article 3 into the four Geneva Conventions that were adopted that year.⁸ Thereafter, all instruments of IHL, such as the 1977 Additional Protocols, distinguish between international and non-international armed conflicts by specifically prescribing which rules apply in which type of armed conflict or whether the rules apply to both types. Today, the rules governing international armed conflicts are vastly more elaborate and detailed than those governing non-international armed conflicts.

When one considers the (current) material scope of application of IHL, it becomes clear that transnational armed conflicts do not seem to fall under any of the “definitions” given in treaty

5 Anthony P.V. Rogers, “International humanitarian law and today’s armed conflicts”, in: Cindy Hannard, Stephanie Marques dos Santos and Oliver Fox (eds), *Proceedings of the Bruges Colloquium: Current Challenges in International Humanitarian Law*, Collegium No. 21 (ICRC/College of Europe, Bruges, 2001), p. 20.

6 ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paragraph 81.

7 Article 8(2)(a) and (b) contains provisions for war crimes committed in international armed conflicts, whilst 8(2)(e) applies to violations committed in non-international armed conflicts. The charges against Thomas Lubanga Dyilo, the first accused before the International Criminal Court, were confirmed under Article 8(2)(b)(xxvi) to the conscription/enlistment and use in hostilities of child soldiers in an international armed conflict, but the Trial Chamber re-qualified the situation in Ituri, at the time, as constituting a non-international armed conflict. Lubanga was subsequently convicted under Article 8(2)(e)(vii). See ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, 14 March 2012, paragraphs 566-67.

8 On the creation of the distinction between international and non-international armed conflicts and the influence of State sovereignty on the ensuing legal regimes, see Rogier Bartels, “Timelines, borderlines and conflicts: The historical evolution of the legal divide between international and non-international armed conflicts”, in: *International Review of the Red Cross*, Vol. 91, No. 873, 2009.

law, literature, or jurisprudence. They seem to fall outside the established categories of armed conflict. Because these conflicts appear not to be regulated by IHL, those affected by them would also seem to fall outside the protection afforded by this body of law. Indeed, this was exactly the position held by the US Government before the US Supreme Court ruled that as a minimum, common Article 3, which gives certain minimum standards of humane treatment, should be applied in these situations.

What sort of situations could be called transnational armed conflicts?

The opening contribution of this publication mentions the seven categories of non-international armed conflicts that are distinguished by the International Committee of the Red Cross (ICRC).⁹ Only the seventh type is referred to as “transnational”, but of course a few of the other six types involve some crossing of State borders, as well as the participation of non-State entities. Namely, ‘cross-border’, ‘spill-over’, and ‘multinational’ non-international armed conflicts, as well as the subset of the latter type in situations where United Nations forces (or those of a regional organisation), are involved.¹⁰ The ‘multinational’ situations will not be discussed in this paper, as they could be divided into either a situation where the territorial State is assisted, such as the International Security Assistance Force (ISAF) in Afghanistan, and which is generally viewed as constituting a non-international armed conflict, or a situation where the armed group is assisted by a State, which would then internationalise the conflict. Another category could be added to the ICRC’s list, where the fighting is definitely transnational in nature: when armed groups fight each other whilst crossing State borders, such as often happens in the Great Lakes region. However, it is clear that in such a situation, the fighting is covered by common Article 3 (as long as the organisation and intensity has passed the lower threshold).

So what situations of conflict then, would fall under the heading of ‘transnational armed conflict’? I identify four situations that could each be called a transnational armed conflict whose qualification under IHL is currently unclear:

- 1) The government forces of State A are engaged in fighting with organised armed group Z (of which the members have the nationality of State B) that operates from the territory

9 See “Opening address” by Christine Beerli. The seven categories are identified in ICRC, *International Humanitarian Law and the challenges of contemporary armed conflicts*, a report prepared for the 31st International Conference of the Red Cross and Red Crescent, 2011, pp 9-11; and in Jelena Pejic, “The protective scope of Common Article 3: more than meets the eye”, in: *International Review of the Red Cross*, Vol. 93, No. 881, 2011, pp 193-195.

10 The sixth, third, fourth and fifth type mentioned by the ICRC, respectively.

of State B. The fighting takes place on both the territory of State A and on that of State B. A real-life example would be the 2006 Israel-Hezbollah conflict.

