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Politics by Other Means: The Battle over the Classification of Asymmetrical Conflicts

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Politics by Other Means: The Battle over the Classification of Asymmetrical Conflicts

Yahli Shereshevsky*

ABSTRACT

Transnational armed conflicts between states and non-state armed groups have emerged as a defining characteristic of twenty-first century warfare. Humanitarian actors tend to classify such conflicts (e.g., between the United States and ISIL) as non-international armed conflicts rather than international armed conflict. This classification is subject to considerable debate; yet both sides present their views as the inevitable result of the interpretation of the relevant International Humanitarian Law (IHL) treaty articles.

*This Article demonstrates that the classification of transnational armed conflicts as non-international armed conflicts does not merely concern the application of the relevant laws, but represents a fundamental shift in the attitude of humanitarian actors: while IHL has traditionally been considered the most effective legal constraint on the brutality of warfare, the current trend perceives International Human Rights Law as the desirable legal regime for regulating asymmetrical conflicts. Humanitarian actors prefer to classify these conflicts as non-international armed conflicts because the relative lack of IHL norms applicable to that class of conflict enables extensive application of the more protective international human rights law as a complementary mechanism. Nonetheless, the adoption of this classification by the U.S. Supreme Court in *Hamdan v. Rumsfeld* may have been a Pyrrhic victory for this novel approach due to the United States' reluctance to apply international human rights law*

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norms to extraterritorial conflicts. Thus, instead of the full application of IHL norms, only the vague norms relevant to non-international armed conflicts apply, without the benefit of applying international human rights law as a complementary legal regime.

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I. INTRODUCTION

Much has been written about the politics of international humanitarian law (IHL).¹ IHL constitutes a fertile ground for ideological confrontation with disagreement even stemming from the name assigned to this legal regime.² The inherent tension in the delicate balance between humanitarian considerations and military necessity that underlies IHL makes the conflict between competing ideological positions almost unavoidable. This Article focuses on one particular normative tension: the way in which the classification of transnational armed conflicts between states and extraterritorial non-state armed groups (transnational armed conflicts),³ as either international armed conflicts (IACs) or non-international armed conflicts (NIACs), has been used as a strategic tool in the general ideological struggle over the regulation of warfare. These conflicts, such as the conflicts between the United States and ISIL,⁴ between the United States and al Qaeda, or between several African states and Boko Haram, have drawn much attention in recent years. Surprisingly, although the question of the classification of transnational armed conflicts is one of the major debates in contemporary IHL discourse, it has largely been left outside of the discussion on the politics of IHL, even by authors who discuss these politics openly in other contexts.⁵

1. See, e.g., DAVID KENNEDY, *OF WAR AND LAW* (2006); Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1 (2004); Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49 (1994); David Luban, *Military Necessity and the Cultures of Military Law*, 26 LEIDEN J. INT'L L. 315 (2013); Marko Milanovic, *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 (Jens d. Ohlin ed., forthcoming) [hereinafter Milanovic, *The Lost Origins*]; Yuval Shani, *Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror*, in INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 13 (Orna Ben-Naftali ed., 2010).

2. IHL is usually associated with humanitarian or progressive voices, while the laws of war or the laws of armed conflict (LOAC) are associated with more conservative voices. See, e.g., Eyal Benvenisti, *Human Dignity in Combat: The Duty to Spare Enemy Civilians*, 39 ISR. L. REV. 81, 83 (2006); Luban, *supra* note 1, at 315. However, the use of these terms does not always reflect ideological differences, but may be based on other reasons, such as institutional conventions. In this Article, I usually use the term IHL to describe the laws that regulate armed conflicts.

3. There is no agreed term for these conflicts. In this Article I have chosen to use the term transnational armed conflicts, which is used in some of the literature. Others use different terms, such as cross-border NIACs or trans-border armed conflicts.

4. ISIL is the acronym for the Islamic State of Iraq and the Levant, a non-state armed group also known as ISIS, IS, and DA'ISH.

5. Milanovic is perhaps the most explicit regarding the ideological motivations, but even he did not significantly address the politics of classification: See

The contemporary classification debate is the outcome of a long history of states' reluctance to support the full application of IHL norms in internal armed conflicts. IHL is built on a pragmatic compromise aimed at minimizing the calamities of war to the greatest extent possible, by regulating warfare but not prohibiting it altogether. Its core principles limit the ways in which the opposing sides can conduct their operations, whilst at the same time allowing them to conduct an effective military campaign. Significantly, this compromise is based to a large extent on the notion of symmetry between the parties to the conflict: in order to reach and follow a compromise between military needs and humanitarian considerations, the parties to a conflict must be able to expect to incur similar gains and burdens from this agreed compromise. Indeed, one of the most important principles of the laws of war is the equality of belligerents. This principle means that IHL norms apply equally to all parties to a conflict regardless of the potential differences between them.⁶ It is believed that normative symmetry has an important impact on the willingness of parties to the conflict to comply with IHL norms.⁷

Asymmetrical conflicts, in which the application of similar rules has radically different repercussions for the parties involved, complicate the ability to effectively regulate warfare. There are several asymmetries that can be discussed in the context of armed conflicts.⁸ This Article focuses on situations that combine two main asymmetries: significant differences in power between the parties to the conflict and the asymmetry between states and non-state actors with respect to international legal personality. Significant asymmetry

Milanovic, *The Lost Origins*, *supra* note 1, at 2 (“[B]oth camps are prepared to use all of the tools in the lawyerly toolbox to advance their broader agenda, be it formalism/positivism/textualism, teleological interpretation, pragmatism, or various moral, value and policy judgments. I think it fair to say that while some of these tools might be used a bit more by one camp than by the other, there is really no methodological consistency in that regard—the same person can be a textualist by day (e.g. in rejecting the extraterritorial application of the ICCPR) and a pragmatist by night (e.g. by using the nebulous *lex specialis* principle to disregard the clear text of human rights treaties). I also think it fair to say that, as a general matter, the positivist interpretative positions of the members of either camp align perfectly with their individual policy preferences. I, at least, have not met anyone who thinks that *de lege lata* human rights apply everywhere and all the time, including in armed conflict, but that this is a bad thing which is unfortunately unavoidable, nor conversely anyone who thinks that it would be just fantastic to apply human rights as broadly as possible, but that the current legal framework simply does not at all allow it.”).

6. See, e.g., Gabriella Blum, *On a Differential Law of War*, 52 HARV. INT’L L.J. 164, 168–73 (2011).

7. Adam Roberts, *The Equal Application of the Laws of War: A Principle Under Pressure*, 90 INT’L REV. RED CROSS 931, 961 (2008) (“[W]hen the laws of war have been developed or interpreted in a way that can be perceived as privileging one side in a conflict because of the nature of its cause, the other side has often shown a tendency to ignore or downgrade the law.”).

8. See, e.g., Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, 62 A.F.L. REV. 1 (2008).

in power results in a divergence of interests between the parties to the conflict with the stronger side having a clear interest in looser regulation. It is easier for the stronger side to realize its military advantage and achieve its goals with fewer limitations on its ability to use force. Moreover, asymmetry in political status and clout enables the stronger side to design the law in accordance with its interests and preferences. The influence of these asymmetries can be clearly seen in the creation of two different types of conflicts under IHL—IACs and NIACs. The laws of IACs, which have traditionally been regarded as applicable to conflicts between two or more states, usually reflect IHL's pragmatic compromise. In contrast, with regard to NIACs, which were traditionally regarded as internal armed conflicts, states have long resisted the introduction of the same normative regime applicable in IACs due to the power asymmetries discussed above. As a result, the norms of NIAC have become biased in favor of state interests.

The lesser regulation in NIAC is a cause for concern from a humanitarian perspective due to the diminished ability to protect the victims of armed conflict under such a regime. Humanitarian actors, such as the International Committee of the Red Cross (ICRC), have tried to advance the full application of IHL norms in NIACs in order to increase the protection of civilian populations in such conflicts. When direct attempts to change the laws of NIAC by way of legislation to better reflect the IHL ethos failed, the need arose to take a different path. Ostensibly, this path was fairly clear: if it was not possible to explicitly revise the treaties governing NIACs, then interpretation could be used to narrow the gap between the law of IAC and the law of NIAC. One way of achieving this goal was to widen the definition of IAC to include at least some asymmetrical conflicts previously deemed outside its scope of application. However, this was not the only available solution to the problem. This Article describes the classification debate relating to two situations—the conflict in the former Yugoslavia and the transnational armed conflicts of the twenty-first century—and argues that it reflects two competing responses to the deficiencies of the law of NIAC. While the conflict in Yugoslavia was widely classified as an IAC, transnational armed conflicts have been widely classified as NIACs. Neither of these situations fit the classical attributes of an internal armed conflict: the conflict in the former Yugoslavia involved both states and internal non-state armed groups with strong relationships to foreign states, while the transnational armed conflicts of the twenty-first century involve states on the one hand and non-state armed groups operating inside the territory of foreign states on the other.

If this were a matter of simple interpretation, there would be no real puzzle, and, indeed, many scholars treat the classification of transnational armed conflicts as the inevitable result of the interpretive exercise. However, this Article demonstrates that in both

situations an alternative classification as a NIAC or IAC was a valid interpretation. This Article argues that the choice between these competing interpretive approaches reflects a battle over the role of IHL in the regulation of asymmetrical armed conflicts. Put differently, the interpretive alternatives reflect two opposing approaches regarding the desirable normative regime in such conflicts. Whereas the interpretive approach to the events in the former Yugoslavia, which I call the "inclusive approach," envisioned the implementation of IHL norms pertaining to IACs as a desirable goal, the interpretive position regarding the classification of transnational armed conflicts, which I call the "exclusive approach," views the more protective International Human Rights Law (IHRL), which fills the many gaps of IHL in NIACs, as the preferable normative regime.

