Commentary

Transnational Armed Conflicts: IAC or NIAC – The Lesser of Two Evils?

Shriya Maini and Raima Singh[1670]

Received: 03 March 2025 / Accepted: 10 June 2025

Abstract

Transnational Armed Conflicts may be described as 'non-traditional' conflicts, which involve hostilities between a non-State armed group and the armed forces of a State. The classification of such conflicts is a matter of deliberation and controversy, given its implications for the application of international humanitarian law. These conflicts do not fit under the conventionally recognised conflicts, namely conflicts between two states, a state, and a non-state party or two non-state parties within a territory. For the purposes of international humanitarian law, this article argues that transnational armed conflicts may be categorized as a classic Non – International Armed Conflict. This argument hinges on four grounds: (1) Interpretation of the Geneva Conventions; (2) Basis for separate legal regimes; (3) Consequential Reasons; and (4) Examination of counter arguments. In essence, this article aims to address and clarify the legal ambiguity surrounding the categorisation of transnational armed conflicts, along with emphasising upon broader concerns of sovereignty and accountability. Further, it presents a practical model to supplement the author's conceptual analysis, drawing upon the insights of renowned legal scholars.

[1670] Shriya Maini is an Advocate on Record, practising at Supreme Court of India, Delhi High Court and various district courts of Delhi. She is a graduate from Gujarat National Law University, India (2008 – 2013) and University of Oxford (BCL), (2014 – 2015).

Introduction

Transnational Armed Conflicts may be described as 'non-traditional' conflicts, which involve hostilities between a non-State armed group and the armed forces of a State.[1671] The classification of such conflicts is a matter of deliberation and controversy, given its implications for the application of international humanitarian law **["IHL"].** These conflicts do not fit under the conventionally recognised conflicts in IHL, namely conflicts between two states, a state, and a non-state party or two non-state parties within a territory.[1672] This article aims to address and clarify the legal ambiguity surrounding the categorisation of transnational armed conflicts, along with emphasising upon broader concerns of sovereignty and accountability. Further, it presents a practical model to supplement the author's conceptual analysis, drawing upon the insights of renowned legal scholars.

The characterisation of transnational armed conflicts as non-international armed conflicts ("NIACs") or international armed conflicts ("IACs") remains contested in international legal scholarship.[1673] For the purposes of international humanitarian law, I argue that transnational armed conflicts may be categorized as a classic NIAC. This argument hinges on four grounds: (**1**) Interpretation of the Geneva Conventions; (**2**) Basis for separate legal regimes; (**3**) Consequential Reasons; and (**4**) Examination of counter arguments.

The factual model that I examine is as follows: A belligerent state [B] uses force against a non-state actor [N] on the territory of a territorial state [T]. Armed forces of T are not involved in the conflict, and actions of N are not attributable to T.

[1671] Bartels, R. (2013). Transnational Armed Conflict: Does it Exist? In L. De Jong, S. Kolanowski, L. Bouza Garcia, A. Deckmyn, E. Hébert, & M.-S. Rinuy (Eds.), *Scope of Application of International Humanitarian Law = Le champ d'application du Droit International Humanitaire* (Vol. 43, pp. 114–128). College of Europe. https://pure.uva.nl/ws/files/61983693/Transnational_Armed_Conflict.pdf.

[1672] Chelimo, G. C. (2011, April 1). *Defining armed conflict in international humanitarian law*. Inquiries Journal. http://www.inquiriesjournal.com/articles/1697/defining-armed-conflict-in-international-humanitarian-law.

[1673] The author is grateful to Professor Dapo Akande and Judge Theodor Meron for their teaching on international armed conflicts and international criminal law during the author's postgraduate studies at the University of Oxford (2014-15). She is also grateful to her father, Advocate Rajive Maini whose critical reading of earlier drafts and constant guidance significantly shaped this article and her partner Advocate Vishesh Wadhwa who kept up with endless support during many late nights this article demanded.

CHARACTERISATION OF THE CONFLICT

Interpretation of the Geneva Conventions

An armed conflict between two or more… High Contracting Parties is an international armed conflict.[1674] At first blush, it may seem indisputable that the conflict between B and N, a non-inter-state conflict, falls outside this definition. However, it has been argued that the use of force by B on T's territory without its consent brings this conflict within Common Article 2 **["CA2"]**.[1675] Prof. Akande argues that the use of force by B *against* T without its consent violates Art. 2(4) and suffices to establish an IAC between B and T.[1676]

The author presents several arguments in support of a contrasting viewpoint.

