

---

---

# INTERNATIONAL LAW STUDIES

PUBLISHED SINCE 1895

U.S. NAVAL WAR COLLEGE



## Charting the Legal Geography of Non-International Armed Conflict

*Michael N. Schmitt*

90 INT'L L. STUD. 1 (2014)

Volume 90

2014

---

---

## Charting the Legal Geography of Non-International Armed Conflict

Michael N. Schmitt\*

### I. INTRODUCTION

United States extraterritorial drone and special operations continue to generate international and domestic controversy.<sup>1</sup> Much of the debate surrounds the legality of crossing State borders to conduct the missions. Although commentators sometimes look to international humanitarian law

---

\* Charles H. Stockton Professor of International Law and Chairman, International Law Department, United States Naval War College; Professor of Public International Law, University of Exeter. The views expressed in this article are those of the author in his personal capacity and do not necessarily reflect those of the U.S. government. The article is republished with permission from the *Military Law and the Law of War Review* and was part of a symposium honoring my friend, the late Brigadier General Erwin Dahinden, Swiss Army.

1. See, e.g., the recent reports on drone operations. *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, transmitted by Note of the Secretary-General*, U.N. Doc. A/68/382 (Sept. 13, 2013) (by Christopher Heyns); *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, transmitted by Note of the Secretary-General*, U.N. Doc. A/68/389 (Sept. 18, 2013) (by Ben Emmerson); “Will I be Next?": *US Drone Strikes in Pakistan*, AMNESTY INTERNATIONAL (Oct. 22, 2013), <http://www.amnestyusa.org/research/reports/will-i-be-next-us-drone-strikes-in-pakistan>; “Between a Drone and Al-Qaeda”: *The Civilian Cost of US Targeted Killings in Yemen*, HUMAN RIGHTS WATCH (Oct. 22, 2013), <http://www.hrw.org/reports/2013/10/22/between-drone-and-al-qaeda>.

(IHL) as the source of authority for transborder operations, the existence of an armed conflict in which IHL applies generally has no bearing on the extraterritoriality question. As has been discussed elsewhere, the primary international law bases for extraterritorial operations are instead consent and self-defense—aspects of the *jus ad bellum*, not the *jus in bello*.<sup>2</sup>

However, the existence of an armed conflict does fix the legal regime that controls *how* extraterritorial operations have to be conducted.<sup>3</sup> The fundamental legal question in this regard is whether the *lex generalis* of international human rights law (IHRL) or the *lex specialis* of IHL binds a State's extraterritorial application of force. The difference between the two distinct bodies of law is crucial. To the extent IHL applies, individuals may be targeted based on status as members of the armed forces (including as members of organized armed groups) or as civilians directly participating in hostilities.<sup>4</sup> Should it not apply, IHRL norms restrict lethal targeting to situations in which its use is "strictly unavoidable in order to protect life."<sup>5</sup> Moreover, the IHL rules governing detention are less restrictive than their IHRL counterparts and the application of IHL opens the door to prosecution for war crimes.<sup>6</sup> Finally, IHRL generally applies only to the operations of State forces, thereby leaving the activities of non-State armed groups

---

2. Michael N. Schmitt, *Extraterritorial Lethal Targeting: Deconstructing the Logic of International Law*, 52 COLUMBIA JOURNAL OF TRANSNATIONAL LAW \_\_ (forthcoming 2013).

3. On the range of extraterritorial operations to which IHL might be applicable, see INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY CONFLICTS, Report Prepared for the 31st International Conference of the Red Cross and Red Crescent, 31IC/11/5.1.2, 9–11 (Oct. 2011) [hereinafter ICRC 31st Conference Report]. See also Jelena Pejic, *The Protective Scope of Common Article 3: More than Meets the Eye*, 93 INTERNATIONAL REVIEW OF THE RED CROSS 189, 193–97 (2011).

4. INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 21–22 (Nils Melzer ed., 2009); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51(3), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of August 12 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts art. 13(3), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

5. Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27–Sept. 7, 1990, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, U.N. Doc. A/CONF.144/28/Rev.1, at 112, 114 (1990).

6. ICRC 31st Conference Report, *supra* note 3, at 10.

subject solely to prohibitions set forth in domestic legal regimes.<sup>7</sup> IHL, by contrast, binds all parties to a conflict.

This article examines the geographical reach of IHL during an armed conflict between a State and a non-State organized armed group.<sup>8</sup> Its purpose is to explore how location affects the applicability of the differing legal regimes. Discussion will focus predominantly on non-international armed conflict (NIAC), for that genre of hostilities poses the greatest interpretive conundrums. It is an inquiry of momentous practical importance since IHL's range (or lack thereof) influences operational planning and mission execution, determines how civilians and civilian objects must be protected during hostilities, sets the applicable detention regime, and affords avenues for enforcement of norms that are not otherwise available.

