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THE APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW
TO “TRANSNATIONAL” ARMED CONFLICTS

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to “Transnational” Armed Conflicts*

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Abstract

States are increasingly involved in violent conflicts with non-state actors. This new situation challenges the classical distinction of international humanitarian law (IHL) between international and non-international armed conflicts. However, it does not lessen the importance of IHL. The essence of this body of law – to protect civilians and those out of combat and to lessen unnecessary harm during armed conflict – remains the same. This paper examines the question as to what extent the existing body of humanitarian law applies to transnational conflicts.

Keywords

International humanitarian law, applicability, transnational conflicts, terrorism.

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Scope of Application of International Humanitarian Law

Does international humanitarian law (IHL) apply to “transnational” armed conflicts, i.e. conflicts between the armed forces of a state and non-state armed groups (or between such groups) operating across borders on the territory of more than one state? Or should human rights law apply to such warlike situations? The so-called “global war on terror”¹ as well as the conflicts between Israel and non-state groups in the occupied territories and in Lebanon (Hamas and Hezbollah), and the conflict between coalitions led by the United States and insurgent groups in Iraq and Afghanistan (Al-Qaida and the Taleban), have cast new light on the problem of the applicability of international humanitarian law. While the members of these groups are criminals according to the domestic law of states, the main point is whether certain rules of IHL nevertheless apply to them.

The classic IHL makes a distinction between international and non-international armed conflicts. Article 2 common to the Geneva Conventions of 1949 extends the scope of applicability of IHL to all cases of “declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties”. This means that IHL is applicable to inter-state armed conflicts. The Third Geneva Convention relative to the treatment of prisoners of war makes the IHL applicable to “all cases of partial or total occupation of the territory of a High Contracting Party”. Protocol I of 1977 introduced a new type of international armed conflict “in which peoples are fighting against colonial domination and alien occupation and against racist *regimes* in the exercise of their right to self-determination” (Article 1.4).

The IHL rules applicable to non-international armed conflict are rudimentary. IHL establishes minimum rules of human treatment in non-international armed conflicts that are codified in Article 3 common to the four Geneva Conventions.² According to the ICJ, the principles enshrined in Article 3 constitute “elementary considerations of humanity” and are applicable to all situations of armed conflict.³ 1977 Protocol II additional to the Geneva Conventions specified the scope of non-

¹ ‘Global War on Terror’ is the label attached by the Bush administration to the struggle against Al-Qaeda and other terrorist groups. See John B. Bellinger, “Prisoners in War: Contemporary Challenges to the Geneva Conventions”, Lecture at the University of Oxford, 10 December 2007, available at <http://www.state.gov/s/l/rls/96687.htm>, visited 10 March 2009. Recently, the British Foreign Secretary distanced himself from the term, see David Miliband, “‘War on Terror’ was wrong”, *The Guardian*, 15 Jan. 2009, available at www.guardian.co.uk (last visited 10 March 2009); whereas the Obama Administration appears to use the term only sparingly, if at all, see Howard LaFranchi and Gordon Lubold, “Obama redefines war on terror”, *The Christian Science Monitor*, 29 Jan. 2009, available at features.csmonitor.com (last visited 10 March 2009).

² Art 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages

(c) outrages upon personal dignity, in particular, humiliating and degrading treatment

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

³ ICJ, *Nicaragua case*, Merits, para. 218: “Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a noninternational character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate

international armed conflict – it requires that non-state groups engaged in armed violence against a state satisfy certain (strict) criteria of organization: they need to be “organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”. Such non-international armed conflicts do not include “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature”. Protocol II does not affect the scope of application of Common Article 3, it rather “develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application” (Article 1.1.).

Human rights norms that form a different legal regime protecting the individual at all times also apply to armed conflict.⁴ However, the scope of application is a different one. In international armed conflicts many human rights norms are subject to IHL. However they will apply in non-international armed conflicts, subject only to permissible derogations and exceptions. This means that while the IHL of non-international armed conflicts does not recognize a combatant status of non-state fighters, they remain protected by human rights norms (and Common Article 3).

