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Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflicts

Sasha Radin

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I. INTRODUCTION

On February 4, 2013 the National Broadcasting Corporation (NBC) published a leaked U.S. Department of Justice White Paper outlining the U.S. government's legal authority to kill American citizens who occupy senior operational roles within Al Qaeda.¹ In addition to raising domestic constitutional questions, the White Paper cast renewed attention upon a number of contentious international law issues. These concerns, which all stem from a lack of clarity as to when a State may conduct hostilities against armed groups located outside its borders, include the extent of a State's

* Visiting Research Scholar at the Naval War College, Newport Rhode Island; PhD candidate, Asia Pacific Centre for Military Law, University of Melbourne Law School. For helpful comments and conversations, special thanks to Jann Kleffner, Michael Schmitt, Kinga Tibori-Szabó, Michelle Lesh, Lieutenant Commander James Farrant, Lieutenant Colonel Jeffrey S. Thurnher, Marko Divac Oberg and Captain Ralph Thomas (Ret.).

1. U.S. Department of Justice, *Lanfulness of a Lethal Operation Directed against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qaeda or an Associated Force* (2011), available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf [hereinafter DOJ White Paper].

right of self-defense against the actions of an armed group in a second State; the question of when the law of armed conflict (LOAC) is triggered; and the body of law that applies to individuals affiliated with an armed group, yet who are located in a second State at a distance from the main area of hostilities. As part of that broader discussion, this article focuses on the question of when hostilities with armed groups operating across State borders may be classified as an armed conflict, and therefore subject to LOAC. The latter issue of what law is applicable to individuals located away from the battlefield once an armed conflict exists is also briefly addressed.

This topic has particular relevance today given the frequency with which armed groups disregard State boundaries in conducting their operations and the ambiguity surrounding the applicable legal framework. The law of armed conflict is structured around State-centric concepts of sovereignty and territory, and is designed for either inter-State conflicts or for purely internal armed conflicts.² Its contours have been based on territorial boundaries.³ Thus, international armed conflicts (IACs)⁴ may generally only occur between States.⁵ Non-international armed conflicts (NIACs),⁶ or

2. For an interesting historical discussion of the territorialized thinking influence upon the development of LOAC, see Louise Arimatsu, *Territory, Boundaries and the Law of Armed Conflict*, 12 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 157 (2009).

3. *Id.* at 170.

4. The main treaties applicable to international armed conflicts are: Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC III]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

5. See COMMENTARY TO GENEVA CONVENTION III RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 23 (Jean Pictet ed., 1960) [hereinafter GC III COMMENTARY] (“Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2.”); Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the former Yugoslavia Oct. 2, 1995) [hereinafter *Tadić* Appeals Decision on Jurisdiction]. Recognized belligerencies and the controversial Article 1(4) of AP I are exceptions.

6. The law applicable to NIACs is found in Article 3 Common to the Geneva Conventions of 1949 (Common Article 3) and in Protocol Additional to the Geneva Conven-

conflicts where armed groups either fight a State or each other, have traditionally been geographically limited to the confines of a State.⁷

Conflicts such as the Israeli-Hezbollah war of 2006, the ongoing conflict in Afghanistan that has spilled over into Pakistan and the U.S. global armed conflict against Al Qaeda⁸ challenge this traditional State-centric structure of LOAC. As a result, there is considerable debate as to how such extraterritorial hostilities (i.e., those that cross State borders) should be characterized. If hostilities do not rise to the level of an armed conflict, they fall under a law enforcement regime⁹ and are governed mainly by domestic law and international human rights law. Although extraterritorial hostilities do not fit neatly into any of these three existing legal divisions—IACs, NIACs or law enforcement—their categorization has serious practical implications. Particularly, the classification of conflict affects such matters as how force may be used, what rules apply for detention and whether an individual may be held criminally liable.¹⁰

tions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II]. In addition, relevant customary international law applies to non-international armed conflicts. Domestic law and international human rights law continue to apply in situations of armed conflict. *See, e.g.*, A.P.V. ROGERS, LAW ON THE BATTLEFIELD 217 (3d ed. 2012). The interaction of human rights law, domestic law and LOAC during an armed conflict is a complex matter that is beyond the scope of this paper. In armed conflict LOAC is the *lex specialis*.

7. *See infra* notes 67 and 68 and accompanying text.

8. The United States considers that it is engaged in an armed conflict with Al Qaeda and its associates that spreads across multiple territories. *See, e.g.*, DOJ White Paper, *supra* note 1, at 3. This is not to suggest that the whole world is the battlefield for this type of conflict, but that the conflict spans multiple States. *See, e.g.*, the U.S. Navy, U.S. Marine Corps & U.S. Coast Guard, NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7A, The Commander's Handbook on the Law of Naval Operations ¶ 5.1.2.3 (2007), available at <http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M> (“The Global War on Terror is an example of this new type of conflict What law applies in this type of conflict is still being settled.”).

9. The terms law enforcement situation and peacetime are not used in this article to mean a total lack of hostilities, but merely to describe situations that do not rise to the level of armed conflicts.

10. THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 618 (Dieter Fleck ed., 2d ed. 2010). Therefore, if hostilities qualify as an armed conflict, targeting an individual participating in the conflict is likely to be lawful (if, of course, it is done in accordance with the applicable rules). In contrast, if considered a law enforcement scenario, the use of force against an individual would be lawful in a more limited set of circumstances. In addition, substantial differences in the content of certain IAC and NIAC rules exist. For example, combatant status and prisoner of war status only pertain to IACs.

Several approaches have been put forth for how to legally categorize extraterritorial hostilities with armed groups. In Part II, this article provides a contextual framework for the discussion by laying out these various approaches. Part III outlines the law applicable to NIACs. Part IV discusses why the prevailing view is that some of these extraterritorial conflicts may qualify as NIACs despite the fact that such conflicts do not conform to the traditional interpretations limiting the application of LOAC to within a State's own borders.¹¹

Part V examines potential problems in applying a body of law that was intended for internal application to an extraterritorial context. The fact that the law was not designed for such use has led to inconsistencies in the rationale for when and where this body of law applies. Today, many argue that NIAC law may apply to spill-over conflicts and even to hostilities that occur between a State and an armed group predominantly in the territory of a second uninvolved State (e.g., the Israeli-Hezbollah conflict). In contrast, a great deal of unease surrounds the notion that a global armed conflict is taking place with Al Qaeda. There is concern that the removal of territorial restrictions when establishing the existence of an armed conflict could transform the entire world into a potential "battlefield."¹²

An examination of the requirements for the existence of an armed conflict and their underlying purpose suggest that the criteria for establishing when a NIAC exists cannot be entirely divorced from geography. In particular, difficulties may arise in establishing that an armed conflict exists when hostilities with armed groups span multiple States. One challenge is

11. GC III COMMENTARY, *supra* note 5, at 37; Roy S. Schondorf, *Extra-State Armed Conflicts: Is There a Need for a New Legal Regime*, 37 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 1, 50 (2004); ANTHONY CULLEN, THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW 49–51 (2010); Arimatsu, *supra* note 2, at 186. UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 15.2 (2004) [hereinafter UK MANUAL].

12. See, e.g., Letter from Human Rights Watch to President Barack Obama Re: Targeted Killings and Unmanned Combat Aircraft Systems (Drones) (Dec. 7, 2010), available at <http://www.hrw.org/news/2010/12/07/letter-obama-targeted-killings> ("While the United States is a party to armed conflicts in Afghanistan and Iraq and could become a party to armed conflicts elsewhere, the notion that the entire world is automatically by extension a battleground in which the laws of war are applicable is contrary to international law."). See also Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶¶ 67, 68, Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>

how the law factors in the links between various armed groups when calculating whether the violence has reached a sufficient level of intensity necessary to trigger LOAC. This involves a combination of distinguishing the identifiable party and establishing the intensity requirement. Another issue is whether violence diffused over a number of countries can be amassed in order to reach a total level of intensity. In addition, a shift in the State whose sovereignty is affected could have an impact on the underlying purpose of the intensity criterion.

Part VI briefly considers the separate issue of where LOAC may be applied once the law of armed conflict has been triggered. The question is contentious and at this point unresolved. The article suggests that the most defensible position is that once an armed conflict exists, the law applies to the parties to the conflict even if in another country, but that a number of other factors restrict whether or not an individual may be targeted or detained. Under this view, the key question is whether an armed conflict exists in the first place. The majority of the article concentrates on this former question.

Part VII concludes that although the law applicable to NIACs may apply extraterritorially, the process of establishing when an armed conflict exists is still partially bound geographically by virtue of the intensity requirement. In this sense, the law does not simply follow the parties to the conflict. Because the law was designed with territorial constraints in mind, there is a need for clarification of when the law is to apply extraterritorially.

Before addressing the main issues of this article, two preliminary matters should be highlighted. First, a factual distinction is made between three types of hostilities, all of which fall under the category of “extraterritorial”: (1) conflicts within a single State that spill over into neighboring States; (2) conflicts that take place between a State and an armed group located in a second uninvolved State; and (3) conflicts between a State and an armed group that spread across multiple States. Scholars frequently use the term “transnational armed conflicts” to describe the latter two situations,¹³ and

13. See, e.g., Geoffrey Corn & Eric T. Jensen, *Transnational Armed Conflict: A ‘Principled’ Approach to the Regulation of Counter-Terror Combat Operations*, 42 ISRAEL LAW REVIEW 46 (2009), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1256380 [hereinafter Corn & Jensen, *Transnational Armed Conflict*]; Geoffrey Corn, *Hamdan, Lebanon, and the Regulation of Hostilities—The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VANDERBILT JOURNAL OF INTERNATIONAL LAW 295 (2007) [hereinafter Corn, *Hamdan, Lebanon, and the Regulation of Hostilities*]. Other terms used include “extra-state hostilities,” Schonendorf, *supra* note 11, and “extra-territorial NIAC,” Arimatsu, *supra* note 2, at 183.

at times all three.¹⁴ This article employs the terms “spill-over,” “cross-border” and “global” armed conflicts, respectively, in order to differentiate between the three types of conflicts.¹⁵

Second, determining if and when force may be used in self-defense is a different issue than establishing whether that use of force amounts to an armed conflict. The former is a *jus ad bellum* issue and the latter a matter of *jus in bello*. *Jus ad bellum* determines, *inter alia*, under what circumstances a State may use force in self-defense.¹⁶ *Jus in bello* is another name for the body of law applicable to armed conflict. While both are often discussed within the context of extraterritorial hostilities with armed groups and at times conflated,¹⁷ they are distinct bodies of law. Once a State employs force in self-defense, the question still remains as to what body of law governs that use of force. If the situation rises to the level of an armed conflict, LOAC applies.¹⁸ Alternatively, the situation is governed by a law enforce-

14. See generally Claus Kress, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflict*, 15 JOURNAL OF CONFLICT AND SECURITY LAW 245 (2010).

15. It must be emphasized that these terms refer to factual, not legal, categories of conflict. For a more extensive typology of non-international armed conflicts, see INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 9–12 (2011), available at <http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf> [hereinafter 31st ICRC Conference on IHL CHALLENGES].

16. *Jus ad bellum* governs the legality of resort to the use of force by a State. The exceptions to the UN Charter’s prohibition on the resort to force are individual and collective self-defense, and when authorized by the Security Council under Chapter VII (such as occurred in the military intervention in Libya in 2011).

17. A number of statements by U.S. government officials, for instance, leave it unclear whether the legal justification for using force against Al Qaeda and its associates is that of self-defense, a global armed conflict or both. See, e.g., Harold Hongju Koh, Legal Adviser, U.S. Department of State, Address at Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), <http://www.state.gov/s/1/releases/remarks/139119.htm> (“as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law”). See also Attorney General Eric Holder’s response to Senator Lindsey Graham. *Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 33 (2011) (“The operation against bin Laden was justified as an act of national self defense. It is lawful to target an enemy commander in the field. We did so, for instance, with regard to Yamamoto in World War II when he was shot down in an airplane.”).

18. It should be noted that even if LOAC applies and a State has a right to act in self-defense, the question remains as to whether the State using force in self-defense may vio-

ment regime. This article limits its focus to the *jus in bello* issues—specifically, when LOAC applies to extraterritorial hostilities with armed groups.

II. APPROACHES TO APPLYING THE LAW OF ARMED CONFLICT TO EXTRATERRITORIAL HOSTILITIES

Generally, those who view the application of NIAC law as limited to internal armed conflicts maintain that extraterritorial hostilities may still be classified as an armed conflict.¹⁹ They differ, however, in how they characterize the armed conflict. Four main approaches have been put forth for how extraterritorial hostilities between States and armed groups can be classified under the law of armed conflict.

Some, like the Bush administration in its initial position after 9/11,²⁰ have claimed that these armed conflicts fall entirely outside of the Geneva Conventions. The administration reasoned that because Article 3 Common

late another State's sovereignty in order to do so—also an issue of *jus ad bellum*. This matter involves two competing rights: the right of the territorial State to its sovereignty (and, as such, to its territorial integrity) and the right of the victim-State to defend itself. If the territorial State is unwilling or unable to police the matter itself, then some argue that State loses partial right to its territorial integrity. The “unable and unwilling” test is taken from the law of neutrality found in three of the 1907 Hague Conventions. *See* Convention No. 5 Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310; Convention No. 11 Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, Oct. 18, 1907, 36 Stat. 2396; Convention No. 13 Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415. For some suggested criteria to determine when a State might be considered unwilling or unable, see Ashley Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extra-Territorial Self-Defense, 52 VIRGINIA JOURNAL OF INTERNATIONAL LAW 483 (2011). Issues of sovereignty do not arise if the territorial State gives consent to the victim-State. However, the basis for which a victim-State can use force in the territory of another State in the absence of consent is currently a controversial aspect of international law. These issues are beyond the scope of this article.