First, Art. 2(4) and CA2 are textually and rationally different. While Art. 2(4) prohibits the "use of force… *against* any state", CA2 requires an armed conflict *between* states. The suggestion that Art. 2(4) does not prohibit the use of force *in* the territory of a state, though not directed against it, was rejected by the ICJ.[1677] However, that decision was based on the comprehensive nature of the prohibition in Art. 2(4) and the dangers that the "manifestation of a policy of force" may give rise to. These concerns are irrelevant for CA2. Admittedly, CA2 does not require the exchange of force between states.[1678] However, this does not mean that any use of force on the territory, though directed at a non-state actor, leads to an "armed conflict" *between* the states. Further, Prof. Akande alludes to the danger that this issue may turn on the state of mind or intention of the belligerent state. This is unwarranted in our view. A conflict "between" states - a treaty requirement, must be interpreted objectively, independent of the motive of the belligerent state.

Secondly, a contrary view would render Paragraph 2 of CA2 redundant, as occupation of a state's territory indisputably constitutes a use of force against that state (Armed

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[1674] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, August 12, 1949, Art. 2.

[1675] Dapo Akande, "Classification of Armed Conflicts: Relevant Legal Concepts," *SSRN Electronic Journal*, January 1, 2012, https://surl.li/jxbsjw.

[1676] Charter of the United Nations, June 26, 1945, Art. 2, para. 4.

[1677] United Kingdom of Great Britain and Northern Ireland v. Albania, (1949) ICJ Rep 244. https://www.icj-cij.org/sites/default/files/case-related/1/001-19490409-JUD-01-00-EN.pdf

[1678] Hans Peter Gasser, Christopher Greenwood. 2017. *Law on the Use of Force and Armed Conflict.* Edward Elgar Publishing.

Activities).

Thirdly, in *Nicaragua,* the International Court of Justice **["ICJ"]** held that the United States of America's **[" U.S."]** "arming and training of contras" constituted a use of force against Nicaragua.[1679] In this case, Nicaragua had filed an application alleging unlawful use of force and breach of sovereignty. The ICJ found these acts to be unlawful use of force, and a breach of the territorial integrity of the country. Even today, a significant portion of the U.S. aid has been directed towards Ukraine, particularly since the 2022 invasion. The U.S. also provides substantial military aid to Israel, which has been a major point of discussion in relation to the ongoing conflict in Gaza and to Taiwan too, particularly in response to perceived threats from China. There are also claims that the U.S. also funds military activities and initiatives in the Indo-Pacific region since a large portion of the U.S. federal budget is allocated to defense spending, covering military operations, weapons development, and personnel costs. Prof. Akande's view would lead to the result that even in the complete absence of fighting by the forces of the USA, there was an IAC between Nicaragua and the contras. That render undermines the requirement of 'overall control' – a threshold that mere "arming and training" might not satisfy.[1680]

Finally, the statute of the International Criminal Tribunal for Rwanda **["ICTR"]** extends its jurisdiction to enforce the law of non-international armed conflicts to neighboring countries.[1681] This also lends support to characterising transnational armed conflicts as NIACs.[1682]

Rationale

Despite repeated attempts by the ICRC, States have shown a marked reluctance to renounce the distinction between rules applicable to IACs and NIACs. One reason for this is the fear that greater protection to non-state actors in NIACs may threaten state

[1679] The Republic of Nicaragua v. The United States of America, (1984) ICJ Rep 392. https://www.icj-cij.org/sites/default/files/case-related/70/070-19841126-JUD-01-00-EN.pdf

[1680] The Prosecutor v. Duško Tadić, (1999) IT-94-1-A. https://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf

[1681] Statute of the International Criminal Tribunal for Rwanda, November 8, 1994, Art. 7.

[1682] Marco Sassòli, "Transnational Armed Groups and International Humanitarian Law," by Harvard University, *Harvard University Occasional Paper Series*, season-04 2006, https://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper6.pdf.

sovereignty.[1683] An equally important reason is the unwillingness of states to attach any legitimacy to the use of force by non-state actors.[1684] Thus, states have repeatedly suggested that members of organized armed groups engaged in NIACs do not deserve the same protection as solders of regular armed forces.[1685] Evidently, the territorial spread of a conflict is wholly immaterial to these concerns. Thus, affording greater protection to non-state groups on the sole ground that they fight from the territory of a different state runs contrary the intention of states. As has often been argued, "it cannot be the case that by stepping across the border a rebel would suddenly be entitled to claim…. immunity for attacks against state forces".[1686]