The politics of IHL are often presented as a binary tension between the laws of war or law of armed conflict (LOAC) camp and the IHL camp, between military lawyers and humanitarian lawyers.⁹ The LOAC camp emphasizes the legitimizing role of laws of war, while the IHL camp emphasizes its limiting role; the LOAC camp protects existing power structures and the current status quo, while the IHL camp has progressive aspirations.¹⁰ This Article demonstrates that the politics of IHL might better be thought of as revealing a tension within a triangle comprised of three camps: (i) the state apologetics camp, who argue for as limited of a regulation of warfare as possible; (ii) the IHL camp, who argue for the maximum application of IHL norms; and (iii) the IHRL camp, who argue for the maximum application of IHRL norms. Recharacterizing the politics of IHL as a triangle emphasizes the uniqueness of the pragmatic compromise of IHL as a middle ground between apology and utopia. It can be seen as a more limited version of the emergence of IHL, as a third way between realist and pacifist accounts of warfare.¹¹ It is not only a struggle between state apologetics and humanistic forces, between *lex lata* and *de lege ferenda*, but also between different visions of this more humanitarian *lex ferenda*.

This novel vision of IHRL as the desirable legal framework should be considered with great caution, even from a humanitarian perspective. This Article addresses several concerns in this regard. Specifically, it questions whether this approach can be applied in full, taking into consideration the current positions of relevant states on the relationship between IHL and IHRL. The Article suggests that

9. Luban, *supra* note 1, at 315–16.

10. See, e.g., *id.*

11. See, e.g., GEOFFREY BEST, HUMANITY IN WARFARE: THE MODERN HISTORY OF THE INTERNATIONAL LAW OF ARMED CONFLICTS 15 (1980) (describing IHL as "in between the positions of unrestrained and absolute violence on the one hand, unresisting and absolute non-violence on the other.").

the classification of transnational armed conflicts as NIACs in *Hamdan v. Rumsfeld*¹² may have been a Pyrrhic victory for the “exclusive approach,” due to the reluctance of the U.S. administration, as well as the Supreme Court in several cases, to apply IHRL to transnational armed conflicts.

The Article proceeds as follows: Part II presents the development of IHL treaty law of asymmetrical armed conflicts. Part III discusses the two alternative responses to the inequality of the law as it applies to asymmetrical conflicts—the endorsement of the “inclusive approach” with respect to the conflicts in the former Yugoslavia and the endorsement of the “exclusive approach” with respect to transnational armed conflicts. Part IV explains how the enormous growth in the role of IHRL in the regulation of armed conflicts is the most reasonable explanation for the departure from the inclusive approach and the adoption of the exclusive approach to classification. Part V then critically examines the exclusive approach and rethinks its desirability in a non-ideal world. Part VI concludes.

II. IHL'S PRAGMATIC COMPROMISE AND THE REGULATION OF ASYMMETRICAL CONFLICTS: THE CASE OF NON-INTERNATIONAL ARMED CONFLICTS

The creation of a legal regime that follows the pragmatic compromise between military necessity and humanitarian considerations underlying IHL is largely dependent on the symmetry of power between the different parties to a potential conflict. The closer in degree and nature the gains and burdens incurred by the parties, the greater the ability to reach a meaningful compromise:¹³ in such symmetrical conflicts, the parties are expected to be able to design norms that best limit the suffering in the conflict, since they can equally expect to be on either the side that wishes to use force effectively or the side that suffers the humanitarian consequences of the use of such force. By contrast, in asymmetrical conflicts, norms that emphasize either military necessity or humanitarian considerations usually serve one of the parties to the conflict to a greater degree than the other.¹⁴

Asymmetrical conflicts are not limited to conflicts between states and non-state actors. They also include cases where there are significant power differences between two or more states fighting

12. *Hamdan v. Rumsfeld*, 548 U.S. 557, 629–36 (2006).

13. See Robin Geiß, *Asymmetric Conflict Structures*, 88 INT'L REV. RED CROSS 757, 773 (2006).

14. See, e.g., Toni Pfanner, *Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action*, 87 INT'L REV. RED CROSS 149, 160–62 (2005).

with one another.¹⁵ In both situations, the conflicting interests of the parties might affect norm creation and increase the gap between positive IHL norms and IHL's initial pragmatic basis of compromise, which emphasizes the importance of the normative symmetry between the parties to the conflict. For instance, some of the norms that were incorporated in the 1899 and 1907 Hague Conventions¹⁶ reflect the interests of the more powerful states at the expense of less powerful states.¹⁷ However, the problems associated with asymmetrical distribution of power are less significant when both sides are states and have the ability to influence the law. Indeed, the law of IAC usually follows the IHL ethos. The problem is much more significant in cases of asymmetrical conflicts between state and non-state actors. First, the gaps in power between the adversaries are stable and not likely to change. States will almost always be stronger than non-states, whereas relations of power between different states may change. Second, the asymmetry between the parties is manifested not only in differences in physical power, but also with regard to the ability to design and create the relevant norms. International law has traditionally been, and still is to a large extent, a legal regime in which the major lawmakers are states. Under these circumstances, it is easier for states to design the norms in a manner that promotes their interests.

This ability is clearly manifested in the law of NIAC. Since IHL norms were created mostly by states, they reflect a clear bias in favor of state interests in the regulation of NIACs. In the first one hundred years of modern IHL, states refused in most cases to apply IHL norms to NIACs.¹⁸ Until the creation of the four Geneva Conventions in 1949,¹⁹ there was almost no regulation of internal armed conflicts. As explained above, the absence of regulation helps the stronger side to realize its military advantages. Only in cases in which a state of

15. See Schmitt, *supra* note 8, at 5–6 (describing this asymmetry as “technological asymmetry”).

16. See Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 26 Martens Nouveau Recueil (ser. 2) 949; Convention Respecting the Laws and Customs of War on Land, annex art. 22, Oct. 18, 1907, 36 Stat. 2277, 207 Consol. T.S. 277.

17. See Antonio Cassese, *The Martens Clause: Half a Loaf or Simply Pie in the Sky?*, 11 EUR. J. INT'L L. 187, 198 (2000).

18. LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* 17–18 (2002).

19. See Geneva Convention [I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention [II] for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention [III] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention [IV] Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

belligerency was recognized were the laws of war applied between the parties to the conflict, and this recognition was left to the discretion of the state party to the conflict.²⁰ In actuality, there have been very few cases of an explicit recognition of belligerency.²¹

Even in later periods, states remained firmly opposed to applying the entire body of IAC norms to NIACs. During the negotiations that led to the adoption of the 1949 Geneva Conventions, the ICRC promoted a draft text that sought to apply IHL norms in full to all conflicts, whether international or non-international in character.²² However, this position met strong resistance from many state delegations to the diplomatic conference of 1949.²³ Instead, a narrow set of limitations on conduct in NIACs, namely Common Article 3 to the Geneva Conventions (CA3), was accepted as a compromise formula.²⁴ CA3 also set out the possibility of creating special agreements between the parties to a NIAC, which can include an obligation to follow wider norms than those enshrined in CA3 itself. While there are some examples of actual special agreements, they rarely include the full application of IHL treaty law and specifically the application of combatant immunity.²⁵ The main explanations for the limited application of special agreements are states' fear of conferring legitimacy on the armed group and the different interests

20. See, e.g., MOIR, *supra* note 18, at 10–11; LAURA PERNA, *THE FORMATION OF THE TREATY LAW OF NON-INTERNATIONAL ARMED CONFLICTS* 29–30 (2006); Rogier Bartels, *Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide Between International and Non-International Armed Conflicts*, 91 INT'L REV. RED CROSS 35, 50–51 (2009). For the laws of war to apply between the parties to a conflict, there must be recognition by the state party to the conflict; in contrast, for the application of the laws of neutrality, there must be recognition of belligerency by third-party states.

21. The most notable example in which recognition of belligerency did occur is the American Civil War. See, e.g., PERNA, *supra* note 20, at 30; Bartels, *supra* note 20, at 51.

22. See, e.g., PERNA, *supra* note 20, at 51; JEAN PICTET, *THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY* 42–43 (1952) [hereinafter GC: COMMENTARY]; Bartels, *supra* note 20, at 57–61.

23. See GC: COMMENTARY, *supra* note 22, at 43–44.

24. See Bartels, *supra* note 20, at 61–64.

25. See, e.g., MICHELLE MACK, INT'L COMM. OF THE RED CROSS, *INCREASING RESPECT FOR INTERNATIONAL HUMANITARIAN LAW IN NON-INTERNATIONAL ARMED CONFLICTS* 16–18 (2008); SANDESH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* 124–31 (2012) (discussing various special agreements, and presenting parts of several of these special agreements); René Provost, *Asymmetrical Reciprocity and Compliance with the Laws of War*, in *MODERN WARFARE: ARMED GROUPS, PRIVATE MILITARIES, HUMANITARIAN ORGANIZATIONS AND THE LAW* 17, 34 (2012) (“[T]here have been very few recorded instances of the adoption of special agreements under Common Article 3 relative to the prevalence of internal conflicts.”); Cedric Ryngaert & Anneleen Van de Meulebroucke, *Enhancing and Enforcing Compliance with International Humanitarian Law by Non-State Armed Groups: An Inquiry into Some Mechanisms*, 16 J. CONFLICT & SECURITY L. 443, 454 (2011) (“In practice, there are relatively fewer special agreements as compared with other legal instruments.”).

of the parties to the conflicts due to the power differences between them.²⁶

A second attempt to apply the same level of protection granted to traditional interstate conflicts to asymmetrical conflicts was made in the process of adopting the additional protocols to the 1949 Geneva Conventions in 1977.²⁷ During this process, some delegates proposed the adoption of a single protocol applicable to all situations of armed conflict.²⁸ This attempt proved futile, as had the one in 1949. In the end, a compromise was reached regarding the adoption of the second additional protocol (APII).²⁹ The protocol narrowed the scope of the types of NIACs to which it applies,³⁰ in exchange for some expansion of the substantive IHL norms that were introduced into it.³¹ However, even after this expansion, the normative gap between the treaty norms of IAC and NIAC remained significant.

In addition to APII, article 1(4) of the first additional protocol (API) recognized a specific type of asymmetrical armed conflict, namely wars of national liberation, as IACs. The agreement on the text of the article was made possible partly due to the participation of national liberation movements in the proceedings prior to the adoption of the protocol, which mitigated, to a limited extent, the gap between the status of states and non-state armed groups under

26. Provost, *supra* note 25, at 34–35 (“The formality of such bilateral special agreements is taken by states as ineluctably endowing the signatory insurgents with a significant dose of the political legitimacy that states are keen to deny them.”); *see also* Ryngaert & Van de Meulebroucke, *supra* note 25, at 455 (“[A]greements are unlikely to be concluded if there is not at least some substantive equality or balance between the parties.”).

