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CONTENTS

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I. INTRODUCTION

From Afghanistan to Syria, from Mali to Yemen, cross-border armed conflicts involving organized armed groups (OAGs) are breaking news headlines and increasing in frequency.[1] They are unprecedented in both scale and impact. Indeed, although pre-dating this century,[2] cross-border armed conflicts were a rarity and not a concern for the international community during the second half of the twentieth century. Yet, international humanitarian law (IHL) developed greatly during this period and, therefore, did not include any specific framework for today's cross-border armed conflicts. These conflicts challenge IHL's scope of application.

Classification of cross-border armed conflicts remains highly disputed in some respects. Many States[3] agree to classify certain types of cross-border

1. This article is based on the author's doctoral research and conclusions, defended at the University of Louvain in September 2021. *See* Pauline Lesaffre, The Challenge of Cross-border Armed Conflicts for International Humanitarian Law—Material and Personal Scopes of Application: Between Continuity and Change (2021), https://dial.uclouvain.be/pr/boreal/object/boreal:251444 (to be published in French).

2. For instance, in September 1957, armed confrontations occurred between French troops deployed in Algeria and rebels on Tunisian territory without Tunisia's consent. *See*, *e.g.*, Ian Brownlie, *International Law and the Activities of Armed Bands*, 7 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 712, 712 (1958). Russian intervention against insurgents and in support of the local authorities of Tajikistan between 1992 and 1997 constitutes another example. *See*, *e.g.*, Christopher J. Le Mon, *Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested*, 35 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLITICS 741, 786–90 (2003).

3. *See*, *e.g.*, Eric David, *La pratique du pouvoir exécutif et le contrôle des chambres législatives en matière de droit international (2007–2011)*, 2011 REVUE BELGE DE DROIT INTERNATIONAL 295, 516 (for Belgium); Neil Verlinden, "Are We at War?" State Support to Parties in Armed Conflict: Consequences under Jus in Bello, Jus ad Bellum and Neutrality Law 87 (Nov. 25, 2019) (unpublished manuscript) (on file at the University of Leuven Law Library); Federal Prosecutor-General (Der Generalbundesanwalt beim Bundesgerichtshof), Case No. 3 BJs 6/10-4, ¶ D(II)(1)(a) (2010), https://web.archive.org/web/20180425015830/http://www.generalbundesanwalt.de/docs/einstellungsvermerk20100416offen.pdf (for Germany); Wolff Heintschel von Heinegg & Peter Dreist, *The 2009 Kunduz Air Attack: The Decision of the Federal Prosecutor-General on the Dismissal of Criminal Proceedings against Members of the German Armed Forces*, 53 GERMAN YEARBOOK OF INTERNATIONAL LAW 833, 842 (2010); Administrative Court of North Rhine-Westphalia (Oberverwaltungsgericht NRW), Case No. 4 A 13 61/15, ¶¶ 441–454 (2019), https://www.justiz.nrw.de/nrwe/ovgs/ovg_nrw/j2019/4_A_1361_15_Urteil_20190319.html (for Germany); DEPARTMENT OF DEFENCE AND FORMER COMBATANTS, MANUAL OF INTERNATIONAL HUMANITARIAN LAW FOR MALIAN ARMED

armed conflicts as non-international armed conflicts (NIACs). Many scholars do also.[4] However, classification of one specific type of cross-border armed conflict—those resulting from a non-consensual State intervention against an OAG—still constitutes an important point of contention in legal scholarship.[5]

Scholarly discussions focused on the armed conflict in Syria, where an international coalition of States, led by the United States, fought against the Islamic State (ISIS) *without consent* of Syrian authorities, at least since September 2015. Although the coalition first intervened in Syria in September 2014,[6]

FORCES 11, 40, 92, 96 (2016) (unpublished manual) (on file at the International Committee of the Red Cross Library) (for Mali); Jacques Hartmann et al., *United Kingdom Materials on International Law 2012*, 83 BRITISH YEARBOOK OF INTERNATIONAL LAW 298, 663–64 (2013); David Turns, *The International Humanitarian Law Classification of Armed Conflicts in Iraq since 2003*, 86 INTERNATIONAL LAW STUDIES 97, 99 (2010); David Turns, *The "War on Terror" Through British and International Humanitarian Law Eyes: Comparative Perspective on Selected Legal Issues*, 10 NEW YORK CITY LAW REVIEW 435, 472–73 (2007) (for the United Kingdom); Kenneth W. Watkin, *Coalition Operations: A Canadian Perspective*, 84 INTERNATIONAL LAW STUDIES 251, 252 (2008) (for Canada).

4. *See*, *e.g.*, Louise Arimatsu, *Territory, Boundaries and the Law of Armed Conflict*, 12 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 157, 184 (2009); Max Brookman-Byrne, *Drone Use "Outside Areas of Active Hostilities": An Examination of the Legal Paradigms Governing US Covert Remote Strike*, 64 NETHERLANDS INTERNATIONAL LAW REVIEW 3, 10 (2017); LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 51 (2009); Françoise J. Hampson, *Afghanistan 2001–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF ARMED CONFLICTS 242, 251, 256 (Elizabeth Wilmshurst ed., 2012); Michael N. Schmitt, *Iraq (2003 Onwards)*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 356, 371–72 (Elizabeth Wilmshurst ed., 2012); Jelena Pejic, *The Protective Scope of Common Article 3: More Than Meets the Eyes*, 882 INTERNATIONAL REVIEW OF THE RED CROSS 189, 196 (2011); Hans-Peter Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon*, 33 AMERICAN UNIVERSITY LAW REVIEW 145, 147 (1983–1984); Katie A. Johnston, *Transformations of Conflict Status in Libya*, 17 JOURNAL OF CONFLICT & SECURITY LAW 81, 110 (2012); Yoram Dinstein, *The Syrian Armed Conflict and its Singular Characteristics*, 46 ISRAEL YEARBOOK ON HUMAN RIGHTS 261, 274, 279 (2016); ROBERT KOLB, ADVANCED INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW 109 (2015); Sasha Radin, *Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflicts*, 89 INTERNATIONAL LAW STUDIES 696, 704–5 (2013).

5. *See*, *e.g.*, Terry D. Gill, *Classifying the Conflict in Syria*, 92 INTERNATIONAL LAW STUDIES 353, 367 (2016).

6. *See*, *e.g.*, Helene Cooper & Eric Schmitt, *Airstrikes by U.S. and Allies Hit ISIS Targets in Syria*, NEW YORK TIMES (Sept. 22, 2014), https://www.nytimes.com/2014/09/23/world/middleeast/us-and-allies-hit-isis-targets-in-syria.html; *L'engagement américain en Syrie depuis 2011*, LE POINT (Oct. 7, 2019), https://www.lepoint.fr/monde/l-engagement-americain-en-syrie-depuis-2011--07-10-2019-2339756_24.php.

Syrian authorities clearly opposed foreign intervention since September 2015 and repeatedly claimed violations of Syrian sovereignty and territorial integrity before the United Nations.[7]

How should these armed interactions between the coalition of States and ISIS be classified?[8] This question must be answered independently of subsequent direct confrontations between Syria and certain intervening States.[9] More generally, how should armed hostilities between an intervening State and an OAG be classified when the State on whose territory these hostilities occur (the territorial State) did not consent to the foreign intervention?

One theory maintains that there is a single NIAC between the intervening State(s) (e.g., the coalition of States intervening in Syria) and the OAG (e.g., ISIS).[10] This theory emphasizes the nature of the belligerent parties and

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7. *See*, *e.g.*, Bashar Ja'afari, Permanent Representative of the Syrian Arab Republic to the U.N., Identical Letters Dated 16 September 2015 Addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/718 (Sept. 17, 2015); Bashar Ja'afari, Permanent Representative of the Syrian Arab Republic to the U.N., Identical Letters Dated 21 September 2015 Addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/727 (Sept. 22, 2015); Bashar Ja'afari, Permanent Representative of the Syrian Arab Republic to the U.N., Identical Letters Dated 14 July 2016 Addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2016/616 (July 18, 2016).

8. This question does not touch upon hostile interactions between Syria and ISIS. These interactions gave rise to a distinct NIAC between this territorial State and this OAG.

9. *See*, *e.g.*, Helene Cooper et al., *U.S., Britain and France Strike Syria Over Suspected Chemical Weapons Attack*, NEW YORK TIMES (Apr. 13, 2018), https://www.nytimes.com/2018/04/13/world/middleeast/trump-strikes-syria-attack.html; Julian Borger & Peter Beaumont, *Syria: US, UK and France Launch Strikes in Response to Chemical Attack*, THE GUARDIAN (Apr. 14, 2018), https://www.theguardian.com/world/2018/apr/14/syria-air-strikes-us-uk-and-france-launch-attack-on-assad-regime; Suleiman Al-Khalidi, *U.S.-backed Forces Say They Regain Villages Seized by Syrian Army*, REUTERS (Apr. 29, 2018), https://www.reuters.com/article/us-mideast-crisis-syria-euphrates-idUSKBN1I00EX; Suleiman Al-Khalidi & Matt Spetalnick, *U.S. Warplane Downs Syrian Army Jet in Raqqa Province*, REUTERS (June 18, 2017), https://www.reuters.com/article/us-mideast-crisis-syria-usa-idUSKBN1990XI.

10. Amongst others, *see* DJEMILA CARRON, L'ACTE DÉCLENCHEUR D'UN CONFLIT ARMÉ INTERNATIONAL 345, 357 (2016); Djemila Carron, *Transnational Armed Conflicts: An Argument for a Single Classification of Non-International Armed Conflicts*, 7 JOURNAL OF INTERNATIONAL HUMANITARIAN LEGAL STUDIES 5, 9 (2016); Raphaël van Steenberghe, *Les interventions étrangères récentes contre le terrorisme international—Seconde partie: droit applicable (jus in bello)*, 63 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 37, 71 (2017); Kenneth Watkin, *The ICRC Updated Commentaries: Reconciling Form and Substance, Part II*, JUST SECURITY (Aug. 30, 2016), https://www.justsecurity.org/32608/icrc-updated-commentaries-reconciling-form-substance-part-ii/; Sean Watts, *The Updated First Geneva Convention Commentary, DoD's Law of War*

is in accordance with State practice. Another theory favors a "double classification:"[11] (1) an international armed conflict (IAC) between the territorial State (e.g., Syria) and the intervening State(s) (e.g., the coalition of States intervening in Syria) and (2) a NIAC between the intervening State(s) and the involved OAG (e.g., ISIS).[12] Double classification proponents urge taking into account not only the nature of the belligerent parties, but also the cross-border component of the conflict. This second theory was articulated by the

Manual, and a More Perfect Law of War, Part I, JUST SECURITY (Jul. 5, 2016), https://www.just-security.org/31749/updated-geneva-convention-commentary-dods-lowm-perfect-law-war/. *See also* Claus Kress, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts*, 15 JOURNAL OF CONFLICT & SECURITY LAW 245, 266 (2010); Siobhan Wills, *The Legal Characterization of the Armed Conflicts in Afghanistan and Iraq: Implications for Protection*, 58 NETHERLANDS INTERNATIONAL LAW REVIEW 173, 177 (2011); Lindsay Moir, "*It's a Bird! It's a Plane! It's a Non-international Armed Conflict!": Cross-border Hostilities Between States and Non-state Actors*, *in* CONTEMPORARY CHALLENGES TO THE LAWS OF WAR: ESSAYS IN HONOUR OF PROFESSOR PETER ROWE 71, 82 (Caroline Harvey et al. eds., 2014).

11. This term is used by the ICRC itself. *See* Tristan Ferraro, *Book Discussion: Some Considerations on Intervention Against Non-state Actors in Foreign Territory*, EJIL:TALK! (Mar. 31, 2017), https://www.ejiltalk.org/ejil-talk-book-discussion-some-considerations-on-intervention-against-non-state-actors-in-foreign-territory/ ("In this regard, it is submitted that any unconsented-to military operations against non-state organized armed group is *also* a military operation against the territorial State, triggering—in parallel to the non-international armed conflict—an international armed conflict. *A situation which is now labelled by the ICRC as 'an armed conflict with a double classification.'"*) (emphasis added).

12. Amongst others, *see* Geneva Academy of International Humanitarian Law and Human Rights, *Classification of Armed Conflicts* (2017), https://www.rulac.org/classification/contemporary-challenges-for-classification#collapse2accord; Julia Grignon, *The Beginning of Application of International Humanitarian Law: A Discussion of a Few Challenges*, 893 INTERNATIONAL REVIEW OF THE RED CROSS 139, 149–50 (2014); Vaios Koutroulis, *The Fight Against the Islamic State and Jus in Bello*, 29 LEIDEN JOURNAL OF INTERNATIONAL LAW 827, 841 (2016); NOAM ZAMIR, CLASSIFICATION OF CONFLICTS IN INTERNATIONAL HUMANITARIAN LAW: THE LEGAL IMPACT OF FOREIGN INTERVENTION IN CIVIL WARS 87, 204–5 (2017); Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF ARMED CONFLICTS 32, 72–74 (Elizabeth Wilmshurst ed., 2012); KUBO MAČÁK, INTERNATIONALIZED ARMED CONFLICTS IN INTERNATIONAL LAW 38, 39 (2018); Jann K. Kleffner, *Human Rights and International Humanitarian Law*, *in* THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 35, 43–44 (Terry D. Gill & Dieter Fleck eds., 2015); Dieter Fleck, *The Law of Non-International Armed Conflict*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 581, 584–85 (Dieter Fleck ed., 2013).

International Committee of the Red Cross (ICRC)[13] and, with ambiguities, by the International Criminal Court.[14]

This article demonstrates why this second theory, the double classification theory, should *not* be accepted. Part II underlines the main tenants of this theory. Part III pinpoints two problems raised by this theory in relation to the traditional understanding of IAC. Part IV addresses problems resulting from this theory in the determination of the law applicable to the intervening State's armed forces.