19. Schondorf, *supra* note 11, at 30. A minority of commentators, however, consider that the extraterritorial application of violence must be governed by a law enforcement regime. *See, e.g.*, Leila Sadat, *Terrorism and the Rule of Law*, 3 WASHINGTON UNIVERSITY GLOBAL STUDIES LAW REVIEW 135, 140–41 (2004). Schondorf cites a number of commentators who hold this view in *Extra-State Armed Conflicts*, *supra* note 11, at 14–15.

20. *See* Memorandum from George Bush to Vice President et al., Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002); Memorandum from John C. Yoo & Robert Delahunty to William J. Haynes II, General Counsel, Department of Defense, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002).

to the Geneva Conventions (Common Article 3) only applies within the territory of a State, the hostilities with Al Qaeda could not be categorized as a non-international armed conflict. At the same time, because the conflict did not occur between two States, it could not qualify as an international armed conflict. The position that the conflict with Al Qaeda fell outside the purview of the Geneva Conventions was widely criticized around the world²¹ and rejected by the U.S. Supreme Court in *Hamdan*.²² Given the far-reaching and explicit denunciation of this option, it cannot be seen as a viable approach.

Another view suggests that all conflicts that cross a border must qualify as international armed conflicts, even if one of the parties to the conflict is an armed group. The Israeli Supreme Court took this position in its 2006 Targeted Killing case.²³ Not all Israeli government statements, however, have endorsed the same view.²⁴ Moreover, apart from the Israeli Supreme Court decision, few other States or commentators share this interpretation.²⁵ The position contradicts the generally accepted understanding that

21. See, e.g., Thom Shanker & Katharine Q. Seelye, *Behind-the-Scenes Clash Led Bush to Reverse Himself on Applying Geneva Conventions*, NEW YORK TIMES (Feb. 22, 2002), at A12, available at <http://www.nytimes.com/2002/02/22/world/nation-challenged-captives-behind-scenes-clash-led-bush-reverse-himself-applying.html> (“Senior officials also disclosed for the first time that NATO allies were so concerned with Mr. Bush's initial decision to reject the conventions that Britain and France warned they might not turn over Taliban and Al Qaeda fighters captured by their troops in Afghanistan unless Mr. Bush pledged to honor the treaties.”).

22. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). See also John B. Bellinger III, State Department Legal Advisor, Foreign Press Center Briefing: Military Commissions Act of 2006 (Oct. 19, 2006), audio available at <http://2002-2009-fpc.state.gov/74786.htm>.

23. HCJ 769/02 Public Committee against Torture in Israel v. Government of Israel 2006 ¶ 18, (2) PD 459 [2006] (Isr.), reprinted in 46 INTERNATIONAL LEGAL MATERIALS 373 (2007), available at http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf.

24. See, e.g., ISRAELI MINISTRY OF FOREIGN AFFAIRS, THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS ¶ 29 (2009), available at <http://www.mfa.gov.il/NR/rdonlyres/E89E699D-A435-491B-B2D0-017675DAFEF7/0/GazaOperationwLinks.pdf> (“It is not yet settled which regime applies to cross-border military confrontations between a sovereign State and a non-State terrorist armed group operating from a separate territory.”).

25. The International Criminal Court in *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-2842, Judgment, ¶ 541 (Mar. 14, 2012), explicitly states that extraterritorial conflicts are not international unless the armed group is acting under the control of the State. See also International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 89 INTERNATIONAL REVIEW OF THE RED CROSS 719, 725 (2007) [hereinafter ICRC 2007 Report on IHL and the Challenges of Con-

international armed conflicts only occur between States, with the exception of the rare circumstances in which Article 1(4) of Additional Protocol I (AP I) applies or a belligerency is recognized. Although the holding of the Israeli Supreme Court could be used as evidence of emerging customary international law, there would need to be far more indications of State practice and *opinio juris* in order for this position to develop into a customary norm. In addition, this view leaves open the question of whether the full gamut of the Geneva Conventions would apply in the same manner as they would to inter-State conflicts.

Still others have maintained that because extraterritorial conflicts with armed groups do not fit into the traditional categories of IACs or NIACs, a new category of conflict should be created.²⁶ Under this view the legal principles applicable in NIACs and IACs could be adopted and tailored to suit extraterritorial conflicts,²⁷ however, it is not clear exactly what rules would apply or what threshold would trigger such conflicts. While proponents acknowledge that their view does not reflect the current state of the law, they suggest that it constitutes *lege ferenda*.²⁸ This position has been countered in recent years by developments in jurisprudence, the practice of States and an increasing number of scholars.²⁹

The final alternative put forth—and one increasingly gaining acceptance—is that Common Article 3 and relevant customary international law pertaining to NIACs may be applied to extraterritorial conflicts. Those who hold this view do not consider it necessary to create a new category of conflict.³⁰ Rather, they maintain that the existing law may be interpreted to

temporary Armed Conflict]. However, for support that such conflicts are international, see Dapo Akande, *Classification of Armed Conflicts Relevant Legal Concepts*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 32, 73–74, 77–78 (Elizabeth Wilmshurst ed., 2012).

26. Schondorf, *supra* note 11 at 50–51. Corn, *Hamdan, Lebanon, and the Regulation of Armed Conflict*, *supra* note 13.

27. Schondorf, *supra* note 11 at 5–7, 10, 48; Corn, *Hamdan, Lebanon, and the Regulation of Armed Conflict*, *supra* note 13; Corn & Jensen, *Transnational Armed Conflict*, *supra* note 13, at 5.

28. *See, e.g.*, Schondorf, *supra* note 11, at 9.

29. *See, e.g.*, Jelena Pejic, *The Protective Scope of Common Article 3: More than Meets the Eye*, 93 INTERNATIONAL REVIEW OF THE RED CROSS 16 (2011); 31st ICRC Conference on IHL CHALLENGES, *supra* note 15 (“There does not appear to be, in practice, any current situation of armed violence between organized parties that would not be encompassed by one of the two classifications”); Akande, *supra* note 25, at 71; NOAM LUBELL, EX-TRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 127, 128 (2010).

30. For a detailed assessment of why, in general, the existing regimes of either law en-

apply extraterritorially. This approach thus moves away from the traditional understanding that the applicability of Common Article 3 is limited to internal armed conflicts. Today, this standpoint reflects the predominant trend. It was the position taken by the U.S. Supreme Court in *Hamdan* and has been advanced by numerous commentators.³¹

In sum, there is currently very little law or practice to support the first three options (that the Geneva Conventions do not apply, IAC law applies or a third category of conflict should be created). What is more, the fourth option (that NIAC law may apply extraterritorially) has garnered widespread support. As such, this article focuses on the fourth view.

III. EXISTENCE OF A NON-INTERNATIONAL ARMED CONFLICT

Two types of non-international armed conflicts can be found in treaty law: those governed by Common Article 3 and those to which Additional Protocol II (AP II) applies.³² Importantly for the purposes of this article, Common Article 3 has a lower threshold of applicability than does AP II.³³ Its application therefore reflects the dividing line between situations of law enforcement and those of armed conflict. Not all hostilities amount to an armed conflict. Common Article 3 distinguishes between mere internal disturbances and tensions and those situations that rise to the level of an

forcement or NIAC are sufficient, see Marco Sassòli, *Transnational Armed Groups and International Humanitarian Law* 25, 6 HPCR OCCASIONAL PAPER SERIES (Winter 2006). See also SANDESH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* 228–29 (2012).

31. See, e.g., Marco Sassòli, *Use and Abuse of the Laws of War*, 22 *LAW AND INEQUALITY* 195, 201(2004); SIVAKUMARAN, *supra* note 30, at 229.

32. Some debate exists as to whether the Rome Statute of the International Criminal Court establishes a third threshold of non-international armed conflict. However, the drafting history, jurisprudence and majority of scholars do not support this view. Rome Statute of the International Criminal Court arts. 8(2)(d), 8(2)(f), July 17, 1998, 2187 U.N.T.S. 90. See, e.g., Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶ 87 (Int'l Crim. Trib. for the former Yugoslavia Nov. 30, 2005); Dino Kritsiotis, *The Tremors of Tadić*, 43 *ISRAEL LAW REVIEW* 262, 288 (2010); Theodor Meron, *The Humanization of Humanitarian Law*, 94 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 239, 260–61 (2000); Anthony Cullen, *The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2)(f)*, 12 *JOURNAL OF CONFLICT AND SECURITY LAW* 419 (2007).

33. A key distinguishing factor between the two regimes is that Article 1 of AP II requires armed groups to have the ability to control territory.

armed conflict.³⁴ Internal disturbances are not regulated by Common Article 3, but instead are controlled by law enforcement rules, human rights and other applicable law. It is only once the threshold of an armed conflict is reached that Common Article 3 applies.

Customary international law is particularly relevant in NIACs, given the dearth of treaty law rules. This article takes the position that the criteria triggering the application of Common Article 3 are the same as those required by customary international law to establish the existence of a NIAC. To conclude otherwise would create an additional category of conflict, an outcome that is generally rejected. The move in both treaty law and jurisprudence towards making fewer distinctions in types of NIACs, rather than more,³⁵ lends credence to viewing the Common Article 3 and customary law thresholds of armed conflict as synonymous.

Common Article 3, widely considered to reflect customary international law,³⁶ governs non-international armed conflicts between a State(s) and armed group(s), as well as those conflicts between armed groups.³⁷ The full Article reads as follows:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

34. The phrase “internal tensions and disturbances” is shortened to “internal disturbances” throughout the article for clarity’s sake. Although taken from AP II, Article 1(2), and not explicitly found in Common Article 3, the rule is widely understood to be applicable to Common Article 3. *See* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶¶ 4472–73 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter AP II COMMENTARY]; Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 620, 625 (Sept. 2, 1998); *Limaj* Trial Judgment, *supra* note 32, ¶ 84; Rome Statute, *supra* note 32, art. 8(2)d; UK MANUAL, *supra* note 11, ¶ 15.2.1; THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, *supra* note 10, at 616; International Committee of the Red Cross, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?* 3 (2008), available at <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

35. *See, e.g.*, Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict art. 22, Mar. 26, 1999, 2253 U.N.T.S. 212. *See generally* CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2 volumes) (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter CIHL Study].

36. *Akayesu* Trial Judgment, *supra* note 34, ¶ 608; *Tadić* Appeals Decision on Jurisdiction, *supra* note 5, ¶¶ 116, 134; Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 218 (June 27) [hereinafter ICJ *Nicaragua* Case].

37. AP II COMMENTARY, *supra* note 34, ¶ 4461. THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, *supra* note 10, at 609.

- (1) Persons taking no active part in the 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, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
 - (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (b) taking of hostages;
 - (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (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.
- (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Common Article 3 provides minimum standards for humane treatment of persons no longer taking part in hostilities. In addition, as a result of developments in customary international law, once Common Article 3 is triggered, a number of LOAC rules governing the conduct of hostilities are also applicable.³⁸ Strong support exists among commentators, jurisprudence and State practice for this interpretation,³⁹ reinforcing the position

38. Whether one views that it is the application of conduct of hostilities rules to conflicts that have been triggered by Common Article 3, or that Common Article 3 is itself now interpreted to include conduct of hostilities rules, is not material to this analysis.

39. Article 8(2)e of the Rome Statute supports the customary law status of some conduct of hostilities rules in NIACs. *See also* Prosecutor v. Blaskić, Case No. IT-95-14-T, Judgment, ¶ 170 (Int'l Crim. Trib. for the former Yugoslavia Mar. 3, 2000); Prosecutor v. Kordić and Čerkez, Motion to Dismiss the Amended Indictment for Lack of Jurisdiction

that the threshold for Common Article 3's applicability is synonymous with that of a non-international armed conflict. Disagreement, however, exists as to exactly which rules on the conduct of hostilities reflect customary international law.⁴⁰

As has been frequently pointed out, despite the important consequences resulting from its application, Common Article 3 does not specify when a situation amounts to an armed conflict.⁴¹ Three explicit requirements necessary to trigger Common Article 3 can be found in treaty law: (1) the existence of an armed conflict, (2) the armed conflict is not of an international character and (3) the armed conflict takes place in the territory of

Based on the Limited Jurisdictional Reach of Articles 2 and 3, ¶ 30 (Int'l Crim. Trib. for the former Yugoslavia Mar. 2, 1999). In addition, some recent conventions, which place limits on methods and means of warfare, apply to both IACs and NIACs. *See, e.g.*, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137; Second Protocol to the Hague Convention, *supra* note 35, art. 22; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 45. *See also* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, *supra* note 10, at 614–16, 624–25; Robin Geiss, *Armed Violence in Fragile States: Low-Intensity Conflicts, Spillover Conflicts, and Sporadic Law Enforcement Operations by Third Parties*, 91 INTERNATIONAL REVIEW OF THE RED CROSS 127, 133–34 (2009).

40. The ICRC's customary international law study, for instance, suggests that 147 of the 161 rules contained in the study are applicable in both international and non-international armed conflicts. CIHL Study, *supra* note 35. *But see* Letter from John Bellinger III, Legal Adviser, U.S. Department of State, & William J. Haynes, General Counsel, U.S. Department of Defense, to Dr. Jakob Kellenberger, President, International Committee of the Red Cross, Regarding Customary International Law Study (Nov. 3, 2006), *reprinted in* 46 INTERNATIONAL LEGAL MATERIALS 514 (2007). The *Tadić* Appeals Decision on Jurisdiction, *supra* note 5, ¶ 127, states that customary rules applicable in NIACs include the “protection of civilians . . . 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 inter-national armed conflicts and ban of certain methods of conducting hostilities.”