27. *See* 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, 1125 U.N.T.S. 3 [hereinafter Protocol I]; 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, 1125 U.N.T.S. 609 [hereinafter Protocol II].

28. *See, e.g.*, ANTHONY CULLEN, *THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW* 88–90 (2010).

29. *See* MOIR, *supra* note 18, at 92–94.

30. This narrower scope of application is mainly achieved by the requirement that the armed group be in control of part of the territory of the state. *See* Protocol II, *supra* note 27, § 1 (“This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of applications, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other 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.”).

31. *See* CULLEN, *supra* note 28, at 87–88.

international law.³² The article had the potential to have a major influence as the first instance of direct application of the whole body of IHL to asymmetrical conflicts. However, it had very little practical effect on the law of asymmetrical conflicts.³³ This limited effect was mainly due to the alleged politicization of the definition of the specific types of conflicts that it regulates.³⁴ Article 1(4) specifically addresses “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination,” and since states are reluctant to identify themselves as either an alien occupier or a racist regime, the article has never been openly used to classify a conflict as an IAC by states that are involved in an active conflict.³⁵

An area in which the distinction between international and non-international armed conflicts has not always been maintained is the regulation of weapons and methods of war.³⁶ Some of the main conventions in this area of law do not distinguish between different types of conflicts, applying equally to all armed conflicts.³⁷ This is also the case of the Second Protocol to the Cultural Property Convention.³⁸ In any case, these conventions do not address the core norms regarding the means and methods of warfare or the protection of the civilian population and therefore have only limited effect on the regulation of warfare. Moreover, one can make the case that in the

32. See *id.* at 67. (noting that the national liberation movements participated in the proceedings, but lacked voting rights). This might seem an indication that the asymmetry between state and non-state armed groups is not stable and might change. Indeed, it is fair to say that the status of non-state actors is slowly strengthening. However, as demonstrated in this section, this alleged change in status has not yet succeeded in significantly narrowing the asymmetry in status between state and non-state actors, and has not eliminated the inequality of the norms of asymmetrical conflicts. This does not mean that such a change cannot happen, but it seems, even today, still quite distant.

33. See SIVAKUMARAN, *supra* note 25, at 222.

34. CULLEN, *supra* note 28, at 83 (“[T]he motivation behind the initiative was intrinsically political.”).

35. See *id.* at 84–85. In addition, API requires a declaration under Article 96(3) for the protocol to apply. The information regarding actual instances of 96(3) is rather vague. See SIVAKUMARAN, *supra* note 25, at 220–21.

36. See THEODOR MERON, *THE HUMANIZATION OF INTERNATIONAL LAW* 32 (2006).

37. See, e.g., Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, *opened for signature* Apr. 10, 1972, 11 I.L.M. 309 (entered into force Mar. 26, 1975); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, 32 I.L.M. 800 (entered into force Apr. 29, 1997); Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, *opened for signature* Dec. 3, 1997, 36 I.L.M. 1507 (entered into force Mar. 1, 1999).

38. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 38 I.L.M. 769 (1999).

regulation of weapons the inequality of the norms starts already with respect to the norms of IAC, where the strong states refuse to outlaw weapons that they believe give them an advantage over less powerful states.³⁹

Thus, the treaty norms that apply to NIACs, even after the adoption of APII, remain vague and partial.⁴⁰ Although some progress has been made, there is still a relatively wide gap between IAC and NIAC treaty norms. In the almost forty years since the adoption of the additional protocols, no serious attempts have been made to change the current legal regime through the adoption of new core treaties. In an era where asymmetrical conflicts are becoming more significant,⁴¹ the possibility of reaching an agreement on the desirable norms seems less likely, due to the disparate interests of the parties and the ability of states to design the law in line with their interests. Moreover, as long as strong states have a dominant role in the negotiations, there is a chance that the new norms will not bring about more equality between the parties to the conflict but may possibly even increase current inequality.

The current treaty rules applicable to NIAC deviate in significant aspects from core IHL principles. The greatest deviation is found in the limited application of the principle of equality of belligerents to NIACs.⁴² Indeed, this inequality is not an explicit part of the law of NIACs, which formally applies equally to the parties to the conflict.⁴³ However, under domestic law, there is no such equality, and thus the inevitable result of the absence of combatant immunity from the laws of NIAC is a manifest inequality between the parties to the conflict: while the state armed forces can conduct their

39. Eyal Benvenisti, *The Legal Battle to Define the Law on Transnational Asymmetric Warfare*, 20 DUKE J. COMP. & INT'L L. 339, 343 (2010) [hereinafter Benvenisti, *The Legal Battle*] ("Usually it is the stronger, technologically advantaged regular army that develops and enjoys the advantage of using new weapons. That party will most likely refuse to outlaw new weaponry it holds exclusively.")

40. See, e.g., EMILY CRAWFORD, *THE TREATMENT OF COMBATANTS AND INSURGENTS UNDER THE LAW OF ARMED CONFLICT* (2010); François Bugnion, *Jus ad Bellum, Jus in Bello and Non-International Armed Conflict*, 6 Y.B. INT'L HUMANITARIAN L. 167 (2003); Marko Sassòli, *Ius ad Bellum and Jus in Bello—The Separation Between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare: Crucial or Outdated?*, in *INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES—ESSAYS IN HONOUR OF YORAM DINSTEIN* 241 (Michael Schmitt & Jelena Pejic eds., 2007) [hereinafter Sassòli, *Ius ad Bellum*].

41. See, e.g., M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711, 714–16 (2008); Benvenisti, *The Legal Battle*, *supra* note 39, at 340 ("We can therefore anticipate that most future wars will be characterized as asymmetric, involving powerful regular armies and irregular non-state militias.")

42. See David Kretzmer, *Rethinking the Application of IHL in Non-International Armed Conflicts*, 42 ISR. L. REV. 8, 36 (2009) [hereinafter Kretzmer, *Rethinking*].

43. Sassòli, *Ius ad Bellum*, *supra* note 40, at 256.

operations without exposing their soldiers to significant (legal) risks as long as they are targeting legitimate targets, IHL enables states (under their domestic criminal laws) to prosecute fighters of non-state armed groups for their participation in hostilities even if they only target government soldiers.⁴⁴

This inequality raises serious concerns regarding the effectiveness of the law of NIACs. Combatant immunity is one of the main incentives for the parties to a conflict to comply with IHL norms.⁴⁵ Combatant immunity is one of the key ways in which individual soldiers in an IAC incur a direct gain from adhering to the laws of war and are thus incentivized to attack only legitimate targets.⁴⁶ In NIACs, there is no combatant immunity, and this is a major obstacle to the effectiveness of the law of NIAC. If an armed group's members can be tried for murder for the killing of a state's soldiers, these members have very little incentive to refrain from targeting civilians if they find such targeting to be a useful strategy.⁴⁷

In light of this background, this Article demonstrates in the following Parts that the debate over the classification of contemporary asymmetrical armed conflicts plays an important role in the battle over the desirable legal regime under which the deficiencies of the law of asymmetrical conflicts can be mitigated.

44. See Kretzmer, *Rethinking*, *supra* note 42, at 36. The possibility of a parallel prosecution of government forces by armed groups' courts is debatable, and some authors argue that it is not possible. See Parth S. Gejji, *Can Insurgent Courts Be Legitimate Within International Humanitarian Law?*, 91 TEX. L. REV. 1525, 1542 (2013) (arguing that an armed group's court might be in accordance with international law, but it cannot prosecute members of the armed forces for mere participation in hostilities). Other authors argue that armed groups can prosecute governmental forces as well. However, in practice this seems to be impractical in many cases, since this right is subject to the ability to guarantee impartiality, independence and other core fair trial principles, which might be unavailable to armed groups. See, e.g., Sandesh Sivakumaran, *Courts of Armed Opposition Groups: Fair Trials or Summary Justice?*, 7 J. INT'L CRIM. JUST. 489, 508 ("All this is not to say that armed opposition groups invariably conduct trials consistent with international standards. However, some of them have the potential to do so. Views to the contrary are often fair but sometimes overstated."); Jonathan Somer, *Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict*, 89 INT'L REV. RED CROSS 655, 690 (2007) ("It is unlikely that all but the most organized armed opposition groups would be able to meet the standards.")

45. Geoffrey S. Corn, *Thinking the Unthinkable: Has the Time Come To Offer Combatant Immunity to Non-State Actors?*, 22 STAN. L. & POL'Y REV. 253, 256 (2011).

46. Eric Talbot Jensen, *Combatant Status: It Is Time for Intermediate Levels of Recognition for Partial Compliance*, 46 VA. J. INT'L L. 209, 234 (2005).

47. *Id.* at 232.

III. TWO ALTERNATIVE RESPONSES TO THE INEQUALITY OF THE LAW OF NON-INTERNATIONAL ARMED CONFLICTS

The abovementioned efforts to change IHL treaty law were part of the general movement towards the “humanization of humanitarian law,”⁴⁸ which has strengthened the humanitarian aspects of IHL over the years.⁴⁹ The relevant actors in this humanization process are varied and include not only humanitarian organizations such as the ICRC, but also international tribunals and scholars who are among what David Luban calls “humanitarian lawyers.”⁵⁰ Following the failure to explicitly amend treaty law, these actors had to take a different approach in the quest to change the law of asymmetrical conflicts to a more protective regime. This new approach is based primarily on the use of interpretation to widen the protections granted under existing treaty law applicable to asymmetrical conflicts. What the use of interpretation seeks is not to obtain the explicit consent of states to changing IHL norms, but rather to win the battle of persuasion. It therefore seems to be a potentially promising alternative to the formal change of treaty norms.