- 2) The 'foreign' organised armed group Z is engaged in fighting with the government forces of State A, on the territory of State A. Examples would include the foreign Islamist groups currently fighting in Syria against the government.
- 3) The government forces of State A are engaged in fighting with organised armed group Z (which came from State A, but has taken refuge on the territory of State B), on the territory of State B. This would be similar to the conflict between Turkey and the PKK in northern Iraq.
- 4) The government forces of State A make use of the territory of State C to engage in fighting with organised armed group Z (of which the members are not linked to one of the concerning States), which is residing on the territory of State B. The US making use of the territory in Afghanistan in its fight against the Taliban (or *Al-Qaeda*) in Pakistan comes to mind in this regard.

The above four situations do not include accidental border incursion or accidental bombings of another State. Neither can they be seen as international armed conflicts because there is no intent to attack the other State.¹¹ In situations 1, 2 and 4, for the purposes of this paper, the territorial State B does not consent to the use of force by State A on its territory. Only in situations without consent, and without a link between the territorial State and the armed group, is the use of force by State A transnational in nature.

In situations where an armed group can be seen as 'belonging to' State B's armed forces for the purposes of Article 4(2) of the third Geneva Convention, there clearly is an international armed conflict. When an armed group residing in State B launches attacks on neighbouring State A, but the government of State B has overall (or effective) control over the armed group,¹² the situation should obviously qualify as an international armed conflict, as two States are pitted against each other. Indeed, this would be no different if the armed group, whilst being controlled by State B, resided on the territory of State A (thereby not themselves crossing any State border), and was engaged in fighting the government of State A. The real difficulty, however, is qualifying the situations where the territorial State does not give consent to the attacking State.

11 See United Kingdom Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford, Oxford University Press, 2004, p. 29.

12 The effective control test, as set out in *Nicaragua*, is advocated by the International Court of Justice. The overall control test is used by the ICTY since *Tadić*, and adopted by the International Criminal Court in *Lubanga*.

Currently, four approaches to the qualification of transnational conflict situations can be distinguished:

- 1) These situations should be considered as non-international armed conflicts;
- 2) These situations should be considered as international armed conflicts;
- 3) A combination of 1 and 2, namely, transnational conflict situations can be divided into two parallel armed conflicts: a non-international armed conflict between the attacking State and the armed group, and an international armed conflict between the fighting State and the territorial State;
- 4) Transnational conflict situations cannot adequately be qualified as either international or non-international conflict situations. Therefore, a third regime developed for this type of armed conflict should govern these situations.

As I will explain in more detail below, the majority of transnational armed conflicts are not regulated by the law on non-international armed conflict, but are governed by the law on international armed conflict. Before I explain why, I will argue that, in any case, a new regime for a third category is neither necessary nor desirable.

A new category is not necessary

Some scholars consider transnational conflict situations to be significantly different from classic international and non-international armed conflicts, and propose that a third legal type of conflict be added.¹³ This third type should then be covered by a new legal regime, which would take into account the special features of such conflicts. For example, with regard to detention in such a third conflict, Roy Schöndorf proposes a legal framework where the attacking State can take the best of both worlds:

‘One possibility is to afford battlefield detainees the (non-political) privileges regarding conditions of detention that are afforded to prisoners of war under the legal regime regulating inter-state armed conflicts, as this legal regime is designed to hold combatants in detention for long period of times. At the same time, with regard to the more political aspects of detention, one could rely on the analogy between extra-state armed

¹³ See, for example, Roy S. Schöndorf, “Extra-state armed conflicts: Is there a need for a new legal regime?”, in: *New York University Journal of International Law and Politics*, Vol. 37, No. 1, 2004; Geoffrey S. Corn, “Hamdan, Lebanon, and the regulation of hostilities: The need to recognise a hybrid category of armed conflict”, in: *Vanderbilt Journal of Transnational Law*, Vol. 40, No. 2, 2007; and Robert D. Sloane, “Prologue to a voluntarist war convention”, in: *Michigan Law Review*, Vol. 106, 2007.

conflicts and intra-state armed conflicts, which allows prosecution of detainees for their participation in hostilities'.¹⁴

Why would the attacking State have the “right” to detain captured members of the armed group longer than normal, whilst at the same time being allowed to use aspects of the more limited law on non-international armed conflict? When an attacking State is attacking citizens (or persons residing in the territory) of another State, or otherwise violating the sovereignty of the territorial State, why would it then, in addition, be allowed to benefit from rules that only assist States and not non-State actors? The usual basis for such disparity (e.g. national law, a State’s sovereignty over own territory) is lacking in transnational situations.