## II. THE LEGAL GEOGRAPHY OF INTERNATIONAL ARMED CONFLICT

Before turning to non-international armed conflict, it is useful to briefly detour into the geography of international conflict.<sup>9</sup> There are two conditions precedent to the existence of an international armed conflict (IAC). First, the parties to the conflict must be States. This requirement is clear from the text of Common Article 2 of the 1949 Geneva Conventions, which provides that the Conventions “apply to all cases of declared war or of any other armed conflict which may arise between *two or more of the High Contracting Parties*, even if the state of war is not recognized by one of

---

7. For a survey of the differences between IHL and IHRL, see *id.* at 13–20.

8. See also Kenneth Anderson, *Targeted Killing and Drone Warfare: How We Came to Debate Whether There is a “Legal Geography of War,”* in FUTURE CHALLENGES IN NATIONAL SECURITY AND LAW (Peter Berkowitz ed., 2011), [http://media.hoover.org/sites/default/files/documents/FutureChallenges\\_Anderson.pdf](http://media.hoover.org/sites/default/files/documents/FutureChallenges_Anderson.pdf); 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 (2013); Sasha Radin, *Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflict*, 89 INTERNATIONAL LAW STUDIES 696 (2013); Claus Kress, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts*, 15 JOURNAL OF CONFLICT AND SECURITY LAW 245 (2010); Louise Arimatsu, *Territory, Boundaries and the Law of Armed Conflict*, 12 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 157 (2009); Sylvain Vité, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INTERNATIONAL REVIEW OF THE RED CROSS 69 (2009).

9. For a concise discussion of qualification as an IAC, see Jelena Pejic, *Status of Armed Conflicts*, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 77, 80–84 (Elizabeth Wilmshurst & Susan Breau eds., 2007).

them.”<sup>10</sup> The 1977 Additional Protocol I to the Geneva Conventions adopts the same formulation by reference.<sup>11</sup> Although Common Article 2 is treaty law, and while key certain States, including the United States, are not party to Additional Protocol I, the State-on-State construct for international armed conflict is universally seen as reflecting customary international law. For instance, in *Hamdan v. Rumsfeld*, the United States Supreme Court adopted the approach when it distinguished conflicts that are “not of an international character” from “a clash between nations.”<sup>12</sup> Note that a conflict between a non-State group and a State may sometimes qualify as international, but only when another State exercises “overall control” of the group such that the conflict is at its heart between the two States.<sup>13</sup>

The second condition precedent, that the conflict be “armed,” also derives from the text of Article 2. The celebrated Pictet *Commentary* to the provision states,

[a]ny difference arising between two States and leading to the intervention of armed forces is an *armed* conflict within the meaning of Article 2, even if one of the Parties denies the existence of the state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.<sup>14</sup>

Similarly, the International Committee of the Red Cross (ICRC) *Commentary* to the companion Additional Protocol I provision provides, “[n]either the duration of the conflict, nor its intensity, play a role” in quali-

---

10. Only States may become party to the Conventions. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 75 U.N.T.S. 31; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 2, Aug. 12, 1949, 75 U.N.T.S. 85; Convention (III) Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 75 U.N.T.S. 135; Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 75 U.N.T.S. 287 (emphasis added) [hereinafter Geneva Conventions I–IV].

11. Additional Protocol I, *supra* note 4, art. 1(3).

12. *Hamdan v. Rumsfeld*, 548 U.S. 557, 777 (2006).

13. *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶ 145 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999). *See also* *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Trial Chamber Judgment, ¶ 211 (Mar. 14, 2012). The International Court of Justice cited the standard with approval in its Bosnian Genocide judgment. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, 2007 I.C.J. 108, ¶¶ 403–05 (Feb. 26).

14. COMMENTARY TO GENEVA CONVENTION III RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 23 (Jean Pictet ed., 1960) (emphasis added).

fication as an armed conflict.<sup>15</sup> While publicists do not universally agree with the purported lack of intensity or duration criteria,<sup>16</sup> the International Criminal Tribunal for Yugoslavia (ICTY) has adopted the approach.<sup>17</sup> In the author's view, this understanding comports fully with the object and purpose of IHL and therefore represents a reasonable interpretation of the law.

The geographical scope of an IAC is relatively well settled; IHL applies throughout the territory of States party to the conflict, as well as international waters and airspace.<sup>18</sup> There is no requirement that hostilities occur in the area in which the law is to be applied. The law of neutrality has also long permitted belligerents to also conduct operations on neutral territory, albeit in extremely limited circumstances. Neutral States shoulder an obligation to ensure belligerents do not operate from their territory.<sup>19</sup> Should a neutral State fail to comply with this duty, either because it will not or cannot, the opposing belligerent may lawfully cross into neutral territory for the sole purpose of putting an end to its enemy's activities.<sup>20</sup>

Although it has been suggested that a parallel rule applies during NIACs,<sup>21</sup> neither State practice nor *opinio juris* supports such an expansion. To the extent the logic (vice law) of the neutrality framework applies analogously outside the context of a classic IAC, it does so only as an aspect of the *jus ad bellum* in the form of what has become known as the "unwillingly

15. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF AUGUST 12 1949, ¶ 62 (Yves Sandoz et al. eds., 1988).