This Part focuses on the use of interpretation with regard to the classification of asymmetrical conflicts as part of the humanization effort. In particular, looking once again at the situation in the former Yugoslavia and transnational armed conflicts, this Part examines how interpretation was used in these conflicts as a tool for substantive change in the legal regime. While the conflict in Yugoslavia was widely classified as an IAC, transborder asymmetrical conflicts have been widely classified as NIACs.⁵¹ The different positions regarding the classification of these conflicts represent two competing approaches to the inadequacy of the law of asymmetrical conflicts. The first approach, which I have called the inclusive approach, is an interpretive attempt to apply the norms of IAC to asymmetrical conflicts by either widening the definition of IAC, or by expanding the reach of the law of IAC through the mechanism of customary international humanitarian law to also

48. See MERON, *supra* note 36.

49. The change of IHL towards more humanitarian norms reflects not only a solution to the inequality of IHL norms, but also changes in the perceptions of legitimate means and methods of warfare.

50. Luban, *supra* note 1, at 315–16. For a description of the relevant actors and the way they use “soft law” and interpretation as a tool for progress that bypasses state-centered treaty law, see Benvenisti, *The Legal Battle*, *supra* note 39, at 346 (“NGOs, private legal experts, and other non-state actors have noted the willingness of tribunals to move the law beyond formal state consent and have embarked on several efforts to generate new law by adopting soft law ‘guiding principles’ and other such informal norms that ostensibly interpret the law. These norms practically move the law beyond state consent and below the radar screens of governments in the hope that domestic and international courts will resort to them as reflecting evolving law.”).

51. See *infra* Sections III.A and III.B.

apply to NIACs. The inclusive approach is merely the continuation of the general quest for the humanization of humanitarian law for the full application of IHL norms in all types of conflicts. Contrarily, the second approach, which I have called the exclusive approach, is an interpretive attempt to minimize the scope of application of IHL in asymmetrical conflicts in order to replace it with the more restrictive legal regime of IHRL. This approach deviates from the traditional desire to apply IHL in full in all types of conflicts and places in question the legitimacy and desirability of IHL as the main normative regime in such situations.

This Article does not argue that the conflict in the former Yugoslavia and the transnational armed conflicts of the twenty-first century are similar in all aspects. Indeed, it is fair to say that the conflict in the former Yugoslavia resembles conflicts between states more than transnational armed conflicts do. However, this Article does argue that these conflicts are similar in one important aspect: in both cases, the classification of the conflict was not obvious. The interpreters faced much discretion and could have classified the conflicts as either an IAC or NIAC. Moreover, the interpretations required the adoption of controversial positions. The humanitarian actors' decision to deviate from the traditional inclusive approach and to classify transnational armed conflicts as NIACs raises the question that this Article seeks to answer by pointing to the role of the politics of IHL in the classification debate.

This is not to say that the interpretive decisions were always fully conscious and deliberate attempts to promote the politics or ideological preferences of the relevant actors. Nonetheless, the influence of ideological preferences on one's interpretive positions has long been recognized and, as this Part demonstrates, can serve as an explanation for the different positions in the allegedly formalistic classification debate.⁵²

52. Aside from the references in note 1, which address the politics of IHL, there is much written on the effect of ideological preferences on decision making, mainly with regard to judicial decision making, and specifically with regard to the interpretation of norms. For an account of the politics of interpretation in international law, see Jan Klabbers, *On Rationalism in Politics: Interpretation of Treaties and the World Trade Organization*, 74 *NORDIC J. INT'L L.* 405, 406 (2005) ("As this paper seeks to demonstrate, interpretation is a highly political act, eventually deciding on the precise scope of rights and obligations. With a wink and a nod to Von Clausewitz, one might well quip that interpretation is the continuation of treaty negotiations by other means. The meaning of a treaty is not carved in stone at the moment of its conclusion: instead, debates continue, albeit no longer on what words to use in the treaty, but on how to give meaning to the words that are used."). For the seminal account of the attitudinal model, as applied to the United States Supreme Court, see JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

A. *The Inclusive Approach: From Tadić to the ICRC Study of Customary International Humanitarian Law*

This Part demonstrates how once the path that consisted of changing IHL treaty law had proven largely ineffective, a different road was taken by humanitarian actors—the inclusive approach. Instead of trying to change treaty law directly, the inclusive approach sought to use the interpretation of existing treaty norms as the main tool of the humanization project. Specifically, broader interpretation of the scope of IAC in existing treaty law and expansion of the scope of IHL norms as applying equally in both IAC and NIAC were used as demonstrated below, in court decisions, by various scholars, and by humanitarian organizations to improve humanitarian protection in asymmetrical conflicts.

The most important manifestation of the inclusive approach in the context of classification of armed conflicts is found in the Tadić case, the first trial before the International Criminal Tribunal for the Former Yugoslavia (ICTY).⁵³ Under article 2 of the ICTY statute, the tribunal has the power to prosecute persons who commit grave breaches of the Geneva Conventions.⁵⁴ These grave breaches are part of the treaty norms that govern IACs.⁵⁵ In the Tadić case, the ICTY Trial Chamber stated, following the Appeals Chamber decision on the interlocutory appeal on jurisdiction, that in order to decide whether the tribunal had jurisdiction under article 2 of the ICTY statute, the court first had to determine whether the conflict in that case constituted an IAC.⁵⁶ Specifically, it had to determine whether the type of relationship between the non-state armed group that Tadić belonged to, the Bosnian Serb forces (VRS), and the Yugoslav National Army (JNA) was sufficient for the classification of the conflict as an IAC.⁵⁷ Relying on the ICJ Nicaragua case,⁵⁸ the Trial Chamber

53. Prosecutor v. Tadić, Case No. IT-94-1-T (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997), <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts/70507JT2-e.pdf> [perma.cc/H8NM-LFFD] (archived Jan. 28, 2016).

54. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, art. 2, May 3, 1993, U.N. Doc. S/25704.

55. See GC I, *supra* note 19, art. 50; GC II, *supra* note 19, art. 51; GC III, *supra* note 19, art. 130; GC IV *supra* note 19, art. 147; API, *supra* note 27, art. 11.

56. The Appeals Court did not accept the position that these norms are part of customary law, applicable to non-international armed conflicts. See Tadić, Case No. IT-94-1-T, ¶¶ 559–60; Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 79–84 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> [perma.cc/RX37-FMB8] (archived Jan. 28, 2016).

57. See Tadić, Case No. IT-94-1-T, ¶¶ 584, 607.

decided that the relevant test should be the “effective control” test.⁵⁹ It then determined that despite the vital role of the JNA “in the establishment, equipping, supplying, maintenance and staffing” of the VRS, the “effective control” test was not satisfied.⁶⁰ As a result, the court had no jurisdiction over allegations relying on article 2 of the statute.⁶¹ In her dissenting opinion, Presiding Judge McDonald determined that the degree of control over the VRS was sufficient to characterize the conflict as an IAC.⁶² Judge McDonald reached this conclusion under both the “effective control” test and the more lenient “dependency and control” test.⁶³ Judge McDonald regarded the latter test as more suitable for cases of individual criminal responsibility when compared to attribution cases such as the Nicaragua case.⁶⁴

Among other grounds of appeal the prosecution filed an appeal against the ruling regarding the classification of the conflict.⁶⁵ The Appeals Chamber granted the appeal and acknowledged the existence of an IAC.⁶⁶ In reaching its conclusion, the Appeals Chamber adopted the famous “overall control” test for determining whether non-state armed forces are acting on behalf of a foreign state.⁶⁷ It emphasized that this more flexible test is relevant to cases of armed groups, while in cases of private individuals or groups that are not militarily organized, the relevant test remains the Nicaragua case’s “effective control” test.⁶⁸

The Appeals Chamber did not state explicitly that it embraced the “overall control” test as a tool to strengthen humanitarian protection in cases of asymmetrical conflicts. However, when examining the decision in light of the position of the Appeals

58. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 115 (June 27).

59. See *Tadić*, Case No. IT-94-1-T, ¶¶ 585-88.

60. See *id.* ¶¶ 595, 605.

61. See *id.* ¶¶ 595, 607-08.

62. See *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, § I (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

63. See *id.* § II.

64. See *id.*

65. *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶¶ 68-74 (Int'l Crim. Trib. for the Former Yugoslavia (Jul. 15, 1999), <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf> [perma.cc/7FYX-K7X3] (archived Jan. 28, 2016)).

66. *Id.* ¶ 162.

67. This case is mostly famous for its role as a symbol of the fragmentation of international law. See, e.g., Martti Koskeniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 555 (2002); Pemmaraju Sreenivasa Rao, *Multiple International Judicial Forums: A Reflection of the Growing Strengths of International Law or Its Fragmentation?*, 25 MICH. J. INT'L L. 929, 956-58 (2003); Ruti Teitel & Robert Howse, *Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order*, 41 N.Y.U. J. INT'L L. & POL. 959, 962 (2008). Too little attention was devoted to the substantive issue of its influence on the classification of armed conflicts.

68. *Tadić*, Case No. IT-94-1-A, ¶ 19.

Chamber throughout the entire judgment, as well as other decisions of the Appeals Chamber, this seems to be the most reasonable explanation for its decision.⁶⁹ The Appeals Chamber adopted a teleological approach that emphasized the importance of enhancing accountability even at the price of deviation from “legal formalities.”⁷⁰ This flexibility, which expresses itself in the “overall control” test, was applied by the Appeals Chamber only to situations involving armed groups and not to each and every situation of state responsibility.⁷¹ This application echoes the criticism made by Theodor Meron of the Trial Chamber’s decision, which stressed the importance of teleological interpretation, specifically in the context of humanitarian law conventions.⁷² Moreover, the Appeals Chamber’s classification was not a standalone decision; but rather, it reflected the tendency in the international law literature to classify the conflict in the former Yugoslavia as an IAC.⁷³

69. See Luban, *supra* note 1, at 329 (describing the Appeals Chamber’s classification as “a paradigm example of the IHL vision”).

70. *Tadić*, Case No. IT-94-1-A, ¶ 121.

71. *Id.* ¶¶ 131–32.

72. See Theodor Meron, *Classification of Armed Conflict in the Former Yugoslavia: Nicaragua’s Fallout*, 92 AM. J. INT’L L. 236, 239 (1998) (“In interpreting the law, our goal should be to avoid paralyzing the legal process as much as possible and, in the case of humanitarian conventions, to enable them to serve their protective goals.”).