II. A SUMMARY OF THE DOUBLE CLASSIFICATION THEORY

Double classification proponents rely on *one* decisive criterion to establish whether the intervening State's use of force against the OAG on the territorial State's territory is also a use of force against that territorial State and, thus, whether there is an additional IAC between the intervening State and the territorial State. This criterion is the territorial State's absence of consent to the intervention against an OAG.

Double classification advocates highlight that the territorial State's absence of consent is a clear sign of disagreement between that State and the intervening State.[15] Moreover, their argument relies on the recent ICRC's Commentary on Common Article 2 of the Geneva Conventions. This Commentary specifies that any non-consensual use of force by a State against another State triggers an IAC.[16] While the ICRC's previous Commentary indicated that an IAC exists when a "difference aris[es] *between* two States and

13. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON GENEVA CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD ¶¶ 260–62, 477 (2016) [hereinafter GC I COMMENTARY]; INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON GENEVA CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR ¶¶ 293–95, 511 (2020) [hereinafter GC III COMMENTARY].

14. Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Judgment Pursuant to Article 74 of the Statute, ¶¶ 1184, 1228 (Mar. 7, 2014); Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Judgment, ¶¶ 726, 728 (July 8, 2019); Prosecutor v. Dominic Ongwen, Case No. ICC-02/04-01/15, Judgment, ¶ 2686 (Feb. 4, 2021). Relevant paragraphs of these judgments remain ambiguous as to whether the International Criminal Court adopts double classification as such.

15. ZAMIR, *supra* note 12, at 87.

16. GC III COMMENTARY, *supra* note 13, ¶¶ 251, 255–56; GC I COMMENTARY, *supra* note 13, ¶¶ 218, 222–23.

lead[*s*] *to the intervention of members of the armed forces*,"[17] the recent Commentary makes clear that this restrictive perspective unduly excluded any unilateral use of force by a State against another State.[18] Thus, the recent Commentary on Common Article 2 now asserts that an IAC comes into existence "when one State unilaterally uses armed force against another State even if the latter does not or cannot respond by military means."[19] In light of this new Commentary, double classification proponents contend that any non-consensual use of force by a State on another State's territory constitutes a use of force against that State. Consequently, they argue that a non-consensual State intervention justifies a second classification of IAC between the intervening State and the territorial State.

Statehood may not require an armed force, but it certainly requires an effective government, a territory, and a population.[20] Accordingly, double classification scholars insist that the use of armed force against a State does not need to target that State's armed forces to constitute a use of force against that State. Therefore, whenever the intervening State uses non-consensual force against an OAG but damages the territorial State's territory or harms part of its population, it is still using armed force against that State.[21]

Double classification advocates assert that the intervening State's actions against the OAG are *also* and *at the same time* actions against the territorial State.[22] In other words, the same actions would occur in two belligerent relationships: the relationship between the intervening State and the OAG; and the relationship between the intervening State and the territorial State. The same kind of military activities would trigger the NIAC between the OAG and the intervening State, *and* the IAC between the intervening State and the

17. COMMENTARY TO GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 20 (Jean Pictet ed., 1958) (emphasis added).

18. GC III COMMENTARY, *supra* note 13, ¶¶ 255–56; GC I COMMENTARY, *supra* note 13, ¶¶ 222–23.

19. GC III COMMENTARY, *supra* note 13, ¶ 256; GC I COMMENTARY, *supra* note 13, ¶ 223.

20. Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19.

21. Ferraro, *supra* note 11; Akande, *Classification of Armed Conflicts, supra* note 12, at 75; GC III COMMENTARY, *supra* note 13, ¶¶ 257, 295; GC I COMMENTARY, *supra* note 13, ¶¶ 218, 224, 262.

22. *See* Ferraro, *supra* note 11; Akande, *Classification of Armed Conflicts, supra* note 12, at 77.

territorial State. The intervening State's actions would simultaneously be part of these two conflicts.[23]

This situation is unusual: the double classification theory does not rely on two parallel armed conflicts of a different nature (mixed or horizontal armed conflicts[24]) (*Figure 1*), but it implies two separate armed conflicts that totally overlap (*Figure 2*).[25] It is not possible to dissociate both conflicts that were triggered by identical or similar acts[26] and are based on the same hostilities. Consequently, the *same* intervening State's actions are governed by both the laws of IAC *and* NIAC.

23. Giulio Bartolini, *Gli attacchi aerei in Siria, l'operazione Inherent Resolve e la complessa applicazione del diritto internazionale umanitario*, 2017 DIRITTI UMANI E DIRITTO INTERNAZIONALE 387, 420; Robert Kolb, *La superposition du droit des conflits armés internationaux et non internationaux s'agissant d'un seul et même acte dans le cadre des conflits armés dits transnationaux*, *in* PANSER LA GUERRE—PENSER LA PAIX. MÉLANGES EN L'HONNEUR DU PROFESSEUR RAHIM KHERAD 299, 301 (Emanuel Decaux & Nabil Hajjami eds., 2021).

24. *See* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 35 (2016) ("Horizontally, within the territory of a single State, there may be elements of both inter-State hostilities (between insurgents and an incumbent Government, or between rival armed groups vying for power in a State where the Government has vanished). . . . But the point is that the hostilities (synchronized or unsynchronized) *have disparate inter-State and intra-State strands*." (emphasis added)).

25. Not every author seems to agree with this distinction. *See*, *e.g.*, Dapo Akande, *When Does the Use of Force Against a Non-State Armed Group Trigger an International Armed Conflict and Why Does this Matter?*, EJIL:TALK! (Oct. 18, 2016), https://www.ejiltalk.org/when-does-the-use-of-force-against-a-non-state-armed-group-trigger-an-international-armed-conflict-and-why-does-this-matter/.

26. Due to a difference between both types of armed conflicts regarding the threshold of intensity, it is very likely that the NIAC will be triggered by a different act than the IAC although one of the same or similar nature. Thus, there often will be two triggering acts, one for the IAC (the intervening State's first use of force against the OAG on the territorial State's territory, which constitutes a use of force against the territorial State) and another for the NIAC (the intervening State's action against the OAG that reaches the NIAC threshold of intensity). However, it is not excluded that the exact same intervening State's action will trigger both the IAC and the NIAC when this action is of a magnitude such that it reaches the NIAC threshold of intensity. In this case, there will be one single triggering act for the IAC and the NIAC. On the start of IACs and NIACs in this context, *see* Section III(B)(1).

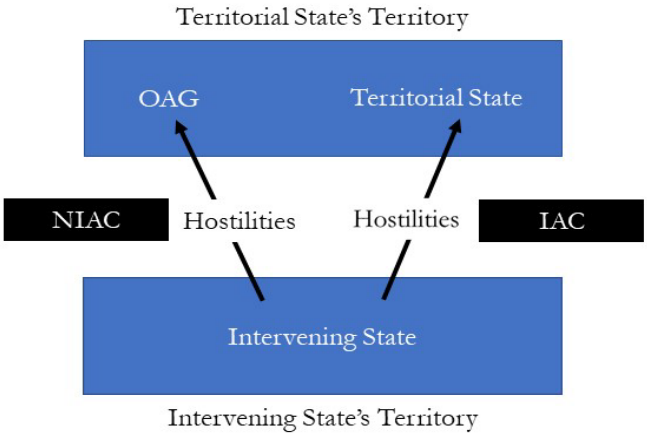

Figure 1. Mixed or Horizontal Conflicts

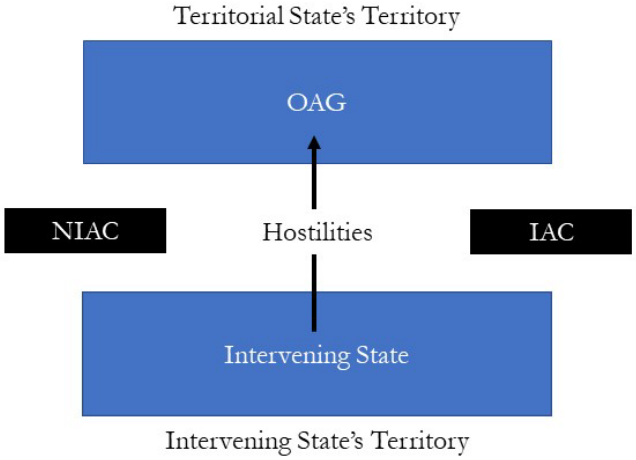

Figure 2. Double Classification

Neither proponents nor opponents of double classification have analyzed, in depth, this overlap of armed conflicts and IHL regimes. In 2017, Dapo Akande highlighted that "[t]wo questions remain to be discussed: 1. What are the consequences of having both an international armed conflict

and a non-international armed conflict? 2. Is it workable to have this overlap of laws between international and non-international armed conflicts?"[27]

Parts III and IV of this article answer Professor Akande's two questions. Because both classifications of armed conflict and both legal regimes were not designed to apply at the same time to the same military activities, their overlap creates problems not only for the traditional understanding of IAC, but also for the determination of the law applicable to the intervening State's armed forces.

III. PROBLEMS WITH THE TRADITIONAL NOTION OF IAC

Scholarly works criticize the double classification theory in relation to the traditional notion of IAC.[28] Admittedly, a few criticisms—such as those relating to the criterion of belligerent parties,[29] or the principle of separation between *jus in bello* and *jus ad bellum*[30]—seem unfair and misunderstand the

27. Dapo Akande, Keynote Speech, *reprinted in Conference on the ICRC Updated Commentary on the First Geneva Convention: Capturing 60 Years of Practice*, 56 MILITARY LAW & LAW OF WAR REVIEW 189, 190 (2017–2018). *See also* Marco Sassòli, *Legal Qualification of the Fight Against Terrorism*, *in* TERRORISM, COUNTER-TERRORISM AND INTERNATIONAL HUMANITARIAN LAW 47, 51 (2016).

28. On the traditional understanding of IACs, *see* Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]; Convention (III) Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 1, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Prosecutor v. Tadić, Case No. IT-94-1-AR-72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) [hereinafter *Tadić* Decision on the Defense Motion]; International Committee of the Red Cross, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?* (Mar. 2008), https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf.

29. For this kind of criticism, *see*, *e.g.*, Gill, *supra* note 5, at 372; CARRON, L'ACTE DÉCLENCHEUR D'UN CONFLIT ARMÉ INTERNATIONAL, *supra* note 10, at 358.

30. Against this criticism, *see* Akande, *When Does the Use of Force Against a Non-State Armed Group Trigger an International Armed Conflict*, *supra* note 25; Akande, Keynote Speech, *supra* note 27, at 193; Adil A. Haque, *Whose Armed Conflict? Which Law of Armed Conflict?*, 45 GEORGIA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 475, 484, 487 (2017); Adil A.

theory. However, two legitimate criticisms remain and warrant further scrutiny: (a) the negation of the intervening State's hostile intent; and (b) the different temporal scopes of application between IACs and NIACs.

A. Negation of the Intervening State's Hostile Intent

The first legitimate criticism of the double classification theory relates to an undue objectification of IACs.[31] This theory dismisses or diminishes the importance of identifying a hostile intent between involved States based on multiple objective factors.

Before the adoption of the Geneva Conventions in 1949, States sometimes denied any intent to wage war and refused IHL applicability on this ground. The absence of belligerent intent was thus invoked to escape the law. The drafters of the Geneva Conventions wanted to overcome such abuses and, therefore, changed perspectives. The Conventions prefer "armed conflict" over the term "war." This preference in terminology underscores a new objective mindset in IHL.[32] Since this change, hostile intent

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Haque, *Between the Law of Force and the Law of Armed Conflict*, JUST SECURITY (Oct. 13, 2016), https://www.justsecurity.org/33515/law-force-law-armed-conflict/; Koutroulis, *supra* note 12, at 841; Bartolini, *supra* note 23, at 399; van Steenberghe, *supra* note 10, at 72.

31. *Contra* Akande, *Classification of Armed Conflicts, supra* note 12, at 75; Dapo Akande, *Classification of Armed Conflicts*, *in* THE OXFORD GUIDE TO INTERNATIONAL HUMANITARIAN LAW 29, 54 (Ben Saul & Dapo Akande, 2020); Akande, Keynote Speech, *supra* note 27, at 194–95; Jelena Pejic, *Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications*, 893 INTERNATIONAL REVIEW OF THE RED CROSS 67, 77–78 (2011); Koutroulis, *supra* note 12, at 838–39; Ferraro, *supra* note 11.

32. Amongst others, *see* Jann K. Kleffner, *Scope of Application of International Humanitarian Law*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 43, 45–46 (Dieter Fleck ed., 2013); MARCO SASSÒLI, INTERNATIONAL HUMANITARIAN LAW: RULES, CONTROVERSIES, AND SOLUTIONS TO PROBLEMS ARISING IN WARFARE 172 (2019); NILS MELZER, INTERNATIONAL HUMANITARIAN LAW—A COMPREHENSIVE INTRODUCTION 56–57 (2019); ROBERT KOLB, IUS IN BELLO: LE DROIT INTERNATIONAL DES CONFLITS ARMÉS 157–58 (2009); GC III COMMENTARY, *supra* note 13, ¶¶ 225–27, 236–46; GC I COMMENTARY, *supra* note 13, ¶¶ 192–94, 203–13. On this change of perspective, *see also* FEDERAL MINISTRY OF DEFENCE OF THE FEDERAL REPUBLIC OF GERMANY, ZDV 15/2, LAW OF ARMED CONFLICT MANUAL ¶¶ 203–4 (2013); AUSTRALIAN DEFENCE HEADQUARTERS, ADDP 06.4, LAW OF ARMED CONFLICT ¶ 3.6 (2006) [hereinafter AUSTRALIAN MANUAL]; DANISH MINISTRY OF DEFENCE, MILITARY MANUAL ON INTERNATIONAL LAW RELEVANT TO DANISH ARMED FORCES IN INTERNATIONAL OPERATIONS ¶ 3.3.1 (2016) [hereinafter DANISH MILITARY MANUAL]; EJERCITO DE TIERRA, ORIENTACIONES: EL

is taboo in international scholarship, international case-law, and State practice.