The trigger for the application of international humanitarian law is the existence of an armed conflict. However, the IHL does not define the concept of armed conflict. In its *Tadić* jurisdiction decision, the Appeals Chamber of the ICTY emphasized that “an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.”⁵ This test was subsequently endorsed by the International Committee of the Red Cross⁶ and the Rome Statute of the International Criminal Court.⁷ Though the definition makes clear that non-state armed groups may be parties to the conflict, it does not specify the characteristics of such armed groups.

Some have even questioned the very existence of international legal rules applicable to “transnational” armed conflicts, pointing to the lack of reciprocity between ordinary armed forces and insurgent groups that neither conduct their operations in accordance with international humanitarian law nor claim to do so.⁸

Reciprocity was always an important part of international humanitarian law,⁹ in particular with regard to the reciprocity of the obligations involved.¹⁰ However, the application of IHL basic standards is not predicated on reciprocity; rather, the rules on minimum treatment as contained in Common Article 3 and Article 75 of Additional Protocol I are applicable regardless of reciprocity. While the provisions of Geneva Convention III on the personal scope of the Convention require membership of armed forces or at least of militias fulfilling a similar set of criteria,¹¹ Common Article 3 is unconditional and equally applicable to all parties alike.¹² Nevertheless, it can hardly be doubted that

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rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity" (Corfu Channel, Merits, *I. C. J. Reports* 1949, p. 22).”

⁴ Noam Lubell, “Challenges in applying human rights law to armed conflict”, *International Review of the Red Cross*, Vol. 87, No. 860, December 2005, pp. 737-754.

⁵ *Tadić*, Appeal on Jurisdiction, para. 70.

⁶ International Committee of the Red Cross (ICRC), Opinion Paper, “How is the Term ”Armed Conflict” Defined in International Humanitarian Law”, March 2008, [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/\\$file/Opinion-paper-armed-conflict.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/$file/Opinion-paper-armed-conflict.pdf).

⁷ See Article 8 § 2 f of the Rome Statute of the International Criminal Court of 17 July 1998, 2187 UNTS 3.

⁸ See the description in Herfried Münkler, “The wars of the 21st century”, *International Review of the Red Cross*, Vol. 85 (849), 2003, p. 7.

⁹ Jean de Preux, “The Geneva Conventions and reciprocity”, *International Review of the Red Cross*, No. 244, January-February 1985, pp. 25-29.

¹⁰ For the importance of such expectations of reciprocity in international law, see Fleck, *The Handbook of International Humanitarian Law*, Oxford University Press, Oxford, 2008, p. 607, para. 1201 3 b; Bruno Simma, “Reciprocity”, in Rüdiger Wolfrum (ed.) *Max Planck Encyclopedia of Public International Law*, Online edn, Oxford UP, Oxford, 2008, para. 8, available at: www.mpepil.com (last visited 10 March 2009).

¹¹ Article 4 A II of Geneva Convention II.

¹² A clause requiring reciprocity was explicitly dropped in the course of the negotiations, see 4 Jean S. Pictet (ed), *The Geneva Conventions of 12 August 1949. Commentary*, International Committee of the Red Cross, Geneva, 1952-58 p. 37. In the words of the Pictet Commentary: “What Government would dare to claim before the world, in a case of civil