73. See, e.g., George H. Aldrich, *Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia*, 90 AM. J. INT’L L. 64, 66–68 (1996); Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT’L L. 78, 81–82 (1994); James C. O’Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT’L L. 639, 647 (1993). But see Christopher Greenwood, *International Humanitarian Law and the Tadić Case*, 7 EUR. J. INT’L L. 265, 272–74 (1996). Indeed, in its Interlocutory Appeal decision, the Appeals Chamber rejected the claim that a single IAC had taken place and determined that the situation had both internal and international aspects. See *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 77 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). This position was criticized for enabling “the creation of a crazy quilt of norms that would be applicable in the same conflict” and thus for “the potential for unequal and inconsistent treatment of the accused.” MERON, *supra* note 36, at 238. The Appeals Chamber’s decision was limited, however, in the sense that it did not determine the actual classification of the specific conflict. Greenwood, *supra*, at 274. Moreover, this decision seems to have been based, at least partially, on a parallel concern to avoid a “crazy quilt of norms”; that is, the concern that classifying the conflict as an IAC would exclude Bosnian Serbs from protected persons status due to their Bosnian nationality, while regarding the Bosnian civilians as protected persons since the actions of the Bosnian Serbs would be considered acts of the Federal Republic of Yugoslavia. See *Tadić*, Case No. IT-94-1-AR72, ¶ 76. The exclusion of victims from protected person status indeed raises a humanitarian concern. However, this concern was rightly criticized as being “unconvincing and potentially dangerous,” since the tribunal’s interpretation of protected person status was not inevitable. Indeed, in its judgment in the *Tadić* case, the Appeals Chamber decided that Bosnian Serb victims ought to be regarded as protected persons, and adopted the inclusive approach to the classification of the conflict. See *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment,

More generally, the inclusive approach to classification can be seen as part of the tribunal's tendency to narrow the normative gap between international and non-international armed conflicts. The best known example of the use of the inclusive approach by the tribunal is the Tadić Appeals Chamber's October 1995 decision on the Interlocutory Appeal on jurisdiction ruling, which was delivered four years before the Appeals Judgment discussed above, particularly with regard to the scope of customary law norms applicable to internal armed conflicts.⁷⁴ In its decision, the Appeals Chamber not only recognized a broad set of norms as applying equally to IACs and NIACs but also explicitly questioned the justification of the separation between the two types of armed conflicts.⁷⁵ It also recognized the violation of many of these norms as international crimes. This approach suffers from a less than convincing methodology in recognizing customary IHL,⁷⁶ which strengthens the indication that its normative consequences played an important role in the court's decision. The Appeals Chamber repeated this position in subsequent cases, which endorsed the "overall control" test and the classification of the conflict as an IAC.⁷⁷ The tribunal's position regarding the scope of customary IHL is a good example of the inclusive approach, in which interpretive tools have been used to mitigate the vagueness and limited protection of the treaty norms that govern asymmetrical armed conflicts.⁷⁸ This example of the inclusive approach is not part of the classification debate but rather an interpretive way to decrease the need for a classification debate

¶¶ 164–69 (Int'l Crim. Trib. for the Former Yugoslavia (Jul. 15, 1999). The Trial Chamber in the Čelebići case had already adopted this position prior to the Tadić Appeal Judgment. See *Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgment, ¶¶ 236–66 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf [<https://perma.cc/SAR4-438K>] (archived Feb. 8, 2016).

74. See *Tadić*, Case No. IT-94-1-AR72.

75. See *id.* ¶ 97 (“[In] the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted ‘only’ within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.”)

76. See, e.g., Greenwood, *supra* note 73, at 277–78.

77. See *Prosecutor v. Delalić*, Case No. IT-96-21-A, Judgment, ¶¶ 17–20, 172 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001), <http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf> [<https://perma.cc/7VH2-QNEM>] (archived Feb. 8, 2016).

78. See Sandesh Sivakumaran, *Re-envisaging the International Law of Internal Armed Conflict*, 22 EUR. J. INT'L L. 219, 228–32 (2011) [hereinafter Sivakumaran, *Re-envisaging*] (describing the attempt to fill the normative vagueness of internal armed conflicts through the applications of customary IHL).

altogether by narrowing the normative gap between the two types of conflicts.⁷⁹ The inclusive approach to classification comes into play in those areas where the interpretive exercise has not succeeded in fully eliminating the gap between IAC and NIAC. This gap in protection is most apparent in international criminal law (ICL) where, in spite of significant progress, the number of international crimes is larger in the case of an IAC than in the case of an NIAC.⁸⁰ Nonetheless, the inclusive approach is not limited to ICL. A similar approach can be found, for example, in the ICRC customary IHL study.⁸¹ This study suggests that the vast majority of customary norms applicable in IACs also apply in NIACs, even though these norms do not necessarily appear in the treaty norms that govern NIACs.⁸²

If the inclusive interpretive approach to customary law had resulted in similar norms applying equally in both types of conflicts, it would have made the whole question of classification redundant. However, although the ICRC went quite far in its approach,⁸³ it does not recognize prisoner of war status in NIACs. Thus, it does not apply

79. See Benvenisti, *The Legal Battle*, *supra* note 39, at 347 (“No longer bound by parties’ consent, third parties, acting separately or collectively, can overcome power disparities between the parties to the conflict and the contingencies of this new type of asymmetric combat. The rise of international criminal law cannot be explained otherwise. Moreover, its applicability to internal armed conflicts must be attributed to the jurisprudence of the International Criminal Tribunal of the former Yugoslavia (ICTY), which has in only a few years of adjudicating war crimes in the former Yugoslavia virtually rewritten the law on internal armed conflicts. By formally asserting the laws customary status, the ICTY overcame years of governmental resistance to regulating methods for fighting insurgents.”)

80. See Rome Statute of the International Criminal Court, art. 8, July 12, 1998, 2187 U.N.T.S. 900. This difference might be mitigated in the future. For instance, following the Kampala Review Conference in 2010, the crime of “employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices” was added to the list of crimes for non-international armed conflicts. However, the amendment applies only to state parties that have ratified it, and thus far only twenty-six states have ratified. *Id.* ch. 18.

81. See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT’L COMM. OF THE RED CROSS, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005).

82. Another example of an approach which resembles the “inclusive approach” is the minimum humanitarian standards project, which aims at granting fundamental protections in all situations regardless of classification. See Theodor Meron & Allan Rosas, *A Declaration of Minimum Humanitarian Standards*, 85 AM. J. INT’L L. 375, 376 (1991).

83. According to the ICRC customary law study, the vast majority of customary norms apply equally in both types of conflict. For criticisms of the study’s approach to non-international armed conflicts, see John B. Bellinger, III & William J. Haynes, II, *A U.S. Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INT’L REV. RED CROSS 443, 447, 454, 460, 465 (2007) (criticizing, *inter alia*, the tendency of the study to acknowledge the customary status of norms in IACs, without sufficient evidence to support the extension of such customary norm to NIACs). *Contra* Jean-Marie Henckaerts, *Customary International Humanitarian Law: A Response to U.S. Comments*, 89 INT’L REV. RED CROSS 473, 485–87 (2007) (defending the methodological approach of the study with regard to NIACs).

combatant immunity, which accompanies this status, in these armed conflicts. As explained above, the absence of combatant immunity in NIACs is a major obstacle to the ability of the law to effectively mitigate suffering during armed conflicts. Even if one accepts the position of the ICRC customary study, there are still good reasons for adopting an inclusive approach to classification.

B. *The Exclusive Approach: The Classification of Transnational Armed Conflicts*

The so-called war on terror brought IHL once again to the forefront of the international law discourse. The normative debate over the law that governs transnational armed conflicts involves several core issues, one of them being the classification of such conflicts.⁸⁴

One may assume that the same rationale behind the classification of the conflict in the former Yugoslavia would lead humanitarian actors to the classification of transnational armed conflicts as IACs: if the regime of NIAC is less protective than the parallel regime of IAC, then classification of transnational armed conflicts as IACs is preferable from a humanitarian perspective. Indeed, the inclusive approach did not disappear, and the call for abandoning the separation between IAC and NIAC is still heard.⁸⁵

Nonetheless, it seems that the overwhelming majority of actors, including the majority of humanitarian actors,⁸⁶ classify these conflicts as NIACs.⁸⁷ If this were a case of simple interpretation,

84. See *infra* note 98.

85. See, e.g., Emily Crawford, *Unequal Before the Law: The Case for the Elimination of the Distinction Between International and Non-International Armed Conflicts*, 20 LEIDEN J. INT'L L. 441, 453–57 (2008); James G. Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, 85 INT'L REV. RED CROSS 313, 314 (2003).

86. It is not an easy task to divide these actors into groups. However, at least some of these authors admit that they belong to a specific ideological group. See, e.g., Marko Milanovic, *Norm Conflicts, International Humanitarian Law, and Human Rights Law*, in INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 95, 95–96 (Orna Ben-Naftali ed., 2011) [hereinafter Milanovic, *Norm Conflicts*] (“At the outset it must be said that this is not an abstract academic endeavour, but rather a pragmatic and practical project designed to have a real-life impact . . . The first, and broadest, is the affirmation of an idea: the law applicable in war is no longer solely a law between sovereigns who agree out of grace and on the basis of reciprocity to limit themselves in their struggles in order to reduce the suffering of innocent people. Rather, human beings embroiled in armed conflict retain those rights that are inherent in their human dignity, which are more—not less—important in wartime than in peacetime, and which apply regardless of considerations of reciprocity between warring parties.”).

87. See, e.g., Hamdan v. Rumsfeld, 548 U.S. 557, 629–36 (2006); INT'L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 10 (2011) [hereinafter ICRC CHALLENGES 2011]; SIVAKUMARAN, *supra* note 25, at 229; Derek Jinks, *September 11 and the Laws of War*,

where it is clear that only one classification is possible, there would be no real puzzle regarding the classification. Indeed, in many cases, the classification is presented by its supporters as the inevitable result of the interpretive exercise.⁸⁸ In an era where the law has moved away to a large extent from a formalistic, deterministic understanding of legal interpretation,⁸⁹ and in light of some alternative interpretive options for the classification of transborder armed conflicts,⁹⁰ this classification raises a question and calls for a closer examination of the possible reasons for the adoption of this interpretive approach. The following sections argue that the exclusive approach might be based on a competing normative approach to the inclusive approach.