41. *See, e.g.*, Prosecutor v. Musema, Case No. ICTR-96-13-A, Appeals Judgment, ¶¶ 246, 252 (Jan. 27, 2000); 1 MARCO SASSÒLI & ANTOINE A. BOUVIER, HOW DOES LAW PROTECT IN WAR 109 (2d ed. 2011); LINDSEY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 31 (2002); COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 34, ¶¶ 4448, 4450. Interestingly, the ICRC customary international law study does not address the criteria for the existence of a non-international armed conflict. CIHL STUDY, *supra* note 35.

one of the high contracting parties.⁴² In addition, although not explicit in the text, hostilities must surpass situations of internal disturbances in order for an armed conflict to exist.⁴³ In any case, the existence of an armed conflict is determined through an assessment of the facts on the ground.⁴⁴

The ambiguity surrounding Common Article 3's threshold of application can be traced back to its codification in 1949. The groundbreaking inclusion of non-international armed conflicts in the regulatory framework of violence reflected a delicate compromise between States' sovereign concerns and the interests of humanity. The implicit exclusion of situations of internal disturbances from the purview of Common Article and the lack of clarity as to the threshold of the law's applicability were a consequence of these underlying tensions. Governments traditionally have feared intrusion into their sovereign affairs. They considered the regulation by international law over their internal matters to be an incursion in their sovereignty that could affect their ability to maintain law and order and impact the national security of the State. States have also long been reluctant to grant any appearance of legitimacy to armed groups rebelling against their authority.⁴⁵ As a consequence of these factors, States considered that the violence had to reach a certain threshold—beyond internal disturbances—in order to justify what they considered to be interference in their internal affairs. Moreover, the lack of clarity as to Common Article 3's threshold was seen to be beneficial as it offered flexibility to States to deny the existence of an armed conflict.⁴⁶

Humanitarian interests also played a role in requiring that the threshold surpass situations of internal disturbances. One of the underlying purposes of Common Article 3 is to bring a body of law into effect when the normal

42. Common Article 3: "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . ."

43. See *supra* note 34 and accompanying text.

44. See, e.g., Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence, ¶ 93 (Dec. 6, 1999); *Limaj* Trial Judgment, *supra* note 32, ¶ 93; CULLEN, *supra* note 11, at 131–32.

45. This concern resulted in the last paragraph of Common Article 3 stating: "The application of the preceding provisions shall not affect the legal status of the Parties to the conflict." See also AP II, *supra* note 6, art. 3(2).

46. In fact, Common Article 3's application has been frequently contested. The U.S. government, for instance, initially denied Common Article 3's applicability to Al Qaeda after 9/11. See Meron, *supra* note 32, at 261 n.117; RENÉ PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 268 (2002). These authors provide a number of examples where States have denied Common Article 3's applicability. See also G.I.A.D. Draper, *The Geneva Conventions of 1949*, 114(I) RECUEIL DES COURS 57, 87–88 (1965).

system of law and order breaks down.⁴⁷ For this reason, a distinction was made between internal disturbances and situations of armed conflict. The ambiguity surrounding the application of Common Article 3 was considered positive by some as it allowed for the necessary flexibility to deal with changing circumstances and the expansion of types of situations that could fall under it.⁴⁸

In more recent years, jurisprudence of international tribunals and State practice has provided some clarification for Common Article 3's threshold. Today, Common Article 3 conflicts exist when the hostilities have reached a certain level of intensity and when the armed groups involved are sufficiently organized.⁴⁹ These two requirements, known as the *Tadić* test, were first articulated by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* Appeals Chamber judgment: "Armed conflict exists whenever there is a resort to armed force between States *or protracted armed violence* between governmental authorities and *organized armed groups* or between such groups within a State."⁵⁰

The key purpose underlying both criteria is to distinguish situations of internal disturbances from those of armed conflict.⁵¹ This test is now considered to be reflective of customary international law. Subsequent decisions of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) have repeatedly relied on the *Tadić* test.⁵² Significantly, States draft-

47. See, e.g., NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 256 (2008).

48. See, e.g., Draper, *supra* note 46, at 87; MOIR, *supra* note 41, at 33, 42; CULLEN, *supra* note 11, at 60; Heike Spieker, *Twenty-Five Years After the Adoption of Additional Protocol II: Breakthrough or Failure of Humanitarian Legal Protection?*, 4 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 141 (2001); GC III COMMENTARY, *supra* note 5, at 35.

49. *Tadić* Appeals Decision on Jurisdiction, *supra* note 5, ¶ 70. See, e.g., 31st ICRC Conference on IHL CHALLENGES, *supra* note 15, at 8, 9. Jelena Pejic, *Terrorist Acts and Groups: A Role for International Law?*, 75 BRITISH YEARBOOK OF INTERNATIONAL LAW 86 (2004).

50. *Tadić* Appeals Decision on Jurisdiction, *supra* note 5, ¶ 70 (emphasis added).

51. Prosecutor v. *Tadić*, Case No. IT-94-1-T ICTY, Judgment, ¶ 562 (Int'l Crim. Trib. for the former Yugoslavia May 7, 1997). See also: Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 38 (Int'l Crim. Trib. for the former Yugoslavia Apr. 3, 2008); Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-A, Appeals Judgment, ¶ 341 (Int'l Crim. Trib. for the former Yugoslavia Dec. 17, 2004); Prosecutor v. Delalić et al., Case No. IT-96-21-T, Judgment, ¶ 184 (Int'l Crim. Trib. for the former Yugoslavia Nov. 16, 1998); *Limaj* Trial Judgment, *supra* note 32, ¶¶ 84, 89; *Akayesu* Trial Judgment, *supra* note 34, ¶ 620. *Musema* Appeals Judgment, *supra* note 41, ¶ 248. Rome Statute, *supra* note 32, art. 8(2)(f).

52. See, e.g., *Akayesu* Trial Judgment, *supra* note 34, ¶ 620. *Rutaganda* Trial Judgment, *supra* note 44, ¶ 93; *Tadić* Trial Judgment, *supra* note 51, ¶¶ 561–62; *Delalić* Trial Judgment, *supra* note 51, ¶¶ 183–85; Prosecutor v. Krnojelac et al., Case No. IT-97-25-T, Judgment,

ing the Rome Statute of the International Criminal Court basically incorporated the *Tadić* test as the definition for the threshold of a NIAC.⁵³ Various international bodies have turned to the *Tadić* test in order to determine the existence of an armed conflict.⁵⁴ Some States, such as the United Kingdom, have explicitly cited the *Tadić* test in their military manuals.⁵⁵ Finally, the majority of commentators today refer to the *Tadić* test as a reflection of the current state of law.⁵⁶

Jurisprudence from the ICTY has supplied a number of indicative factors that help to identify when the criteria of intensity and organization have been met. Factors suggesting that the requisite level of organization has been reached include:

- (1) the existence of a command structure;
- (2) an ability to carry out operations in an organized manner;
- (3) the level of logistics;
- (4) a level of discipline and ability sufficient to implement the basic obligations of Common Article 3; and
- (5) an ability to speak with one voice.⁵⁷

¶ 51 (Int'l Crim. Trib. for the former Yugoslavia Mar. 15, 2002); Prosecutor v. Kunarac et al., Case No. IT-96-23, Appeals Judgment, ¶ 56 (Int'l Crim. Trib. for the former Yugoslavia June 12, 2002); *Kordić and Čerkez* Appeals Judgment, *supra* note 51, ¶ 336; *Limaj* Trial Judgment, *supra* note 32, ¶ 84; Prosecutor v. Naletilić, Case No. IT-98-34-T, Judgment, ¶ 225 (Int'l Crim. Trib. for the former Yugoslavia Mar. 31, 2003); *Haradinaj* Trial Judgment, *supra* note 51, ¶¶ 37–38; Prosecutor v. Boškoski and Tarčulovski, Case No. IT-04-82-T, Judgment, ¶ 175 (Int'l Crim. Trib. for the former Yugoslavia July 10, 2008); Prosecutor v. Milosević, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶¶ 18–21 (Int'l Crim. Trib. for the former Yugoslavia Feb. 25, 2004).

53. Rome Statute, *supra* note 32, art. 8(2)(f).

54. *See, e.g.*, International Commission of Inquiry on Darfur, *Report to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004*, ¶¶ 74–76, U.N. Doc. S/2005/60 (Jan. 25, 2005).

55. *See, e.g.*, UK MANUAL, *supra* note 11, ¶ 15.3.1. As further evidence of State practice, see the Israeli government's reference to the *Tadić* test, demonstrating that the conflict with Hamas could fulfill the requirements for a NIAC, even though as a matter of policy Israel applies both IAC and NIAC rules to its operations in Gaza. ISRAEL MINISTRY OF FOREIGN AFFAIRS, THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS ¶ 28 (2009).

56. *See, e.g.*, TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE rule 23 (Michael N. Schmitt ed., 2013); Michael Cottier, in OTTO TRIFFTERER, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 291, 292 (2d ed. 2008).

57. *Boškoski* Trial Judgment, *supra* note 52, ¶¶ 199–203, 277. *See also* *Limaj* Trial

The ICTY jurisprudence establishes the following factors as indicators that the required level of intensity has been reached:

- (1) the seriousness, increase and spread of clashes over territory and time;
- (2) the distribution and type of weapons;
- (3) government forces (number, presence in crisis area and the way force is used);
- (4) the number of casualties;
- (5) the number of civilians fleeing the combat zone;
- (6) the extent of destruction;
- (7) blocking, besieging and heavy shelling of towns;
- (8) the existence and change of front lines;
- (9) occupation of territory;
- (10) road closures; and
- (11) UN Security Council attention.⁵⁸

While these factors are helpful, it must be highlighted that they are not requirements, but merely indicators. The minimum level of organization and intensity necessary in order for a non-international conflict to be triggered continues to be debated.

It is suggested here that the organized armed group must at least possess a responsible command and have the ability to abide by LOAC. The latter prerequisite can be read into the fact that Common Article 3 requires all parties to the conflict to fulfill certain obligations.⁵⁹ In order to satisfy these requirements, the parties must also have the *ability* to abide by the applicable law. The criterion of a responsible command is implicit in

Judgment, *supra* note 32, ¶ 90; *Haradinaj* Trial Judgment, *supra* note 51, ¶ 64; *Milosević* Decision, *supra* note 52, ¶ 23; Prosecutor v. Djordjević, Case No. IT-05-87/1-T, Judgment, ¶¶ 1525–26 (Int'l Crim. Trib. for the former Yugoslavia Feb. 23, 2011); *Lubanga* Trial Judgment, *supra* note 25, ¶ 537.

58. The *Boškoski* Trial Judgment, *supra* note 52, ¶ 177. The *Boškoski* Trial Judgment is particularly useful as it summarizes previous ICTY case law as well as a discussion on relevant national court decisions. *Boškoski* Trial Judgment, *supra* note 52, ¶¶ 177–83. See also *Djordjević* Trial Judgment, *supra* note 57, ¶ 1523; *Lubanga* Trial Judgment, *supra* note 25, ¶ 538.

59. Common Article 3: “In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, *each Party to the conflict shall be bound to apply*, as a minimum, the following provisions” (emphasis added).

Common Article 3, as evidenced by the drafting history,⁶⁰ case law⁶¹ and the position taken by the majority of commentators.⁶² In addition, the fact that command responsibility is considered applicable to conflicts governed by Common Article 3 as a matter of customary international law today⁶³ lends support to this interpretation. Command responsibility is premised on, among other things, the existence of a responsible command.⁶⁴ Therefore, the customary law status of command responsibility recognizes that a responsible command is a required component for the existence of an armed conflict.

As with the organization requirement, opinions differ with regard to the level of intensity necessary for a situation to amount to a Common Article 3 conflict. In particular, it is debated whether the gravity of the violence or its duration (or protractedness) should be the determinative factor in reaching the necessary intensity threshold for an armed conflict to exist. In the *Abella* case, the Inter-American Commission on Human Rights placed more emphasis on the gravity of a situation over its duration.⁶⁵ The

60. See, e.g., GC III COMMENTARY, *supra* note 5, at 36.

61. See, e.g., *Bošković* Trial Judgment, *supra* note 52, ¶196; Prosecutor v. Hadžihasanović, Case No. IT-01-47-AR72, Appeals Chamber Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 16 (Int'l Crim. Trib. for the former Yugoslavia July 16, 2003). ICTY judgments vary as to the importance given to the duration factor.

62. See, e.g., MOIR, *supra* note 41, at 36, 43; MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS, COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 624–25 (1982).

63. See, e.g., Prosecutor v. Hadžihasanović, Case No. IT-01-47-T, Judgment, ¶¶ 93, 179 (Int'l Crim. Trib. for the former Yugoslavia Mar. 15, 2006). See also Statute of the International Criminal Tribunal for Rwanda art. 6(3), S.C. Res. 955, Annex, U.N. Doc. S/RES/955 (Nov. 8, 1994); Statute of the Special Court for Sierra Leone art. 6(3), annexed to Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 138; Rome Statute, *supra* note 32, art. 28.

64. Although responsible command and command responsibility are two different concepts, they are related. See, e.g., *Hadžihasanović* Appeals Judgment, *supra* note 61, ¶ 16; GUÉNAËL METTRAUX, THE LAW OF COMMAND RESPONSIBILITY 54–55 (2009). Demonstrating command responsibility entails a stricter test than finding that a responsible command exists. See, e.g., *Limaj* Trial Judgment, *supra* note 32, ¶ 89; METTRAUX, *supra*, at 56.

65. The *Abella* case (also referred to as the *Tablada* case) concerns an attack on a military barracks in Argentina by forty-two individuals in 1989. The battle lasted thirty hours and resulted in the death of twenty-nine of the attackers, as well as a number of the State officials. The Inter-American Commission on Human Rights held that this situation constituted an armed conflict governed by Common Article 3 and relevant customary interna-

ICTY jurisprudence has generally held that both aspects matter, although the judgments are not always consistent in the emphasis placed on each factor.⁶⁶ The ICTY approach of incorporating both components of intensity seems to be the predominant trend today.