A third legal type of armed conflict with a separate corresponding legal regime would likely have a negative impact on the protection of those affected by such conflicts, especially those who find themselves in the territorial State. IHL is based on a subtle balance between humanity and military necessity. The proposed rules for a third type appear to be mainly based on military necessity. As will be explained below, the current rules of IHL can be applied to transnational situations without needing to adapt or to water down the protections contained presently in IHL.

Transnational armed conflicts are to be qualified as non-international armed conflicts

The majority of academics propose the first approach, outlined above, that is, they view transnational armed conflicts as non-international armed conflicts between the fighting State and the armed group. This view considers that non-international armed conflicts are distinguished from international armed conflicts by the parties involved rather than by the territorial scope of the conflict.¹⁵ I see several problems with this approach, however.

First of all, if transnational situations were non-international armed conflicts, the lower threshold of non-international armed conflicts would also apply. This would mean that attacks against an armed group in another State would not be governed by IHL unless the criteria of organisation and intensity are fulfilled. Using the wording ‘armed group’ seems to presuppose that the organisation criterion is met. Actually, though, in the situation that triggered the debate about the existence of transnational armed conflict (i.e. the conflict between the US and Al Qaeda), it may be questioned whether the relevant group, Al-Qaida, is (or ever was)

14 Schöndorf, *ibid.* p. 72.

15 See Noam Lubell’s contribution.

sufficiently organised.¹⁶ So, if IHL does not apply, what then regulates the attacks? I will not go into the discussion on extraterritorial law application and enforcement of human rights law, but suffice it to say that according to those States that deny the extraterritorial application of International Human Rights Law, no law at all would govern the attacks, or at least, no law would work in a limiting and thus protecting way. A law enforcement paradigm does not work when use is made of, for example, drones equipped with Hellfire missiles. Compliance with the Human Rights standard of proportionality is then difficult to achieve.

My main concern with the 'non-international armed conflict only' approach is that a body of law is said to apply that is far more limited in both quantitative and qualitative terms. Specifically, the law applicable to international armed conflicts is far clearer and more developed than the law applicable to non-international armed conflicts. The traditional dichotomy of international and non-international armed conflicts was based on sovereignty. States were unwilling to allow for international regulation of their internal matters. They wanted to be able to deal with insurgents or rebels in a way of their own choosing. In 1949, when common Article 3 saw the light as the first application of IHL to internal matters, there were no other international instruments that laid down protectionary rules for States about how to deal with their own citizens.

States made the importance of sovereignty very clear during the negotiations of the 1949 Geneva Conventions and again during the negotiations of the Additional Protocols. As a result, there are far fewer treaty rules regulating non-international armed conflicts. In addition, because States were not willing to extend the combatant privilege to members of armed groups, such members can still be tried for treason or murder, even if they fought in accordance with the law of non-international armed conflict. Notwithstanding the foregoing, the fact that a traditional non-international armed conflict takes place within the territory of a sovereign State also means that there are additional national laws that supplement the limited number of black letter rules of IHL applicable to non-international armed conflicts. I have already mentioned the difficulties with extraterritorial application of Human Rights. Also, when a State acts outside its own borders, the national laws allowing the government to detain and covering such detention, for example, cannot apply.

Nowadays, States appear to be quicker to accept the application of common Article 3 because it enables the use of force, like in the fight against terrorism. Interestingly, the situations

16 See Kai Ambos and Josef Alkatout, "Has 'Justice Been Done'? The Legality of Bin Laden's Killing Under International Law", in: *Israel Law Review*, Vol. 45, No. 2, 2012, pp 347-350; and Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, Oxford, Oxford University Press, 2010, p. 96.

where States seem eager to accept the application of IHL are often the transnational cases.¹⁷ I agree that we should not too easily consider that IHL applies, but in case of attacks on an armed group residing outside a State's own territory, the attacking States will be carrying out these attacks irrespective of whether or not it would be governed by common Article 3. Would it then not be best to make sure that the highest standard of conduct and protection, i.e. the law on international armed conflict, applies? Moreover, whereas reciprocity may have diminished as a reason for States to adhere to IHL, it still plays a role. But in case of attacks against an armed group that cannot strike back – at least not by legitimate¹⁸ means – because the attacking State's territory is thousands of kilometres away, there is little fear for reciprocal behaviour against citizens of its own.