Conversely, it may be argued that it is incorrect to characterize a transnational armed conflict as an NIAC since that confers lesser protection to civilians in the territorial state. However, the development of customary international law has substantially bridged this gap. Thus, principles of proportionality, distinction, and the obligation to take feasible precautions are applicable to NIACs as well as IACs.[1687] Equally, customary law protection of civilian objectives is available regardless of the characterisation of the conflict.[1688]

Consequential Reasons

Characterising a transnational armed conflict as an IAC involves the imposition of a legal regime designed for inter-state conflicts with little reference to the fact that the parties actually engaged in hostilities are a state and a non-state entity. In our view, this leads to several unfounded consequences.

[1683] Christopher Greenwood, "The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia," in Max *Planck Yearbook of United Nations Law*, 1997, https://www.mpil.de/files/pdf2/mpunyb_greenwood_2.pdf.

[1684] Roy Schöndorf, "Israel's Perspective on Key Legal and Practical Issues Concerning the Application of International Law to Cyber Operations," *International Law Studies*, 2021, https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=2957&context=ils.

[1685] Noam Lubell. 2010. "Extraterritorial Use of Force Against Non-State Actors". In *Oxford Monographs in International Law*. OUP Oxford.

[1686] Nils Melzer, "Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretative Guidance on the Notion of Direct Participation in Hostilities," *International Law and Politics*, https://nyujilp.org/wp-content/uploads/2012/04/42.3-Melzer.pdf.

[1687] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge: Cambridge University Press, 2005), Rule 17.

[1688] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge: Cambridge University Press, 2005), Rule 7.

First, members of organised armed groups fail to be treated as civilians. AP I defines civilians as persons not falling under Art. 4A, GC III or Art. 43, AP I.[1689] Since most organised armed groups are unlikely to satisfy the conditions under Art. 4A of GC III[1690] ("having a fixed distinctive sign", "carrying arms openly", etc.) and do not fight under a 'command responsible to' either state-party to the conflict, they are civilians for the purposes of AP I.[1691] They may be targeted only *if* and *for so long as* they take a direct part in hostilities. Notably, as regards rules of targeting, this confers greater protection on members of the non-state group than what members of the territorial state's armed forces would have been entitled to.[1692]

Prof. Milanovic attempts to avoid this fallacy by classifying non-state actors as militia fighting 'on behalf of' the territorial state. However, this is wholly fictional. The territorial state may have expressly disassociated itself from the non-state group or may simply be incapable of preventing the use of its territory by the group. Further, even if one were to accept Prof. Milanovic's classification, non-state actors continue to be treated as "civilians" so long as they do not fulfill the requirements under Art. 4A, GC III.[1693] This leads to the further absurdity that non-state actors can confer on themselves greater protections by choosing to not comply with GCIII requirements.

Secondly, classifying a transnational armed conflict as an IAC also unreasonably expands the 'zone of combat'. For IACs, the zone of combat extends to the whole territory of the warring States while for NIACs it only extends to the territory under the control of a party.[1694] The consequence of this expansion lies in the fact that conventionally in NIACs, the application of IHL is territorially limited to areas of actual fighting between the parties. Human rights law governs all other areas.[1695] The effect

[1689] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, Art. 50.

[1690] Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, Art. 4A.

[1691] Shiri Krebs, "Designing International Fact-Finding: Facts, Alternative Facts, and National Identities," *Fordham International Law Journal*, 2018, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2692&context=ilj.

[1692] Marco Sassòli, "Legitimate Targets of Attacks under International Humanitarian Law," by Program on Humanitarian Policy and Conflict Research at Harvard University, 2003, https://hhi.harvard.edu/sites/hwpi.harvard.edu/files/humanitarianinitiative/files/session1_legitimate_targets_ihl.pdf?m=1615827575.

[1693] Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, Art. 4A.

[1694] The Prosecutor v. Duško Tadić, (1999) IT-94-1-A. https://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf

[1695] Mary Ellen O'Connell, "Declaration of Prof. Mary Ellen O'Connel." *United States District Court for the District of Columbia*,

of the expansion of the zone of combat therefore is to replace human rights norms that would otherwise have applied with the less protective humanitarian law rules.

2010, https://ccrjustice.org/files/Declaration%20of%20Mary%20Ellen%20O'Connell%2010-08-2010.pdf.