Until recently, the debate surrounding Common Article 3's threshold of applicability paid little attention to the Article's requirements that a conflict be "not of an international character" and take place "in the territory of a High Contracting party." The drafting history and literal meaning of the text of Common Article 3 made clear that Common Article 3 was intended to apply to internal armed conflicts.⁶⁷ As a result, over the years States, commentators and jurisprudence have consistently understood the territorial scope of Common Article 3 to be restricted to internal armed conflicts.⁶⁸

This interpretation of Common Article 3 has been challenged in recent years for several reasons. Armed groups have grown in strength and acquired an ability to act against States across multiple borders. At the same time, an increased recognition that internal conflicts often spill over into neighboring countries exists. These developments highlight the inconsistency between traditional State-centric, territorially bound views entrenched in the law of armed conflict and realities on the ground. Moreover, the long-standing resistance of States, which has permeated the development, codification and enforcement of NIAC law, to concede to the ap-

tional law. *Abella v. Argentina*, Case No. 11.137, Inter-Am. Comm'n H.R., Report No.55/97, OEA/Ser/L/V/II.98, doc. 6 rev. ¶156 (1997). For a critique of this case, see Liesbeth Zegveld, *The Inter-American Commission for Human Rights and International Humanitarian Law: A Comment on the Tablada Case*, 324 INTERNATIONAL REVIEW OF THE RED CROSS 505 (1998).

66. See, e.g., *Haradinaj* Trial Judgment, *supra* note 51, ¶ 49 ("The criterion of protracted armed violence has therefore been interpreted in practice, including by the *Tadic* Trial Chamber itself, as referring more to the intensity of the armed violence than to its duration."); *Boškoski* Trial Judgment, *supra* note 52, ¶ 186 (stating that the term "protracted" adds a "temporal element to the definition of armed conflict"), ¶ 185 ("In applying this test, 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.").

67. GC III COMMENTARY, *supra* note 5, at 37. Schondorf, *supra* note 11, at 50; CULLEN, *supra* note 11, at 49–51.

68. See, e.g., UK MANUAL, *supra* note 11, at 383; GC III COMMENTARY, *supra* note 5, at 37; CULLEN, *supra* note 11, at 49–51. MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY ¶ 1.1.1(a) (2006), *reprinted in* 36 ISRAEL YEARBOOK ON HUMAN (2006) (Special Supplement).

plication of Common Article 3 may be shifting for some States. The United States in its current global armed conflict against Al Qaeda is leading this move towards a wider application, rather than avoidance, of the law of armed conflict.

Some scholars have identified the development of international human rights law and its accompanying restrictions to be an impetus for this shift.⁶⁹ They suggest that as a result of the increasing constraints of human rights law, characterizing a situation as one of armed conflict actually allows States more flexibility in how they may lawfully deal with armed groups (in terms of targeting and detention).⁷⁰ An additional contributing factor may be that in these situations the majority of the violence does not take place in the territory of the State fighting the armed group, but occurs on a second State's territory. As such, the fear of the fighting State that it might appear to lack an ability to maintain law and order is no longer present. This set of circumstances has evoked reaction and led to renewed debate within the international law community as to the conditions for the applicability of Common Article 3.⁷¹ One of the challenges today is if and how Common Article 3 applies extraterritorially.

IV. EXTRATERRITORIAL APPLICATION OF COMMON ARTICLE 3

The prevailing view today is that Common Article 3 and relevant customary international law may apply to armed conflicts that are not international in character.⁷² This view re-interprets the geographic scope of Common Article 3 in accordance with the rules on treaty interpretation found in the Vienna Convention on the Law of Treaties.⁷³ It is based on a reading of

69. Kress, *supra* note 14, at 260–61; David Krezmer, *Rethinking Application of IHL in Non-international Armed Conflicts*, 42 ISRAEL LAW REVIEW 8 (2009).

70. Kress, *supra* note 14, at 260–61; Krezmer, *supra* note 69, at 8. *See also* 31st ICRC Conference on IHL CHALLENGES, *supra* note 15, at 10 (“It should be borne in mind that IHL rules governing the use of force and detention for security reasons are less restrictive than the rules applicable outside of armed conflicts governed by other bodies of law.”). This is not to say that these States have abandoned the concern that acknowledging the existence of an armed conflict might be seen as bestowing legitimacy upon the armed group. The U.S. law that prohibits the provision of “material support” to designated foreign terrorist organizations (18 U.S.C. §§ 2339A, 2339B (2006)), which was upheld in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2075 (2010), is an example of the State's fear of legitimizing various armed groups.

71. *See, e.g.*, Letter from Human Rights Watch, *supra* note 12.

72. That is, any conflict not covered by Common Article 2 or AP I.

73. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

Common Article 3 that corresponds with the text, the object and purpose of the Geneva Conventions,⁷⁴ emerging practice of States,⁷⁵ judicial decisions and the views of prominent commentators.⁷⁶

The most frequently cited argument in support of this interpretation is that because the Geneva Conventions are universally ratified, the phrase “in the territory of one of the High Contracting Parties” has lost its significance. According to a literal reading of the text, every armed conflict today takes place “in the territory of one of the High Contracting Parties.”⁷⁷ Moreover, an initial reason for the geographic restriction was to specify that only those States party to the Conventions would be bound by it. This distinction, too, no longer has relevance.⁷⁸

Simultaneously, more emphasis has been placed on the phrase “not of an international character.”⁷⁹ This was the approach of the Supreme Court in the *Hamdan* decision, where the Court held that “[t]he term ‘conflict not of an international character’ is used . . . in contradistinction to a conflict

74. *Id.*, art. 31, provides that treaties should be interpreted in good faith and in accordance with the ordinary meaning of the text, in the context of the treaty and with regard to its object and purpose.

75. *Id.*, art. 31(3)b, provides that in addition to interpreting a treaty “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose,” “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” should be taken into account.

76. *Id.*, art. 32, specifies that supplementary means of interpretation (preparatory work and circumstances surrounding a treaty’s codification) may be resorted to when the treaty’s meaning is “ambiguous or obscure” or “leads to a result which is manifestly absurd or unreasonable.” Article 38 of the Statute of the International Court of Justice refers to judicial decisions and the teachings of the “most highly qualified publicists” as subsidiary means of interpretation. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

77. This is the ICRC position. See International Committee of the Red Cross, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, (Mar. 17, 2008), <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>. See also MOIR, *supra* note 41, at 31; Sylvain Vité, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INTERNATIONAL REVIEW OF THE RED CROSS 69, 90 (2009). In addition, the drafting history, while clearly focused on purely internal armed conflicts, does not explicitly rule out the extraterritorial application of Common Article 3. Pejic, *supra* note 29, at 12, 13; LIESBETH ZEGVELD, ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW 136 (2002); SIVAKUMARAN, *supra* note 30, at 229, 230.

78. See, e.g., Sassòli, *supra* note 30, at 9; SIVAKUMARAN, *supra* note 30, at 229; TALLINN MANUAL, *supra* note 56, cmt. to rule 23, ¶ 3.

79. See, e.g., MELZER, *supra* note 47, at 259.

between nations.”⁸⁰ As a result of this decision, the United States’ position today is that it is engaged in a global conflict with Al Qaeda and its associates governed by Common Article 3.⁸¹

In addition, restricting application of Common Article 3 to conflicts occurring within State borders does not comport with the object and purpose of the Article. Such an interpretation could result in a gap in protection of the vulnerable. For example, in a spill-over conflict this position essentially means that a “party’s humanitarian law obligations would stop at the border,”⁸² even though the hostilities and need for the law would not necessarily cease at that point. This gap in protection “could not be explained by States’ concerns about their sovereignty.”⁸³ The ICRC’s position

80. *Hamdan*, *supra* note 22, ¶ 67. The Supreme Court also held that Common Article 3 “is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase ‘not of an international character’ bears its literal meaning.” *Id.*

81. *See, e.g.*, DOJ White Paper, *supra* note 1, at 3 (“The United States is currently in a non-international armed conflict with al-Qaeda and its associated forces.”); Memorandum from the Secretary of Defense to the Secretaries of the Military Departments et al. on the Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense 1 (July 7, 2006), available at <http://www.defense.gov/pubs/pdfs/DepSecDef%20memo%20on%20common%20article%203.pdf> (“The Supreme Court has determined that Common Article 3 to the Geneva Conventions of 1949 applies as a matter of law to the conflict with Al Qaeda.”); Human Rights Council, United States of America, National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1, ¶ 84, U.N. Doc. A/HRC/WG.6/9/USA/1 (Aug. 23, 2010). It should be noted that a number of official statements demonstrate that the United States views itself as being in an armed conflict with Al Qaeda without specifying whether that conflict is an IAC or NIAC. *See, e.g.*, Koh, *supra* note 17, at 14; John Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at Harvard Law School: Strengthening Our Security by Adhering to Our Values (Sept. 16, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> [hereinafter Brennan Speech at Harvard]; THE WHITE HOUSE, INTERNATIONAL STRATEGY FOR CYBERSPACE: PROSPERITY, SECURITY, AND OPENNESS IN A NETWORKED WORLD 2, 3 (2011), available at http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf [hereinafter NATIONAL STRATEGY FOR COUNTERTERRORISM]. *See also* John Bellinger, *Armed Conflict with Al Qaeda?*, OPINIO JURIS (Jan. 15, 2007), <http://opiniojuris.org/2007/01/15/armed-conflict-with-al-qaida/>.

82. *See* Jelena Pejic, *Status of Armed Conflicts*, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 87 (Elizabeth Wilmshurst & Susan Breau eds., 2007); Pejic, *supra* note 29, at 6; Pejic, *supra* note 49, at 85; Sassöli, *supra* note 30, at 9.

83. Sassöli, *supra* note 30, at 9.

is that Common Article 3 continues to bind both parties to the conflict, even if a border is crossed, as occurs in spill-over and cross-border conflicts.⁸⁴ Several judicial developments also point to the applicability of Common Article 3 extraterritorially. The ICTR Statute, for example, includes jurisdiction over crimes committed across the Rwandan border in neighboring countries.⁸⁵ This suggests that the parties to the conflict, rather than the territorial boundaries, determine the geographic reach of Common Article 3.⁸⁶

In sum, although it cannot be said categorically that Common Article 3 applies extraterritorially as a matter of customary international law,⁸⁷ the prevailing view maintains that Common Article 3 and relevant customary international law can govern extraterritorial hostilities. A consequence of this interpretation is an emphasis on the parties to the conflict, reducing the importance of territory.⁸⁸

V. ORGANIZATION, INTENSITY, AND EXTRATERRITORIALITY—GAPS AND INCONSISTENCIES

Assuming that the law applicable to NIACs can govern extraterritorial hostilities, the question then arises as to how this reduction of the territorial element might impact the conditions widely considered necessary to establish the existence of an armed conflict. Specifically, does this extension of the law's application have an effect on how the organization and intensity requirements apply to extraterritorial hostilities?

It is well accepted that the application of Common Article 3 requires the parties to the conflict be organized and the intensity of the conflict reach a certain level.⁸⁹ This test must also be used in determining whether Common Article 3 applies extraterritorially.⁹⁰ To conclude otherwise would essentially signify the creation of a third legal category of non-international armed conflicts, entailing the establishment of an additional threshold of

84. 31st ICRC Conference on IHL CHALLENGES, *supra* note 15, at 9, 10.

85. Statute of the International Criminal Tribunal for Rwanda, *supra* note 63, arts. 1, 7.

86. ZEGVELD, *supra* note 77, at 136; Sassòli, *supra* note 30, at 9.

87. Pejic, *supra* note 29, at 17.

88. SIVAKUMARAN, *supra* note 30, at 232.

89. *See supra* note 49 and accompanying text.

90. Leading commentators and judgments from the international tribunals support this view. *See, e.g.*, Marco Sassòli, *The Status of Persons Held in Guantanamo under International Humanitarian Law*, 2 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 96, 99–100 (2004); Kress, *supra* note 14, at 261; Pejic, *supra* note 49, at 86, 87.

application and clarification of what rules would then apply. Generating a new category of conflict contradicts the current trend in LOAC toward either reducing the types of NIACs or accepting the existing categories found in Common Article 3 and AP II.⁹¹

Despite an acknowledgment that Common Article 3 and relevant customary international law can apply extraterritorially, the majority of interpretations do not assess the territorial scope of Common Article 3 together with the organization and intensity requirements. For example, the *Hamdan* decision notably does not refer to the organization and intensity criteria, although it embraces the extraterritorial application of Common Article 3. The *Tadić* test, as developed in ICTY jurisprudence, does not seem to have envisioned extraterritorial hostilities.⁹² This is not to suggest that the organization and intensity requirements do not apply to extraterritorial hostilities, but rather to question how they apply. Given that the LOAC system has traditionally been structured territorially, are there any consequences to reducing the relevance of State boundaries?

Moreover, while commentators and States seem to consider that Common Article 3 and the *Tadić* test apply to extraterritorial hostilities, there are inconsistencies in the rationale for the type of extraterritorial conflicts deemed to be covered by NIAC law. Considerable support exists for the position that borders do not matter when establishing Common Article 3 and the *Tadić* test's applicability to spill-over conflicts,⁹³ and even to cross-border conflicts.⁹⁴ The logic, however, seems to change when the discussion turns to "global" conflicts.⁹⁵ There appears to be a reluctance to

91. See *supra* note 35 and accompanying text.

92. Arimatsu points out that "[f]or the ICTY the only 'geography question' that required clarification was to ascertain the reach of the law *within* the state; the extraterritorial reach of the rules was simply not considered." Arimatsu, *supra* note 2, at 187 (emphasis added). See also Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 36–37 (2010).

93. HARVARD PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE ¶ 2(a)5 (2010) [hereinafter AMW MANUAL COMMENTARY]. But see Geiss, *supra* note 39, at 138, for the view that the issue remains unresolved.

94. 31st ICRC Conference on IHL CHALLENGES, *supra* note 15, at 10. Less consensus exists as to how the 2006 conflict between Israel and Hezbollah should best be characterized. This uncertainty is compounded by the complexity of the situation. For example, was the conflict internationalized due to overall control of Hezbollah by an outside State?