Yet, at least one aspect of State practice shows that hostile intent remains a crucial condition for the emergence of IACs.[33] Like scholars,[34] States continue to discard such a classification when using force *unintentionally against another*, either by mistake or accident.[35] For instance, Polish armed forces crossed the border into the Czech Republic in May 2020 and refused to give people access to a religious building. Naturally, Czech authorities questioned the Polish government, which responded that they made a mistake: its troops thought they were acting on Polish territory and had *no hostile intent*.[36]

If the absence of hostile intent between States suffices to reject an IAC classification—such as in the Polish case—such intent must exist to classify an armed confrontation as such. Therefore, even though classification of

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DERECHO DE LOS CONFLICTOS ARMADOS 1–9, ¶ 1.2.b.(1) (2007) (Spain); UNITED KINGDOM MINISTRY OF DEFENSE, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 3.2. (2004) [hereinafter UK MANUAL].

33. In addition to references cited *infra* notes 37–40 and 43, *see also* Cameroon Republic Presidency, Department of Defense, *Droit des conflits armés et droit international humanitaire: manuel de l'instructeur en vigueur dans les forces de défense* 93, 117 (2006) (unpublished manuscript, on file in French at the ICRC Library). *Contra* JEAN D'ASPREMONT & JÉRÔME DE HEMPTINNE, DROIT INTERNATIONAL HUMANITAIRE 48 n.17 (2012); SASSÒLI, *supra* note 32, at 169.

34. *See* SASSÒLI, *supra* note 32, at 172; Koutroulis, *supra* n 12, at 839; Akande, *Classification of Armed Conflicts, supra* note 12, at 41; d'Aspremont and de Hemptinne, *supra* note 33, at 49 n.17; GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 162 (2d ed. 2016); Noam Lubell, *Fragmented Wars: Multi-Territorial Military Operations Against Armed Groups*, 93 INTERNATIONAL LAW STUDIES 214, 235 (2017); Sylvain Vité, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INTERNATIONAL REVIEW OF THE RED CROSS 69, 72–73 (2009); Andreas Paulus & M. Vashakmadze, *Asymmetrical War and the Notion of Armed Conflict—A Tentative Conceptualization*, 91 INTERNATIONAL REVIEW OF THE RED CROSS 95, 101 (2009).

35. Admittedly, States sometimes deal with the issue not from the perspective of hostile intent, but from the viewpoint of intensity threshold. *See* UK MANUAL, *supra* note 32, at 29, ¶ 3.3.1; AUSTRALIAN MANUAL, *supra* note 32, at 3-2, ¶ 3.5.

36. *See* Rob Cameron, *Poland "Invades" Czech Republic in "Misunderstanding,"* BBC NEWS (June 13, 2020), https://www.bbc.com/news/world-europe-53034930; Rob Picheta, *Poland Invaded the Czech Republic Last Month, But Says it Was Just a Big Misunderstanding*, CNN (June 12, 2020), https://edition.cnn.com/2020/06/12/europe/poland-czech-republic-invasion-scli-intl/index.html; *Par erreur, la Pologne vient d'envahir un de ses voisins*, LE POINT (June 13, 2020), https://www.lepoint.fr/monde/par-erreur-la-pologne-vient-d-envahir-un-de-ses-voisins-13-06-2020-2379696_24.php.

armed conflicts became an objective process in 1949, hostile intent still matters.[37] Julia Grignon underlines this: "The very term "hostilities" implies that the acts in question are motivated . . . by enmity."[38]

Two caveats deserve mentioning. First, hostile intent does not mean an intent to wage war or trigger an IAC. It requires that a State's use of force is *deliberate and knowingly against another*.[39] Second, to objectify the classification process and avoid more abuses, a series of factors (based on the battlefront reality) are applied to evidence hostile intent.[40]

Double classification fails to consider this second caveat. It seems to presume the intervening State's hostile intent towards the territorial State based on the single factor of the territorial State's absence of consent. Yet, the territorial State's absence of consent constitutes a necessary, but insufficient, factor to demonstrate the existence of hostile intent.[41] It is a subjective indicium that depends on political considerations and thus cannot, on its own, establish a hostile intent.[42] Other factors must also be considered to establish a hostile intent[43] such as the identity of persons and the nature of

37. *See*, *e.g.*, Eric David, *Le concept de conflit armé: enjeux et ambiguïtés*, *in* PERMANENCE ET MUTATIONS DU DROIT DES CONFLITS ARMÉS 55, 57–58 (Vincent Chetail ed., 2013); MELZER, *supra* note 32, at 56–57.

38. Grignon, *supra* note 12, at 149.

39. On the different meanings of *animus belligerendi* (belligerent intent), *see* Djemila Carron, *Book Discussion: L'acte déclencheur d'un conflit armé international*, EJIL:TALK! (May 30, 2017), https://www.ejiltalk.org/ejil-talk-book-discussion-lacte-declencheur-dun-conflit-arme-international-introductory-post/; Djemila Carron, *Book Discussion: Djemila Carron's Response*, EJIL:TALK! (June 2, 2017), https://www.ejiltalk.org/ejil-talk-book-discussion-djemila-carrons-response/; CARRON, *L'ACTE DÉCLENCHEUR D'UN CONFLIT ARMÉ INTERNATIONAL*, *supra* note 10, at 392–407.

40. van Steenberghe, *supra* note 10, at 73; INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 8 n.3 (2015), https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts.

41. CARRON, L'ACTE DÉCLENCHEUR D'UN CONFLIT ARMÉ INTERNATIONAL, *supra* note 10, at 345; Carron, *Transnational Armed Conflicts*, *supra* note 10, at 22; van Steenberghe, *supra* note 10, at 73.

42. *See*, *e.g.*, JÉROME DE HEMPTINNE, LES CONFLITS ARMÉS EN MUTATION ¶ 335 (2019).

43. *See* van Steenberghe, *supra* note 10, at 74 ; CARRON, L'ACTE DÉCLENCHEUR D'UN CONFLIT ARMÉ INTERNATIONAL, *supra* note 10, at 365–67; Carron, *Transnational Armed Conflicts*, *supra* note 10, at 21–22. Dr. Djemila Carron's work was a useful source of inspiration for the development of this argument. Nevertheless, Dr. Carron mentioned these indicia not to assess the intervening State's hostile intent but to identify the target of the intervening

objects that the intervening State targets (factors *ratione personae* or *ratione materiae*), as well as the places where—and the moment when—this State conducts its attacks (factors *ratione loci* and *ratione temporis*). Other factors of interest in assessing the involved States' intent include: the intervening State's previous or current relationships with other actors, more specifically with the territorial State and the OAG; the degree of efficiency of the intervening State's action in defeating its non-State or State enemy;[44] and the involved States' declarations and reactions. These factors are not cumulative nor exclusive and can be of different importance depending on the situation.

To illustrate this point, consider the U.S.-led coalition's intervention in Syria against ISIS before any direct actions against Syrian facilities and armed forces.[45] As evidenced by actual hostilities on the battlefront,[46] this coalition targeted ISIS members and its military assets. Several intervening States—including Canada,[47] Australia[48] and Norway[49]—indicated to the United Nations Security Council that their operations did not target Syria, but ISIS (factors *ratione materiae* and *ratione personae*).

State's cross-border activities. She believes that these indicia would allow to prove that the OAG—as a belligerent party to a NIAC—is the intervening State's intended target.

44. This indicium is suggested based on Professor Ian Scobbie's work. *See* Ian Scobbie, *Lebanon 2006*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 387, 408 (Elizabeth Wilmshurst ed., 2012).

45. On these subsequent actions, *see supra* note 9.

46. *See*, *e.g.*, *La coalition bombarde l'Etat islamique à Rakka*, LE MONDE (July 5, 2015), https://www.lemonde.fr/international/article/2015/07/05/la-coalition-frappe-l-etat-islamique-a-rakka_4670893_3210.html; *Images du bombardement d'un stock d'armes de l'Etat islamique*, LE MONDE (Feb. 23, 2016), https://www.lemonde.fr/proche-orient/video/2016/02/23/images-du-bombardement-d-un-stock-d-armes-de-l-etat-islamique_4870467_3218.html; Jim Garamone, *U.S. Forces Kill ISIS Founder, Leader Baghdadi in Syria*, U.S. DEPARTMENT OF DEFENCE (Oct. 27, 2019), https://www.defense.gov/News/News-Stories/Article/Article/1999751/us-forces-kill-isis-founder-leader-baghdadi-in-syria/; *Syrie: un responsable militaire de l'organisation Etat islamique tué par la coalition*, LE MONDE (Dec. 29, 2016), https://www.lemonde.fr/syrie/article/2016/12/29/syrie-un-responsable-militaire-de-l-organisation-etat-islamique-tue-par-la-coalition_5055346_1618247.html.

47. Michael Grant, Canadian Ambassador to the U.N., Letter Dated 31 March 2015 Addressed to the President of the Security Council, U.N. Doc. S/2015/221 (Mar. 31, 2015).

48. Gillian Bird, Permanent Representative of Australia to the U.N., Letter Dated 9 September 2015 Addressed to the President of the Security Council, U.N. Doc. S/2015/693 (Sept. 9, 2015).

49. Geir O. Pedersen, Permanent Representative of Norway to the U.N., Letter Dated 3 June 2016 Addressed to the President of the Security Council, U.N. Doc. S/2016/513 (June 3, 2016).

Moreover, the U.S.-led coalition undertook actions in zones controlled by ISIS precisely to regain control over these zones.[50] In their letters addressed to the Security Council, a few States—notably Belgium[51] and Germany[52]—specified that the threat originated in Syrian regions controlled by ISIS and over which Syria itself no longer had any control. Besides, it is useful to scrutinize how relevant the locations of the coalition's attacks are. The fight against ISIS was not strictly limited to Syrian territory. The United States attacked the same armed group in other territories, such as in Libya.[53]

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50. *See L'Etat islamique perd du terrain en Syrie*, LA LIBRE (Jan. 6, 2015), https://www.lalibre.be/international/2015/01/06/letat-islamique-perd-du-terrain-en-syrie-I5FPLUM65FDUFFK5Y23JM4J65Y/; Martin Chulov, *ISIS at Real Risk of Losing Territory for First Time Since "Caliphate" Declared*, THE GUARDIAN (June 2, 2016), https://www.theguardian.com/world/2016/jun/02/isis-islamic-state-risk-losing-territory-caliphate-syria-iraq; Etienne Jacob, *Syrie: des dirigeants de l'Etat islamique quittent leur « capitale » Raqqa*, LE FIGARO (Feb. 17, 2017), https://www.lefigaro.fr/international/2017/02/17/01003-20170217ARTFIG00332-syrie-des-dirigeants-de-l-etat-islamique-quittent-leur-capitale-raqqa.php; Rukmini Callimachi, *Fight to Retake Last ISIS Territory Begins*, NEW YORK TIMES (Sept. 11, 2018), https://www.nytimes.com/2018/09/11/world/middleeast/isis-syria.html. On this criterion, *see also* Gill, *supra* note 5, at 369, 373; Terry D. Gill, *Letter to the Editor from Professor Gill on Classification of International Armed Conflict*, JUST SECURITY (Oct. 14, 2016), https://www.justsecurity.org/33569/letter-editor-prof-terry-gill-classification-international-armed-conflict/; SASSÒLI, *supra* note 32, at 172; Kenneth Watkin, *The ICRC Updated Commentaries: Reconciling Form and Substance, Part I*, JUST SECURITY (Aug. 24, 2016), https://www.justsecurity.org/32538/icrc-updated-commentaries-reconciling-form-substance/. Watkin considers that consent only makes sense when it is granted by the entity who controls the area where armed force is used.

51. Bénédicte Frankinet, Permanent Representative of Belgium to the U.N., Letter Dated 7 June 2016 Addressed to the President of the Security Council, U.N. Doc. S/2016/523 (June 9, 2016).

52. Heiko Thoms, German Chargé d'affaires to the U.N., Letter Dated 10 December 2015 Addressed to the President of the Security Council, U.N. Doc. S/2015/946 (Dec. 10, 2015).

53. The United States conducted an aerial bombing campaign in support of Libyan armed forces fighting against ISIS. *See* Press Release, U.S. Africa Command, U.S. Airstrikes Support GNA in Libya (Aug. 3, 2016), https://www.africom.mil/pressrelease/28322/u-s-airstrikes-support-gna-in-libya; Press Release, U.S. Africa Command, U.S. Airstrikes in Support of GNA: Sept. 6 (Sept. 7, 2016), https://www.africom.mil/pressrelease/28381/u-s-airstrikes-in-support-of-gna-sept-6; Press Release, U.S. Africa Command, AFRICOM Concludes Operation Odyssey Lightning (Dec. 20, 2016), https://www.africom.mil/pressrelease/28564/africom-concludes-operation-odyssey-lightning. American troops were also deployed on Libyan territory. *See* Missy Ryan & Sudarsan Raghavan, *U.S. Special Operations Troops Aiding Libyan Forces in Major Battle Against Islamic State*, WASHINGTON POST (Aug. 9,

Thus, the use of armed force seems deliberate with respect to the group, but not with Syria (factor *ratione loci*).

Furthermore, some intervening States cooperated with allies of the Syrian government in the fight against ISIS, such as France with Russia in November 2015 (factor of current relations with others).[54] Certain Syrian statements were rather hostile to the U.S.-led coalition, but these statements were not followed by actions on the ground (factor of State statements). Lastly, this coalition's operations succeeded in reducing the Islamic State's military capacity and in so doing indirectly strengthened Syrian military capacity. They enabled Syria not to make extra military effort to defeat ISIS and, thus, to reserve some of its military power to defeat other possible opponents, such as the coalition's members themselves (factor of degree of efficiency in defeating the enemy).