16. For somewhat more nuanced analysis, see, e.g., YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 11–12 (5th ed. 2005); Christopher Greenwood, *Scope of Application of Humanitarian Law*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 37, 48 (Dieter Fleck ed., 2d ed. 2009).

17. "[A]n armed conflict exists whenever there is a resort to force by States." Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

18. UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 13.6 (2004) [hereinafter UK MANUAL].

19. Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land art. 5, Oct. 18, 1907, 36 Stat. 2310.

20. U.S. NAVY/U.S. MARINE CORPS/U.S. COAST GUARD, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7A, ¶ 7.3 (2007); UK MANUAL, *supra* note 18, ¶ 1.43. The activity would be governed by IHL.

21. Karl S. Chang, *Enemy Status and Military Detention in the War Against Al-Qaeda*, 47 TEXAS INTERNATIONAL LAW JOURNAL 1 (2011). *But see* Rebecca Ingber, *Untangling Belligerency from Neutrality in the Conflict with Al-Qaeda*, 47 TEXAS INTERNATIONAL LAW JOURNAL 75 (2011).

or unable” test.<sup>22</sup> Thus, while a State embroiled in a NIAC may sometimes cross borders into other States (arguably including those that are distant) to take the fight to its enemy pursuant to *jus ad bellum* norms, it may not do so based solely on the fact that it is engaged in an armed conflict.

The aforementioned benchmarks for qualifying a conflict as international are useful to bear in mind when considering the reach of IHL during a NIAC. In particular, note that 1) the existence of an IAC depends primarily on the nature of the parties involved, and 2) the intensity, or lack thereof, of the hostilities in any specified locale during an IAC does not determine application of IHL there. As will be explained, the preferred view of the legal geography of NIAC adopts a comparable approach, one focusing on parties rather than intensity of combat at any particular place.

### III. CONDITIONS PRECEDENT TO A NON-INTERNATIONAL ARMED CONFLICT

Building on the definition of international conflict set forth in Common Article 2, Common Article 3 of the 1949 Geneva Conventions defines NIACs as those that are “not of an international character occurring in the territory of one of the High Contracting Parties.”<sup>23</sup> This binary approach (those conflicts that are international and those that are not) is reflected in,

---

22. Schmitt, *Extraterritorial Lethal Targeting*, *supra* note 2; Ashley S. Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense, 52 VIRGINIA JOURNAL OF INTERNATIONAL LAW 483 (2012). For an early treatment of the issue, see Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICHIGAN JOURNAL OF INTERNATIONAL LAW 513, 540–43 (2003). This is the position adopted by the United States. *See, e.g.*, White House Office of the Press Secretary, Remarks by the President at National Defense University, May 23, 2013, <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>; White House Office of the Press Secretary, Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities, May 23, 2013, <http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism>; U.S. Department of Justice White Paper, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa’ida or an Associated Force*, Draft 1-2 (Nov. 8, 2011), [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf).

23. Geneva Conventions I–IV, *supra* note 10, art. 3. The United States has accepted Common Article 3 as the definitional basis for non-international armed conflict. *See, e.g.*, Commander’s Handbook, *supra* note 20, ¶ 5.1.2.2. For a concise discussion of qualification as a NIAC, see Pejic, *Status of Armed Conflicts*, *supra* note 9, at 85–89.

for instance, the Statute of the International Criminal Court and jurisprudence of international tribunals.<sup>24</sup>

The ICTY developed the notion of non-international conflict by describing it as “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>25</sup> This well-known pronouncement sets forth the two generally accepted criteria for non-international armed conflict: organization and intensity. First, like IACs, the existence of a NIAC depends on the parties involved. As noted in *Tadić*, a NIAC must involve an organized armed group fighting either a State or another such group; it is this condition which most clearly distinguishes non-international from international armed conflicts. To qualify, the group in question must evidence a particular level of organization (albeit not to the degree of the regular armed forces<sup>26</sup>), a requirement stemming from the reference to “Party” in Common Article 3.<sup>27</sup> The sufficiency of organization in any particular case is fact-specific<sup>28</sup> and need not detain the analysis of legal geography.

Second, the hostilities must reach a certain level of intensity to qualify as a NIAC.<sup>29</sup> Article 1 of Additional Protocol II to the 1949 Geneva Conventions, which supplements the protections set forth in Common Article 3, exemplifies this requirement by excluding “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts” from its

---

24. Rome Statute of the International Criminal Court art. 8(2)(f), July 17, 1998, 2187 U.N.T.S. 90; Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 619 (Sept. 2, 1998); Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment, ¶ 90 (Dec. 6, 1999); Prosecutor v. Fofana, Case No. SCSL-2004-14-AR73, Decision on Appeal Against “Decision on Prosecution’s Motion for Judicial Notice and Admission of Evidence,” ¶ 32 (May 16, 2005) (separate opinion of Judge Robertson); Lubanga, *supra* note 13, ¶ 233; Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Decision on Confirmation of Charges, ¶ 229 (June 15, 2006).

25. *Tadić*, Jurisdiction, *supra* note 17, ¶ 70. See also Rome Statute, *supra* note 24, art. 8(2)(f).

26. Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶¶ 89, 94–129 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005).