In practice, problems arise when it is only the law of non-international armed conflict that applies to transnational situations. These problems become manifest most predominantly in the areas of deprivation of liberty and life. Targeting rules can be applied via custom, but detention is not regulated. This makes perfect sense in internal situations, i.e. in classic civil wars, because the government obviously wants to be the only party that is allowed to detain. Indeed, the government can detain rebels on the basis of national criminal law, but it would be undesirable for States to allow rebels to legally hold captured members of the State's armed forces. When acting extraterritorially within the legal framework of non-international armed conflict, no right to detain exists. In support operations, such as ISAF, this right could be derived via the detaining rights of the host State, whose government is assisted or, arguably, via a UN Security Council Resolution. In a transnational situation, this would not be the case, however. It can be argued that the right to detain is inherent to IHL, as there is also a right to kill. But if a State were to detain a member of an armed group in another State without the latter's consent, it would actually violate the laws of the territorial State that has the monopoly on law enforcement on its own territory.

Moreover, a "right to kill" does not actually exist under the law of non-international armed conflict. These rules do not contain combatant immunity. Again, this makes perfect sense in a classic non-international armed conflict, where the State, on the basis of its national laws, will be allowed to use lethal force against those rising up against its government, yet wants to be able to punish members of the opposition when they kill government soldiers. The State thus does not need the combatant privilege. However, when acting transnationally, it would require this privilege; otherwise, the members of its armed forces would be subject to domestic prosecution for crimes like murder in the territorial State. In addition to the use of force for

17 Such as the US drone strikes in Pakistan and Yemen. See, e.g., The White House, Office of the Press Secretary, "Remarks by the President on National Security", 21 May 2009.

18 Legitimate for the purposes of IHL or International Human Rights Law.

ad bellum reasons then, the armed forces of the attacking State are also using force without any authority to do so under the territorial State's domestic law.

Problems thus arise when trying to apply the law of non-international armed conflict to transnational situations, and it does not stop at the detention issue and the use of force. It also has effects on what happens next. After someone is captured, it makes sense that this person is brought back to the territory of the attacking State.¹⁹ But if this member of the armed group is brought to the attacking State, this would, in case of a non-international armed conflict, amount to rendition.²⁰ It would then lead to subsequent problems in a criminal process. Whilst in certain States, like the US, *male captus bene detentus* is accepted, this is not the case in the majority of civil law States. The detained person could then not be prosecuted.

Although in non-international armed conflicts, the rules for targeting derived from custom would be similar to those in international armed conflict, and States will likely apply Additional Protocol I by analogy, it would (in retrospect) still be impossible for the International Criminal Court in such situations to prosecute drone attacks that violated the principle of proportionality.²¹ Under the Rome Statute, the causing of excessive collateral damage is only a crime in international armed conflicts.²²

Transnational armed conflicts are to be qualified as international armed conflicts

In light of the problems discussed hitherto, I propose a different way of conceptualising transnational situations: by looking not only at the nature of the parties to the conflict as a determinative factor in the identification of the applicable regime, but also at the territory. This would lead to the qualification of at least some of the four situations presented above as international armed conflicts. This is a minority view, however. For example, in the recent Tallinn Manual on Cyber Warfare, it is mentioned that

19 After all, if the attacking State had a sufficient military presence in the territorial State to allow for detention facilities, it would probably be in control of territory, and could be regarded as an occupier. This would then transform the conflict into an international armed conflict.

20 Naturally, rendition would also be possible in cases of international armed conflicts, but it would not cover the moving of captured members of the opposing forces (who would be prisoners of war) outside the territory of a State, as this is legal under IHL.

21 Obviously, this would only concern situations during which war crimes can occur, i.e. during an armed conflict. The lower threshold for non-international armed conflict would thus have to be reached.

22 Article 8(2)(b)(iv) of the Rome Statute.

‘[s]ome members of the International Group of Experts took the position that an international armed conflict can also exist between a State and a non-State organised armed group operating transnationally even if the group’s conduct cannot be attributed to a State (...) The majority of the experts rejected this view on the ground that such conflicts are non-international in character.’²³

I tend to agree with the minority of the Manual’s experts and consider these situations as international armed conflicts. Let me use an example. If a State launches an attack against Costa Rica, a nation without armed forces, and takes control over part of its territory, it would be an international armed conflict, even though Costa Rica would not be able to defend itself. Common Article 2 is clear that no armed resistance is required. Another example would be Iceland, a nation with no real military, but that has an armed coast guard of 170 men strong. Imagine all 170 coast guards being out at sea, say for a naval exercise. If strikes were to be launched on Icelandic territory by the British Royal Air Force, for example, surely no one would contest that this would be an international armed conflict, also even if the strikes were not actually directed at government buildings, but only hit infrastructure and civilian objects.