The assessment of all these factors excludes any hostile intent of the U.S.-led coalition towards Syria but confirms such an intent towards ISIS. Consequently, the coalition's actions against ISIS did not trigger an IAC between the intervening States and the territorial State due to the intervening States' lack of hostile intent. Inversely, a NIAC clearly existed between the intervening States and ISIS—the latter being organized and the hostilities between these actors meeting the required threshold of intensity.[55]

Admittedly, assessing States' hostile intent remains a complex task requiring a multiple-factor analysis. This task is more complicated in some circumstances, such as actions conducted against a territorial State's civilian

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2016), https://www.washingtonpost.com/news/checkpoint/wp/2016/08/09/u-s-special-operations-forces-are-providing-direct-on-the-ground-support-for-the-first-time-in-libya/.

54. *See*, *e.g.*, Frédérique Coulée, *Pratique française du droit international*, 61 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 939, 971 (2015); *La France et la Russie conviennent d'une « coopération » militaire « plus étroite »*, LE MONDE (Nov. 19, 2015), https://www.lemonde.fr/attaques-a-paris/article/2015/11/19/syrie-la-cooperation-entre-la-france-et-la-russie-s-organise_4813753_4809495.html; *Poutine accepte de coopérer avec Hollande pour lutter contre l'EI en Syrie*, FRANCE24 (Nov. 26, 2015), https://www.france24.com/fr/20151126-poutine-hollande-russie-france-lutte-terrorisme-ei-jihadistes-syrie-daech-cooperation; Neil McFarquhar, *Russia Allies With France Against ISIS, Saying Jet That Crashed in Sinai Was Bombed*, NEW YORK TIMES (Nov. 17, 2015), https://www.nytimes.com/2015/11/18/world/europe/russia-plane-crash-bomb.html.

55. *See Tadić* Decision on the Defense Motion, *supra* note 28, ¶ 70; Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶ 90 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005) [hereinafter *Limaj* Judgment]; Prosecutor v. Boškoski, Case No. IT-04-82-T, Judgment, ¶¶ 175, 177–78 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008) [hereinafter *Boškoski* Judgment].

population. The multiple-factor analysis does not offer an automatic solution when classifying non-consensual foreign interventions, unlike the double classification theory that uses a single factor; that is, the territorial State's absence of consent. Thus, grey areas inevitably persist when applying the multiple-factor analysis. Nevertheless, these grey areas cannot justify an automatic double classification. Although the principle of legal security—which includes a principle of foreseeability—implies that the law must be clear, precise, and accessible enough for individuals to anticipate the legal consequences of their actions,[56] this principle cannot trump IAC triggering conditions, including the involved States' hostile intent.

B. Different Temporal Scopes of Application for IACs and NIACs

The double classification theory faces another major hurdle: the difference between IACs and NIACs concerning their temporal scope of application. The IAC between the intervening State and the territorial State and the NIAC between the intervening State and the OAG would often (a) not start nor (b) end at the same time. This would impact (c) the law applicable to the intervening State's armed forces.

1. Start of IACs and NIACs

Most agree that the start of IACs and NIACs must be identified through different criteria. IACs are triggered by *any* non-consensual use of force by a State against another State[57]—provided that there is a hostile intent.[58] The existence of NIACs relies on two criteria: the organization of the involved armed group(s) and the *intensity* of hostilities between all the involved parties.[59] Consequently, it is generally accepted that the main difference in the

56. *See*, *e.g.*, GÉRARD CORNU, VOCABULAIRE JURIDIQUE 943 (2011); Jérémie Van Meerbeeck, *Les principes de légalité et de sécurité juridique: des faux amis?*, *in* LA LÉGALITÉ: UN PRINCIPE DE LA DÉMOCRATIE BELGE EN PÉRIL? 678 (Luc Detroux et al. eds., 2019).

57. *See supra* note 28.

58. On the condition of hostile intent, *see* Section III(A).

59. *See*, *e.g.*, *Tadić* Decision on the Defense Motion, *supra* note 28, ¶ 70; *Limaj* Judgment, *supra* note 55, ¶ 90; *Boškoski* Judgment, *supra* note 55, ¶ 175; GC I COMMENTARY, *supra* note 13, ¶¶ 421, 455; SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 167–80 (2014); EMILY CRAWFORD & ALISON PERT, INTERNATIONAL HUMANITARIAN LAW 68–69 (2020); D'ASPREMONT & DE HEMPTINNE, *supra* note 33, 67–68; ERIC DAVID, PRINCIPES DE DROIT DES CONFLITS ARMÉS 140–52 (2019).

start of IACs and NIACs regards the threshold of intensity for hostilities. While NIACs require a certain threshold of intensity, IACs do not.[60]

Thus, two scenarios are possible. First, fighting between an intervening State and an OAG on the intervening State's territory (or any other territory that is not the territory of the future territorial State) could already meet the NIAC intensity threshold. Therefore, from the very first action of the intervening State against the group within the territory of the territorial State, the NIAC between the OAG and the intervening State would spill over onto, or export itself to, the territory of the territorial State.[61] In addition, from this very first action, an IAC between the intervening State and the territorial State would immediately arise. Therefore, the NIAC would start before the IAC on a different territory, but the two conflicts would simultaneously and immediately exist on the territorial State's territory.

Second, in the absence of any previous intense fighting between the intervening State and the OAG, no NIAC between these actors could exist. The first non-consensual use of armed force by the intervening State on the territorial State's territory would immediately trigger the IAC between these States, even though the direct target is the OAG. Conversely, because of the NIAC intensity threshold, the NIAC between the OAG and the intervening State will only start if the intervening State repeats its actions or subsequently undertakes other kinds of action against the OAG.[62] Consequently, the IAC between the intervening State and the territorial State would start before the NIAC between the intervening State and the OAG. Such a single IAC classification can persist over time if armed hostilities between the intervening

60. *See*, *e.g.*, CARRON, L'ACTE DÉCLENCHEUR D'UN CONFLIT ARMÉ INTERNATIONAL, *supra* note 10, at 233, 245; GC I COMMENTARY, *supra* note 13, ¶ 236; GC III COMMENTARY, *supra* note 13, ¶ 269; D'ASPREMONT & DE HEMPTINNE, *supra* note 33, at 48; KOLB, *supra* note 32, at 158; SASSÒLI, *supra* note 32, at 16. *Contra* International Law Association, Final Report on the Meaning of Armed Conflict in International Law 2 (2010), https://www.rulac.org/assets/downloads/ILA_report_armed_conflict_2010.pdf.

61. The author favors a broad approach of IHL geographical scope of application based on the nexus to the existing armed conflict. *See*, *e.g.*, Noam Lubell & Nathan Derejko, *A Global Battlefield? Drones and the Geographical Scope of Armed Conflict*, 11 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 65, 75, 77, 79, 82, 87 (2013); Christian Schaller, *Using Force Against Terrorist "Outside Areas of Active Hostilities"—The Obama Approach and the Bin Laden Raid Revisited*, 20 JOURNAL OF CONFLICT & SECURITY LAW 195, 217 (2015).

62. Unless the intervening State's first use of armed force against the group on the territorial State's territory is of such a magnitude that it reaches the NIAC threshold of intensity itself—which is rare in practice—or suffices with previous armed interactions on another territory to reach that threshold.

State and the group never or only belatedly escalate to the NIAC threshold of intensity.

For instance, in early July 2014, the United States conducted a rescue mission of several hostages at ISIS's hands in Syria, resulting in the killing of several ISIS members.[63] At that time, fighting between the United States and ISIS, whether in Iraq or Syria, was not meeting the NIAC intensity threshold.[64] Assuming the rescue mission was not consented to by Syrian authorities—they were reported not to be aware of it[65]—this mission would trigger an IAC between the United States and Syria. However, in this instance, the act was not sufficiently intense to trigger a separate NIAC between the intervening State (the United States) and the OAG (ISIS). Hostilities against the OAG, especially through airstrikes, only started to increase on Iraqi and Syrian territories, respectively, in August and September 2014.[66] Thus, in the interim, only a single classification of IAC would exist between the United States and Syria.[67]

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63. *See*, *e.g.*, Karen DeYoung, *The Anatomy of a Failed Hostage Rescue Deep in Islamic State Territory*, WASHINGTON POST (Feb. 14, 2015), https://www.washingtonpost.com/world/national-security/the-anatomy-of-a-failed-hostage-rescue-deep-into-islamic-state-territory/2015/02/14/09a5d9a0-b2fc-11e4-827f-93f454140e2b_story.html; Spencer Ackerman, *James Foley: US Reveals Failed Special Forces Rescue Mission Within Syria*, THE GUARDIAN (Aug. 21, 2014), https://www.theguardian.com/world/2014/aug/21/elite-forces-us-raid-syria-james-foley-failed.

64. In addition to references in *infra* note 66, *see, e.g.*, Luke Harding, *Iraq War Inquiry: Timeline of Conflict*, THE GUARDIAN (July 6, 2016), https://www.theguardian.com/world/2016/jul/05/iraq-war-inquiry-timeline-of-conflict.

65. DeYoung, *supra* note 63.

66. *See*, *e.g.*, Dan Roberts & Spencer Ackerman, *US Begins Air Strikes Against ISIS Targets in Iraq, Pentagon Says*, THE GUARDIAN (Aug. 8, 2014), https://www.theguardian.com/world/2014/aug/08/us-begins-air-strikes-iraq-isis; Barack Obama, Letter from the President—War Powers Resolution Regarding Iraq (Aug. 8, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/08/08/letter-president-war-powers-resolution-regarding-iraq; Helene Cooper & Eric Schmitt, *Airstrikes by U.S. and Allies Hit ISIS Targets in Syria*, NEW YORK TIMES (Sept. 22, 2014), https://www.nytimes.com/2014/09/23/world/middleeast/us-and-allies-hit-isis-targets-in-syria.html; The White House, Statement by the President on Airstrikes in Syria (Sept. 23, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/09/23/statement-president-airstrikes-syria.

67. The author thanks Major Aaron Johnson, U.S. Army, for bringing this example to her attention.

2. End of IACs and NIACs

Although still very controversial, the end of IACs and NIACs should be assessed through different criteria.[68] Traditionally, IACs end with the general termination of military operations, assuming there is no risk of resumption.[69] This criterion of "general termination of military operations" has a broad meaning. Hostilities must cease amongst *all* the involved belligerents, and any movement of troops that entails a hostile intent must stop.[70] Concerning NIACs, the International Criminal Court,[71] the ICRC,[72] and a significant number of legal scholars (this author included)[73] consider that this type of

68. *Contra* JULIA GRIGNON, L'APPLICABILITÉ TEMPORELLE DU DROIT INTERNATIONAL HUMANITAIRE 272 (2014); SASSÒLI, *supra* note 32, at 192–93; Emily Crawford, *The Temporal and Geographic Reach of International Humanitarian Law*, *in* THE OXFORD GUIDE TO INTERNATIONAL HUMANITARIAN LAW 57, 60 (Ben Saul & Dapo Akande eds., 2020).

69. *See*, *e.g.*, AP I, *supra* note 28, art. 3(b); GC IV, *supra* note 28, art. 6(2); GC III COMMENTARY, *supra* note 13, ¶¶ 310–13; GC I COMMENTARY, *supra* note 13, ¶¶ 277–80; COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶¶ 152–53 (Claude Pilloud et al. eds., 1983) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS]; INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 40, at 11–12; SASSÒLI, *supra* note 32, at 191; Marco Milanović, *The End of Application of International Humanitarian Law*, 96 INTERNATIONAL REVIEW OF THE RED CROSS 163, 172–74 (2014); GRIGNON, *supra* note 68, at 411–12 (conclusions); DAVID, *supra* note 59, at 306–8 ; Gabriella Venturini, *The Temporal Scope of Application of the Conventions*, *in* THE 1949 GENEVA CONVENTIONS: A COMMENTARY 54, 56 (Andrew Clapham et al. eds., 2015).

70. Grignon, *supra* note 68, at 276–78.

71. *See*, *e.g.*, *Prosecutor v. Ntaganda*, *supra* note 14, ¶ 721.

72. *See*, *e.g.*, GC III COMMENTARY, *supra* note 13, at 522–28; GC I COMMENTARY, *supra* note 13, ¶¶ 485–96; COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 69, at 489–94; INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 40, at 12–14.

73. *See*, *e.g.*, HELEN DUFFY, THE "WAR ON TERROR" AND THE INTERNATIONAL LAW FRAMEWORK 357, 404 (2015); KOLB, *supra* note 32, at 221; Rogier Bartels, *Ceasefires and the End of the Application of IHL in Non-International Armed Conflicts*, ARMED GROUPS AND INTERNATIONAL LAW (Nov. 1, 2012), https://armedgroups-internationallaw.org/2012/11/01/ceasefires-and-the-end-of-the-application-of-ihl-in-non-international-armed-conflicts/; Rogier Bartels, *Temporal Scope of Application of IHL: When Do Non-International Armed Conflicts End? Part 1*, OPINIOJURIS (Feb. 18, 2014), http://opiniojuris.org/2014/02/18/guest-post-bartels-temporal-scope-application-ihl-non-international-armed-conflicts-end-part-1/; Rogier Bartels, *From Jus in Bello to Jus Post Bellum: When Do Non-International Armed Conflicts End?*, *in* JUS POST BELLUM: MAPPING THE NORMATIVE FOUNDATIONS 297, 303 (Carsten Stahn et al. eds., 2014); Milanović, *supra* note 69, at 170, 180; Gabor Rona, *The Start, End, and Territorial Scope of Armed Conflict*, JUST SECURITY (Nov. 11, 2015), https://www.justsecurity.org/27543/start-end-territorial-scope-armed-conflict/; DAVID, *supra* note 59, at 311;

armed conflict ends *either* with the dissolution or disorganization of the OAG—when there is no risk of resurgence or restructuring—*or* with the decrease in the intensity of hostilities—when there is no risk of resumption. To avoid a "revolving door between applicability and non-applicability" of the law of NIAC, [74] NIACs should not cease to exist when there is a slight decrease in intensity with a strong probability for it to resume. They only disappear when there is a significant decrease in hostilities and one can reasonably expect these hostilities not to resume.