27. “In the case of armed conflict not of an international character . . . each Party to the conflict shall be bound to apply . . .” Geneva Conventions I–IV, *supra* note 10, art. 3.

28. Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 60 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008).

29. For illustrative factors that may bear on the sufficiency of the intensity in this regard, see Limaj, *supra* note 26, ¶¶ 135–70; Haradinaj, *supra* note 28, ¶ 49.

reach.<sup>30</sup> Although imbedded in a treaty to which a number of key States involved in such conflicts, including the United States and Israel, are not party, the formula has been generally accepted as reflecting customary international law in all NIACs. This is confirmed by its replication in the Statute of the International Criminal Court.<sup>31</sup>

Additional Protocol II requires a higher degree of intensity than Common Article 3 and, unlike that article, expressly sets geographical limitations on its applicability.<sup>32</sup> With respect to intensity, the organized armed groups in question must “exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement” Additional Protocol II.<sup>33</sup> Moreover, the Protocol relates only to conflicts that “take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups.”<sup>34</sup> As is apparent from the use of the word “its,” Additional Protocol II only applies when a State is involved (thereby excluding conflicts between organized armed groups) and only to conflicts occurring *within* that State.<sup>35</sup> No such limits appear in Common Article 3, nor are they deemed applicable as a matter of customary law.

#### IV. APPROACHES TO THE LEGAL GEOGRAPHY OF NON-INTERNATIONAL ARMED CONFLICT

It is undisputed that a NIAC requires the participation of an armed group that is sufficiently organized and hostilities that rise to a particular level. Only when these preconditions have been met does IHL govern operations associated with the conflict. The question remains as to whether geography limits the reach of IHL with respect to those activities. Several approaches to the issue have crystallized.

---

30. Additional Protocol II, *supra* note 4, art. 1(2).

31. Rome Statute, *supra* note 24, art. 8(2)(d). *See also, e.g.*, U.S. ARMY JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK 15 (2013).

32. *See* discussion of this point in NILS MELZER, TARGETED KILLINGS IN INTERNATIONAL LAW 257–59 (2008).

33. Additional Protocol II, *supra* note 4, art. 1(1).

34. *Id.*

35. *See* discussion in 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 626 (1982).

### A. *Operations Limited to the Territory of the State*

By the most restrictive approach to the geographical scope of non-international armed conflict, IHL governs only those hostilities and other conflict related operations that take place within a State's geopolitical borders. Support for this approach is found in a plain meaning interpretation of Common Article 3's "in the territory of one of the High Contracting Parties" text. The phrase can plausibly be understood as referring to the territory of the State that is involved in the conflict, much as Additional Protocol II appears to make such a limitation explicit during conflicts to which it applies.<sup>36</sup> Adopting this interpretation would mean that human rights law, as well as the domestic law of the respective territorial State, would govern any extraterritorial hostilities during a NIAC.

Whether or not a State's borders limit the applicability of IHL in a NIAC, it is clear that the law extends throughout the territory of the State involved. In the *Tadić* jurisdiction decision, the ICTY addressed the issue of IHL's application beyond the "hot battlefield," that is, where hostilities of the requisite intensity are *not* taking place. It explained,

The geographical and temporal frame of reference for internal armed conflicts is . . . broad. This conception is reflected in the fact that beneficiaries of [C]ommon Article 3 of the Geneva Conventions are those taking no active part (or no longer taking active part) in the hostilities. This indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations. Similarly, certain language in Protocol II to the Geneva Conventions . . . also suggests a broad scope. . . . [I]nternational humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.<sup>37</sup>

---

36. The ICRC Commentaries to the provision might seem to support such a view in that they refer to a NIAC that takes place "within the confines of a single country." COMMENTARY TO GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 36 (Jean Pictet ed., 1958). *But see* Pejic, *Protective Scope*, *supra* note 3, at 200–01; SANDESH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* 231 (2012).

37. *Tadić*, Jurisdiction, *supra* note 17, ¶¶ 69–70. *See also, e.g.*, Prosecutor v. Kunarac, Case Nos. IT-96-23 & IT-96-23/1-A, Judgment, ¶¶ 56–57 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002); Prosecutor v. Blaskić, Case No. IT-95-14-T, Judgment, ¶ 64 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000); Prosecutor v. Kordić and Čerkez, Judgment, Case No. IT-95-14/2-A, ¶ 319 (Int'l Crim. Trib. for the Former Yugo-

Two aspects of this finding are especially relevant to the issue of legal geography. On the one hand, the Tribunal clearly rejected any requirement that there be ongoing hostilities in the location where the IHL norms in question are to be applied. As noted in a later case, “there is no necessary correlation between the area where the actual fighting takes place and the geographical reach of the laws of war.” For the Tribunal, the key was whether the acts were “closely related” to the hostilities.<sup>38</sup> This premise is especially pertinent with respect to the extraterritorial reach of IHL, discussed below.