Examination of Counterarguments

(a) Consent of the Territorial State

The consequences of the territorial State's consent for the purposes of interpretation of CA2 have been considered above. Here, we propose to outline a few other objections to that line of argumentation.

First, the 'consent-reasoning' runs in problems when the belligerent state acts in breach of a mandate conferred by the territorial state. That scenario leaves two options: (**i**) to bifurcate that part of the conflict that exceeds the mandate and (**ii**) to treat the whole conflict as internationalized. Upon further analysis, it can be deduced that neither option is satisfactory. While bifurcating the conflict may be possible in cases of geographical restrictions, it may prove unworkable where the mandate is more nuanced; for instance, where it imposes a maximum threshold for the use of force, or restrictions on the nature of weapons employed. It may seem that treating the whole conflict as internationalized is a convenient solution. However, even for geographically restricted mandates, it does not stand to reason why rights of non-state actors within the territory covered by the mandate should differ depending on the belligerent state's breach.

Secondly, neither view commands unequivocal judicial support. Prof. Akande relies on the *Armed Activities* case.[1696] However, while in the dispositive the Court found a violation of GCIV outside the area occupied by Uganda, the reasoning of the majority does not reflect on this issue at all. The majority confines itself to Uganda's violation of GCIV "with regard to obligations of an occupying Power".[1697] Moreover, the court in that case found that "Uganda was not… engaging in military operations against rebels… it was engaged in military assaults that resulted in the taking of the town of Beni... its airfield… taking of the town of Bunia… its airport… the town of Watsa and its airport". Thus, an objective determination under CA2 would have characterised the conflict as an IAC in any case. Prof. Akande also relies on Judge Shahabuddeen's separate opinion in *Tadic*. However, the issue that he was considering was whether or not force was being used by a state and not whether the use of force *against* a state suffices to constitute an IAC.

[1696] Democratic Republic of the Congo v. Uganda, (2005) ICJ Rep 168. https://www.icj-cij.org/case/116

[1697] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949.

(b) Interpretation of Common Article 3

It has been argued that CA3 **["Common Article 3"]** applies only to conflicts confined to the territory of one contracting party.[1698] In my opinion, the preferable view is that CA3 applies as long as hostilities takes place in the territory of *one of the* High Contracting Parties.[1699] The latter view is supported by the drafting history of CA3.[1700] Admittedly, an earlier draft of CA3 used the phrase "on the territory of one or more of the High Contracting Parties." However, in response to a query by the Mexican delegate, the ICRC representative clarified that the removal of this phrase was not intended to affect the territorial reach of CA3.[1701]

(c) Bifurcation Problem

It has been argued that characterising the conflict as an NIAC runs into problems when the territorial state fights on the side of the non-state group. Proponents of the NIAC-characterisation are then forced to bifurcate the conflict into two components – IAC between B and T and NIAC between B and N. While this is undoubtedly a complicated exercise, there are in my view, good reasons for bifurcation. First, it derives support from the reasoning in *Nicaragua*. There, the ICJ considered the conflict between Nicaragua and the contras as an NIAC while applying rules of IAC to the conflict between the USA and Nicaragua. Secondly, the difficulties of bifurcation often correspond to the practical complexities on the ground. Avoiding bifurcation in the interests of simplicity may therefore work injustice. For instance, it is not clear why members of non-state groups should be entitled to greater rights merely because they happen to be fighting on the same territory as a conflict between two states.[1702] In an IAC, IHL provides specific protections for combatants, including POW **["Prisoner of**

[1698] Marko Milanovic and European Society of International Law, "The End of Application of International Humanitarian Law," *International Review of the Red Cross*, vol. 96–96, 2014, https://doi.org/10.1017/S181638311500003X.

[1699] Noam Lubell et al., *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice* (The Geneva Academy of International Humanitarian Law and Human Rights,2019), https://www.geneva-academy.ch/joomlatools-files/docman-files/Guidelines%20on%20Investigating%20Violations%20of%20IHL.pdf.

[1700] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, August 12, 1949, Art. 2.

[1701] Nils Melzer, *Targeted Killing in International Law* (Oxford University Press, 2008), http://www.ejil.org/pdfs/20/2/1808.pdf.