With these different criteria, the IAC between an intervening State and a territorial State could end simultaneously with the NIAC between the intervening State and the OAG. This would occur when the intervening State ceases all its operations and withdraws its troops or defeats the OAG but stays on the territorial State's territory with its consent to repair damaged infrastructure.

However, the NIAC between the OAG and the intervening State could end before the IAC between the intervening State and the territorial State. The end of the NIAC would occur when the intensity of hostilities between the group and the intervening State diminishes. Even if the intensity of hostilities decreases with no risk of resumption of intense confrontations—thus causing the NIAC to end—the intervening State may still undertake non-consensual sporadic actions against the OAG or maintain its troops on the territorial State's territory without its consent to keep an eye on the OAG. In such circumstances, the IAC would continue because the intervening State continues non-consensual military operations, albeit intermittently, within the territory of the territorial State. Thus, there is no general termination of military operations.

This illustrates circumstances where the double classification theory would lead to a single IAC classification: the IAC between the intervening State and the territorial State would start before and/or end after the NIAC between the intervening State and the OAG. In these circumstances, the law of IAC would be the only body of law applicable to the intervening State's actions against the OAG.

ANNYSSA BELLAL, THE WAR REPORT: ARMED CONFLICTS IN 2018, at 28 (2019), https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202018.pdf.

74. *See* Prosecutor v. Gotovina, Case No. IT-06-90-T, Judgment, ¶ 1694 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011). *See also* Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 100 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008).

3. The Sole Application of the Law of IAC

Such a single IAC classification creates many problems because the law of IAC was not designed to regulate a State's action against an OAG. The application of this law would prevent the intervening State from legally undertaking its military campaign. Many of its actions against the group would be violating that law.

i. Actions Against Members of the OAG

In an IAC, an individual is either a member of a belligerent party's armed forces, a participant in a *levée en masse*, or a civilian.[75] In the IAC between the intervening State and the territorial State, the OAG's members do not qualify as members of a party's regular or irregular armed forces. The OAG is not a party to the alleged IAC; thus, its members cannot be a party's regular armed forces. In addition, the OAG's members are not regular armed forces of a non-recognized government or authority.[76] Likewise, they are not members of a party's irregular armed forces because their group does not *belong* to a party to the IAC[77]—at least in most cases. Further, members of the group do not qualify as participants in a *levée en masse*.[78] Such participants spontaneously take up arms to fight against a State invasion,[79] while members of the group are, by definition, organized.

Consequently, the OAG's members are necessarily civilians in the IAC between the intervening State and the territorial State. Many would probably agree with this conclusion. More surprisingly though, members of the group would *always* be protected civilians—that is, civilians *not* directly participating

75. *See* AP I, *supra* note 28, art. 50(1); INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 22–23 (2009) [hereinafter INTERPRETIVE GUIDANCE]; 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW r. 5 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter CIHL STUDY].

76. GC III, *supra* note 28, art. 4(a)(3).

77. *Id.* art. 4(a)(2); AP I, *supra* note 28, art. 43; COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 69, ¶¶ 1663, 1668, 1672, 1674–75, 1685.

78. GC III, *supra* note 28, art. 4(a)(6).

79. *See*, *e.g.*, COMMENTARY TO GENEVA CONVENTION III RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 75–76 (Jean Pictet ed., 1960).

in the hostilities,[80] at least according to the ICRC's interpretation of direct participation in hostilities.[81] Because the ICRC endorses the double classification theory,[82] it seems reasonable to consider its definition of direct participation in hostilities.[83] The OAG's members, as civilians, would *rarely* meet the third condition of this definition—that is, the belligerent nexus.[84] This condition requires that the involved civilian acts *in support of* a belligerent party *and to the detriment* of another. While members of the group conduct operations against the intervening State, they often *do not* operate in favor of the territorial State.[85]

Therefore, even when the OAG's members undertake hostile actions against the intervening State, this State could not legally target them because they would not be directly participating in the hostilities. Any attack against them would amount to a direct attack against civilians prohibited by Article 51(2) of Additional Protocol I (AP I) and by customary rule 1 of the ICRC's customary international humanitarian law study.[86]

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80. *Contra* David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defense*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 171, 192–93 (2005); SASSÒLI, *Legal Qualification of the Fight Against Terrorism*?, *supra* note 27, at 50; Marco Milanović & Vidan Hadži-Vidanović, *A Taxonomy of Armed Conflict*, *in* RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW: JUS AD BELLUM, JUS IN BELLO AND JUS POST BELLUM 256, 296–97 (Nigel D. White & Christian Henderson eds., 2013); Marco Milanović, *The Applicability of the Conventions to "Transnational" and "Mixed" Conflicts*, *in* THE 1949 GENEVA CONVENTIONS: A COMMENTARY 27, 38 (Andrew Clapham et al. eds., 2015).

81 The ICRC's interpretation of this notion has been and is still disputed but it is not the purpose of this article to discuss and assess this interpretation.

82. *See* GC I COMMENTARY, *supra* note 13.

83. More flexible approaches, for example regarding the notions of irregular armed forces or direct participation in hostilities, could change the result of this analysis and make the OAG's members targetable in the IAC against the territorial State. On these approaches, *see, e.g.*, Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation of Hostilities: A Critical Analysis*, 1 HARVARD NATIONAL SECURITY JOURNAL 5, 16–20, 34 (2010).

84. INTERPRETIVE GUIDANCE, *supra* note 75, at 58–64. There are also other obstacles for the OAG's members to meet the definition of direct participation in hostilities. There are no actual hostilities between the intervening State and the territorial State in which they can participate. On this point, *see, e.g.*, Kress, *supra* note 10, at 253–54; International Committee of the Red Cross, Fifth Expert Meeting on the Notion of Direct Participation in Hostilities, Summary Report 44 (2008), https://www.icrc.org/en/doc/assets/files/other/2008-05-report-dph-2008-icrc.pdf.

85. *See also* van Steenberghe, *supra* note 10, at 67.

86. AP I, *supra* note 28, art. 51(4)(a); CIHL STUDY, *supra* note 75, r. 11–12.

ii. Actions Against the OAG's Military Objects

In the IAC between the intervening and territorial States, the OAG's military objects would not constitute military objectives. Rather, they would constitute civilian objects for the intervening State. In IACs, objects which are not military objectives are necessarily civilian objects.[87] The OAG's military objects do not meet the definition of military objective, as will be explained below. Therefore, they must be considered as civilian objects.

According to Article 52(2) of AP I, "military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[88] Although the definition does not make it explicit, the notion of military objective has an inherent relational dimension. An object is a military objective if it effectively contributes to the military action *of a belligerent State party to a specific IAC*, and if its destruction provides a military advantage *to another belligerent State or its cobelligerents that are parties to the same specific IAC*. There is no doubt that drafters of AP I always thought about and analyzed the notion of military objective in the context of a specific belligerent State relationship.[89]

87. AP I, *supra* note 28, art. 52(1); CIHL STUDY, *supra* note 75, r. 9.

88. AP I, *supra* note 28, art. 52(2); CIHL STUDY, *supra* note 75, r. 10.

89. For an explicit relational perspective of the notion of military objective, *see* van Steenberghe, *supra* note 10, at 68; Robert Kolb, *Military Objectives in International Humanitarian Law*, 28 LEIDEN JOURNAL OF INTERNATIONAL LAW 691, 692 (2015); KOLB, *supra* note 32, at 250. For an implicit relational perspective of the notion of military objective, *see, e.g.*, Yoram Dinstein, *Legitimate Military Objectives Under the Current Jus in Bello*, 31 ISRAEL YEARBOOK ON HUMAN RIGHTS 1, 7 (2001); SASSÒLI, *supra* note 32, at 351–52; Marco Sassòli, *Targeting: The Scope and Utility of the Concept of "Military Objectives" for the Protection of Civilians in Contemporary Armed Conflicts*, *in* NEW WARS, NEW LAWS? APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS 181, 185–86 (David Wippman & Matthew Evangelista eds., 2005); MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS 324 (1982); International Law Association Study Group, "The Conduct of Hostilities and International Humanitarian Law—Challenges of 21st Century Warfare," (June 25, 2017), https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=3763&StorageFileGuid=11a3fc7e-d69e-4e5a-b9dd-1761da33c8ab.

The ordinary meaning of the terms used by Article 52(2) favors such a relational dimension.[90] First, the military action to which the military objective makes an effective contribution is necessarily the military action of an adverse belligerent State. Second, the attacking State necessarily directs its military actions at its enemy *in an actual conflict*. Third, this State must obtain a military advantage from its action. "Advantage" means "a greater chance of success"[91] or victory over another belligerent State. One cannot talk about advantage if there is no more than one actor involved.

The relational dimension of the notion of military objective results in the OAG's military objects being civilian objects. In the IAC between the intervening State and the territorial State, an object is a military objective when it contributes to the military action of *one of these States* and its destruction would offer a military advantage *to the other State*. Yet, when the intervening State considers acting against the OAG's military objects, these objects often only contribute to the group's operations and not to the territorial State's military action. In addition, the intervening State is not gaining a military advantage over the territorial State, but over the OAG. Rather, the intervening State's attack against the OAG could provide an advantage to the territorial State in certain circumstances; that is, when the territorial State is itself fighting against the same OAG.

Consequently, the OAG's military objects would not constitute military objectives for the intervening State in its IAC against the territorial State. The only option left would be to consider them as civilian objects. Therefore, the intervening State would not be entitled to target them: it would otherwise directly attack civilian objects in violation of Art. 52(1) of AP I and customary rule 7.[92]

iii. Actions Against the OAG

If the OAG's members are civilians in the IAC between the intervening State and the territorial State, the group itself is part of the territorial State's civilian population. Indeed, according to Article 50(2) of AP I: "The civilian population comprises all persons who are civilians."[93] Thus, any action against the

90. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

91. *Advantage*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/advantage (last visited May 25, 2022).

92. AP I, *supra* note 28, art. 51(4)(a); CIHL STUDY, *supra* note 75, r. 11–12.

93. AP I, *supra* note 28, art. 50(2).

group would be against the territorial State's population. This is important because certain methods of warfare are lawful in the conduct of hostilities against regular or irregular armed forces but prohibited when directed at the civilian population. Therefore, the intervening State could not use these methods of warfare against the OAG.

For instance, in the conduct of hostilities, the law of IAC prohibits acts whose primary purpose is to spread terror among the civilian population.[94] Thus, in the IAC against the territorial State, the intervening State cannot undertake any act that would cause fear among the OAG that is part of the civilian population. Likewise, the law of IAC proscribes the destruction of objects indispensable for the survival of the civilian population.[95] In the IAC against the territorial State, the intervening State could not destroy essential objects for the OAG as, by doing so, it would destroy vital goods for the civilian population.

The conclusion is rather absurd. Under the law of IAC, the intervening State could not do much against the OAG or its objects. It could only *capture and detain* (rather than target) members of the group—which is hardly feasible in a significant number of circumstances—*if* they represent a threat for its security.[96] The law of IAC unduly gives priority to the principle of humanity over the principle of military necessity.[97] While providing victims of cross-border hostilities with an absolute protection against attacks—they would not even be acceptable collateral damage—it negates the military need for the intervening State to fight the OAG. The law of IAC completely fails to address the OAG operating within the territorial State.

Who would dare present these statements as standing law to any intervening State whose armed forces are deployed abroad and fighting an OAG without the territorial State's consent? These statements clearly do not match with current State practice. No State argues, under any circumstances, that intervening States' actions strictly directed at an OAG and/or its objects are contrary to IHL.

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94. *Id.* art. 51(2); CIHL STUDY, *supra* note 75, r. 2.

95. AP I, *supra* note 28, art. 54(2); CIHL STUDY, *supra* note 75, r. 54.

96. GC IV, *supra* note 28, art. 42.

97. On the necessary balance between these principles, *see, e.g.*, Mary E. O'Connell, *Historical Development and Legal Basis*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 1, 36–38 (Dieter Fleck ed., 2013); D'ASPREMONT & DE HEMPTINNE, *supra* note 33, at 220, 226; CRAWFORD & PERT, *supra* note 59, at 49.

IV. PROBLEMS WITH THE LAW APPLICABLE TO FOREIGN ARMED FORCES

When the IAC against the territorial State and the NIAC against the OAG co-exist under the double classification theory, the laws of IAC and NIAC are applicable to the same intervening State's actions under two conditions.[98] First, the actions must have a separate and independent belligerent nexus to each armed conflict.[99] Second, they must fall within the ambit of the relevant norms under both the laws of IAC and NIAC, especially within their geographical scope of application.[100] When these conditions are met, the intervening State must, in principle, apply both legal regimes simultaneously. Whether a territorial State can do so, however, is in question for two reasons: (a) because of conflicting norms in the laws of IAC and NIAC, which lead to different results in practice; and (b) because none of the possible solutions to these normative conflicts appears satisfying.

A. Normative Conflicts Between the Laws of IAC and NIAC

In some cases, the intervening State can simultaneously apply the laws of IAC and NIAC. Norms of both regimes require a common behavior, which is not surprising because both regimes were created with a common purpose: to regulate the conduct of hostilities and to offer a better protection to victims of armed conflicts.

In other cases, the intervening State can undertake different actions under both bodies of law. These cases constitute normative conflicts. Indeed,

98. For further analysis on these two conditions, *see* Lesaffre, *supra* note 1.

99. Some of the intervening State's operations would not have such a double belligerent nexus. Certain actions would only have a single belligerent nexus to the IAC against the territorial State (e.g., the intervening State's attacks against the territorial State's armed forces or military assets), while others would only have a belligerent nexus to the NIAC against the OAG (e.g., the intervening State's operations on its own territory against the OAG).