1. The Exclusive Approach: Transnational Armed Conflicts as Non-International Armed Conflicts

The starting point for most authors when discussing the classification of transnational armed conflicts is that common article 2 (CA2) of the Geneva Conventions,⁹¹ which defines the notion of

28 YALE J. INT'L L. 1, 38 (2003); Claus Kreß, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts*, 15 J. CONFLICT & SECURITY L. 245, 255–57 (2010); David Kretzmer, *Targeted Killings of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L. 171, 210 (2005) [hereinafter Kretzmer, *Targeted Killings*]; Noam Lubell, *The War (?) Against Al-Qaeda*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 421, 431–36 (Elizabeth Wilmshurst ed., 2012) [hereinafter Lubell, *The War Against Al-Qaeda*]; Marko Milanovic & Vidan Hadzi-Vidanovic, *A Taxonomy of Armed Conflict*, in RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW 256, 305 (Nigel D. White & Christian Henderson eds., 2013); Sean D. Murphy, *Evolving Geneva Convention Paradigms in the "War on Terrorism": Applying the Core Rules to the Release of Persons Deemed "Unprivileged Combatants"*, 75 GEO. WASH. L. REV. 1105, 1136–140 (2007); Andreas Paulus & Mindia Vashakmadze, *Asymmetrical War and the Notion of Armed Conflict—A Tentative Conceptualization*, 91 INT'L REV. RED CROSS 95, 111–12 (2009); Marco Sassòli, *Use and Abuse of the Laws of War in the "War on Terrorism"*, 22 L. & INEQ. 195, 200–01 (2004) [hereinafter Sassòli, *Use and Abuse*]; Iain Scobbie, *Gaza*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 280, 301 (Elizabeth Wilmshurst ed., 2012); Iain Scobbie, *Lebanon 2006*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 387, 409–10 (Elizabeth Wilmshurst ed., 2012) [hereinafter Scobbie, *Lebanon 2006*]; Sylvain Vit e, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 9 INT'L REV. RED CROSS 69, 91–92 (2009). *But see* HCJ 769/02 Public Committee Against Torture in Israel v. Government of Israel PD 62(1) 507 [2005]; Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 32, 57–67 (Elizabeth Wilmshurst ed., 2012).

88. See, e.g., Paulus & Vashakmadze, *supra* note 87, at 111–12; Sassòli, *Use and Abuse*, *supra* note 87, at 200–01.

89. See, e.g., KENNEDY, *supra* note 1, at 91–98; MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA (2005); Michel Rosenfeld, *Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism*, 11 CARDOZO L. REV. 1211, 1211 (1989).

90. See *supra* part II.B.2.

91. See, e.g., GC III, *supra* note 19, art. 2.

IAC, does not apply to conflicts between a state and a non-state armed group.⁹² This position is based on a plain reading of the CA2 text, which limits its application only to “armed conflict which may arise between two or more of the high contracting parties,”⁹³ meaning only conflicts between two states. This reading is often presented as an almost trivial interpretation that requires no further consideration.⁹⁴ CA3, which deals with NIACs, refers to an “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . .”⁹⁵ A plain textual reading of CA3 suggests that it refers only to internal armed conflicts, due to the allusion to the territory of the state party in the text.⁹⁶ Moreover, the reality of transnational armed conflicts was not part of the discussion that led to the adoption of the Geneva Conventions, and the drafters of CA3 seem to have imagined only internal armed conflicts when the article was created.⁹⁷ This analysis equally applies to the definition of NIAC in AP2, which refers to conflicts “which take place in the territory of a High Contracting Party . . .”⁹⁸

Following this formalistic reading of CA2, most authors have concluded that it does not apply to transnational armed conflicts.⁹⁹ In contrast to the formalistic approach to CA2, these authors have adopted a much more flexible interpretive approach in the case of CA3, suggesting that an alternative textual interpretation of CA3 exists: the reference to a territory of one of the high contracting parties does not refer to the territory of a party to the conflict; but rather, to the requirement that the conflict should take place in the territory of one of the parties to the convention for CA3 regarding NIAC to apply.¹⁰⁰ In addition, it has been suggested that the use of the term “non-international armed conflicts” rather than “internal armed conflicts” further supports the position that any conflict that is not international is a non-international armed conflict.¹⁰¹ Another possibility is that even if only the effects of the attacks are felt within

92. See, e.g., Jinks, *supra* note 87, at 11; Sassòli, *Use and Abuse*, *supra* note 87, at 199.

93. See, e.g., GC III, *supra* note 19, art. 2.

94. See, e.g., Jinks, *supra* note 87, at 11–12; Scobbie, *Lebanon 2006*, *supra* note 87, at 409 (“It is generally accepted that an international armed conflict within the terms of the Geneva Conventions can only exist between States . . .”).

95 GC III, *supra* note 19, art. 3.

96. See, e.g., Lubell, *The War Against Al-Qaeda*, *supra* note 87, at 435; Milanovic & Hadzi-Vidanovic, *supra* note 87, at 288.

97. Bartels, *supra* note 20, at 66; Milanovic & Hadzi-Vidanovic, *supra* note 87, at 288.

98. Protocol II, *supra* note 27, art. 1(1).

99. This applies to all the authors that classify transnational armed conflicts as NIAC. See *supra* note 87.

100. See, e.g., Sassòli, *Use and Abuse*, *supra* note 87, at 201.

101. See, e.g., Lubell, *The War Against Al-Qaeda*, *supra* note 87, at 434; Sassòli, *Use and Abuse*, *supra* note 87, at 200.

the territory of the state party, this suffices to bring CA3 into play. This textual interpretation is not supported by the preparatory work of the Geneva Conventions.¹⁰² To the contrary, the article seems to have been designed for and intended to apply only to internal conflicts. The delegates to the diplomatic conference referred to internal conflicts (and in some instances to colonial wars that resemble civil wars),¹⁰³ and their substantive arguments focused on concerns regarding possible limitations on their sovereign rights with respect to their own nationals.¹⁰⁴

Some authors offer, in addition to the textual interpretation, a normative argument that suggests that the law of NIAC might be a more suitable legal framework for the regulation of conflicts in which non-state armed groups participate,¹⁰⁵ particularly since the norms of IACs were specifically designed for state actors and did not take into consideration non-state armed groups. This argument seems to be relevant only to some types of asymmetrical conflicts, in which the armed groups are relatively weak and unorganized. In some of the main contemporary asymmetrical conflicts, it is reasonable to assume that armed groups, which are well organized and have control over all or part of a territory, are capable of complying with most norms of

102. Without entering the general debate on treaty interpretation, this seems to be a situation for the invocation of Article 32 of the Vienna Convention on the Law of Treaties, which allows the recourse to preparatory work in cases of an ambiguous meaning. Vienna Convention on the Law of Treaties, art. 31–32, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention], <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> [<https://perma.cc/HU2B-S3XW>] (archived Feb. 8, 2016).

103. See, e.g., U.N. Special Comm., II Final Record of the Diplomatic Conference of Geneva of 1949, sec. B, at 41.

104. Perhaps the clearest example of both the reference to civil wars and the sovereignty concerns can be found in the words of Leland Harrison, the United States delegate to the diplomatic conference, who explicitly used the relevant words of the article in a way that emphasizes its territorial scope: “The convention would therefore be applicable in all cases of declared war between states, parties to the convention, and to certain armed conflicts within the territory of a state party to the convention. Every government had a right to put down rebellion within its borders and to punish the insurgents in accordance with its penal laws. Conversely, premature recognition of the belligerency of insurgents was a tortuous act against the lawful government and a breach of international law. The United States of America therefore considered that the convention should be applicable only where the parent government had extended recognition to the rebels . . .” *Id.* at 12. Similar positions were expressed by, among others, the delegates of the United Kingdom, France, Greece, Mexico, Norway, Spain, Canada, Monaco and Burma. See *id.* at 10–15, 40–48, 76–79, 82–84, 93–95, 97–102, 325–39.

105. See, e.g., Lubell, *The War Against Al-Qaeda*, *supra* note 87, at 434 (“Non-state actors would be unable to comply with many of the international armed conflict provisions, and States would be unwilling to grant non-state actors immunities from prosecution granted to prisoners of war in conflicts of this type.”); Sivakumaran, *Re-envisioning*, *supra* note 78, at 237–38.

IAC.¹⁰⁶ This is the case, for example, with respect to the conflict between Israel and Hamas, the conflict between Israel and Hezbollah, and possibly the recent conflict between the United States and several other states and ISIL. In addition, the same argument about the unsuitability of the law of IAC could also be made regarding an IAC between a state and a failed state that is unable to comply with all of the requirements of the law of IAC. Moreover, the same authors accept the possibility of an IAC between a state and a non-state armed group both in situations of state control over such a group and in Article 1(4) of API situations,¹⁰⁷ that is, situations in which the same concerns regarding the compatibility of IAC norms arise.

The heart of the normative argument of the exclusive approach lies elsewhere. It is the result of a normative position that focuses on the protective goal of IHL.¹⁰⁸ As Marco Sassòli states, “[F]rom the perspective of the aim and purpose of IHL, the latter interpretation [classification as NIAC] must be correct, as there would otherwise be a gap in protection, which could not be explained by States’ concerns about their sovereignty.”¹⁰⁹ According to Sassòli, the exclusive approach should be endorsed since it is the best out of only two viable interpretive options—the classification of the conflict as a NIAC or, alternatively, the inapplicability of any form of IHL norms to these conflicts.

Indeed, a formalistic reading of both articles might lead to the conclusion that IHL treaty law does not apply to this new kind of transnational armed conflict. This formalistic interpretation was endorsed by the first Bush administration¹¹⁰ and is the apologetic mirror image of the utopian position of the exclusive approach that lies at the heart of this Article. Criticism of the apologetic approach to classification is beyond the scope of this Article and has been

106. These conflicts resemble AP2 conflicts. The above criticism of the capabilities argument applies, of course, to all of these conflicts, regardless of a transnational element.