the applicability of IHL to non-state groups creates a considerable number of problems, and that IHL appears ill-prepared, at times, for today's armed conflicts. While IHL recognizes two categories of armed conflicts (international and non-international), there are three possibilities for the combination of actors and territory: a conflict may be an international armed conflict between states, a non-international conflict between a state and one or more non-state actors (or several non-state actors), and, finally a "transnational" conflict between a state and a non-state group (or between two non-state groups) on more than one state territory. Common Article 3, however, does not provide for the third possibility, and its territorial scope is limited to conflicts taking place "on the territory of a State party". In 1949, this omission may have been due to the relative obscurity of such conflicts. But since September 11, 2001 at the latest, they are at the forefront of international discussion. The Bush administration seemed to imply that transnational conflicts could amount to armed conflicts, but that IHL was not applicable to them.¹³ Others deny that transnational conflicts are armed conflicts at all and thus conclude that international human rights law applies to the use of lethal force against suspected terrorists.¹⁴ However, human rights norms cannot provide adequate protection during hostilities. They follow the different goal of protecting the individual primarily in peacetime whereas the essence of IHL is to provide protection to civilians and persons hors de combat, and to minimize unnecessary harm during armed conflict. The main disadvantage of the applicability of human rights norms is their lack of precision regarding the conduct of hostilities, as well as their reliance on the indeterminate standard of proportionality. Although there are certain criteria for determining proportionality in human rights law that are applicable to armed forces while carrying out law enforcement duties¹⁵, it appears questionable whether the human rights proportionality principle will have the same constraining effects on armed forces during hostilities. In addition, most human rights rules are not as specific as respective IHL norms created for situations of armed conflict. However, complementary to IHL, human rights standards remain applicable. As the ICTY emphasized in the *Prosecutor v Kuranac*, "the laws of war do not necessarily displace the laws regulating a peacetime situation; the former may add elements requisite to the protection which needs to be afforded to victims in a wartime situation."¹⁶

In the following, I analyse how IHL applies to some of the conflicts of the first decade of the 21st century that do not clearly fit into the traditional pattern of either inter-state or internal conflict.

International Armed Conflict and Non-State Groups

The Israeli military operation against Hezbollah launched in summer 2006 involved state and non-state actors. However, while Common Article 2 extends the notion of an international armed conflict to the "High Contracting Parties" e. g. states only, the treaty law of international armed conflict is not directly applicable to non-state actors. If the military actions undertaken by armed groups are clearly attributable to a state, this results in the applicability of the law of international armed conflict. The legal situation is much more complicated when there is no indication that the actions of a non-state armed group can be attributed to the respective state. In this context the question arises whether international armed conflict under customary international law might cover non-state actors. However, there is no consistent state practice or *opinio juris* which would support such an assertion. With regard to the Israeli war against Hezbollah in Lebanon, it was very doubtful whether the military operation of

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disturbances ..., that, Article 3 not being applicable, it was entitled to leave the wounded uncared for, to torture and mutilate prisoners and take hostages?" Ibid, p. 36.

¹³ George W. Bush, 'Humane treatment of Taliban and al Qaeda detainees', 7 February 2002, available at www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf (last visited 10 March 2009).

¹⁴ For an example how international human rights law applies see European Court of Human Rights, *McCann and Others v. United Kingdom*, Judgment, 27 September 1995 Series A no. 324, para. 148.

¹⁵ See principle 9 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the UN General Assembly in Resolution 45/166, 18 December 1999.

¹⁶ *Prosecutor v Kunarac et al.*, IT-96-23&23/1, Appeals Chamber, 12 June 2002, para. 60.

Hezbollah was attributable to Lebanon or to any other state.¹⁷ The Israeli military intervention occurred without Lebanese consent. Arguably, armed conflicts between the armed forces of a state and transnational armed groups on the territory of another state without the latter's consent could be treated as international armed conflict, because of the transboundary element. In this case, the law of international armed conflict with its detailed humanitarian guarantees would be applicable. However, it appears more appropriate to qualify a transnational armed conflict involving non-state actors not associated to another state as armed conflicts of a non-international character. The law of non-international armed conflict – Common Article 3 and applicable customary law should therefore cover the conduct of hostilities in such conflicts. However, contrary to an “internationalized” armed conflict, in which the actions of all participants can ultimately be measured against traditional international humanitarian law applicable in international armed conflicts, a non-international armed conflict is much more difficult to handle because of the rudimentary nature of the legal regulation of non-international armed conflicts in Common Article 3 and also in Additional Protocol II.