[1702] Christopher Greenwood, "International Law and the Conduct of Military Operations: Stocktaking at the Start of a New Millennium," *International Law Studies*, 2016, https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1430&context=ils.

war"] status upon capture. These protections are not automatically extended to members of non-state armed groups, even if their conflict overlaps with an international one, though all victims irrespective of their nature must be entitled to a humane treatment and protection from unnecessary suffering. This creates a situation where members of non-state groups, while still subject to the laws of war, may not benefit from the same protections afforded to state combatants. Additional rights must not be provided as mere incidents of geographical location of a non-state group, rather the conduct of such actors during the said conflict. Further, as per the Additional Protocol II of the Geneva Convention, 1949, such groups must meet a specified criteria to be classified as a non-state group.[1703] Entitlement to greater rights must arise out of the universally accepted principle of foundational equality and be based upon the engagement of the group in the conflict.[1704]

II. Consequences of Characterisation

As Prof. Akande points out, it is one thing to say that the law of IAC applies; it is quite another to ascertain how that legal regime applies to members of organized armed groups. In many cases, non-compliance with the requirements under GC III **["Geneva Convention III"]** disentitles non-state fighters from protections that are available to members of regular armed forces. In order to substantiate the arguments raised, it is essential to examine the below mentioned four potential areas of concern :-

1. **Prisoner of War Status**: The (un)availability of POW status to non-state fighters vindicates Prof. Akande's point. It does not follow from the fact that the law of IAC applies that all non-state actors are entitled to POW status. They additionally have to comply with the requirements in Art. 4A, GCIII.[1705] Hence, even if the IAC characterisation is adopted, whether the availability of POW status to members of organised armed groups turns on whether they comply with the requirements in Art. 4A.

[1703] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977.
[1704] Sassòli, M., & Shany, Y. (2011). DEBATE: Should the obligations of states and armed groups under international humanitarian law really be equal? *International Review of the Red Cross*, *93*(882), 425–442. https://doi.org/10.1017/s1816383111000403
[1705] Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, Art. 4A.

2. **Combatant Immunity**: AP I confer "the right to participate directly in hostilities" only on members of armed forces of a party to the conflict.[1706] Therefore, regardless of the characterisation of a conflict as an IAC or NIAC, this protection is unlikely to be extended to members of non-state groups.

3. **Rules of Detention**: This issue hinges on the scope of application of AP II **[Additional Protocol II to the Geneva Conventions, 1977"].** Notably, AP II applies only to armed conflicts that take place in the territory of a High Contracting Party between its armed forces and organised armed groups. AP II is thus inapplicable to transnational conflicts. Detainees in an NIAC are therefore only entitled to the generic protection made available by CA3. Needless to say, the scope of this protection is severely restricted as compared to the provisions of AP I. Apart from protecting detainees from torture and other "cruel treatment", it prohibits the passing of sentences or executions without the sanction of a "regularly constituted court affording all the judicial guarantees."

4. **Targeting Rules:** Regardless of the areas of convergence noted above, crucial differences remain in the applicable rules of targeting. As has been demonstrated before, characterising a transnational conflict as an IAC leads to conferring a 'civilian' status on members of organised armed groups. They can be targeted only for so long as they take a 'direct part in hostilities. However, the NIAC-characterisation means that those who assume a 'continuous combat function' may be targeted for the whole duration of their membership in the group.[1707]

5. **International Criminal Law:** Differences of classification also remain in terms of prosecution for war crimes.[1708] For instance, the prohibitions on means and methods of warfare in article 8(2) and (b) applicable to IACs are significantly more exhaustive than the limited nature of offences prescribed during an NIAC,

[1706] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, Art. 43, para. 2.
[1707] Nils Melzer and International Committee of the Red Cross, "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law," 2009, https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf.
[1708] C. Byron, "Armed Conflicts: International or Non-International?" *Journal of Conflict and Security Law* 6, https://doi.org/10.1093/jcsl/6.1.63.

limited primarily to conduct such as cruelty, mutilation, taking of hostages, etc..[1709]

[1709] Rome Statute of the International Criminal Court, July 17, 1998, Art. 8, para. 2(c).

Conclusion

The classification of transnational armed conflicts remains of great significance to international academia and also affects the legal obligations of the states involved. A close examination of the aforementioned treatises and judgements, such conflicts can be best understood as NIACs to preserve legal consistency and adherence to international frameworks. Although classifying the said conflicts as IACs significantly undermines civilian and combatant safety, it is pertinent to note that neither classification can be negated or accepted in totality. Complex nature of transnational armed conflict calls for a nuanced approach. Classification of the said conflicts, as of now, aligns with IHL standards. Thus, legal frameworks governing the ambit of armed conflicts must remain in consonance with the contemporary political realities.

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