This is so because the attacks on Costa Rica and on Iceland would violate the territorial integrity of these States. A State is not merely made up of a government. The main criteria for Statehood are a territory, a population, and a functioning government. At least one of these, the territory, but more often two, the territory and the population, are made object of attack in transnational armed conflicts.

If we look at Article 2(4) of the UN Charter, it is clear that it is not only the government that can be the object of the use of force (albeit for *jus ad bellum* purposes). It is prohibited to use force against the political independence or against the territorial integrity of another State. If objects are destroyed by missiles, for example, territory is obviously affected. Also, when persons are attacked, however precise the conducted attacks are, it will always similarly affect the territory. It makes no difference whether it is a piece of desert in Yemen, for example, or the heart of the capital that is attacked. Moreover, in such a situation, in addition to affecting the territory, one or more members of the territorial State’s population are also killed or injured.

23 Mike N. Schmitt (ed.), *The Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge, Cambridge University Press, 2013 (forthcoming). To give another example of just how much of a minority view it is, only one of the authors in Elizabeth Wilmhurst (ed.), *International Law and the Classification of Conflicts*, Oxford, Oxford University Press, 2012, namely Dapo Akande, advocates a similar view to that which I have put forward in this paper. The other eleven contributors to that book disagree with Akande’s view.

It is proposed by some that when transnational attacks²⁴ constitute an international armed conflict, there could still also exist a parallel non-international armed conflict with the armed group.²⁵ I am not in favour of such a combined approach, though. Apart from the fact that every shot fired at the armed group would, in my view, still be part of the (single) international armed conflict and would thus need to be conducted in accordance with the law governing that type of conflict, such a combined approach would create unnecessary confusion. Why could it not just be considered as an international armed conflict only? Clarity is key in IHL and having only one conflict is undoubtedly far more clear than two parallel conflicts with separate legal regimes.

This would be the case also when the drone strikes on Al-Qaeda in Pakistan,²⁶ even if Al-Qaeda cannot be considered as sufficiently organised, are part of one international armed conflict against the State of Pakistan. I do consider this to be problematic and taking this approach does not enable States to use force more easily. Firstly, that what they would engage in would be called an international armed conflict and might actually restrain States. Secondly, whoever was targeted would still have to be a legitimate target.

Of course, the main critique against considering transnational situations as international armed conflicts concerns the latter observation (i.e. the question of when members of an armed group can be targeted). However, the existence of organised armed groups in the context of an international armed conflict is well known. Consider the Partisans in the Second World War, for example. Normally, such groups belong to the armed forces of a party to the conflict and as such, become targetable as combatants. However, the 'continuous combat function', as proposed by the ICRC's Interpretive Guidance on Direct Participation in Hostilities²⁷, does not apply to international armed conflicts. Consequently, the members of the armed group residing on the territory of another State could not yet be directly participating in hostilities (against the attacking State) before the first strike.²⁸ They might not even get the chance to fight back because the targeting is done with drones or fighter jets.

24 Irrespective of whether the missile is launched from within the territory of the attacking State into the territory of the territorial State or whether it is fired by troops on or above the territory of the territorial State.

25 Approach number 3, mentioned above.

26 Assuming for the sake of argument that Pakistan does not consent to such strikes.

27 Nils Melzer, *Interpretive Guidance on the notion of direct participation in hostilities under international humanitarian law*, Geneva, ICRC, 2009.

28 Naturally, if the armed group is engaged in a non-international armed conflict in the territorial State (against the government of the territorial State or against another armed group), its members could be directly participating in hostilities as part of that conflict. If the attacking State were to assist the territorial State, it can attack such directly participating members. However, it is submitted here that direct participation of certain persons in an unrelated armed conflict does not make these persons targetable by an attacking State, because the "threshold of harm" would not be met as the hostilities in which the persons participate are not directed at the attacking State (see the first criterion in *ibid*, p. 16).

However, in a transnational situation, there may well first have been attacks conducted on the territory of the attacking State. One may assume, at least, that the attacking State has a reason to go after the armed group. Provided the threshold is met, such attacks by an armed group are part of a non-international armed conflict, because it was a situation of State versus an armed group, on its own territory. I do not see a problem in a continued direct participation (by means of a continuous combat function) whilst the members of the armed group withdraw onto the territory of another State. This might require an adaptation of the Interpretive Guidance, but it being an interpretation, it could just be re-interpreted.