95. 31st ICRC Conference on IHL CHALLENGES, *supra* note 15, at 10 ("It should be reiterated that the ICRC does not share the view that a conflict of global dimensions is or

accept that Common Article 3 and relevant customary international law may apply to “global” conflicts without regard to State borders.

Part of the criticism involves skepticism that the armed groups in various countries actually form a single party to a distinct conflict. There is also unease with the idea that the law of armed conflict may apply in countries where the level of violence is very low. It seems that territory does still play a role for some commentators,⁹⁶ despite acceptance of the extraterritorial application of Common Article 3 and relevant customary international law. In addition, the practice of a number of States does not support the United States’ position that territorial boundaries are irrelevant for the application of the law in NIACs.⁹⁷ Taken to its logical conclusion, this position would appear to suggest that the organization and intensity criteria should be assessed per territory for “global” conflicts. Yet, it seems inconsistent to maintain on one hand that territorial borders do not stop the application of Common Article 3 to spill-over and cross-border conflicts and, on the other hand, to say that the applicability of Common Article 3 (thus LOAC) must be determined on a case-by-case basis according to territorial constraints with regard to a “global” armed conflict.

An underlying reason for this inconsistency may be the traditional separation of the “protection” and “conduct of hostilities” rules in LOAC. Common Article 3 and the 1949 Geneva Conventions as a whole deal with protective measures (known as “Geneva law”), while the 1907 Hague Regulations concern rules on the conduct of hostilities (known as “Hague law”). It was not until 1977 that the Additional Protocols combined both the “protection” and “conduct of hostilities” rules into one treaty. It may be that the tendency to push for the application of the protective side of the law, while viewing the conduct of hostilities side as too permissive,

has been taking place.”). See, e.g., Jelena Pejić, “Unlawful/Enemy Combatants”: *Interpretations and Consequences*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES: ESSAYS IN HONOUR OF YORAM DINSTEIN 335, 346 (Michael N. Schmitt & Jelena Pejić eds., 2007) (discussing the bombings in Madrid, London, Bali, New Delhi and other places).

96. Sassòli, *supra* note 30 at 8 (“It is not clear to this author why a situation, which is not an armed conflict when it arises on the territory of only one state, should be an armed conflict when it spreads over the territory of several states.”). See also Pejić, *supra* note 29, at 8, 9.

97. Brennan Speech at Harvard, *supra* note 81. See also Kress, *supra* note 14, at 266; Pejić, *supra* note 95, at 346; Sassòli, *supra* note 30, at 10 (referring to the law enforcement response by the Spanish and UK governments to terrorist attacks on their soil in 2004 and 2005).

stems from this traditional division. Although as a matter of black letter law Common Article 3 only contains protection provisions, as noted, once the Article is triggered, so too are the customary rules on conduct of hostilities applicable to NIACs.⁹⁸ To separate the two tracks would complicate the application of the law (e.g., what would the threshold of application be for each?).

Setting aside these dual strands in the development of LOAC, an acknowledgment that Common Article 3 and customary international law apply extraterritorially suggests that an assessment of the intensity and organization requirements cannot be conducted separately per country. Even in accepting this conclusion, however, the concern remains that if the territorial restrictions are removed when establishing the existence of an armed conflict over multiple, geographically dispersed States, what constraints within LOAC remain?⁹⁹

It is suggested that territory does still play a role in determining when an armed conflict exists, particularly in the case of “global” armed conflicts. Problems arise if the manner in which the threshold of a NIAC has been determined in internal conflicts is simply transposed to those conflicts that are geographically dispersed across numerous territories. Two issues in particular may challenge the way in which the organization and intensity criteria are applied to “global” armed conflicts. The first concerns the matter of links between armed groups—can violence conducted by various armed groups that are linked to one another be conglomerated in order to fulfill the intensity requirement? If so, what must the nature of the link be? Second, can violence that is dispersed over large geographic spaces be amassed in order to meet the requisite level of intensity for the existence of an armed conflict? In addition, the underlying purpose of the requirements may be affected by a shift in State sovereignty. These factors are now examined.

98. *See supra* note 39 and accompanying text.

99. *See, e.g.,* Geiss, *supra* note 39, at 138:

Clearly, a sweeping and global application of IHL without any territorial confines whatsoever is not maintainable owing to the unjustifiable worldwide derogations from human rights law this would bring about, and in light of the very object and purpose of IHL, i.e. to provide relatively basic but feasible standards in areas where the reality of armed conflict simply forestalls the application of more protective (human rights) standards.

A. Organized Armed Group Criterion

In general, it does not appear that the geographical extension of the law presents insurmountable difficulties for the criterion of an organized armed group in and of itself. The *Tadić* test requires that at least one of the parties consist of an organized armed group. Likewise, a consequence of the extra-territorial application of Common Article 3 is an emphasis on the parties to the conflict over the territorial constraints. In this way, the law of armed conflict can be said to follow the parties to the conflict. This logic can be seen in the widespread understanding today that Common Article 3 applies to spill-over conflicts.¹⁰⁰ Therefore, even if the conflict spans several countries without geographic proximity, there still must be an identifiable party that fulfills the requirements of an organized armed group. Correspondingly, to require that the existence of an organized armed group be separately assessed in each country would not be consistent with the acceptance that the law may apply across State boundaries. The United States, for example, acknowledges the relevance of the organized armed group requirement in conducting its global war on Al Qaeda and its associates.¹⁰¹

Where controversy arises is with regard to what constitutes an organized armed group¹⁰² and who is considered to be a member of that group. In particular, the question of whether armed groups organized in networked structures exhibit sufficient organization is crucial for establishing whether an armed conflict exists. Despite its importance, the issue is not specific to the geographical matter discussed here. Similar challenges could arise in the context of a purely internal conflict. At most, it could be argued that large geographical distances may make it more difficult for an armed group to be adequately organized (i.e., possess some of the indicative factors for organization, such as having a command structure and a level of

100. See, e.g., 31st ICRC Conference on IHL CHALLENGES, *supra* note 15, at 9, 10; AMW MANUAL COMMENTARY, *supra* note 93, ¶ 2(a)5; THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, *supra* note 10, at 605, 607.

101. See Koh, *supra* note 17, at 13 (where he mentions that Al Qaeda is an organized armed group). See also Jeh Charles Johnson, General Counsel of the U.S. Department of Defense at the Oxford Union, Oxford University: The Conflict Against Al Qaeda and its Affiliates: How Will It End? (Nov. 30, 2012), available at <http://www.youtube.com/watch?v=cun8o2sDjgE> [hereinafter Johnson Oxford Speech].

102. The United States' determination that Al Qaeda is an organized armed group has generated criticism. See, e.g., Noam Lubell, *The War (?) against Al-Qaeda*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS, *supra* note 25, at 421, 425–28 (where he questions who exactly forms the armed group).

discipline that provides an ability to abide by the law). However, the components required for an organized armed group as such, do not change due to a geographical extension of the law's application. Likewise, the location of the conflict does not affect the determination of whether an individual is a member of an organized armed group. While it could be argued that the practical challenges of gathering intelligence in a second State may present additional obstacles to verifying that a particular individual is a group member, the same disputed legal questions on membership that surface in internal conflicts arise wherever the conflict is situated.¹⁰³

B. Party to the Conflict, Conglomeration of Violence and Links between Armed Groups

Particular difficulties may arise in establishing that distinct organized armed groups are part of a single identifiable party. An organized armed group is not necessarily equivalent to a party to the conflict. The party to the conflict may be the organized armed group, it may have an armed wing that constitutes the organized armed group¹⁰⁴ or the party may consist of multiple organized armed groups.¹⁰⁵ With regard to the latter, the law does not specify the nature of the link required between multiple organized armed groups and a party to the conflict in a NIAC in order for them to form a single identifiable party.

Clarifying what constitutes an identifiable party is intricately connected to the intensity requirement. Even if each armed group fulfills the organized armed group criterion, a question remains as to how the intensity requirement is to be met. Specifically, can all of the violence that occurs as

103. The membership question is hotly debated. The main disagreement is about which members of an organized armed group may be targeted and when. See INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION UNDER INTERNATIONAL HUMANITARIAN LAW 58 (Nils Melzer ed., 2009) [hereinafter ICRC DPH Guidance]. See also *ICRC Clarification Process on the Notion of Direct Participation in Hostilities under International Humanitarian Law (Proceedings)*, INTERNATIONAL COMMITTEE OF THE RED CROSS (June 30, 2009), <http://www.icrc.org/eng/resources/documents/article/other/direct-participation-article-020709.htm>.

104. See ICRC DPH Guidance, *supra* note 103, at 32.

105. Common Article 3 refers to the obligations of “parties” to the conflict, which does not rule out more than one organized armed group. Moreover, the *Commentary* to AP II refers to “insurgents *who are organized in armed groups*,” suggesting that multiple armed groups might be a part of the party to the conflict under AP II. AP II COMMENTARY, *supra* note 34, ¶ 4460 (emphasis added).

a result of hostilities with various armed groups be aggregated in order to meet the intensity criterion, or must the level of violence be separately assessed vis-à-vis each armed group? The response to this question may affect whether or not a situation rises to the level of an armed conflict.

The growing acceptance that NIAC law may also apply extraterritorially has brought this issue of links to the forefront in recent years. Although the difficulty arises in internal armed conflicts as well, once territorial constraints are removed from the law's application, it is less obvious that armed groups are part of the same conflict. As a result, the need to ascertain links between these groups increases.

Strictly speaking, it is the hostilities that take place between the specific parties to the conflict that must surpass a level of sporadic violence. It is a well-accepted view that separate conflicts may exist in parallel.¹⁰⁶ Consequently, multiple conflicts may exist side-by-side in the same region. Today many armed groups simultaneously participate in hostilities to varying degrees in a single conflict space. However, in practice, it appears that in some internal NIACs the intensity requirement is not always assessed individually per armed group, but rather through aggregating the violence as a whole. In Iraq, for example, between 2003 and 2009 some estimate that over seventy armed groups existed.¹⁰⁷ Alliances among and between the armed groups frequently shifted,¹⁰⁸ making it difficult to conclude that these armed groups formed a single party to a conflict. Yet, separate assessments were not carried out vis-à-vis each armed group in order to ascertain that the hostilities between specific groups fulfilled the intensity requirement. In reality, the violence conducted by and against each of these groups did not fulfill the criterion of intensity in every case, yet the armed groups were treated as being part of an armed conflict in Iraq.¹⁰⁹ Similar observations can be made with regard to the current conflict in Syria.¹¹⁰

106. See, e.g., *Tadić* Appeals Decision on Jurisdiction, *supra* note 5, ¶¶ 72–74; ICJ *Nicaragua* Case, *supra* note 36, ¶ 219.

107. *Rule of Law Armed Conflicts Project: Iraq*, GENEVA ACADEMY OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS, http://www.geneva-academy.ch/RULAC/non-state_armed_groups.php?id_state=110 (last visited Feb. 15, 2013). Other armed conflicts, such as those in Syria, the Democratic Republic of Congo, Afghanistan and the former Yugoslavia have involved multiple armed groups.

108. The Mehdi Army for example changed sides a number of times.

109. See, e.g., Michael N. Schmitt, *Iraq (2003 onwards)*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS, *supra* note 25, at 356, 371 (“There is no question but that the fighting in Iraq was sufficiently widespread and intense to meet the violence

Part of the reason for this circumstance could be because it can be difficult to isolate the specific group that conducted each attack and to assign to a particular group some of the indicative factors used to ascertain that the intensity requirement is fulfilled (e.g., determining which group's violence is responsible for fleeing civilians and refugees) given the shared territory. In a way, the common territory serves to link the violence undertaken by these various armed groups.

The question has relevance for characterizing the conflict and targeting. If such an assessment results in the conclusion that a NIAC exists alongside situations of violence that do not reach the threshold of a NIAC (i.e., law enforcement situations), members of the armed group would need to be dealt with through law enforcement means or be treated as civilians directly participating in hostilities.

Not only has there been little emphasis on separating out the intensity of violence generated from each armed group,¹¹¹ but also little attention has been given to determining the type of link required to render multiple armed groups part of a single party. This is in notable contrast to the discussion and practice that surrounds the determination of whether parallel IACs and NIACs exist in a country.¹¹² It is not clear, even for internal

threshold or that many of the entities active in the fray amounted to 'organized armed groups.'").

110. The Rule of Law Armed Conflicts Project: Syria identifies the Syrian Free Army as the main armed group, but also lists the following additional armed groups: Syrian branch of the Muslim Brotherhood, Fighting Vanguard, Islamic Liberation Party, Islamic Liberation, Mohammad's Youth, God's Soldiers and Al-Qaeda. *Rule of Law Armed Conflicts Project: Syria*, GENEVA ACADEMY OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS, http://www.geneva-academy.ch/RULAC/non-state_armed_groups.php?id_state=211 (last visited Feb. 15, 2013). More recently, the Syrian Islamic Liberation Front formed as a prominent umbrella organization for Islamist groups. *Syria's Islamist rebels join forces against Assad*, REUTERS, Oct. 11, 2012, available at <http://www.reuters.com/article/2012/10/11/us-syria-crisis-rebels-idUSBRE89A0Y20121011>. For a detailed overview of Islamist groups, see *Holy Warriors: A Field Guide to Syria's Jihadi Groups*, FOREIGN POLICY (Oct. 15, 2012), http://www.foreignpolicy.com/articles/2012/10/15/holy_warriors.

111. Although this practice is by no means uniform. For a list of the separate NIACs occurring in Colombia between the Colombian State and various armed groups and between armed groups, see, e.g., Felicity Szesnat & Annie R. Bird, *Colombia*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS, *supra* note 25, at 203, 227. It should be noted that the distinction made here was between NIACs governed by AP II and those by Common Article 3.