Problems may also arise during occupation when the occupying state conducts military operations against non-state actors as part of the existing armed conflict (occupation) – in this case we have an “armed conflict within an armed conflict”.¹⁸ Should the rules of international armed conflict apply? Or the rules of non-international armed conflict, i.e. between a state and a non-state actor? Or both? One suggestion would be to apply only the law of occupation, in particular Article 5 of Geneva Convention IV that allows some limitations on the rights of those individuals in occupied territory who are “definitely suspected or engaged in activities hostile to the security of the State”. But this provision is intended for “individuals”, i.e. a limited number of persons¹⁹ and cannot be used for ‘hot’ conflicts between the occupier and organized armed groups of the occupied. Israel claims to be in a “hot” armed conflict with armed groups in the occupied territories, such as Fatah or Hamas. The Israeli Supreme Court has based its judgment of 11 December 2005 in *Public Committee Against Torture v. Israel* on the premise that a situation of continuous armed conflict existed between Israel and “the various terrorist organizations active in Judea, Samaria, and the Gaza Strip”.²⁰ Among the different possible qualifications of the armed conflict with terrorist groups, the Court opted for the characterization as international, but added that “even those who are of the opinion that the armed conflict between Israel and the terrorist organizations is not of international character, think that international humanitarian or international human rights law applies to it”. The court also referred to the case law of the International Criminal Tribunal for the Former Yugoslavia²¹ and of the US Supreme Court to the effect that minimum rules apply to both categories of conflict alike.²² Thus, when the occupier itself is involved the law of international armed conflict should apply. In addition, Common Article 3 remains applicable to any armed conflict. Thus we would have a situation where the rules on international armed conflict and Common Article 3 apply concurrently. The same would

¹⁷ Kirchner even argues that Hezbollah's attacks against Israel are attributable not only to Lebanon but also to Iran and Syria, Stefan Kirchner, “Third Party Liability for Hezbollah Attacks against Israel”, *German Law Journal*, Vol. 07, No. 09, 2006, pp. 777-784. However, Kirchner seems to have confused attribution and complicity. On the conditions of attribution, see ICJ, *Application of the Genocide Convention (Bosnia-Herzegovina v. Yugoslavia)*, Judgment, 26 Feb. 2009, available at www.icj-cij.org (last visited 10 March 2009), paras. 396-412. For the application of these criteria to the Lebanon conflict with the (in our view correct) conclusion that attribution fails, see Andreas Zimmermann, “The Second Lebanon War: *Jus ad bellum, jus in bello* and the Issue of Proportionality”, *Max Planck Yearbook of United Nations Law*, Vol. 11, 2007, p. 112-115.

¹⁸ Cf. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, paras. 84, 86 et seq (separate analysis of different parts of conflict).

¹⁹ For the details of the drafting history see Jean S. Pictet (ed), *The Geneva Conventions of 12 August 1949. Commentary*, International Committee of the Red Cross, Geneva, 1952-58 at 54. In the words of the Pictet Commentary: “The suspicion must not rest on a whole class of people; collective measures cannot be taken under this Article; there must be grounds justifying action in each individual case.” See *Ibid.*, p. 55.

²⁰ Supreme Court of Israel, *Public Committee Against Torture v. Israel*, Judgment, HCJ 769/02, 13 Dec.2006, para. 16, with further references to previous case law of the Supreme Court.

²¹ ICTY, *Prosecutor v. Tadić*, Case No. IT-91-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 127.

²² US Supreme Court, *Hamdan v. Rumsfeld*, 548 US 557, 629; 126 S.Ct. 2749, 2795 (2006) (minimum rules contained in common Article 3 for international and non-international including transnational armed conflicts).

be true for the situation in Lebanon in 2006 (Israel/Hezbollah as far as the Hezbollah military actions are not attributable to Lebanon, and Israel/Lebanon). However, there are situations when a state is fighting a non-state transnational armed group whose activities are not attributable to any other state and are not carried out under conditions of occupation.

The so called “war on terror” may be a relevant example in this respect. Terrorism as such cannot be a party to a conflict, but clearly identifiable terrorist groups can. However, many states, while launching military operations against such groups and organizations, are not ready to accept the existence of armed conflict within their boundaries. If they admit that there is an armed conflict, they tend to argue that the so-called war on terrorism constitutes a new type of armed conflict to which international humanitarian law does not apply. However, on 29 June 2006, the US Supreme Court held Common Article 3 applicable to a “conflict not of an international character between the United States and al-Qaida”.²³ The Court rejected the US Government’s reasoning that the conflict with al-Qaida, being “international in scope”, does not qualify as a “conflict not of an international character”. According to this ruling, the concept of armed conflict is wide enough to include sustained armed violence between a state and a transnational non-state actor.