100. Certain norms of the law of IAC have a limited geographical scope of application which would exclude the intervening State's actions against the OAG on the territorial State's territory. Indeed, several rules of the law of IAC, such as most articles of Geneva Convention IV, only apply to State parties when they conduct operations on their own territory or in occupied territory. In case of non-consensual State interventions against an OAG, the involved intervening State will not need to abide by, or will not benefit from, these rules on the territorial State's territory. Indeed, this intervening State does not act on its territory nor occupy the territorial State's territory, at least according to a traditional understanding of the notion of occupation. *See*, *e.g.*, GC IV, *supra* note 28, arts. 27–34, 35–46.

according to the Study Group of the International Law Commission in its final report on the *Fragmentation of International Law*,[101] there is a normative conflict when two applicable norms allow different results in practice. In most cases, there is no strict incompatibility between the laws of IAC and NIAC because neither obliges the intervening State to undertake an action that the other prohibits.[102] Nonetheless, when two norms have the *potential* to lead to different results, it is also a sign of friction between these norms. A potential conflict is a normative conflict. Normative conflicts between the laws of IAC and NIAC are not astonishing because both regimes apply to distinct belligerent relationships.

1. Compatibility Between the Laws of IAC and NIAC

The first category of compatibility between the laws of IAC and NIAC encompasses cases where norms of both regimes are identical and support an identical solution in practice. Examples include the norms on means of warfare,[103] or those prohibiting improper use of recognized emblems (conduct

101. International Law Commission Study Group, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, ¶ 24, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006). *See also* International Law Commission, Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law 186 (2006); Marco Sassòli, *Le droit international humanitaire, une lex specialis par rapport aux droits humains?*, *in* LES DROITS DE L'HOMME ET LA CONSTITUTION: ÉTUDES EN L'HONNEUR DU PROFESSEUR GIORGIO MALINVERNI 377, 381–82 (Andreas Auer et al. eds., 2007); SASSÒLI, *supra* note 32, at 438; Marco Sassòli, *International Humanitarian Law and International Human Rights Law*, *in* THE OXFORD GUIDE TO INTERNATIONAL HUMANITARIAN LAW 381, 393 (Ben Saul & Dapo Akande eds., 2020).

102. For a definition of strict incompatibility or normative conflict, *see* SASSÒLI, *supra* note 32, at 437–38.

103. *See*, *e.g.*, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction art. 1, Jan. 13, 1993, 1974 U.N.T.S. 45; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction art. 1, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163; Declaration (IV, 3) Concerning Expanding Bullets, July 29, 1899, 187 Consol. T.S. 459, 26 MARTENS NOUVEAU RECUEIL; Protocol IV to the 1980 Convention on Blinding Laser Weapons art. 1, Oct. 13, 1995, 1380 U.N.T.S. 370; 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 art. 1, Oct. 10, 1980, 1342 U.N.T.S. 137; CIHL STUDY, *supra* note 75, r. 73–74, 77–78, 86. On the example of means of warfare, *see also* Bartolini, *supra* note 23, at 402; ROBERT KOLB,

of hostilities),[104] as well as the norms prohibiting torture,[105] murder,[106] or collective sanctions (protection of persons in enemy hands).[107] For instance, whether in the IAC against the territorial State or the NIAC against the OAG, the intervening State must refrain from using chemical weapons against the OAG's members or the civilians. It does not matter which body of law applies.

The second category of compatibility covers cases of "unqualified" silence. In certain circumstances, the law of IAC provides a specific norm on an issue, while the law of NIAC remains silent. Sometimes, this silence is "qualified." That is, the law of NIAC does not address the issue because States do not want the prohibition or requirement in the law of NIAC.[108] Other times, this silence can appear "unqualified."[109] That is, the silence does not seem to support any State opposition to the rule contained in the law of IAC. In these cases of "unqualified silence," the law of NIAC often includes general rules which aim for a similar solution as the rules imposed by the law of IAC.

LE DROIT INTERNATIONAL COMME CORPS DE « DROIT PRIVÉ » ET DE « DROIT PUBLIC » (2022).

104. AP I, *supra* note 28, art. 38 (recognized emblems); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 12, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II] (distinctive emblem); CIHL STUDY, *supra* note 75, r. 58 (white flag), r. 59 (distinctive emblems), r. 60 (United Nations emblem).

105. CIHL STUDY, *supra* note 75, r. 90; AP I, *supra* note 28, art. 75(2)(a)(ii); AP II, *supra* note 104, art. 4(2)(a); GC I, *supra* note 28, arts. 3(1)(a), 12(2); GC II, *supra* note 28, arts. 3(1)(a), 12(2); CG III, *supra* note 76, arts. 3(1)(a), 17(4), 87(3); GC IV, *supra* note 28, arts. 3(1)(a), 32.

106. CIHL STUDY, *supra* note 75, r. 89; AP I, *supra* note 28, art. 75(2)(a)(i); AP II, *supra* note 104, art. 4(2)(a); GC I, *supra* note 28, arts. 3(1)(a), 12(2); GC II, *supra* note 28, arts. 3(1)(a), 12(2); GC III, *supra* note 28, arts. 3(1)(a), 13(1); GC IV, *supra* note 28, arts. 3(1)(a), 32.

107. CIHL STUDY, *supra* note 75, r. 103; AP I, *supra* note 28, art. 75(2)(d); AP II, *supra* note 104, art. 4(2)(b); GC III, *supra* note 28, art. 87(3); GC IV, *supra* note 28, art. 33(1).

108. Cases of "qualified" silence constitute a category of incompatibility between the law of IAC and the law of NIAC. *See* Section IV(A)(2).

109. Professor Gloria Gaggioli uses the term "qualified silence" in her taxonomy of normative conflicts. In this article, hypotheses of qualified silence are opposed to hypotheses of unqualified silence. *See* GLORIA GAGGIOLI, L'INFLUENCE MUTUELLE ENTRE LES DROITS DE L'HOMME ET LE DROIT INTERNATIONAL HUMANITAIRE À LA LUMIÈRE DU DROIT À LA VIE 41 (2013).

For example, with respect to the protection of persons, only the law of IAC gives children, expectant mothers, and nursing mothers priority in the distribution of relief consignments[110] and, when detained, additional food in proportion to their physiological needs.[111] Nevertheless, whether customary or conventional, rules common to the laws of IAC and NIAC already provide specific protection to these categories of persons. Customary IHL for IACs and NIACs provides specific protection to women and children who are civilians or persons *hors de combat*.[112] Further, both IHL regimes call, for instance, for separate detention quarters for children and women[113] and prohibit the pronouncement and the execution of the death penalty.[114] Therefore, the silence of the law of NIAC on these two other rules—priority in distribution of relief consignments and additional food in case of detention—does not seem to express opposition to them.

With respect to the conduct of hostilities, Article 36 of AP I obliges all States, including the intervening State, to verify *ex ante* the legality of any potential use of new weapons during their "*study, development, acquisition or adoption*."[115] The law of NIAC does not impose such an obligation on States, but does not contradict it either. When the military uses new weapons, the legality of their use must be assessed under the same principles in the laws of IAC and NIAC, notably the principles of distinction, proportionality, and the prohibition of excessive suffering. These exact same principles govern the legality check at a preliminary stage under the law of IAC. Further, States usually undertake one single legality check which thus concerns both categories of armed conflict.[116] Therefore, it is hard to conceive any opposition between both legal regimes in this regard.

In these two categories of compatibility—which appear limited—the law of IAC adds an extra layer of protection over that of the law of NIAC. To avoid violating IHL, the intervening State must abide by both bodies of law.

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110. AP I, *supra* note 28, art. 70(1).

111. GC IV, *supra* note 28, art. 89(5).

112. CIHL STUDY, *supra* note 75, r. 134, 135.

113. *Id.* r. 119 (women), r. 120 (children); AP I, *supra* note 28, arts. 75(5) (women), 77(4) (children); AP II, *supra* note 104, art. 5(2)(a); GC IV, *supra* note 28, arts. 76(4), 124(3).

114. AP I, *supra* note 28, arts. 76(3) (women), 77(5) (children); AP II, *supra* note 104, art. 6(4).

115. AP I, *supra* note 28, art. 36 (emphasis added).

116. The author thanks Professor Robert Kolb for raising this point.

2. Incompatibility Between the Laws of IAC and NIAC

The first category of incompatibility between the laws of IAC and NIAC is the most significant, albeit counter-intuitive, category of normative conflicts. Identical norms between both regimes—IAC and NIAC—could lead to different solutions in practice. This should not be shocking because the concrete context of analysis is very different: on the one hand, a belligerent relationship between the intervening State and the territorial State; on the other hand, a belligerent relationship between the intervening State and the OAG.

Therefore, contrary to claims by its proponents[117]—sometimes accepted by its opponents[118]—the double classification theory does raise legal problems and creates normative conflicts regarding the conduct of hostilities by the intervening State. Although the laws of IAC and NIAC include identical rules in this regard, these rules can lead to different results.

Notions such as member of armed forces, civilian, civilian population, military objective, and civilian object have the same definition in the laws of IAC and NIAC. However, they refer to different realities in the IAC against the territorial State or the NIAC against the OAG. Although the OAG's members are members of a belligerent party's armed forces in the NIAC, they are civilians in the IAC.[119] Where the OAG's military assets are military objectives for the intervening State in the NIAC, they constitute protected civilian objects in the IAC.[120] And, although the civilian population does not encompass the armed group in the NIAC, it does so in the IAC.[121]

These observations are not trivial: these notions are at the core of important IHL principles and prohibitions in the conduct of hostilities. For instance, as far as the principle of distinction is concerned (i.e., the necessity to distinguish between, on the one hand, fighters and military objectives and, on the other hand, civilians and civilian objects[122]), if classified as a NIAC,

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117. *See*, *e.g.*, Adil A. Haque, *The United States is at War with Syria (According to the ICRC's New Geneva Convention Commentary)*, EJIL:TALK! (Apr. 8, 2016), https://www.ejiltalk.org/the-united-states-is-at-war-with-syria-according-to-the-icrcs-new-geneva-convention-commentary/; Koutroulis, *supra* note 12, at 842.

118. *See*, *e.g.*, Gill, *supra* note 5, at 369; Kolb, *supra* note 23, at 6; DE HEMPTINNE, *supra* note 42, ¶ 378.

119. *See supra* Section III(B)(3)(i).

120. *See supra* Section III(B)(3)(ii).

121. *See supra* Section III(B)(3)(iii).

122. *See* AP II, *supra* note 104, art. 13(1)–(2); AP I, *supra* note 28, arts. 51(1)–(2), 52(1); CIHL Study, *supra* note 75, r. 1, 7.

then the intervening State can attack the OAG's members because they are members of a party's armed forces. However, as previously demonstrated, it cannot do so if classified as an IAC against the territorial State.[123] Likewise, applying the proportionality principle (i.e., the necessity to ensure a fair balance between the expected collateral damage and the anticipated military advantage[124]) makes sense in the NIAC: it obliges the intervening State to avoid excessive collateral damage when targeting members of the OAG. Oppositely, this same principle loses meaning in the IAC because the law of IAC only recognizes the OAG's members as civilians and, thus, the intervening State always directly targets civilians. For another example, regarding IHL prohibitions, the intervening State can starve or cause fear among the OAG as well as destroy the objects indispensable for its survival, but only in the NIAC and not in the IAC.[125] In other words, even though the double classification theory does not appear problematic at first sight for the conduct of hostilities, this analysis demonstrates that it creates many normative conflicts to be solved.

A second category of incompatibility between the laws of IAC and NIAC applies to cases where one of these regimes includes a more demanding rule, which risks different practical results. In certain circumstances, the law of NIAC is more extensive than the law of IAC. For instance, while the law of NIAC entails an obligation of result not to recruit and use child soldiers, the law of IAC only provides for an obligation of conduct.[126] The NIAC obligation of result leaves no choice for the intervening State but to not recruit and use child soldiers. Conversely, the IAC obligation of conduct only requires the State to deploy every possible means to avoid recruiting and using child soldiers—this leaves open that the desired result may not be attained.

In other circumstances, the law of IAC is more demanding than the law of NIAC. For example, if the ICRC wishes to visit a detention center, under

123. *See supra* Section III(B)(3)(iii).

124. *See* AP I, *supra* note 28, art. 57(2)(a)(iii); CIHL Study, *supra* note 75, r. 14.

125. *See supra* Section III(B)(3)(iii).

126. AP II, *supra* note 104, art. 4(3)(c); AP I, *supra* note 28, art. 77(2); COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 69, ¶ 3184. This being said, according to the ICRC's Customary Study, customary IHL provides an obligation of result in both IACs and NIACs. *See* CIHL STUDY, *supra* note 75, r. 136–37.

the law of NIAC, it needs to obtain permission and consent from the detaining party. However, in the IAC context, belligerent parties have no choice and must give the ICRC access.[127]

Qualified silence is a third category of incompatibility between the laws of NIAC and IAC.[128] As previously explained,[129] the silence of the law of NIAC on a particular issue that is explicitly addressed in the law of IAC constitutes a "qualified" silence when this silence represents State opposition to the applicability of the IAC rule in a NIAC. For instance, the law of IAC provides a specific protection to the environment.[130] In contrast, the law of NIAC is silent on the environment. As evidenced by negotiations preceding the adoption of the Rome Statute of the International Criminal Court,[131] States do not want environmental protection rules in the law of NIAC.

B. Resolution of Normative Conflicts

When confronted with these incompatibilities between the laws of IAC and NIAC, an intervening State needs to decide which regime to apply. Despite strong criticisms,[132] a well-recognized principle in international law to solve

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127. CIHL STUDY, *supra* note 75, r. 124(A); GC II, *supra* note 28, art. 126(1); GC IV, *supra* note 28, art. 143(1).

127. CIHL STUDY, *supra* note 75, r. 124(B); GC I, *supra* note 28, art. 3(2); GC II, *supra* note 28, art. 3(2); GC III, *supra* note 28, art. 3(2); GC IV, *supra* note 28, art. 3(2).