112. For example, the 2011 Libyan conflict could be seen as entailing an IAC between NATO forces and the Libyan government, alongside a NIAC between the Libyan rebels

armed conflicts, if an additional factor must be considered that links armed groups to a party to the conflict in a NIAC.

The questions of what link is required between an organized armed group and a party to the conflict and how the intensity criterion is assessed take on increased significance when applied to an extraterritorial context. In particular, when it comes to a global armed conflict, the lack of clarity has generated disquiet.¹¹³ The United States claims to be in a “global” armed conflict with Al Qaeda and *its affiliates*.¹¹⁴ The argument is that these affiliated armed groups are connected and collectively constitute a threat to the United States. Therefore, they are part of the same conflict, which happens to be spread out geographically.

However, to simply transfer the model of establishing the requisite level of intensity that is sometimes used in practice in internal (or even regional) armed conflicts to a global armed conflict creates problems. Most importantly, the degree to which these affiliated groups are, in fact, part of the same conflict is less clear in situations spread out across multiple States. Territory no longer serves as a presupposed link between the armed groups that connects the violence. Hostilities undertaken by an affiliated group may be part of an entirely separate conflict. For example, the majority of fighting conducted by groups affiliated with Al Qaeda, such as Al Shabaab in Somalia, often takes place as part of separate internal conflicts.¹¹⁵ Al Shabaab’s interests and targets are predominantly local.¹¹⁶

and the Libyan government. Likewise, in Afghanistan in 2001, an IAC existed in parallel with a NIAC. *See, e.g.,* Michael N. Schmitt, *Status of Opposition Fighters in a Non-International Armed Conflict*, in *NON-INTERNATIONAL ARMED CONFLICT IN THE TWENTY-FIRST CENTURY* 119 (Kenneth Watkin & Andrew Norris eds., 2012) (Vol. 88, U.S. Naval War College International Law Studies). *See* Vité for some practical concerns in having a “differentiated approach.” Vité, *supra* note 77, at 86.

113. *See, e.g.,* ICRC 2007 Report on IHL and the Challenges of Contemporary Armed Conflict, *supra* note 25, at 725; Pejic, *supra* note 95, at 346; LUBELL, *supra* note 29, at 117; SIVAKUMARAN, *supra* note 30, at 233.

114. *See, e.g.,* John Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at the Center for Strategic and International Studies: Securing the Homeland by Renewing American Strength, Resilience and Values (May 26, 2010), <http://www.whitehouse.gov/the-press-office/remarks-assistant-president-homeland-security-and-counterterrorism-john-brennan-csi> [hereinafter Brennan Remarks at CSIS] (“We are at war against al Qaeda and its terrorist affiliates.”).

115. *See, e.g.,* Current and Projected National Security Threats to the United States: Hearing Before the S. Select Comm. on Intelligence, 113th Cong. (2013) (statement of James R. Clapper, Director of National Intelligence, Worldwide Threat Assessment of the US Intelligence Community 4, 5 (Mar. 12, 2013), *available at* <http://www.dni.gov/files>

At the same time, the law does not specify how multiple organized armed groups might be part of a single party to a conflict in NIACs. Part of the problem is that the test for the existence of an armed conflict has been articulated in terms of the organized armed group requirement in some cases (the *Tadić* test) and at other times in terms of a party to the conflict (Common Article 3). Over the years little attention or clarification has been given to this issue of what constitutes a party to a conflict in NIACs.¹¹⁷

The United States claims to be in an armed conflict not only with Al Qaeda, but also with affiliated groups.¹¹⁸ These affiliates include Al Qaida in the Arabian Peninsula (AQAP), al-Qa'ida in the Islamic Maghreb, Al Shabaab, Al Qaeda in Iraq and Boko Haram (although not formally).¹¹⁹ Pejic pertinently questions whether the violent acts committed since 9/11 have stemmed from the same group, or if distinct armed groups have carried them out: “[C]an it be said that the totality of terrorist acts that have been perpetrated since 11 September 2011—in Bali, Moscow, Peshawar, Casablanca, Riyadh, Madrid, Istanbul, Beslan, London, Egypt, and elsewhere—constitute a global non-international armed conflict that can be attributed to one and the same party?”¹²⁰

/documents/Intelligence%20Reports/2013%20ATA%20SFR%20for%20SSCI%2012%20Mar%202013.pdf [hereinafter Clapper Statement].

116. See Stanford University, *Al-Shabab*, MAPPING MILITANT ORGANIZATIONS, <http://www.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/61> (last visited Feb. 15, 2013); NATIONAL COUNTERTERRORISM CENTER, COUNTERTERRORISM 2013 CALENDAR: AL-SHABAB, http://www.nctc.gov/site/groups/al_shabaab.html (Al-Shabab’s fighters “are predominantly interested in the nationalistic battle against the TFG [Transitional Federal Government of Somalia] and not supportive of global jihad”). See, e.g., Clapper Statement, *supra* note 115, at 4, 5.

117. See, e.g., Bahia Tahzib-Lie & Olivia Swaak-Goldman, *Determining the Threshold for the Application of International Humanitarian Law*, in MAKING THE VOICE OF HUMANITY HEARD: ESSAYS ON HUMANITARIAN ASSISTANCE AND INTERNATIONAL HUMANITARIAN LAW IN HONOUR OF HRH PRINCESS MARGRIET OF THE NETHERLANDS 248 (Liesbeth Lijnzaad, Johanna Van Sambeek & Bahia Tahzib-Lie eds., 2004) (they point out the importance of the relationship between non-State parties, but do not specify what this relationship might entail).

118. See, e.g., NATIONAL STRATEGY FOR COUNTERTERRORISM, *supra* note 81, at 3; Brennan Remarks at CSIS, *supra* note 114.

119. U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON TERRORISM 2011: STRATEGIC ASSESSMENT (2012), available at <http://www.state.gov/j/ct/rls/crt/2011/195540.htm>.

120. Pejic, *supra* note 49, at 86, 87. See also Kress, *supra* note 14, at 261; SIVAKUMARAN, *supra* note 30, at 233.

Whether these armed groups form a single party to a conflict rests on the degree and type of connection required. Some have suggested that an armed group's declaration of allegiance to the identified party to the conflict (such as was the case with Al Shabaab and Al Qaeda in 2012)¹²¹ suffices for a determination that the affiliated group is part of the same armed conflict. The U.S. government has introduced the terms "associated forces"¹²² and "co-belligerents"¹²³ to describe those armed groups that are affiliated with Al Qaeda and thus part of the global conflict.¹²⁴ The meaning and legal basis of these terms are unclear, however. The term "associated" is not found within LOAC. While the concept of "co-belligerency" does surface in international law, it stems from the law of neutrality and pertains only to States.¹²⁵ Application of the law of neutrality to hostilities with armed groups is not generally accepted.

121. Al Shabaab declared its allegiance to Al Qaeda in February 2012. Bill Rogio, *Somali Islamist Group Formally Declares Allegiance to Shabaab, al Qaeda*, LONG WAR JOURNAL (Feb. 25, 2012), http://www.longwarjournal.org/archives/2012/02/somali_islamist_grou.php.

122. See, e.g., DOJ White Paper *supra* note 1, at 2; NATIONAL STRATEGY FOR COUNTERTERRORISM, *supra* note 81, at 3 n.1 ("Associated Forces is a legal term of art that refers to cobelligerents of al-Qa'ida or the Taliban against whom the President is authorized to use force (including the authority to detain) based on the Authorization for the Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001)." National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81, §1021, 125 Stat.1298, 1562 (2011), available at <http://www.gpo.gov/fdsys/pkg/PLAW-112publ81/pdf/PLAW-112publ81.pdf> (refers to "associated forces that are engaged in hostilities against the United States or its coalition partners.")). Although the specification falls under the heading of the authority to detain, statements like the one above indicate that the U.S. government also uses that phrase to signify the parties to the armed conflict in which it is engaged. The United States also refers to "adherents" or "individuals" associated with Al Qaeda. See, for example, the definition provided in the NATIONAL STRATEGY FOR COUNTERTERRORISM, *supra* note 81, at 3.

123. Johnson Oxford Speech, *supra* note 101 ("We have publicly defined an 'associated force' as having two characteristics: (1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners.").

124. The White House has defined "affiliates" as "[g]roups that have aligned with al-Qa'ida." NATIONAL STRATEGY FOR COUNTERTERRORISM, *supra* note 81, at 3 (emphasis added). But it acknowledges in that document that the term is not a legal one. *Id.* at 3 n.1.

125. This was acknowledged in a decision of the U.S. Court of Appeals for the District of Columbia Circuit, which stated:

[T]he laws of co-belligerency affording notice of war and the choice to remain neutral have only applied to nation states. See 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE § 74 (1st ed. 1906). The 55th [Arab Brigade, which included Al Qaeda

Although the law is silent with regard to links between armed groups in NIACs, the concept of links can be found under LOAC for a number of other purposes—namely the criterion of “belonging to a party” used for determining combatant and prisoner of war (POW) status in IACs;¹²⁶ the connections necessary to establish a system of responsible command; the two concepts of belligerent nexus used to prove individual criminal responsibility¹²⁷ and direct participation in hostilities,¹²⁸ respectively; and the link of “overall control” required to internationalize a NIAC.¹²⁹ Given the lack of explicit law on the matter, the question examined here is whether any of these existing concepts can be used by analogy for the purpose of determining links between armed groups in a NIAC?

The closest analogy would seem to be to the “belonging to” criterion found under GC III. In order to incorporate an organized armed group into an existing IAC for the purpose of establishing POW and combatancy status, that group must “belong to” a State party to the conflict. At face value, it might seem logical to apply a similar criterion to organized armed groups that are linked to one another in NIACs. A simple transferal of the IAC concept to NIACs, however, is problematic. First, and most importantly, the prerequisite was developed for the specific purpose of establishing qualifications that only exist in international armed conflicts (i.e., POW and combatancy status). Second, the type of link necessary to fulfill the “belonging to” requirement is debated even under IAC law. It is not

members within its command structure] clearly was not a state, but rather an irregular fighting force present within the borders of Afghanistan at the sanction of the Taliban. Any attempt to apply the rules of co-belligerency to such a force would be folly, akin to this court ascribing powers of national sovereignty to a local chapter of the Freemasons.

Al-Bihani v. Obama, 590 F.3d 866, 873 (D.C. Cir. 2010).

126. GC III, *supra* note 4, art. 4(A)(2) (“Members of other militias and members of other volunteer corps, including those of organized resistance movements, *belonging to a Party* to the conflict and operating in or outside their own territory”) (emphasis added); AP I, *supra* note 4, art. 43 (“The armed forces *of a Party* to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates”) (emphasis added).

127. See, e.g., *Kumarac* Appeals Judgment, *supra* note 52, ¶ 58; *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Appeals Chamber Judgment, ¶ 570 (May 26, 2003).

128. ICRC DPH Guidance, *supra* note 103, at 58.

129. *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Judgment, ¶¶ 122, 156 (Int’l Crim. Trib. for the former Yugoslavia July 15, 1999) [hereinafter *Tadić* Appeals Judgment].

clear whether the criterion calls for a link of control or coordination.¹³⁰ Thus, transferring the concept to NIACs will not likely provide greater clarity.

The ICRC's *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* does introduce the idea that an organized armed group may "belong to" a party to the conflict in a NIAC.¹³¹ The *Guidance's* interpretation of the concept is taken from the third Geneva Convention and corresponds with those who consider that a link of coordination suffices (as opposed to control).¹³² There are, however, several concerns in relying on the *Guidance's* articulation of "belonging to" in NIACs. Most importantly, the *Guidance* does not provide a legal basis for the inclusion of this criterion in NIACs. Rather, it extends the meaning of "belonging to" established for the purpose of determining POW and combatancy status in IACs to a NIAC context, where such status does not exist.¹³³ Moreover, the *Guidance* seems to conflate the vernacular use for whether an individual belongs to an armed group, with the legal notion de-

130. For the interpretations that tend to view the link as one of coordination, see, e.g., GC III COMMENTARY, *supra* note 5, at 57 (Article 4); Michael N. Schmitt *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHICAGO JOURNAL OF INTERNATIONAL LAW 528 (2005). Examples of those who view the link as one of control are Hays Parks, *Combatants*, in *THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS* 247, 269 (Michael N. Schmitt ed., 2012) (Vol. 85, U.S. Naval War College International Law Studies) and the Israeli Military Court in *Military Prosecutor v. Kassem* (Israeli Military Court, Apr. 13, 1971), *reprinted in* 42 INTERNATIONAL LAW REPORTS 476, 477 (1971).

131. ICRC DPH Guidance, *supra* note 103, at 31 ("Organized armed groups *belonging to* a non-State party to an armed conflict include both dissident armed forces and other organized armed groups.") (emphasis added). While the *Guidance's* discussion focuses on targeting, its proposal leaves room for the interpretation that multiple armed groups could be linked to one party in a NIAC. It should be noted the *Guidance* does not constitute law. However, it may influence the way in which the law develops.

132. The *Guidance* requires that there is "at least a de facto relationship between an organized armed group and a party to the conflict" and considers that "conclusive behaviour that makes clear for which party the group is fighting" would suffice. *Id.* at 23. The *Guidance* takes this definition directly from the ICRC *Commentary to the Third Geneva Convention*. GC III COMMENTARY, *supra* note 5, at 57 (Article 4).

133. In addition, the same criticism that the *Guidance* has received for requiring that an organized armed group belong to a party to an IAC applies in the case of NIACs. Some consider it problematic to use a criterion that exists for the purposes of detention in order to determine who may be targeted. See, e.g., Michael N. Schmitt, *The Interpretive Guidance: A Critical Analysis*, 1 HARVARD NATIONAL SECURITY JOURNAL 18 (2009). It should also be noted that the *Guidance* discusses the criterion in the context of targeting, rather than for the purposes of establishing the existence of an armed conflict.

veloped under the law of armed conflict for whether or not an armed group “belongs to” a party to an IAC.¹³⁴ Given these factors, employing the “belonging to” link by analogy may lead to further complication, rather than clarifying the circumstances for when organized armed groups may be linked to one another for the purpose of establishing when an armed conflict exists.