What is the criterion for the existence of an armed conflict? The employment of armed forces by states to fight against terrorism may be seen as one important indication for the existence of an armed conflict. Additionally, the intensity and the degree of organization of the parties involved in hostilities should also be taken into consideration. However, the fact that some terrorist networks are not operating in an organized manner and do not possess the capacity and willingness to ensure the respect for humanitarian law obligations during hostilities should not relieve the respective states (and their armed forces) from their international responsibility to respect minimal humanitarian guarantees applicable to all situations of armed conflict. Otherwise a circle of “negative reciprocity” could ensue,²⁴ which would deprive IHL of all its constraining effects.

The application of the *Tadić* criteria to transnational armed conflicts appears defensible. The minimum rules of Common Article 3, Article 75 AP I, and customary law should apply under any circumstances including transnational armed conflicts. Moreover, in view of the recognition by the International Court of Justice that the provisions of Article 3 constitute an emanation of general principles of law, namely “elementary considerations of humanity”, the territorial requirement of Article 3 can thus be regarded as obsolete.²⁵ Marco Sassòli maintained that “according to the aim and purpose of IHL, this provision must be understood as simply recalling that treaties apply only to their state parties”.²⁶

Beyond the minimum rules, however, the most important criterion for the applicability of the whole body of the IHL of non-international armed conflicts, in particular regarding the conduct of hostilities, still needs to be determined: the characteristics of the groups involved in such a conflict. Article 1 of AP II identifies strict criteria, namely that non-state actors should be objectively identifiable and sufficiently organized to carry out military operations reaching the threshold of intensity required for an armed conflict. However, certain terrorist armed groups may be loosely organized and internationally dispersed. Thus the criteria of Article AP II could not cover the most of counterterrorist combat. In line with the ICTY case law, the parties to an armed conflict should possess a “minimal degree of organization” to ensure the application of basic humanitarian protections

²³ United States Supreme Court, *Hamdan v. Rumsfeld*, 548 U.S. 557, 633, 126 S.Ct. 2749, 2797 (2006). Cf. the implicit criticism in the International Institute of Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict – With Commentary* (Drafting Committee: Michael N. Schmitt, Charles H.B. Garraway, Yoram Dinstein), San Remo, 2006, p. 2, with the approval by Fleck, Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, Oxford University Press, Oxford, 2008, p. 607 para. 1201 3 b); Marco Sassòli, “Transnational Armed Groups and International Humanitarian Law”, *Humanitarian Policy and Conflict Research Occasional Paper Series*, 6), 2006, p. 8.

²⁴ Robin Geiss, ‘Asymmetric conflict structures’, *International Review of the Red Cross*, No. 864 (2006), pp. 757–77.

²⁵ The temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities, in international armed conflict to the whole territory of the State in question, in non-international armed conflict at least to the area in which the conflict takes place, see *Tadić*, Appeal on Jurisdiction, paras. 67 and 70; see also ICJ, *Armed Activities on the Territory of the Congo (DR Congo v. Uganda)*, Sep. Op. Simma, para. 23.

²⁶ Marco Sassòli, *Transnational Armed Groups and International Humanitarian Law*, Harvard University Program on Humanitarian Policy and Conflict Research, Occasional Paper Series, Winter 2006, No. 6, p. 8.

guaranteed by Common Article 3.²⁷ The *Tadić* criteria should apply to transnational conflicts between states and non-state actors rather than the stricter standard of AP II, Art. 1.1. Accordingly, to ensure the applicability of IHL to each use of armed force, the degree of organization required to engage in “protracted violence” should be lower than the degree of organization required to carry out “sustained and concerted military operations”. The criterion of organization has been interpreted as referring to the existence of headquarters, designated zones of operations, the ability to procure, transport, and distribute arms,²⁸ the existence of command structure, disciplinary rules and mechanisms, control of territory, the existence of recruits, military training, military strategy and tactics, and the ability of the armed group to speak with one voice.²⁹

Thus the requirements of a certain intensity of armed violence³⁰ and some level of organization³¹ of non-state actors involved would trigger the existence of an armed conflict.