128. GAGGIOLI, *supra* note 109, at 41.

129. *See supra* Section (IV)(A)(1).

130. AP I, *supra* note 28, arts. 35(3), 55; CIHL STUDY, *supra* note 75, r. 44, 45. These two customary rules are applicable in IACs and *arguably* in NIACs.

131. *See* Jessica C. Lawrence & Kevin J. Heller, *The First Ecocentric Environmental War Crime: The Limits of Article 8(2)(b)(iv) of the Rome Statute*, 20 GEORGETOWN INTERNATIONAL ENVIRONMENTAL LAW REVIEW 61, 84 (2007); Mark A. Drumbl, *Waging War Against the World: The Need to Move from War Crimes to Environmental Crimes*, 22 FORDHAM INTERNATIONAL LAW JOURNAL 122, 136 n.42 (1998); Tara Smith, *Critical Perspectives on Environmental Protection in Non-International Armed Conflict: Developing the Principles of Distinction, Proportionality and Necessity*, 32 LEIDEN JOURNAL OF INTERNATIONAL LAW 759, 759 n.4 (2019). *See also* Michael Bothe et al., *International Law Protecting the Environment During Armed Conflict: Gaps and Opportunities*, 92 INTERNATIONAL REVIEW OF THE RED CROSS 569, 579 (2010); STEVEN FREELAND, ADDRESSING THE INTENTIONAL DESTRUCTION OF THE ENVIRONMENT DURING WARFARE UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 211 (2015). However, the ICRC seems cautious but open to a special protection in NIACs. *See* CIHL STUDY, *supra* note 75, r. 44–45.

132. *See*, *e.g.*, Cédric de Koker, *Foregoing Lex Specialis? Exclusivist v. Symbiotic Approaches to the Concurrent Application of International Humanitarian and Human Rights Law*, 2016 REVUE

normative conflicts (between IHL and international human rights law, for example)[133] is the *lex specialis*.[134] That is, the principle that the more specific norm will prevail over the more general norm. Accordingly, the intervening State must determine whether the norm of the law of IAC or the norm of the law of NIAC is the *lex specialis* "governing more specifically [the] subject matter."[135]

To identify the *lex specialis*, the intervening State can use one or several criteria. Although not specifically referring to the *lex specialis* principle and therefore not directly touching upon cases of normative conflicts, double

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BELGE DE DROIT INTERNATIONAL 240, 256–62; Marco Milanović, *The Lost Origins of Lex Specialis: Rethinking the Relationship Between Human Rights and International Humanitarian Law*, *in* THEORETICAL BOUNDARIES OF ARMED CONFLICT AND HUMAN RIGHTS 78, 115 (Jens D. Ohlin ed., 2016); Francoise Hampson & Noam Lubell, *Amicus Curiae* Brief for Human Rights Centre, University of Essex, ¶ 48, in the case Hassan v. United Kingdom, Application No. 29750/09 (Eur. Ct. H.R.), https://www1.essex.ac.uk/hrc/documents/practice/ amicus-curae.pdf (last visited May 20, 2022); Cordula Droege, *Elective Affinities? Human Rights and Humanitarian Law*, 90 INTERNATIONAL REVIEW OF THE RED CROSS 501, 523 (2008); Lawrence Hill-Cawthorne, *Just Another Case of Treaty Interpretation? Reconciling Humanitarian Law and Human Rights Law in the ICJ*, *in* A FAREWELL TO FRAGMENTATION: REASSERTION AND CONVERGENCE IN INTERNATIONAL LAW 272, 285–89 (Mads Andenas & Eirik Bjorge eds., 2015).

133. *See*, *e.g.*, Jelena Pejic, *Conflict Classification and the Law Applicable to Detention and the Use of Force*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF ARMED CONFLICTS 83, 113 (Elizabeth Wilmshurst ed., 2012); Helen Duffy, *International Human Rights Law and Terrorism: An Overview*, *in* RESEARCH HANDBOOK ON INTERNATIONAL LAW AND TERRORISM 314, 355 (Ben Saul ed., 2020); KOLB, *supra* note 32, at 138–39; SIVAKUMARAN, *supra* note 59, at 89; Nico Schrijver & Larissa van den Herik, *Leiden Policy Recommendations on Counter-terrorism and International Law*, 57 NETHERLANDS INTERNATIONAL LAW REVIEW 531, ¶ 65 (2010); YORAM DINSTEIN, NON-INTERNATIONAL ARMED CONFLICTS IN INTERNATIONAL LAW 227–29 (2014); Marco Sassòli & Laura M. Olsen, *The Relationship Between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts*, 90 INTERNATIONAL REVIEW OF THE RED CROSS 599, 603–4 (2008).

134. *See*, *e.g.*, Conor McCarthy, *Legal Conclusion or Interpretative Process? Lex Specialis and the Applicability of International Human Rights Standards*, *in* INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW: TOWARDS A NEW MERGER IN INTERNATIONAL LAW 101, 104 (Noëlle Quévinet & Roberta Arnold eds., 2008); Jean d'Aspremont & Elodie Tranchez, *The Quest for a Non-Conflictual Coexistence of International Human Rights Law and Humanitarian Law: Which Role for the Lex Specialis Principle?*, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND HUMANITARIAN LAW 223, 224 (Robert Kolb & Gloria Gaggioli eds., 2013).

135. *See* SASSÒLI, *supra* note 32, at 86.

classification proponents seem to suggest four possible criteria: (1) the impact on the intervening State's sovereignty; (2) the essence of the NIAC against the OAG; (3) the impact on the OAG's fighting ability; and (4) the protection of victims of cross-border interactions.

The analysis of these four criteria will focus on four points:[136] IHL transversal principles of humanity and military necessity; the status of the OAG's members; the immunity of the intervening State's armed forces from prosecution by the territorial State; and the usefulness of the *lex generalis*. Some conclusive remarks will follow.

1. Impact on the Intervening State's Sovereignty

A first criterion considers the intervening State's sovereignty in parallel with the territorial State's sovereignty. When the intervening State's sole sovereignty is at stake, that is, when it is an internal matter for the intervening State, the law of NIAC prevails. Oppositely, in any situation where the territorial State's sovereignty is at stake, that is, when it is not an internal matter for the intervening State, the law of IAC prevails.[137] Here, because the intervening State is entering the territorial State's territory, the intervening State's sovereignty is not under threat on *this* territory—although its sovereignty could be under threat on its own territory—and, conversely, the territorial State's sovereignty is directly under threat. Thus, it is not an internal matter for the intervening State and, therefore, the law of IAC systematically applies to its actions on the territorial State's territory.[138]

However, this solution is problematic. First, it has similar consequences as a single IAC classification.[139] As indicated previously, the intervening State could not legally target the OAG and its military assets in its IAC against the territorial State. Consequently, the principle of humanity would unduly prevail over the principle of military necessity. By forcing the intervening State to choose between either violating IHL or abandoning its military campaign,

136. For further details (beyond the scope of this article), *see* Lesaffre, *supra* note 1.

137. *See*, *e.g.*, Akande, *Classification of Armed Conflicts, supra* note 12, at 79; Akande, Keynote Speech, *supra* note 27, at 194. *See also* Haque, *Whose Armed Conflict?*, *supra* note 30, at 484–85.

138. In addition to references in *supra* note 138, *see* Akande, *Classification of Armed Conflicts* (OXFORD GUIDE), *supra* note 31, at 55.

139. *See supra* Section III(B)(3).

this solution would discredit IHL and certainly not encourage belligerent parties to respect it.

Second, contrary to some beliefs,[140] such a criterion would not give members of the intervening State's armed forces the benefit of immunity from prosecution by the territorial State. As demonstrated previously,[141] many actions conducted by the intervening State against the OAG would violate the law of IAC. Consequently, members of this State's armed forces could still be prosecuted for their violations, whether they be war crimes or domestic crimes. Indeed, immunity from prosecution only covers acts that are legal under the law of IAC.

Third, this first criterion puts into question the usefulness and the meaning of the applicability of the law of NIAC as a *lex generalis*.[142] Of course, the OAG still needs to abide by the law of NIAC—and this is the only IHL regime applicable to the group. However, from the intervening State's perspective, the classification of NIAC and the applicability of the law of NIAC do not bring much value because the law of NIAC would actually never apply in practice. Indeed, this State mainly acts against the group on the territorial State's territory. Yet, according to this first criterion of the impact on the intervening State's sovereignty, the norms of the law of IAC would always be considered as *lex specialis* in cases of normative conflicts with the norms of the law of NIAC—even when the intervening State's actions relate to what could be called the essence of the NIAC. If the law of IAC always applies in practice to the intervening State's actions on the territorial State's territory, why then accept a classification of NIAC in the first place?[143]

140. *See*, *e.g.*, Akande, *When Does the Use of Force Against a Non-State Armed Group Trigger an International Armed Conflict, supra* note 25; Haque, *Whose Armed Conflict?*, *supra* note 30, at 485–86; Haque, *The United States is at War with Syria*, *supra* note 117.

141. *See supra* Section III(B)(3).

142. *See*, *e.g.*, Gregory Bott, *The Operations of the Islamic State and the Relevance of International Humanitarian Law*, 22 AUSTRALIAN INTERNATIONAL LAW JOURNAL 99, 105 (2015–2016).

143. In the same vein, *see* Rogier Bartels, *Transnational Armed Conflict: Does It Exist?*, *in* SCOPE OF APPLICATION OF INTERNATIONAL HUMANITARIAN LAW 114, 125 (2012).

2. Essence of the NIAC Against the OAG

A second criterion relates to the essence of the NIAC between the intervening State and the OAG.[144] NIAC norms govern any action that is the essence of the NIAC, while IAC norms regulate all other actions not considered the "essence" of the NIAC. Thus, defining this "essence of the NIAC" is essential. Surprisingly, the essence of the NIAC has been strictly understood as successful direct attacks against the OAG's members *with no* (*other*) *damage whatsoever* for the territorial State.[145]

Similarly, this second criterion—understood as such—creates problems. Except for one type of action, the law of IAC would regulate all operations conducted by the intervening State in cases of normative conflicts.[146] Once again, this amounts to a single IAC classification with all its hurdles, most notably the intervening State's inability to legally target the OAG's military assets and to use certain methods of warfare.

Further, such a definition of "the essence of the NIAC" runs counter to the principle of effectiveness. Successful surgical strikes against the OAG's members rarely have *no impact at all* on the territorial State's territory, infrastructure, or population. One can reasonably expect collateral damage from the use of military force.

In addition, the resolution of normative conflicts with this second criterion would contradict the principles of legal security and foreseeability. A military cannot anticipate, with full certainty, the effects of its operations. Consequently, it would not know which legal regime to apply before its operations are over.[147] When a soldier succeeds in eliminating a member of the OAG *without damaging anything else*, the law of NIAC would apply and the soldier's action would be legal. Inversely, when this soldier kills such a member but destroys the window of an empty house, the law of IAC would govern this action, and the soldier's act would be illegal.

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144. Christof Heyns et. al., *The International Law Framework Regulating the Use of Armed Forces*, 65 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 791, 815 (2016). *See also* Interview by Raphaël van Steenberghe with Dapo Akande (on file with the author) (available in the International Humanitarian Law course taught by Raphaël van Steenberghe and Jérôme de Hemptinne on MOOC edXw, at chapter 3.9.3., transcripts at 42–43, https://courses.edx.org/courses/course-v1:LouvainX+Louv16x+3T2017/pdfbook/0/).

145. *See*, *e.g.*, Interview with Akande, *supra* note 144, at 43.

146. *See id.* at 42; Heyns et al., *supra* note 144, at 815 n.104.

147. *See* van Steenberghe, *supra* note 10, at 69; DE HEMPTINNE, *supra* note 42, ¶ 378.

Further, the OAG's members would acquire a double status depending on the intervening State's actions.[148] If the intervening State detains them, the law of IAC (i.e., the *lex specialis* for detention) classifies them as civilians. If the intervening State targets the OAG's members and does so without causing other damage, the law of NIAC (i.e., the *lex specialis* for such actions) categorizes them as members of a belligerent party's armed forces. Admittedly, such a double status creates difficulties that the intervening State could manage in practice. The intervening State could apply the law of IAC when detaining individuals and the law of NIAC in its targeting operations against the OAG's members. Additionally, such a double status is known under IHL. Under the law of IAC, soldiers can always be targeted as members of a belligerent State's armed forces (conduct of hostilities). Yet, they could lose this status and benefit from the civilian status *if captured* by the enemy while not distinguishing themselves from the civilian population (protection of persons in enemy hands).[149] Nevertheless, the double status under examination differs as it is automatic and dependent on the intervening State's decision—whether to capture or target—rather than on the individual's decision—whether to distinguish themselves from civilians.

Finally, members of the intervening State's armed forces would not be immunized from prosecution if captured by the territorial State. On the one hand, as indicated previously, most of this intervening State's actions against the OAG would be illegal under the law of IAC and, thus, not subject to immunity. On the other hand, the law of NIAC would regulate all successful attacks against members of this group. Accordingly, members of the intervening State's armed forces would not be immune from prosecution for their successful attacks. Only the law of IAC immunizes the intervening State's

148. DE HEMPTINNE, *supra* note 42, ¶¶ 374–77.

149. *See* Prosecutor v. Delalić, Case No. IT-96-21-A, Judgment, ¶ 271 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001); CIHL STUDY, *supra* note 75, at 515; MELZER, *supra* note 32, at 200; SASSÒLI, *supra* note 32, at 26, 273–74; Jelena Pejic, *"Unlawful/Enemy Combatants:" Interpretation and Consequences*, *in* INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 335, 339–42 (Michael Schmitt & Jelena Pejic eds., 2007); INTERPRETIVE GUIDANCE, *supra* note 75, at 24 n.15; COMMENTARY TO CONVENTION IV, *supra* note 17, at 58; INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 10–11 (2007), https://www.icrc.org/en/doc/assets/files/other/ihl-challenges-30th-international-conference-eng.pdf; Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatant,"* 85 INTERNATIONAL REVIEW OF THE RED CROSS 45, 49 (2003). Note that the conclusion would be different if AP I was applicable.

armed forces from prosecution by the territorial State. Therefore, the immunity from prosecution should only benefit the intervening State's armed forces when the law of IAC governs their actions. When the law of NIAC applies as *lex specialis* to their actions, no immunity should benefit them.