Another reasonable analogy might be to require that the organized armed group falls under a responsible command of a party to the conflict. If the affiliated group were required to be under the responsible command of the party to the conflict, a stronger link would be necessary than, for example, simply sharing a common ideology with, or being inspired by, Al Qaeda.¹³⁵ In the case of groups affiliated with Al Qaeda, the fact that armed groups pledge allegiance or change their name does not mean they become part of Al Qaeda’s command structure.¹³⁶ Accordingly, some of the groups affiliated with Al Qaeda would not form part of a single identifiable party to the conflict under this interpretation. They could still be parties to separate armed conflicts if the intensity criterion was fulfilled. A benefit of turning to responsible command for establishing the link is that the concept already exists in NIAC law.¹³⁷ The difficulty is that being part of a responsible command would likely necessitate a high threshold of control. For instance, the link required by a responsible command would likely not encompass organized armed groups that act in a coordinated manner, a circumstance that frequently occurs today.

An analogy to a belligerent nexus also raises concerns. Most significantly, the concepts of belligerent nexus currently found in the law (both as used to establish individual criminal responsibility and as a constitutive element of direct participation in hostilities) pertain to the relationship between the acts of an individual and an armed conflict. Such a relationship

134. For example, the COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 34, ¶ 4789, uses the term “belonging to” with reference to membership into a group in a NIAC (“[t]hose who *belong to* armed forces or armed groups may be attacked at any time”) (emphasis added).

135. *See, e.g.*, ICRC 2007 Report on IHL and the Challenges of Contemporary Armed Conflict, *supra* note 25, at 725; Pejic, *supra* note 95, at 346; LUBELL, *supra* note 29, at 117, 118; SIVAKUMARAN, *supra* note 30, at 233.

136. DANIEL L. BYMAN, BREAKING THE BONDS BETWEEN AL-QAIDA AND ITS AFFILIATE ORGANIZATIONS 11 (2012), *available at* <http://www.brookings.edu/~media/research/files/papers/2012/7/alqaida%20terrorism%20byman/alqaida%20terrorism%20byman.pdf>.

137. AP II, *supra* note 6, art. 1.

must be distinguished from linking the actions of an armed group to those of another armed group or a party to the conflict. Therefore, the concept does not correspond directly to the issue under discussion.¹³⁸

The “overall control” test used to internationalize a non-international armed conflict could also provide a template. As articulated in the ICTY’s *Tadić* appeals judgment, the State party to a conflict need not direct specific actions, but must have overall control of the armed group in question.¹³⁹ This test requires a high standard of control over an armed group as it is developed for the purpose of triggering the full body of IAC law. The purpose of the test would be different in the NIAC context—to link an armed group to a party to a NIAC with consequences for targeting. It is, therefore, not self-evident that the same test would be appropriate. Moreover, if transferred to NIACs, this test would necessitate that one armed group party to the conflict have overall control of another armed group. Today this often is not the case.

In sum, these analogies are not particularly helpful in addressing the challenge presented by multiple organized armed groups connected to varying degrees to one another and to a party to the conflict. Given the lack of clarity in the law concerning identifiable parties, the question remains whether the armed groups can still be part of the same conflict, such that their hostilities are accumulated in order to establish the requisite level of intensity for an armed conflict to exist.

One option is to apply the intensity test more strictly in situations of global armed conflicts, assessing the requirement solely based on the violence that occurs between the specific parties to that conflict. Any violence with affiliated armed groups would be considered separately. As a consequence, some situations might not fulfill the intensity requirement and, therefore, not qualify as an armed conflict (either because the situation as a

138. Interestingly, one of the key authors of the ICRC *Guidance*, Nils Melzer, equates this “belonging to” link to that of a belligerent nexus. Melzer states that for an armed group even to be part of an IAC the violence conducted by that armed group must be “designed to support one of the belligerents against another (belligerent nexus).” Nils Melzer, *Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 831, 841 (2010). He continues, “[w]hether or not a group is involved in hostilities does not only depend on whether it resorts to organized armed violence temporally and geographically coinciding with a situation of armed conflict, but also on whether such violence is designed to support one of the belligerents against another (belligerent nexus).” *Id.*

139. *Tadić* Appeals Judgment, *supra* note 129, ¶ 122.

whole does not fulfill the intensity requirement or because a particular circumstance is not considered to be part of an existing armed conflict).¹⁴⁰ A law enforcement regime then would apply, affecting the applicable rules on targeting and detention.

However, this approach does not deal with the realities of some conflicts today where armed groups may be linked with one another to differing degrees and over geographic distances. As a consequence, States may reject this option on the ground that it does not provide adequate means to address what they view as a threat. Furthermore, in situations where separate ongoing internal conflicts take place—such as in Somalia—the normal law enforcement regime may not be wholly functional. This absence, along with the outside State’s inability to legally resort to the law of armed conflict, could result in a legal gap. Considering that one of the initial underlying reasons for developing NIAC law was prevention of a legal black hole, such an outcome is not optimal.

An alternative suggestion is to develop an additional requirement—that the affiliated armed group constitute a *threat* to the State party. The term “threat” here refers to an actual threat based on the intentions and actions of the armed group. In a sense, this extra condition suggests that the purpose of the group would matter.¹⁴¹ The purpose here does not refer to a political purpose, but that the armed group’s main purpose, as evidenced by its actions, is fighting the State in question. An assessment of who the group targets and what their goals are would indicate whether the armed group was a threat and thus actually part of the global conflict. As a consequence, violence stemming from armed conflicts that are separate from the threat posed to the State could not be factored into the same intensity assessment.

So, for example, a number of different armed groups participate in the hostilities in Yemen. Fighting is taking place in the north between the Al-Houthi tribe and the Yemeni government; in the south with Southern Mobility Movement attempting to secede;¹⁴² and throughout the country be-

140. A State could still be involved in an armed conflict if invited by the territorial State. For example, the United States could legitimately be part of the armed conflict against AQAP in Yemen, after being asked to fight on behalf of the Yemeni government. However, this would not constitute a “global” armed conflict.

141. Currently, the majority view is that the purpose of an armed group does not matter when determining if an armed conflict exists. *See, e.g.*, 31st ICRC Conference on IHL CHALLENGES, *supra* note 15, at 11; Vité, *supra* note 77, at 78.

142. *Armed Conflict Database: Yemen (Houthis/AQAP/SMM)*, INTERNATIONAL INSTITUTE FOR STRATEGIC STUDIES, <https://acd.iiss.org/en/conflicts/yemen--houthis-aqap>

tween AQAP and the Yemeni government.¹⁴³ Even if AQAP is considered to be part of Al Qaeda, the violence taking place in Yemen relating to the internal conflict could not be factored into the intensity assessment in the U.S. conflict against Al Qaeda and its affiliates. Put differently, because the hostilities of these other armed groups are not directed against the United States, they are not part of the same conflict.

This suggestion addresses the lack of clarity in what constitutes the identifiable party to the conflict when conflicts become more geographically dispersed and multiple organized armed groups are involved. It also serves to place a constraint on when and where an armed conflict may exist. At the same time, it has the benefit of maintaining consistency with internal conflicts.

There are clear risks, however, in considering that the purpose of an armed group might matter. Most notably, the subjective nature of determining a purpose, particularly in an environment where the same group may have multiple agendas, poses practical challenges. Moreover, just as it may be difficult to separate out the hostilities conducted by multiple armed groups for the purpose of establishing the intensity requirement in internal conflicts, the same issue easily arises with hostilities that span multiple territories. Finally, this suggestion of looking to the threat posed by the armed group does not reflect current law.

The point here is that the issue of links between organized armed groups and the calculation of the intensity requirement is an area where the law needs more clarity, particularly in a global context.

C. Intensity Criterion and Conglomeration of Violence over Space

Even if the various affiliated groups are considered to be involved in a single conflict, a second issue arises as to how the intensity requirement should be assessed in global conflict. Does the distribution of violence over multiple territories make the hostilities less intense? Put differently, if the overall level of violence was deemed sufficiently intense to satisfy the *Tadić*

smm-9651 (last visited Aug. 2, 2013); BYMAN, *supra* note 136, at 11 (“Even AQAP, often touted as the affiliate closest to al-Qa’ida because it has attempted attacks on American civil aviation—perhaps the ultimate target for the al-Qa’ida core—still concentrates primarily on targets within Yemen itself.”).

143. *Rule of Law Armed Conflicts Project: Yemen*, GENEVA ACADEMY OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS, http://www.geneva-academy.ch/RULAC/current_conflict.php?id_state=234 (last visited Feb. 15, 2013).

test, should it matter whether that violence occurred entirely within a single State or was instead spread over multiple States, such that in each State it is sporadic?

Given the lack of clarity on the matter, it is useful to resort to the underlying purpose of the intensity requirement. The criterion is intended to differentiate a situation of armed conflict from one of internal disturbances, or as articulated by ICTY case law, “to distinguish an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, all of which are not subject to international law.”¹⁴⁴ The law does not define internal disturbances. ICRC internal guidance, however, on the meaning of the phrase states that internal disturbances can range 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.”¹⁴⁵ As discussed earlier, the intensity requirement includes both components of gravity and duration.¹⁴⁶ The question here revolves around whether the geographic diffusion of violence renders it less grave.

An underlying purpose of the intensity requirement was to differentiate between situations where the normal domestic law regime of the country in conflict would be sufficient to deal with the unrest and those where a break-down in the system occurred.¹⁴⁷ In the case of a global armed conflict where the violence is spread out geographically, if the necessary level of intensity (in terms of gravity) is not present in each territory then arguably there may not be a basis upon which to resort to a LOAC regime. In such a case, presumably normal domestic law and human rights regimes

144. *Milosević* Decision, *supra* note 52, ¶ 26. See also *Tadić* Trial Judgment, *supra* note 51, ¶ 562; *Delalić* Trial Judgment, *supra* note 51, ¶ 184; *Limaj* Trial Judgment, *supra* note 32, ¶ 84; Corrected Letter of January 28, 1998 from Christopher Hulse, Ambassador of the United Kingdom, to the Swiss Government (July 2, 2002), available at <http://www.icrc.org/ihl/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument> (setting forth the UK government’s reservation to Article 1(4) of AP I). Note: the designation of a group or acts by a group as “terrorist” has no bearing on whether LOAC applies. Either the acts/situation amounts to one of armed conflict or it does not. See, e.g., *Djordjević* Trial Judgment, *supra* note 57, ¶ 1524, citing the *Bošković* Trial Judgment, *supra* note 52, ¶ 5763.

145. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 34, ¶ 4475. See also *id.*, ¶¶ 4474–77.

146. See *supra* notes 65, 66 and accompanying text.

147. See, e.g., *Tadić* Trial Judgment, *supra* note 51, ¶ 562; Geiss, *supra* note 39, at 138. Domestic law continues to apply in situations of armed conflict.

would be sufficient to deal with the matter.¹⁴⁸ A counterargument to this perspective is that, from the point of view of the parties to the conflict, the consequences are the same whether the violence emanates from one territory or several. However, the intensity requirement has not been determined in the past by the effects on the opposing party alone. The calculation of the intensity requirement has generally included an assessment of the situation as a whole. Factors such as civilians fleeing the conflict zone, occupation of territory, existence of front lines and quantity of troops deployed have been considered.¹⁴⁹ These elements indicate that the violence is linked, at least to a geographic region, if not with a State. Therefore, when hostilities are so dispersed that the domestic legal regime is able to function, it could be difficult to maintain that an armed conflict exists.

D. Intensity Criterion and State Sovereignty

State sovereignty was another impetus for creating the requirement that the hostilities reach a certain level of intensity before LOAC could apply. States wanted to limit the involvement of outside States in their domestic affairs. This objective must, therefore, be seen in light of the fact that the types of conflicts envisioned were mainly internal armed conflicts. In an extraterritorial NIAC context, the reluctance of the State party to the conflict to be subject to interference from other States in its internal affairs largely disappears.¹⁵⁰ Neither internal disturbances nor the conflict itself takes place in their own territory.

Does it matter in terms of what LOAC requires for its application that it is the State *not* party to the conflict whose territorial integrity is infringed? In other words, could this geographic shift in where the hostilities occur affect one of the original underlying reasons for the existence of the threshold? In contrast to the previous two points (whether the violence undertaken by various armed groups may be conglomerated and whether the distribution of violence over space means that it does not reach the sufficient level of intensity), this point questions whether the level of intensity

148. The separate issue then would arise of how one State may exercise law enforcement authority in a second State without violating its sovereignty.

149. *Boškovski* Trial Judgment, *supra* note 52, ¶ 177. See, e.g., Louise Arimatsu, *The Democratic Republic of the Congo 1993–2012*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS, *supra* note 25, at 146, 153.

150. See Sassòli, *supra* note 30.

customarily required for internal armed conflicts is the same for extraterritorial conflicts.

It may be argued that the territorial State (i.e., the State in which an extraterritorial NIAC physically takes place) has an interest in trying to prevent incursions into its sovereignty, even though it may not be a party to that NIAC. An incursion by an outside State in order to fight an armed group would likely have implications for the “uninvolved” territorial State. For instance, such an action could be an indication that the territorial State is not able to maintain its own security—an image that States usually take pains to avoid. Or, the territorial State may be concerned that the outside State might gain control or influence within their State.

The implications this shift might have on establishing the threshold of an extraterritorial armed conflict are not clear. At the very least, the reassignment of which State’s sovereignty is affected indicates that issues arising from the shifted location of the conflict warrant further examination. Therefore, even if one accepts the premise that NIACs may exist extraterritorially, the fact that the law was designed for a different context presents challenges in determining the existence of an armed conflict.