How should the intensity requirement be defined? Can a single terrorist act trigger an armed conflict within the meaning of the IHL? US practice after the terrorist attacks against the United States on September 11, 2001, has likened the military intensity of these attacks to the existence of an armed conflict³² to the effect that the more intense a conflict is, the less should be demanded of its length. Nevertheless, a single act, may it even be an attack as ferocious as September 11, will not lead to a change from a human rights to a humanitarian law régime and render the whole body of the laws of armed conflict applicable. Isolated terrorist acts do not meet the objective criteria for the scope of application of international humanitarian law. Article 1.2 of Additional Protocol II excludes “isolated and sporadic acts of violence” from its scope of application “as not being armed conflicts”. If terrorist acts occur during hostilities, they must be assessed within the existing framework of IHL which bans such acts.³³

The term “armed conflict” refers to a situation, and thus contains a temporal element. However, by lessening the requirement of “sustained” (Art. 1 AP II) to “protracted” (Art. 8 II f Rome Statute) military operations, the *Tadić* definition allows for certain interruptions in a conflict and thus leads to an earlier applicability of IHL.

In addition, in view of the recognition by the International Court of Justice of the provisions of Common Article 3 as an emanation of a general principle of law, namely “elementary considerations of humanity”, the territorial requirement of Article 3 can indeed today be regarded as less relevant for

²⁷ *Prosecutor v Ljube Bošković, Johan Tarculovski*, ICTY, Case No. IT-04-82-T, 10 July 2008, para. 197.

²⁸ *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, ICTY, Case No. IT-03-66-T, Judgment (Trial Chamber), 30 November 2005, para. 90.

²⁹ ICTY, *Prosecutor v. Ramush Haradinaj*, Case No. IT-04-84-T, Judgment (Trial Chamber I), 3 Apr. 2008, paras. 63-88.

³⁰ To assess the intensity of a conflict, the following factors have been taken into consideration: the seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilization and distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and, whether any resolution on the matter has been passed. *Prosecutor v Fatmir Limaj, Haradin Bala, Isak Musliu*, ICTY, Case No. IT-03-66-T, 30 November 2005, para. 90.

³¹ ICTY, *Prosecutor v. Ljube Bošković and Johan Tarculovski*, Case No. IT-04-82-T, Judgment (Trial Chamber), 10 July 2008, para. 197.

³² Section 5 (c) of Military Commission Instruction No. 2, Crimes and Elements for Trials by Military Commission, April 30, 2003, <http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf> (visited 10 March 2009). Cf. preambles of SC res. 1368 and 1373 (2001) justifying self-defense against the perpetrators regardless of their origin. For the same confusion of *jus ad bellum* and *jus in bello*, see Executive Order 13492 (2009) – Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities, 74 FR 4897, p. 4-5.

³³ The Fourth Geneva Convention relative to the Protection of Civilian Persons prohibits “all measures of intimidation or terrorism” (Art. 33); “Acts or threat of violence the primary purpose of which is to spread terror among the civilian population are prohibited” (Protocol I, Art. 51.2, and Protocol II, Art. 13.2); see Hans-Peter Gasser, Acts of Terror, „Terrorism“ and International Humanitarian Law, 847 *International Review of the Red Cross* (2002), p. 556; Jelena Pejić, Terrorist Acts and Groups: A Role for International Law?, 75 *British Yearbook of International Law* 2004, pp. 85-88 argues that beyond the case of the 2001-2002 conflict in Afghanistan, the contemporary “war on terror” is not an armed conflict at all.

the applicability of the minimum rules of IHL.³⁴ However, it is not sufficient to identify a single, globally operating non-state actor as a transnational group to render the IHL of non-international armed conflict applicable. Rather, we need a geographically defined group with a quasi-military organization, not a loose terrorism network. Thus, Al-Qaida in Pakistan or the Taleban in Afghanistan may qualify, but Al-Qaida's broader network does not, except for a situation when such a network operates within the territory of a state. In case of the protracted use of military force by and against such a group, the IHL for non-international armed conflict appears applicable. But this threshold should not be applied too lightly. As a result, the so-called "war on terror" is not an armed conflict as such, independently of time and space.³⁵ On the contrary, however, a concrete transnational armed conflict between a state and a terrorist organization that meets the *Tadić* criteria can be accommodated within the existing body of IHL.