107. See NOAM LUBELL, *EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS* 96–98 (2010); SIVAKUMARAN, *supra* note 25, at 212–22, 225–28.

108. See, e.g., Elizabeth Holland, *The Qualification Framework of International Humanitarian Law: Too Rigid to Accommodate Contemporary Conflicts?*, 34 *SUFFOLK TRANSNAT’L L. REV.* 145, 159–69 (2011); Jinks, *supra* note 87, at 40–41; Lubell, *The War Against Al-Qaeda*, *supra* note 87, at 435; Sassòli, *Use and Abuse*, *supra* note 87, at 201.

109. Sassòli, *Use and Abuse*, *supra* note 87, at 201.

110. See Brief for Respondents at 37–40, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184); Memorandum from the President of the United States, to the Vice President, on Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002) [hereinafter Bush Memorandum], <http://www.fidh.org/IMG/pdf/memo11.pdf> [perma.cc/2ZTS-2LYJ] (archived Jan. 24, 2016); Memorandum from U.S. Department of Justice, Office of Legal Counsel, to William Haynes II, General Counsel, Department of Defense, on Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002), <http://www.justice.gov/olc/docs/memo-laws-taliban-detainees.pdf> [perma.cc/KAQ8-QWMU] (archived Jan. 24, 2016).

addressed in detail by other authors.¹¹¹ Since this conclusion is highly problematic from a humanitarian perspective, an interpretive exercise is needed in order to apply IHL norms to such conflicts. However, this humanitarian concern does not necessarily mandate deviation from a plain interpretation of CA3. An alternative solution might be found in widening the definition of IAC. If transnational armed conflicts can be classified as IACs following an interpretive exercise, then, following the rationale of the inclusive approach, classification of such conflicts as IACs seems to better serve the humanitarian purpose, as well as the pragmatic compromise of IHL.¹¹² The next section of this Article demonstrates that this is indeed the case: the classification of transnational armed conflicts as IACs is a reasonable interpretive position. Therefore, a closer examination of the motives behind the classification of transnational armed conflicts is needed.

2. An Alternative Interpretation: Transnational Armed Conflicts as International Armed Conflicts

The seminal cases in which transnational armed conflicts were classified as IACs are the Supreme Court of Israel's decisions regarding the classification of Israel's asymmetrical conflicts with the Palestinians and Hezbollah, especially the Targeted Killings case.¹¹³ In this case, the court discussed very briefly the classification question and concluded that the conflict between Israel and Palestinian armed groups is an IAC.¹¹⁴ The court determined, relying on a legal opinion by Antonio Cassese who served as expert witness for the petitioners, that any armed conflict within the context of an occupation should always be classified as an IAC.¹¹⁵ The court did not limit its position to the context of an occupation and defined an IAC

111. See, e.g., Kretzmer, *Rethinking*, *supra* note 42, at 11 (discussing the legitimizing role of IHL as a basis for the apologetic approach to classification); Marko Milanovic, *Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killing Case*, 89 INT'L REV. RED CROSS 373, 377 (2007) ("It must be noted that it certainly takes some audacity to cite the Martens Clause, of all things, which embodies the humanitarian spirit of the laws of armed conflict, as support for the thesis that there are armed conflicts which are governed by the law of war but are not regulated by it, and all for the purpose of torturing suspected terrorists for information.")

112. See *supra* Part I.

113. See HCJ 769/02 *Public Committee Against Torture in Israel v. Government of Israel* PD 62(1) 507 [2005]; CrimA 6659/06, *Anonymous v. State of Israel* PD 62(4), 329 (2008).

114. See *Public Committee Against Torture in Israel*, HCJ 769/02, ¶ 18. A possible explanation for the lack of a more comprehensive treatment of classification in the judgment might be the vague and inconclusive positions regarding the classification issue in both the petitioners' and the respondents' briefs, which might suggest that it was not a crucial question in the petition. See *id.* ¶¶ 5–7, 11.

115. *Id.* ¶ 18.

as any conflict “that crosses the borders of the state—whether or not the place in which the armed conflict occurs is subject to belligerent occupation.”¹¹⁶ In the *Unlawful Combatants* case, the court repeated this position.¹¹⁷ In both cases, the court did not engage with the language and interpretation of CA2 or CA3. Its interpretive analysis was limited to the statement that any cross-border armed conflict is an IAC.¹¹⁸ In contrast to the reliance of the exclusive approach on the term “non-international” as opposed to “internal” as a starting point for its interpretation of CA3, the Supreme Court seems to have relied on its plain understanding of the term “international” as any situation that is not internal as the basis for its interpretation. This position relies on the notion that the historical justification for the distinction between these two types of conflicts is grounded in the notion of territorial sovereignty.¹¹⁹

Dapo Akande provides a more elaborate argument for classifying transnational armed conflicts as IACs.¹²⁰ Akande argues that a transnational conflict against a non-state armed group that takes place without the consent of the territorial state in which the conflict occurs is an IAC.¹²¹ This interpretation is based on the position that any use of force on a state’s territory, even if it is directed only against a non-state armed group, is a use of force against the territorial state and gives rise to an IAC between the two states.¹²² This position, as Akande demonstrates, finds support in several sources, including the UN Commission of Inquiry into the 2006 conflict in Lebanon and the ICJ’s classification in the *Armed Activities* case.¹²³ Akande argues against the position that in such conflicts an IAC and an NIAC exist in parallel, the former between the two states and the latter between the foreign state and the armed group.¹²⁴ According to Akande, it is impossible to separate the conflicts, since any targeting of the armed group by the foreign state inevitably targets persons or objects that belong to the territorial state.¹²⁵

Another solution could be based on the parallel existence of transnational IACs in the realm of customary international law, in addition to the definitions in CA2 and CA3. This approach is similar to the claim that the recognition of belligerency, which transforms an

116. *Id.*

117. *See* CrimA 6659/06, *Anonymous v. State of Israel* PD 62(4), ¶ 9 (2008).

118. *See Public Committee Against Torture in Israel*, HCJ 769/02, ¶¶ 18, 21; *Anonymous*, CrimA 6659/06, ¶ 9.

119. *See, e.g., supra* note 104 and accompanying text.

120. *See* Akande, *supra* note 87, at 70–79.

121. *Id.* at 73–74.

122. *Id.*

123. *Id.* at 75–76.

124. *Id.* at 77.

125. *Id.*

NIAC into an IAC, exists under customary international law even after the adoption of CA3 and APII.¹²⁶ Under this approach, the treaty norms were not intended to supersede all alternative options for the application of the entire body of IHL norms. Another example of this path is the argument raised by those who support the recognition of transnational armed conflicts as a new category of armed conflict, governed by customary IHL, which is not dependent on the classification of the conflict as either an international or a non-international armed conflict.¹²⁷

Indeed, all of these interpretive options, which result in the classification of transnational armed conflicts as IACs, are far from a simple, formalistic reading of CA2 and CA3, or an undisputed description of the mainstream understanding of *de lege lata*. Nonetheless, these interpretive positions are not different in any meaningful way from the complex interpretive exercise that is needed in order to classify transnational armed conflicts as NIACs that fall within the definition of CA3. In fact, the most convincing textual interpretation of CA2 and CA3 seems to lead to the conclusion that they do not apply to transnational armed conflicts at all, as does the resort to the preparatory work of the conventions.¹²⁸ As mentioned, this was indeed the position that was initially adopted by the U.S. administration.¹²⁹ The (justified) reluctance to accept the reality of a legal black hole was the main reason for the adoption of these creative interpretations, taking into account the overall

126. See, e.g., Tom Farer, *Humanitarian Law and Armed Conflicts: Toward the Definition of "International Armed Conflict"*, 71 COLUM. L. REV. 37, 69 (1971); Yair M. Looftstein, *The Concept of Belligerency in International Law*, 166 MIL. L. REV. 109, 127–39 (2000); Konstantinos Mastorodimos, *Belligerency Recognition: Past, Present and Future*, 29 CONN. J. INT'L L. 301, 311–18 (2014).

127. See Kretzmer, *Targeted Killings*, *supra* note 87, at 195 (arguing that customary IHL norms apply to situations not covered by CA2 and CA3); Roy S. Schöndorf, *Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?*, 37 N.Y.U. J. INT'L L. & POL. 1, 54–62 (2005) (arguing that core IHL principles apply as a matter of customary law to armed conflicts that do not fall within the definitions of CA2 and CA3); see also Geoffrey Corn, *Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VAND. J. TRANSNAT'L L. 295, 327–29 (2007) (arguing for the adoption of a similar approach, but not basing this position on existing customary international law). *Contra* Milanović, *Norm Conflicts*, *supra* note 86, at 304 (arguing that this approach is not part of *de lege lata*).

128. A comprehensive account of the role, and possible efficient use, of the Vienna Convention of the Law of Treaties' (VCLT) rules of interpretation as a tool to increase the uniformity and predictability of interpretation lies outside the scope of this Article. In any case, the use of the VCLT's rules of interpretation does not seem to be able to easily resolve the interpretive debate over classification, since a textual interpretation may be in tension with the overall purpose of the treaty, which leaves the interpreter with relatively extensive interpretive discretion. See Vienna Convention, *supra* note 102, arts. 31–33.

129. See *supra* note 110 and accompanying text.

humanitarian purpose of the treaties.¹³⁰ Acknowledgment of the abovementioned complexity and indeterminacy of the legal rules, together with the possibility of adopting the inclusive approach as a solution to the “legal black hole problem,” as was done in previous conflicts and with regard to other interpretive questions, calls for further examination of the motives behind the exclusive approach.

IV. THE BATTLE OVER THE LAWS OF WAR—IHL, IHRL, AND THE CLASSIFICATION OF CONFLICTS

In order to understand the possible basis for the exclusive approach, it is necessary to take a step back and focus on a wider and more fundamental debate regarding the desirable legal regime to regulate armed conflicts. Numerous books and articles discuss the relationship between IHL and IHRL. This Article does not intend to contribute to the substantive debate on the relationship between the two regimes. Instead, it briefly describes the main positions in the convergence debate as background to the later demonstration of the way in which this substantive debate influences the classification debate.