Another way of looking at it would be to consider the armed group as a party to the international armed conflict. Such would not be inconceivable under IHL, as Article 1(4) of Additional Protocol I, although never applied in practice, allows for a non-State actor to become a party to an international armed conflict, provided the conditions laid down in the article are met. It is quite inconceivable that States would be willing to take this view, however, as this would allow for the possibility of the members of the armed group to enjoy combatant privilege. In practice, it is very unlikely that armed groups would qualify as armed forces as meant by Article 43 of Additional Protocol I. But would creating an option for armed groups to attain combatant status not actually be a good incentive? After all, to achieve the status of armed forces of a party to the conflict, the armed groups would have to internally enforce compliance with IHL. Attacking States would not have to fear such combatant status as any combatant privilege would only apply to the actions on the territory of the territorial State, as explained further below. As with the “non-international armed conflict only” approach, the attacking State would not, or at least should not, be able to prosecute members of the armed group anyway, so in practice there is no difference there.

The problems highlighted above as linked to the “non-international armed conflict only” approach do not exist when the transnational situation is qualified as an international armed conflict. Detention or internment is allowed and is covered by an extensive set of rules. Also, the attacking State’s armed forces would have combatant privilege and thus be immune from prosecution by the territorial State, as long as they adhere to IHL of course. But again, that is exactly what we want the participants in armed conflicts to do.

I mentioned above that the armed group would only have combatant privilege for their actions in the territorial State and hence only for their actions that are part of the international armed conflict. This would be the case because in the framework that I propose, the fighting between that same armed group and the attacking State on the territory of that State would still be seen as a regular (internal) non-international armed conflict. This would in some situations result then in two conflicts, but these are a lot more clearly defined than would be the case

in the parallel approach (where an international and a non-international armed conflict take place simultaneously on the territory of the territorial State), for it would exactly follow the territory. Attacks against members of the armed forces of the State on its own territory would, as part of a non-international armed conflict, not fall under the combatant privilege and be subject to prosecution. Attacks on civilians would, as always, be unlawful, and could also be prosecuted in the regular way.

So to conclude, I would propose not to focus on the nature of the parties to the conflict, but rather to use the territorial borders of a State as guidance to characterise a conflict as international or as non-international. In the end, what determines whether there is an international or a non-international armed conflict is whether a State uses force against another State. The law of non-international armed conflict would regulate a State's use of force against an armed group on its own territory, because the conflict itself is non-international in character. However, that same State's transnational use of force against an armed group on the territory of another State that does not (explicitly) consent to such force is regulated by the law of international armed conflict, because such use of force itself amounts to an international armed conflict.

The four situations identified above can then be qualified as follows:

- In Situation 1,²⁹ the fighting in State B would then be an international armed conflict and regulated as such, as would any responses by Z, so long as these responses take place on the territory of B. Any fighting between A and Z on the territory of A would be a non-international armed conflict.
- Situation 2³⁰ would then be qualified as a non-international armed conflict as the fighting fully takes place on the territory of State A. That Z actually comes from State B is not relevant, because B is not actually controlling Z. Hence, there is no force between two States.
- Situation 3³¹ would be an international armed conflict, at least insofar as all the fighting done on the territory of State B is concerned. Any fighting on, or attacks launched against, the territory of State A would be governed by the law of non-international

29 The government forces of State A are engaged in fighting with organised armed group Z (of which the members have the nationality of State B) that operates from the territory of State B. The fighting takes place on both the territory of State A and on that of State B.

30 The 'foreign' organised armed group Z is engaged in fighting with the government forces of State A on the territory of State A.

31 The government forces of State A are engaged in fighting with organised armed group Z (which came from State A, but has taken refuge on the territory of State B) on the territory of State B.

armed conflict, even if Z fired across the border. Although the force would derive from the territory of State B, it would not be a use of force of State B against State A.

- Lastly, situation 4³² is an international armed conflict, as State A fights outside its own borders and thus uses force against another State that has not consented. If armed group Z fights back, it would be part of the same international armed conflict, both on the territory of State B and/or the territory of State C.

32 The government forces of State A make use of the territory of State C to engage into fighting with organised armed group Z (of which the members are not linked to one of the concerning States), which is residing on the territory of State B.