Conclusion

Armed conflicts with non-state groups do not constitute a "law-free zone" or a "legal black hole", but are subject to IHL or human rights provided by international and/or domestic law.³⁶ There is no legal notion of a general or global "war on terror" and the struggle against terrorist groups does not constitute a new kind of war. Terrorist acts of any scale may occur outside situations of armed conflict. Absent activities amounting to an armed conflict, human rights law and domestic law apply to terrorist activity. The law of armed conflict provides a legal framework only if terrorism occurs within an armed conflict³⁷ or when terrorist groups have achieved a capacity to wage a protracted armed conflict. The threat of terrorism by a limited number of persons that do not constitute a distinct armed group able to fight a "protracted armed conflict" should be dealt with in accordance with Art. 5 GC IV when occurring in the framework of an existing armed conflict or occupation.

Minimum humanitarian standards remain applicable in any situation of armed conflict.³⁸ The combination of a criterion for the existence of a "protracted armed conflict", together with the assertion that certain humanitarian principles are applicable in any conflict, does provide a legal mechanism to deal with transnational conflicts involving non-state armed groups.

³⁴ Common article 3, Article 75 AP II and customary law, see Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. Bd. 1 Rules, Cambridge UP, Cambridge, 2005, as well as the 1990 Turku Declaration of Minimum Humanitarian Standards, in 'Report of the Secretary-General prepared pursuant to Commission resolution 1995/29', E/CN.4/1996/80 of 28 November 1995, Annex, to which only Mexico objected (p. 3); cf. Asbjørn Eide, Allan Rosas and Theodor Meron, 'Combating lawlessness in gray zone conflicts through minimum humanitarian standards', *American Journal of International Law*, Vol. 89 (1995), pp. 215–18.

³⁵ Similarly, Noëlle Quénivet, "The Applicability of International Humanitarian Law to Situations of a (Counter-)Terrorist Nature", in Roberta Arnold and Pierre-Antoine Hildbrand (eds.), *International Humanitarian Law and the 21st Century's Conflicts Changes and Challenges*, edis, Lausanne/Bern/Lugano, 2005, p. 27: "As international humanitarian law does not know of the legal category 'terrorism', one needs to assess, on a case-by-case basis, whether such situations of a terrorist nature can be considered as an armed conflict"; Roberta Arnold, "Terrorism and IHL: A Common Denominator?" in Roberta Arnold and Noëlle Quénivet (eds.), *International Humanitarian Law and the 21st Century's Conflicts*, edis, Lausanne/Bern/Lugano, 2005, p. 22.

³⁶ On the attempt to create such a zone at Guantánamo Bay, see, famously, Johan Steyn, "Guantanamo Bay: The Legal Black Hole", *International & Comparative Law Quarterly*, Vol. 53, 2004, p. 1. The recent judgment of the US Supreme Court in *Boumediene* has apparently definitively laid this attempt to rest, see *Boumediene v. Bush*, 128 SCt 2229 (2008), reprinted in 47 *ILM* 650 (2008).

³⁷ Hans-Peter Gasser, Acts of Terror, „Terrorism“ and International Humanitarian Law, 847 *International Review of the Red Cross* (2002), pp. 547-570.

³⁸ This was suggested already by the Turku Declaration of 1990, *op.cit.* (note 35): "the purpose of the (Turku) Declaration of Minimum Humanitarian Standards (E/CN.4/Sub.2/1991/55) is to list as minimum humanitarian standards the irreducible core of basic human rights and humanitarian norms applicable to everybody in every situation".