On the other hand, the Tribunal specifically limited its holding to territory in the control of a party to the conflict, thereby begging the question of whether it applies in a location over which neither party enjoys control. Limiting its reach would have the curious consequence that IHL would be inapplicable in disputed territory or in remote areas where neither side was significantly present or active. Given the broad approach to geographical scope advanced by the Tribunal, this aspect of the Court’s holding should be interpreted as merely signaling that IHL extends *at least* throughout the State’s entire territory.

Even by a restrictive approach, the one circumstance in which IHL would apply beyond a State’s borders is when an external State becomes involved in the NIAC. In the event a NIAC is “internationalized” by virtue of an external State’s assistance to *rebel* forces (a topic beyond the scope of this article), the IAC rules regarding legal geography outlined above would come into play.<sup>39</sup> Yet, when an external State supports *government* forces it can become a party to the NIAC. Simply providing some material assistance or basic training would not have that effect any more than offering similar aid to non-State parties would internationalize the conflict. Participating in the hostilities that qualify the conflict as non-international, as in the case of U.S. military assistance to Yemen, would, however, make the assisting State a party to the conflict.<sup>40</sup> By the *Tadić* approach, the applica-

---

slavia Dec. 17, 2004); Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment, ¶ 367 (May 15, 2003).

38. Kunarać, *supra* note 37, at ¶ 57. *See also* Prosecutor v. Naletilić and Martinović, Case No. IT-98-34-T, Judgment, ¶ 177 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003).

39. Dietrich Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, RECUEIL DES COURS 121, 150 (1979); DINSTEIN, *supra* note 16, at 5–8; Pejic, *Status of Armed Conflicts*, *supra* note 9, at 89–92.

40. Schindler, *supra* note 39, at 150; Pejic, *Status of Armed Conflicts*, *supra* note 9, at 92.

bility of IHL would therefore extend throughout its territory. Any operations therein would accordingly be governed by IHL, even if hostilities did not regularly occur there. This fact has enormous implications in light of, for instance, international support of Afghanistan in its NIAC with the Taliban and associated armed groups.

### B. *Spillover Conflicts*

The approach by which borders bound IHL has lost favor among States, scholars, and practitioners. In particular, there is growing acceptance of the proposition that IHL applies to “spillover” conflicts in which government armed forces penetrate the territory of a neighboring State in order to engage organized armed groups operating in border areas.<sup>41</sup> In support of this position, the ICRC argues that “spill over of a NIAC into adjacent territory cannot have the effect of absolving the parties of their IHL obligations simply because an international border has been crossed. The ensuing legal vacuum would deprive of protection both civilians possibly affected by the fighting, as well as persons who fall into enemy hands.”<sup>42</sup> There is certainly State practice<sup>43</sup> and scholarly support<sup>44</sup> for this interpretation. Indeed, the jurisdiction of the International Criminal Tribunal for Rwanda extends to “serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed *in the territory of neighbouring States*.”<sup>45</sup>

Such an approach is fully consistent with Common Article 3’s reference

---

41. The issue of whether and when a spillover conflict results in a separate IAC between the penetrating State and the State into which the conflict has spilled over is interesting, albeit beyond the scope of this article. However, the author takes the position that so long as the presence of foreign forces in the territory is lawful and no hostilities have occurred between those forces and forces of the territorial State, an IAC between those States has not been initiated. On the issue, see Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 32, 75–76 (Elizabeth Wilmshurst ed., 2012).

42. ICRC 31st Conference Report, *supra* note 3, at 9–10.

43. MELZER, *supra* note 32, at 259–60.

44. The majority of the experts participating in the Chatham House classification of conflict project, including the author, concluded “conflicts involving the use of force by a State against a non-State group on the territory of another State are non-international armed conflicts where the force is directed solely at that non-State group.” Akande, *supra* note 41, at 72.

45. Statute of the International Criminal Tribunal for Rwanda art. 1, S.C. Res. 955 annex, U.N. Doc. S/RES/955, (Nov. 8, 1994) (emphasis added). *See also id.*, art. 7.

to “one of” the parties, which can reasonably be read as extending the article’s reach to hostilities occurring in the territory of *any* State party to the treaty, irrespective of whether that State is a party to the NIAC. Further, the Conventions are usually explicit when territoriality is a limiting factor (as it often is in those instruments), the paradigmatic example being the Fourth Geneva Convention’s provisions that are limited to occupied territory.<sup>46</sup> That Common Article 3 contains no geographical limitation implies it was not intended to be so limited. It would also run counter to the object and purpose of the 1949 Geneva Conventions, and especially Common Article 3, to adopt the more restrictive approach since a broad interpretation comports more closely with the Pictet *Commentary*’s view that “the article should be applied as widely as possible.”<sup>47</sup>

The logic of the spillover approach arguably justifies even broader application. For instance, an organized armed group may seek sanctuary in a neighboring State because its territory is relatively ungoverned and, therefore, exploitable as a base of operations, or because the State is sympathetic and will not interfere with the group’s operations. Putting aside the separate issues of whether penetrating the third State’s territory would be lawful and whether the operations might launch an IAC between the territorial State and the State taking the action, if the external State launched operations against the group that satisfied the intensity requirement, it would seem incongruent not to treat the situation in the same fashion as a spillover conflict. Although the hostilities may have not flowed across the border, the conflict has done so. The determinative issue would be the degree of nexus between the group’s actions occurring in the neighboring State and ongoing NIAC.<sup>48</sup>