VI. GEOGRAPHIC BOUNDARIES OF EXISTING ARMED CONFLICTS

The removal of territorial boundaries from a system based on these physical limits raises the related question of *where* LOAC may be applied once the law of armed conflict has been triggered. Limited discussion has arisen previously on this issue in the context of purely internal conflicts. However, the main controversy surfaces today specifically with regard to individuals affiliated with an organized armed group located in a second State (“outside of an active battlefield”¹⁵¹). The unease of some commentators that the world could become a battlefield reappears here.

Because NIAC law was designed for internal application, its extraterritorial parameters are not clear. Two main options have been discussed for how to deal with this challenge. One proposes that the geographic application of LOAC is limited to the area of hostilities. The other maintains that

151. John Brennan, Assistant to the President for Homeland Security and Counterterrorism Remarks at Woodrow Wilson International Center for Scholars: The Ethics and Efficacy of the President’s Counterterrorism Strategy (Apr. 30, 2012), *available at* <http://www.cfr.org/counterterrorism/brennans-speech-counterterrorism-april-2012/p28100> [hereinafter Brennan Speech at the Woodrow Wilson Center]. *See also* DOJ White Paper, *supra* note 1.

once an armed conflict exists the law may extend beyond the immediate zone of hostilities. This latter approach has been interpreted by some to suggest that the law applies to the parties to the conflict wherever they may be located.

The first proposal, suggesting that LOAC would not apply at a distance from wherever the hostilities were taking place,¹⁵² may seem logical on its face, but lacks a legal basis. Jurisprudence from the ICTY dealing with the geographic scope of Common Article 3 *within* a State contradicts this interpretation, providing that “international humanitarian law continues to apply . . . in the case of internal conflicts . . . [to] the whole territory under the control of a party, whether or not actual combat takes place there.”¹⁵³ The ICTY case law has generally been interpreted by other bodies to mean that Common Article 3 applies to the entire country in which a conflict is taking place, regardless of where hostilities occur.¹⁵⁴ This language has been repeatedly upheld by subsequent ICTY and ICTR judgments.¹⁵⁵ In the absence of explicit treaty law or customary international law, this jurisprudence could be said to have relevance when it comes to interpreting the geographic contours of internal conflicts.

Resort to the object and purpose of the law also supports application of the law beyond areas of hostilities. One of the law’s fundamental purposes is to ensure protection of individuals once in the hands of the enemy. To interpret the law as only applying to areas of combat would reduce

152. Jennifer Daskal, for example, discusses the “hot” battlefield. Jennifer C. Daskal *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the “Hot” Conflict Zone*, 161 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1165, 1192–1209 (2013).

153. *Tadić* Appeals Decision on Jurisdiction, *supra* note 5, ¶ 70.

154. *See, e.g., Akayesu* Trial Judgment, *supra* note 34, ¶¶ 635–36; Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Trial Judgment, ¶176 (May 29, 1999); GS (Existence of internal armed conflict) Afghanistan [2009] UKAIT 00010 (U.K. Asylum and Immigration Tribunal); Economic and Social Council, Commission on Human Rights, Report of the Independent Expert, *Situation of Human Rights in Somalia*, ¶ 31, U.N. Doc. E/CN.4/2002/119 (Jan. 14, 2002) (by Ghanim Alnajjar). *See also* Kress, *supra* note 14, at 265.

155. *See, e.g., Blaskić* Trial Judgment, *supra* note 39, ¶ 64; *Delalić* Trial Judgment, *supra* note 51, ¶¶ 185, 194, 209; Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgment, ¶ 43 (Int’l Crim. Trib. for the former Yugoslavia June 25, 1999); Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 568 (Int’l Crim. Trib. for the former Yugoslavia Feb. 22, 2001); *Kunarac* Appeals Judgment, *supra* note, 52, ¶ 57; *Limaj* Trial Judgment, *supra* note 32, ¶ 84, Kordić and Čerkez, Case No. IT-95-14/2-T, Judgment, ¶ 27 (Int’l Crim. Trib. for the former Yugoslavia Feb. 26, 2001).

the protection afforded to some of the most vulnerable, who may be located at a distance from active hostilities.

Finally, the text of AP II can be turned to for some guidance, even though the types of conflicts under discussion here are those with a lower threshold. AP II explicitly provides that it applies to “to all persons affected by an armed conflict.”¹⁵⁶ This indicates that although AP II limits its applicability to the State in which the conflict is taking place,¹⁵⁷ its application is not restricted to areas of active hostilities.¹⁵⁸

The second approach considers that once an armed conflict exists LOAC applies beyond the area of active hostilities.¹⁵⁹ It is argued that this is the more defensible position of the two. Although this view does not find an explicit basis in treaty law, it is difficult to find justification within the existing law for restricting the application of LOAC to a certain region once an armed conflict exists. In addition, the ICTY and ICTR case law just noted could be said to indirectly support this position in that it interprets the application of the law as extending beyond the combat zones. However, too much reliance on this jurisprudence is misguided as it still depends on State boundaries. For example, if one accepts that the armed conflict in Afghanistan has spilled over into Pakistan, does Common Article 3 then apply throughout the country of Pakistan?

The view that LOAC applies beyond the area of active hostilities leads to the question of whether anything restricts the geographic application of LOAC. One approach is to interpret the ICTY case law as literally referring to the areas where the parties to the conflict have control.¹⁶⁰ Under

156. Art. 2 AP II. *See also* arts. 5, 6 AP II and Noam Lubell & Nathan Derejko, *A Global Battlefield: Drones and the Geographical Scope of Armed Conflict*, 11 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 65, 75-76 (2013).

157. While there has been discussion that Common Article 3 applies extraterritorially, there has been very little debate regarding AP II’s extraterritorial reach.

158. The ICRC *Commentary* to AP II supports this interpretation. AP II COMMENTARY, *supra* note 34, ¶ 4490 (“[p]ersons affected by the conflict within the meaning of this paragraph are covered by the Protocol *wherever they are in the territory* of the State engaged in conflict” and that the “applicability of protocol follows from a criteria related to persons, and not to places”) (emphasis added).

159. *See, e.g.*, Lubell & Derejko, *supra* note 156, at 82. (“. . . the applicability of the *ius in bello* does not depend on the number of miles between the individual and the fighters they are commanding and directing, nor does it stand or fall on whether the individual is sitting on one side of a border or another. The tests are the standard and long-recognized requirements for determining who or what is a legitimate target under IHL”)

160. Kress proposes a version of this interpretation by suggesting that the law extends only to areas where “the non-State party has established an actual (quasi-) military infra-

such a view, NIAC law would only apply to the territory under control of the Pakistani Taliban (and other armed groups) in the North-West Frontier Province. This construction, however, presents hurdles.¹⁶¹ First, what is meant by control?¹⁶² Second, if it is territorial control that is envisioned, the majority of commentators and jurisprudence view the control of territory by an armed group as an indicator for the applicability of Common Article 3, rather than an obligation.¹⁶³ It would not make sense to require territorial control by an armed group in order to determine the reach of an armed conflict within a country, but not to require territorial control for the existence of an armed conflict.¹⁶⁴ Third, taken to its extreme this interpretation illogically suggests that if neither party controls territory, then LOAC does not apply,¹⁶⁵ leading to the possibility that LOAC would not apply precisely where the battle rages.

The U.S. government position that LOAC is not geographically constrained with regard to individual members of a party to a conflict¹⁶⁶ has engendered criticism.¹⁶⁷ However, it is a defensible stance if one has already accepted that the territorial boundaries of States do not limit LOAC's application. The bigger issue seems to be that the law was not designed for extraterritorial application. As such, should the view that territorial boundaries are not relevant to LOAC's application gain force, it may be that the law will develop in a clearer and more nuanced manner.¹⁶⁸

structure on the territory of the third State's soil that would enable the non-State party to carry out intensive armed violence also from there". Kress, *supra* note 14, at 266.

161. See, e.g., Arimatsu, *supra* note 2, at 187, 188.

162. Arimatsu points this out in *id.* at 188.

163. See, e.g., PROVOST, *supra* note 46, at 267; MOIR, *supra* note 41, at 38, 43; Pejic, *supra* note 82, at 85–86; BOTHE, *supra* note 62, at 623; Tahzib-Lie & Swaak-Goldman, *supra* note 117, at 246; Vité, *supra* note 77, at 79.

164. Lubell & Derejko, *supra* note 156, at 69.

165. *Id.* However, Kress's suggestion that there must be actual military infrastructure with the ability to carry out intensive violence avoids the issue of control. Kress, *supra* note 14, at 266.

166. See, e.g., Brennan Speech at the Woodrow Wilson Center, *supra* note 151 ("There is nothing in international law that . . . prohibits us from using lethal force against our enemies outside of an active battlefield, at least when the country involved consents or is unable or unwilling to take action against the threat.")

167. Kress, *supra* note 14, at 266.

168. Interestingly, while of the view that the law follows the parties to the conflict, the U.S. government places additional policy restraints onto the application of LOAC. The DOJ White Paper states that when targeting an individual located in another country in the context of an extraterritorial NIAC, the individual must be high ranking in the organization, the armed group should have a "significant and organized presence" in that coun-

Notwithstanding the lack of clarity with regard to this issue, significant restrictions on the use of force against an individual located at a distance from hostilities in a second country already exist. Perhaps most importantly, the question only arises in the first place if an armed conflict exists between the State using force and the armed group against which the force is directed (which includes establishing that the group to which the individual belongs is an identifiable party). Second, and crucially, the separate question then arises of whether an individual is targetable (either by virtue of the membership approach or because s/he is directly participating in hostilities).¹⁶⁹ This includes determining that the individual in question has a sufficient nexus to the ongoing armed conflict.¹⁷⁰

Should those conditions be fulfilled, then the constraints within LOAC still apply (such as all of the rules pertaining to the principles of distinction and proportionality), as would the country's domestic law and human rights law to the degree that it interacts with LOAC. It is likely that if the occurrence were far from active hostilities the latter two bodies of law would play a greater role. Issues of State sovereignty could, and often do, present one of the greatest limitations on action. Therefore, it is not the case that force may be used anywhere in the world at any time against parties to the conflict once an armed conflict exists.

VII. CONCLUSION

In conclusion, the general trend today is that some extraterritorial conflicts may qualify as NIACs, despite the fact that they are not geographically confined to a single State. This interpretation recognizes that to artificially re-

try and the location should be one from which "senior operational leaders, plan attacks against U.S. persons and interests." DOJ White Paper, *supra* note 1, at 3, 5 ("The United States retains its authority to use force against al-Qa'eda and associated forces outside the area of active hostilities when it targets a senior operational leader of the enemy forces who is actively engaged in planning operations to kill Americans." "If an operation . . . were to occur in a location where al-Qa'ida or an associated force has a significant and organized presence and from which al-Qa'ida or an associated force, including its senior operational leaders, plan attacks against U.S. persons and interests, the operation would be part of the non-international armed conflict between the United States and al-Qa'ida that the Supreme Court recognized in *Hamdan*."). Although the leaked memorandum is in specific reference to American citizens, this statement seems to refer more generally to the scope of non-international armed conflict.

169. See *supra* note 103 for reference to the debate on membership.

170. Lubell & Derejko, *supra* note 156, at 75.

strict the law in a way that does not reflect either the realities on the ground or the purpose of the law itself is counterproductive. However, because the existing law was not designed for extraterritorial conflicts, challenges arise in its application.

The issue of links between armed groups in NIACs is an area where the law may need reinterpretation or development. Analogies with other areas of the law do not lead to more clarity. The tenuous suggestion that in order to fulfill the intensity requirement not only should the affiliated armed group be organized and part of an identifiable party, but also that the group's actions and goals should constitute a threat to the opposing party carries with it practical problems. Specifically, it could be difficult to ascertain both the threat and which members of an armed group are actually participating in actions that are part of the global conflict, as opposed to part of a separate internal conflict.

Determining whether amassing violence that is diffused over distances may fulfill the intensity requirement is another example of how the geographic extension of the law's application may present difficulties. It has been argued here that taking into account the underlying purpose of the law, the violence must reach a certain level of intensity within a geographic region for an armed conflict to exist. When the violence is spread out geographically, such that in an individual country the law enforcement regimes may function, it is difficult to view the intensity requirement as being met. However, as with links, this issue is far from resolved.

The third principal challenge resulting from the extraterritorial application of NIAC law is that a reassignment of sovereignty occurs. It is unclear if this shift might impact on how States perceive the threshold of the existence of an armed conflict.

Once the existence of an armed conflict has been established, a separate issue arises as to the geographic boundaries of that conflict. This impacts the controversial question of when an individual may be targeted or detained if located in another country away from the main battlefield. Here too, because the law was originally intended to apply within State boundaries, very little guidance exists. It is argued that as the law currently stands, once an armed conflict exists LOAC applies to the parties to the conflict wherever they may be located, but that other restraints within LOAC and *jus ad bellum* limit its application. In particular, the question of whether an armed conflict exists in the first place is not self-evident. The debate on who can be targeted and when applies both to internal NIACs and extraterritorial NIACs. It may be that additional stipulations will be considered

necessary as the law develops given the lack of State boundaries and the distance from an active battlefield. However, currently the law does not require this. Finally, the restrictions found in *jus ad bellum* curtail action that may be taken.

Therefore, to erase territorial boundaries from the equation entirely when establishing the existence of an armed conflict raises challenges to the structure of the law and some of its underlying purposes. Certain obstacles may prompt clarification in the law; others may remain as limitations on the law's application. As a consequence, it is not clear where the bar for the application of Common Article 3, and thus LOAC, lies, particularly when applied to conflicts that spread across multiple countries. Some States want to ensure that they have sufficient flexibility to deal with these circumstances. Other States (as well as organizations and commentators) are concerned that the law may be interpreted too permissively and ultimately be abused. A balance must be found in the solution to these issues.