3. Impact on the OAG's Fighting Ability

A third possible criterion to determine the *lex specialis* between the norms of the law of IAC and the norms of the law of NIAC is the impact that the intervening State's operations have on the OAG's fighting ability. Opponents to the double classification theory seem to have this criterion in mind when criticizing the theory. According to this third criterion, the law of NIAC regulates any action impacting the OAG's fighting ability, while the law of IAC governs any action that does not have such impact.

More precisely, this third criterion means that that the law of NIAC governs any operation strictly directed at the OAG or its assets (whether attack or capture). In addition, this law regulates acts that directly impact civilians but indirectly impact the OAG's fighting ability. For instance, the group might exercise authority over civilians and administer a portion of the territorial State's territory using civilian infrastructure. In this case, the intervening State's attacks against such civilians or infrastructure adversely impact the OAG's territorial control and/or any income gained by the OAG from the civilian population. Thus, it would impact the OAG's fighting ability. Indeed, such territorial control or income strengthens the OAG's fighting ability.

Consequently, all the intervening State's actions within the territorial State have an impact on the OAG's fighting ability. In brief, this third criterion leads to full application of the law of NIAC, like a single NIAC classification. What then is the added value of an additional classification of IAC?[150]

Section IV(A)(1) of this article demonstrated that the laws of IAC and NIAC are sometimes compatible and can simultaneously apply to the intervening State. Thus, the law of IAC reinforces and supplements the law of NIAC in certain cases. However, such cases appear limited in practice.

Two additional points cast doubt on the value of the double classification theory. First, the law of IAC would not immunize from prosecution the

150. For a similar criticism, *see* van Steenberghe, *supra* note 10, at 70–71; CARRON, *Transnational Armed Conflicts*, *supra* note 10, at 16; Sassòli, *Legal Qualification of the Fight Against Terrorism*, *supra* note 27, at 51.

intervening State's armed forces. Instead, their actions would be regulated by the law of NIAC, thus precluding immunization pursuant to the law of IAC.[151]

Second, the law of IAC would always govern certain actions of the intervening State—whether under a double classification or under a single NIAC classification. Under a double classification theory, these actions would have no nexus to the NIAC against the OAG, but a single nexus to the existing IAC against the territorial State. Thus, only the law of IAC would govern these actions. Under a single NIAC classification, these actions would themselves trigger an independent and non-overlapping IAC between the intervening State and the territorial State, and therefore be regulated by the law of IAC.

Indeed, scholars—including double classification opponents and proponents—generally agree that at least three types of action can themselves give rise to an IAC against the territorial State. These actions include: (1) any attack against this State's armed forces or military assets; (2) any attack against this State's civilian objects or population that have no relation with the OAG;[152] and (3) any act of capture and detention of members of this State's armed forces.[153]

Regarding a fourth type of action, scholars disagree whether it is sufficient to trigger a legal classification of IAC against this State. This fourth type of action pertains to capture and detention of the territorial State's civilians who are unrelated to the OAG. Professor Marco Sassòli considers this fourth type of action as not sufficient to trigger an IAC: "[O]ne cannot make the necessary determination that the person is an 'enemy' civilian without pre-existing acts of violence."[154] This assertion is disputable. Capture or

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151. *See supra* Section IV(B)(2).

152. Beyond their dispute over non-consensual foreign interventions against an OAG, double classification opponents and proponents agree that these first two types of actions trigger an IAC. *See*, *e.g.*, Gill, *supra* note 5, at 366; Krisztina H. Orban, The Concept of Armed Conflict in International Humanitarian Law 328 (2014) (unpublished manuscript, on file with the Graduate Institute of International and Development Studies); GC III COMMENTARY, *supra* note 13, ¶ 257; GC I COMMENTARY, *supra* note 13, ¶ 224.

153. *See*, *e.g.*, GC III COMMENTARY, *supra* note 13, ¶¶ 269, 271–72, 277, 314; GC I COMMENTARY, *supra* note 13, ¶¶ 236, 238–39, 281; SASSÒLI, *supra* note 32, at 264; Gill, *supra* note 5, at 369; Kress, *supra* note 10, at 256; Kolb, *supra* note 23, at 9; KOLB, *supra* note 32, at 158; van Steenberghe, *supra* note 10, at 70. *Contra* CARRON, L'ACTE DÉCLENCHEUR D'UN CONFLIT ARMÉ INTERNATIONAL, *supra* note 10, at 199.

154. *See* van Steenberghe, *supra* note 10, at 170.

attacks against members of the territorial State's armed forces or objects can only trigger an IAC when the intervening State acts *with a hostile intent*. The former State's actions make these members or objects adverse because there is such intent. Likewise, the capture of one or several nationals of the territorial State should trigger an IAC *if* the intervening State does so *with a hostile intent*.[155]

Certainly, the territorial State's armed forces have official military duties that distinguish themselves from civilians. Nevertheless, when the intervening State attacks or captures them by mistake (such as by not being aware of their military status or being confused about whose nation they belong to) or in the context of a law-enforcement action (such as a soldier having murdered his wife at their private domicile or being involved in drug trafficking), these members would not be "enemies" for the only reason that they are members of the territorial State's armed forces. They would be so if attacked or captured with a hostile intent towards the territorial State. In other words, whether civilian or military, what matters most is whether the intervening State captures the individual with a hostile intent. This intent must be objectively established through the circumstances of the capture.

4. Best Protection for Victims of Cross-Border Hostilities

The best protection for victims of cross-border hostilities constitutes the last suggested criterion to determine the *lex specialis* between the norms of the law of IAC and the norms of the law of NIAC.[156] This criterion would lead to a similar solution as the *lex favorabilis* principle or the most favorable treatment principle—which is already used to solve normative conflicts within international human rights law[157] and between international human rights law and IHL.[158]

As previously indicated, double classification proponents think in the abstract about both IHL regimes. Therefore, they believe that the law of IAC

155. *See* Gill, *supra* note 5, at 370. *Contra* SASSÒLI, *supra* note 32, at 170.

156. *See*, *e.g.*, Kolb, *supra* note 23, at 6.

157. *See* International Law Commission Study Group, Fragmentation of International Law, *supra* note 101, ¶ 108; GAGGIOLI, *supra* note 109, at 64.

158. *See* Abella v. Argentina, Case No. 11,137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L/V/II.95 doc. 7 rev., ¶¶ 164–65 (1997); Anne-Laurence Graf-Brugère, *A Lex Favorabilis? Resolving Norm Conflicts Between Human Rights Law and Humanitarian Law*, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND HUMANITARIAN LAW 251 (Robert Kolb & Gloria Gaggioli eds., 2013).

would be more protective for the protection of persons in enemy hands.[159] Indeed, this law contains a significantly higher number of provisions than the law of NIAC and thus offers more protection to civilians. On the contrary, double classification proponents argue that the law of NIAC could apply to the conduct of hostilities because, in this regard, the law of IAC would not provide better protection for victims. Regarding the conduct of hostilities, the law of NIAC includes identical or similar rules and shows few differences with the law of IAC.[160]

Nevertheless, this fourth criterion is misconceived. Concerning the conduct of hostilities, this author already discussed that the law of IAC would grant the OAG's members an absolute protection against attacks. The intervening State could never legally target these members under the law of IAC. Therefore, this law would be more protective for civilians because they cannot suffer proportionate collateral damage of an attack against the group.[161]

Moreover, concerning the protection of persons in enemy hands, the law of IAC would not better protect victims. Although the law of IAC is more developed than the law of NIAC, many provisions of Geneva Convention IV on the protection of civilians apply on the belligerent State's own territory and/or in occupied territory.[162] Yet, operations of the intervening State on the territorial State's territory are not conducted in the intervening State's territory, nor—in most circumstances—in occupied territory (in a traditional understanding of the notion, the intervening State often does not occupy the territorial State's territory). Thus, the law of IAC—being inapplicable on the territorial State's territory—would not provide protections at all, whereas the law of NIAC would provide some protection to the civilians.

Other previously mentioned problems also arise with this last criterion. First, the OAG's members would, again, have a double status depending on the intervening State's action. While detained as civilians under the law of IAC, they could be attacked as members of a belligerent party's armed forces under the law of NIAC. Even though this double status may seem unproblematic, it does not conform with the spirit of IHL.[163]

Second, under the law of IAC, members of the intervening State's armed forces would not be immunized from prosecution for their operations in the

159. *See*, *e.g.*, Kleffner, *supra* note 12, at 44.

160. On this criterion, *see also* ZAMIR, *supra* note 12, at 88.

161. *See supra* Section III(C)(2).

162. *See supra* note 100.

163. For explanations, *see supra* Section IV(B)(2).

conduct of hostilities: these operations would be regulated by the law of NIAC and therefore not covered by immunity.[164]

5. Remarks

A general overview of these four criteria allows a few conclusive remarks on normative conflicts between the laws of IAC and NIAC. First, two criteria (the impact on the intervening State's sovereignty and the impact on the OAG's fighting ability) are based on general notions such as sovereignty and identity of belligerent parties. Moreover, they lead to a full application of either the law of IAC or the law of NIAC to the intervening State's operations. Consequently, they seem to solve the normative conflicts not at the lower level of the *norms* in conflict, but at the higher level of the IHL *regimes*. This is contrary to the *lex specialis* principle which usually operates at the former level.[165] Actually, it looks like these two criteria seek to solve the classification debate when determining the applicable law. Yet, this debate should be solved when classifying the situation.

Second, none of the suggested criteria offers a fully satisfying solution to the identified normative conflicts. Besides, a final solution is hard to foresee: IHL actors may freely decide as to which criterion they want to determine the *lex specialis*. Consequently, the specific solution likely will vary from one operation to another, from one cross-border armed conflict to another and/or from one actor to another. In combined or joint operations, multiple intervening States could reach different conclusions for the same set of facts, which might impair cooperation. Likewise, but even more worrisome for IHL coherence and credibility, multiple judicial bodies could reach contradictory determinations for the same set of facts.[166] Worse, this lack of foreseeability increases with ambiguities around the relationships between IHL and international human rights law.

In sum, the double classification theory sets a very complex framework that is difficult to apply,[167] especially for armed forces. While deployed, the

164. For explanations, *see id.*

165. *See*, *e.g.*, DUFFY, *supra* note 73, at 485; Hill-Cawthorne *supra* note 132, at 282; GAGGIOLI, *supra* note 109, at 59; SIVAKUMARAN, *supra* note 59, at 89.

166. The author thanks Major Aaron Johnson, U.S. Army, for emphasizing this point.

167. On the complexity, *see also* Watkin, *supra* note 10; Kolb, *supra* note 23, at 6–7; Carron, *Transnational Armed Conflicts*, *supra* note 10, at 16–17; van Steenberghe, *supra* note 10, at 71.

military needs to make rapid operational decisions. Can we reasonably expect the military to solve these two normative conflicts, one between the law of IAC and the law of NIAC, and a second between one of these regimes and international human rights law, in a short period of time? It is unrealistic, and moreover the few advantages of a double classification theory do not seem worth the effort.

In any case, State practice does not support the double classification theory. Several States, such as the United States[168] and France,[169] took an explicit position on the classification of the armed conflict in Syria. These States favor a single NIAC classification. Likewise, while not directly referring to the Syrian situation, Denmark accepted a single NIAC classification in cases of non-consensual State intervention.[170]

V. CONCLUSION

The double classification theory does not offer a magical solution to better protect victims from cross-border hostilities involving an OAG. On the contrary, it opens a Pandora's box and causes problems not only for the traditional understanding of the notion of IAC itself, but also for the determination of the law applicable to foreign armed forces. Before suggesting a solution for the classification of armed conflicts, one should rigorously analyze the consequences of this solution on the law applicable to belligerent parties. The overlap of conflicts and legal regimes that the double classification requires is not workable.

Regarding the traditional notion of IAC, a double classification theory does not take adequately into consideration the intervening State's hostile intent. Yet, this State must have such an intent to be involved in an IAC. Of course, this intent must be identified through objective factors, including (but not limited to) the territorial State's absence of consent. In addition, a double classification theory would, in some circumstances, lead to a single

168. *See* Brian Egan, Legal Adviser, U.S. Department of State, Address at the 110th Annual Meeting of the American Society of International Law: International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations (Apr. 1, 2016), *in* 92 INTERNATIONAL LAW STUDIES 235, 242 (2016).

169. *See* Claire Landais, *Legal Challenges in Fighting Armed Groups Extra-Territorially*, *in* TERRORISM, COUNTER-TERRORISM AND INTERNATIONAL HUMANITARIAN LAW 75, 78 (2016).

170. DANISH MILITARY MANUAL, *supra* note 32, at 47.

IAC classification before the NIAC starts and after the NIAC stops. However, the sole application of the law of IAC does not constitute an appropriate framework for regulating cross-border interactions with an armed group.

Regarding the law applicable to the intervening State's armed forces, a double classification theory would give rise in many instances to normative conflicts between the laws of IAC and NIAC. These conflicts are difficult to solve for a civilian or military lawyer and none of the possible solutions appears fully in tune with the spirit of IHL. At least, these solutions do not convince this author of the necessity to have an additional IAC classification.

In conclusion, this author favors a single classification of NIAC between the intervening State and the OAG. This single classification is easier to understand and apply, both on the battlefront and in court. Thus, IHL has a better chance to be respected in practice. In addition, the single NIAC classification conforms better with IHL's *raison d'être*, which seeks an acceptable balance between the principles of humanity and military necessity.