### C. *Geographically Unfocused Conflicts*

Situations in which the hostilities in question are not centered in a particular area pose the most complex legal geography issues. Arguments suggest-

---

46. See, e.g., Geneva Convention IV, *supra* note 10, arts. 47–78.

47. COMMENTARY TO GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 50 (Jean Pictet ed., 1952).

48. Claus Kress has noted that the geographical extension of a NIAC “can only be envisaged if the non-State party has established an actual (quasi-) military infrastructure on the territory of the third State’s soil that would enable the non-State party to carry out intensive violence also from there.” Kress, *supra* note 8, at 266. The author agrees that this situation would be a sufficient, but not a necessary, ground for extension.

ing the existence of a “global war on terror” in which the United States is party to an armed conflict with transnational terrorism writ large complicated legal discourse in the aftermath of the 9/11 attacks. Fortunately, they have lost credibility.<sup>49</sup> Instead, most IHL experts now classify the legal state of affairs using mainstream yardsticks. In particular, those who support the possibility of non-geographically focused NIACs, including the author, typically evaluate conflicts with transnational organized armed groups on a case-by-case basis by applying the intensity and organization criteria.<sup>50</sup> In this approach, the activities of organized armed groups may only be combined to satisfy the intensity criterion when the groups concerned can reasonably be characterized as a single coherent organization operating collaboratively.

This view obviously necessitates interpretation of Common Article 3’s “in the territory of one of the High Contracting Parties” text as referring to any State, not just the State that is party to the conflict. For its advocates, the nature of the parties, rather than the hostilities’ territoriality, regulates whether a conflict falls within the ambit of an armed conflict such that IHL applies.<sup>51</sup> They point out that Common Article 3, unlike Additional Protocol I, governs NIACs irrespective of whether the organized armed group exercises any territorial control. The fact that Additional Protocol II expressly frames applicability geographically while Common Article 3 is silent on the issue infers, in their view, the absence of a geographical limitation

---

49. Soon after the 9/11 attacks, the ICRC argued that classification of conflict with transnational terrorists depends on a “case-by-case” analysis applying traditional criteria. INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS, 28th International Conference of the Red Cross and Red Crescent, 03/IC/09, 17–19 (2003). *See also* Jelena Pejic, *Armed Conflict and Terrorism—There is a (Big) Difference*, in COUNTERTERRORISM 171, 201–02 (Ana María Salinas de Frías, Katja L.H. Samuel, & Nigel D. White eds., 2012). The author agrees with this position.

50. *See also, e.g.*, Noam Lubell, *The War(?) against Al-Qaeda*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS, *supra* note 41, at 421, 434–37.

51. This is the position adopted by the Obama administration. John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at the Program on Law and Security, Harvard Law School: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011), <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>. It should be noted, however, that the administration has placed policy (vice legal) restrictions on where operations may be conducted. White House, Fact Sheet, *supra* note 22.

*vis-à-vis* the latter; after all, Additional Protocol II conflicts are but a subcategory of Common Article 3 NIACs.

Moreover, the text of the article does not foreclose extraterritorial applicability. On the contrary, its prohibitions apply “at any time and in any place whatsoever with respect to [protected] persons.”<sup>52</sup> Although that clause does not definitely answer the territoriality question, it does suggest that the article’s protections are to be construed liberally.<sup>53</sup> As Professor Marco Sassòli has perceptively noted, “[i]f such wording meant that conflicts opposing states and organized armed groups and spreading over the territory of several states were not ‘non-international armed conflicts’, there would be a gap in protection, which could not be explained by states’ concerns about their sovereignty.”<sup>54</sup> Along this same line, in *Nicaragua* the International Court of Justice looked back to its first case, *Corfu Channel*, when characterizing Common Article 3 as reflective of “elementary considerations of humanity.”<sup>55</sup> In doing so, it unambiguously emphasized the centrality of its protections in all conflicts.

Like the Supreme Court in *Hamdan*, advocates of the view advance a binary construct, the central premise of which is that because conflicts between States are international in character, all others are, drawing directly on the text of Common Article 3, “not of an international character” (as distinct from the vaguer moniker “non-international armed conflict”). The hostilities must, of course, satisfy the intensity requirement and the group concerned must exhibit sufficient organization, but once these two conditions are satisfied, IHL governs all conflict-related activities. These include, *inter alia*, targeting, detention, and the protection of civilians and civilian objects. For those, such as the author, who contend that IHRL continues

---

52. Geneva Conventions I–IV, *supra* note 10, art. 3.

53. Nils Melzer notes that an original formulation of Common Article 3 referred to conflict that occurred “in the territory of one or more of the High Contracting Parties,” but suggests that its absence in the final draft should not be interpreted as a desire to exclude such applicability. MELZER, *supra* note 32, at 258 n.83. See also the discussion of the drafting history in SIVAKUMARAN, *supra* note 36, at 229–30.

54. Marco Sassòli, *Transnational Armed Groups and International Humanitarian Law* 9, 6 HPCR OCCASIONAL PAPER SERIES (Winter 2006), <http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper6.pdf>.

55. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S), 1986 I.C.J. 14, ¶ 218 (June 27), referring to *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Dec. 19). Jelena Pejic has suggested that the characterization, in part, justifies the extension of IHL to spillover conflicts. Pejic, *Status of Armed Conflicts*, *supra* note 9, at 87.

to apply in an armed conflict subject to the *lex specialis* of IHL, operations would also be constrained to an extent by the former.

The ICRC has rejected “the notion that a person ‘carries’ a NIAC with him to the territory of a nonbelligerent state” on the basis that “[i]t would have the effect of potentially expanding the application of rules on the conduct of hostilities to multiple states according to a person’s movement around the world as long as he is directly participating in hostilities in relation to a specific NIAC.”<sup>56</sup> In other words, such an approach would “mean recognition of the concept of a ‘global battlefield.’”<sup>57</sup> As the organization fairly points out, the classification of conflict paradigm would have significant consequences for civilians and civilian objects in a State that is not a party to the conflict, but in which conflict related activities occurred. For example, collateral damage during attacks against military objectives, members of a party’s “armed forces,” or individuals directly participating in hostilities would not violate international law unless it ran afoul of the excessiveness test set forth in the rule of proportionality or resulted from a failure to take feasible precautions in attack.<sup>58</sup> The ICRC therefore suggests that such operations should be assessed “pursuant to the rules on law enforcement.”<sup>59</sup>

This is a reasonable position, one meriting careful consideration. However, the alternative view, by which IHL is unconstrained territorially, is arguably more consistent with traditional understandings of the *lex lata* and better suited to the realities of modern conflict. For instance, it is, as discussed, well-settled that IHL applies throughout the territory of parties to a NIAC irrespective of where the hostilities are underway (or likely to occur). It is unclear why, as a matter of law, the logic which underpins the applicability of IHL in peaceful areas inside a State would not equally apply beyond its borders, such as regions outside the area of spillover conflict.<sup>60</sup>

The case of State intervention on behalf of the government in a NIAC reveals similar incongruence. Recall that IHL applies throughout the territory of all States that are party to a NIAC irrespective of whether hostilities

---

56. ICRC 31st Conference Report, *supra* note 3, at 22.

57. *Id.*

58. Additional Protocol I, *supra* note 4, arts. 51 & 57. Note that these rules are generally deemed applicable in non-international armed conflict. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW chs. 4 & 5 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

59. ICRC 31st Conference Report, *supra* note 3, at 22.

60. For an interesting piece arguing for a “zone of hostilities” approach that is based in part on this paradoxical possibility, see generally Daskal, *supra* note 8.

are occurring in the location concerned; IHL applicability in a particular area (in this case the intervener's territory) depends on party status, not the geography of activities associated with the conflict. Bearing this in mind, take the Afghan conflict as an example of the resulting paradox if IHL does not follow the parties. Nearly fifty nations presently contribute troops to the International Security Assistance Force.<sup>61</sup> They range from Belgium and Denmark to Mongolia and Tonga. Since all such States are party to Afghanistan's NIAC, IHL applies throughout their territories, even though no conflict related hostilities are taking place there. With respect to the geographic scope of IHL, it is not apparent why, for example, it should be lawful to target a Danish soldier in Copenhagen based on status alone, but not a member of the Taliban who had found his way to, say, a remote area of Turkmenistan.

Both cases illustrate that it is not the intensity of individual operations or the locus of hostilities that matter when determining whether IHL is applicable in a certain area. Rather, the existence of a NIAC in a location, and therefore the applicability of IHL to operations occurring there, depend on 1) the involvement of qualifying parties, and 2) sufficient intensity with respect to the conflict *as a whole*. Neither ongoing hostilities with a nexus to the conflict at the specific location in question nor proximity to the borders of the State involved in the NIAC constitute conditions precedent to IHL applicability.

A geographically focused approach might make sense if IHL's applicability was "border-based," that is, strictly limited to the territories of those States qualifying as parties to the conflict. Such a rule, particularly in a consent-based treaty environment, would reflect sensitivity to the interests of States that are not participating in the conflict, much as the law of international armed conflict takes cognizance of the interests of neutrals. Yet, the ICRC clearly and sensibly has rejected such formalistic line drawing in the context of spillover conflicts on the basis that it might deprive civilians of protections.<sup>62</sup> The reasoning underpinning that argument is no less compelling with respect to civilians and those who fall into enemy hands beyond the area of spillover. After all, if IHL did not apply in the spillover area, international human rights norms would govern the operations. If IHRL

---

61. NATO, International Security Assistance Force, Key Facts and Figures, <http://www.isaf.nato.int/images/stories/File/2013-12-01%20ISAF%20Placemat-final.pdf> (last visited Dec. 24, 2013).

62. ICRC 31st Conference Report, *supra* note 3, at 10.

does not afford sufficient protection in a spillover conflict, it is not obvious why it would do so elsewhere.

Concern about a “global battlefield” also stems in part from fear that a non-geographically focused IHL paradigm would spread hostilities and their effects widely since targeting could, in part, be status-based and because IHL instead of IHRL proportionality norms would govern attacks. Many of those who have expressed this fear, albeit not the ICRC, miss the fact that the *jus ad bellum* already serves as a rigid constraint on the range of the conflict. In particular, even when an individual may lawfully be targeted under IHL, a separate legal basis to cross the border of the State into which the operation is to be mounted must exist (the two most likely being consent and self-defense). Absent such a normative justification, operations that would be lawful under IHL may well be precluded because the forces necessary to conduct them cannot lawfully get to their target. While this point should not be exaggerated, for there is no doubt that the nonrestrictive approach to geographic applicability results in a more permissive targeting environment, concerns as to an unconstrained spread of hostilities should be assuaged in part by the effect of legal norms lying outside IHL.

The changing nature of conflict likewise augurs against a geographically restrictive application of IHL. Two aspects of twenty-first century conflict are particularly noteworthy in this regard. First, organized armed groups have increasingly exploited territoriality in order to shelter operations from counterattacks. It is now common for such organizations to establish base camps in other States for training and logistical purposes, especially when the areas in which they operate are located in States that lack the ability or will to exercise control over those activities. Moreover, their members often operate abroad to frustrate attempts by States involved in the NIAC to identify and locate them. This propensity is in direct relation to the degree of military advantage enjoyed by the State’s forces, for asymmetry tends to drive organized armed groups away from the conventional battlefield. The same dynamic will incentivize their exploitation of any geographical limitations to the applicability of IHL as a means of shielding themselves from its more robust targeting regime.

Second, organized armed groups can be expected to increasingly turn to cyber attacks as a means of striking at their asymmetrically advantaged government opponents.<sup>63</sup> Since such attacks may be launched from any

---

63. On the classification of cyber conflicts, see Michael N. Schmitt, *Classification of Cyber Conflict*, 89 INTERNATIONAL LAW STUDIES 233–51 (2013).

location offering connectivity to the target system, the groups are likely to situate themselves far from the conventional battlefield. In particular, the fact that their State opponent will generally lack control over cyber infrastructure located in other States will render the conduct of cyber operations from those States especially appealing.

Such factors will likely motivate States involved in these conflicts to adopt expansive interpretations of IHL's geographical scope. This is particularly so in light of the fact that the intelligence, surveillance, and reconnaissance capabilities of States are improving dramatically, resulting in commensurate enhancement of their ability to identify and locate their non-State opponents. As this trend continues, States will logically seek to leverage their newfound resources to strike the enemy whenever and wherever the opportunity presents itself. The growing use of armed drones by the United States and other nations to conduct attacks far from the conventional battle lines is apt illustration of this likelihood.

## V. CONCLUDING THOUGHTS

Today, it appears clear that IHL applies throughout the territory of any State that is party to a NIAC, as well as in border areas of neighboring States into which a conflict has spilled over. IHL also governs operations in States not party to the conflict when the intensity and organization criteria are satisfied within that State during a conflict between an organized armed group and another State's forces. But does IHL apply beyond such locations? The interpretive dilemma is that, on the one hand, a broad approach to applicability extends the protections of IHL in a positive fashion. However, on the other, the fact that IHL is *lex specialis* limits IHL's restrictive effect on the conduct of hostilities, thereby expanding the "battle space."

How States will resolve this inherent tension remains to be seen. A State's national interests always influence its interpretation of international law; nowhere is this more so than with respect to IHL's grey areas, for issues of conflict by definition involve vital national interests. In particular, such interests will influence how States balance military necessity (the need to be able to fight effectively) against humanitarian considerations (the desire of States to limit the deleterious consequences of war, both in a general sense and *vis-à-vis* their soldiers, civilians, and civilian property), a balancing that underpins every aspect of IHL.

As it stands now, the geographically unrestricted approach tracks the traditional emphasis on party status as the decisive determinant to IHL ap-

plicability. This is not to say that the restricted approach that extends applicability only to spillover conflicts is insensible; on the contrary, a reasonable argument can be made that such an interpretation accords with the object and purpose of IHL. However, this author is of the view that object and purpose can just as reasonably undergird the unrestricted position.

Moreover, the influence contemporary and future conflict modalities will exert on State interpretation, and therefore State practice and *opinio juris*, is likely to operate against restrictive approaches; narrow interpretations will be seen by States facing such threats as contrary to their national interests. Indeed, the willingness of certain influential IHL actors, most notably the ICRC, to broaden the notion of geographical scope to spillover conflicts signals recognition of the reality that States involved in such conflicts will not countenance treating the operations of their non-State opponents as immune from the more robust response options envisioned in IHL once they cross borders. This article has suggested that the most defensible view from the perspective of both classic party-based conflict classification criteria and the emerging realities of modern conflict is that IHL applicability in NIACs is unconstrained geographically, with the critical caveat that other bodies of international law may well limit where operations attendant to such conflict may be conducted.