A. *The Development of the IHL-IHRL Convergence Debate and the “Exclusive Approach”*

Historically, IHL and IHRL have developed separately, although both regimes are based to some extent on a common ideal—the need for the protection of the dignity and integrity of the person.¹³¹ The prevailing view was that the two regimes are mutually exclusive; they were perceived as a law for peace (IHRL) and a law for war (IHL).¹³²

This perception has changed, and today there is a general consensus that IHRL and IHL co-apply in situations of armed conflict.¹³³ Consequently, the current debate focuses almost

130. See, e.g., Sassòli, *Use and Abuse*, *supra* note 87, at 201.

131. See Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 *ISR. L. REV.* 310, 312 (2007).

132. See Robert Kolb, *The Relationship Between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions*, 38 *INT'L REV. RED CROSS* 409 (1998); Heike Krieger, *A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study*, 11 *J. CONFLICT & SECURITY L.* 265, 266 (2006); see also Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 *ISR. L. REV.* 17, 27–33 (2004) (discussing the different justifications of the mutual exclusivity approach).

133. Even states that traditionally adopted the mutual exclusivity approach seem to be beginning to change their position. See U.N. Human Rights Comm., Fourth

exclusively on the scope of the application of IHRL during armed conflicts.¹³⁴ The seminal case, which represents the co-application of the two regimes during armed conflicts, is the ICJ's Nuclear Weapons case, which states the following:

The Court observes that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.¹³⁵

The considerations that formed the basis of the initial debate regarding the co-application of IHL and IHRL have not disappeared as a result of this judgment, however, and they continue to govern the current discussion on the scope of convergence of the two legal regimes.¹³⁶ For the purposes of this Article, it suffices to present the two main legal approaches, which represent competing views regarding the role of human rights in armed conflicts: the first

Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, ¶ 506, U.N. Doc. CCPR/C/USA/4 (Dec. 30, 2011), [hereinafter U.S. Fourth Periodic Report] (“[A] time of war does not suspend the operation of the Covenant to matters within its scope of application.”). *But see* U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant Pursuant to the Optional Reporting Procedure, Fifth Periodic Reports of States Parties Due in 2013, Israel, ¶ 67, U.N. Doc. CAT/C/ISR/4 (Nov. 17, 2014) (“Israel recognizes that there is a profound connection between human rights and the Law of Armed Conflict, and that there may well be a convergence between these two bodies-of-law in some respects. However, in the current state of international law and state-practice worldwide, it is Israel’s view that these two systems-of-law, which are codified in separate instruments, remain distinct and apply in different circumstances.”).

134. See, e.g., Droege, *supra* note 131, at 314; Noam Lubell, *Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate*, 40 ISR. L. REV. 648, 650 (2007) [hereinafter Lubell, *Parallel Application*].

135. Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. Rep. 66, ¶ 25 (July 8). There were, of course, earlier manifestations of the co-application approach, which include, inter alia, Protocol I, *supra* note 27, art. 72; G.A. Res. 23 (XXIII), Human Rights in Armed Conflicts, U.N. Doc. A/Conf.32/41 (May 12, 1968). For a comprehensive account of the IHL/IHRL debate prior to the ICJ’s Advisory Opinion, see Milanovic, *The Lost Origins*, *supra* note 1.

136. Thus, the contemporary debate over the role of *lex specialis* resembles the debate over the mere application of human rights to armed conflicts, since practical consequence of the approach according to which IHL is the *lex specialis* and that there are no normative gaps in IHL is that no IHRL norms apply in armed conflicts.

remains loyal to the notion of the unique role of IHL in the regulation of armed conflicts, while the second believes in the centrality of the concept of human rights even in extreme situations.¹³⁷ According to the first approach, IHL is the *lex specialis*; consisting of the laws designed specifically to address situations of armed conflict. It overrides the *lex generalis* (IHRL), which was designed to address situations of peacetime relations between a government and individuals under its jurisdiction.¹³⁸ The primacy of IHL under this approach comes into play either through the use of IHL as an interpretive tool of relevant IHRL norms or the total rejection of the application of IHRL norms in cases of a clear contradiction between the two regimes.¹³⁹

The second approach regarding the relations of IHL and IHRL assumes a cumulative or complementary application of IHL and IHRL. According to this approach, both bodies of law can apply cumulatively to the same situation and each of the two regimes can influence the other.¹⁴⁰ As the Human Rights Committee described this approach in General Comment No. 31:

The Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.¹⁴¹

This second approach consists of several sub-approaches, which differ in exactly how the two regimes complement each other. One sub-approach holds that the complementarity question is dependent,

137. See Milanovic, *The Lost Origins*, *supra* note 1, at 1–3 (presenting these two approaches as “human rights skeptics” and “human rights enthusiasts”).

138. See DEPT OF DEFENSE, LAW OF WAR MANUAL § 1.6.3.1 (2015) [hereinafter DOD LAW OF WAR MANUAL], http://www.dod.mil/dodge/images/law_war_manual15.pdf [<http://perma.cc/893T-JPWH>] (archived Jan. 27, 2016); Krieger, *supra* note 132, at 170.

139. These are the two main possible meanings of the *Lex Specialis* principle. See Krieger, *supra* note 132, at 269–70. For a more comprehensive discussion of this principle, which is outside the scope of this Article, see, e.g., Droege, *supra* note 131; Lubell, *Parallel Applications*, *supra* note 134, at 654–56; Milanovic, *The Lost Origins*, *supra* note 1; Milanovic, *Norm Conflicts*, *supra* note 86; Iain Scobbie, *Principle or Pragmatics? The Relationship Between Human Rights Law and the Law of Armed Conflict*, 14 J. CONFLICT & SECURITY L. 449 (2010).

140. See Ben-Naftali & Shany, *supra* note 132, at 103–07.

141. Human Rights Comm., General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004). Arguably, the ICJ has revised its initial position, moving towards an approach that resembles general comment 31 in its *Armed Activities* case, which does not mention the *Lex Specialis* principle in the Judgment. See *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 116, ¶ 216 (Dec. 19).

to a large extent, on the specific type of conflict.¹⁴² Thus, for instance, some scholars argue that in cases of NIAC, IHRL will have a more important role in complementing lacunas in the existing law.¹⁴³ The normative basis of this approach relies both on the relative vagueness of IHL norms in situations of NIAC and on the importance of IHRL in regulating the relationship between a government and its citizens.¹⁴⁴

Two recent cases—*Hassan v. The United Kingdom* in the European Court of Human Rights (ECtHR) and *Mohammed v. Ministry of Defense* in the United Kingdom—exemplify this approach and illustrate the normative differences that can result from the classification exercise.¹⁴⁵ The *Hassan* case concerned the arrest and detention of an Iraqi national during the IAC in 2003. The court decided that no violation of article 5 of the European Convention on Human Rights (ECHR)¹⁴⁶ had occurred, although there were no grounds for detention under this article and no derogation was made under article 15 of the convention.¹⁴⁷ The court held, relying on articles 31(3)(b) and 31(3)(c) of the Vienna Convention on the Law of Treaties,¹⁴⁸ that, in IACs, article 5 should be read in light of the rules of IHL regarding prisoners of war and the detention of civilians.¹⁴⁹

142. In addition to the discussion below of internal armed conflicts, see Krieger, *supra* note 132, at 273–74 (discussing situations of international administration of territory as cases where the “favourable principle of human rights” should apply).

143. See, e.g., U.S. Fourth Periodic Report, *supra* note 133, ¶ 507; William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUR. J. INT’L L. 741, 746–51 (2005); Kretzmer, *Targeted Killings*, *supra* note 87, at 202; Krieger, *supra* note 132, at 273–75; Jens Davis Ohlin, *Is Jus in Bello in Crisis?*, 11 J. INT’L CRIM. JUST. 27, 35 (2013); Nancie Prud’homme, *Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?*, 40 ISR. L. REV. 355, 391 (2007).

144. See, e.g., Abresch, *supra* note 143, at 747 (“The rationale that makes resort to humanitarian law as *lex specialis* appealing—that its rules have greater specificity—is missing in internal armed conflicts.”); Krieger, *supra* note 132, at 275 (“Internal armed conflicts can be much closer to the regular sphere of application of human rights law, because they also concern the relation of the individual vis-à-vis his or her state.”).

145. See *Hassan v. United Kingdom*, App. No. 29750/09 (Sept. 16, 2014), <http://hudoc.echr.coe.int/eng?i=001-146501> [<http://perma.cc/2JFQ-CNCV>] (archived Jan. 27, 2016); *Rahmatullah v. Ministry of Def. & Foreign & Commonwealth Office* [2015] EWCA Civ 843 (U.K.), <https://www.judiciary.gov.uk/wp-content/uploads/2015/07/serdar-mohammed-v-ssd-yunus-rahmatullah-v-mod-and-fco.pdf> [<http://perma.cc/5CGH-SXCR>] (archived Jan. 27, 2016). The court reaffirmed the previous judgment of the High Court. See *Mohammed v. Ministry of Defense*, [2014] EWHC 1369 (QB) (U.K.), <http://justsecurity.org/wp-content/uploads/2014/05/Serdar-Mohammed-v-SSD-2014.pdf> [<http://perma.cc/Q9F5-3PEP>] (archived Jan. 27, 2016).

146. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221.

147. *Hassan*, App. No. 29750/09, ¶ 98.

148. See Vienna Convention, *supra* note 102, art. 31.

149. *Hassan*, App. No. 29750/09, ¶ 104.

The court stressed that its position was limited to IACs.¹⁵⁰ The *Mohammed* case concerned the legality of detention in the context of an NIAC in Afghanistan. The court held that the law of NIAC does not provide an independent power to detain, and, therefore, the ability to detain in the context of an NIAC is based on domestic law and IHRL.¹⁵¹ The court decided that in the absence of a derogation, the detention violated article 5 of the ECHR.¹⁵²

The outcome of these cases is that without explicit derogation, the ability to detain in NIACs is much more limited than the parallel ability in IACs. This is not to say that these decisions are necessarily accurate; in fact, the position of the court in the *Mohammed* case regarding the lack of authority to detain under the laws of NIAC is controversial,¹⁵³ and the recent General Comment 35 of the Human Rights Committee (HRC) does not seem to make the issue any less vague or controversial.¹⁵⁴ Nonetheless, the cases emphasize the

150. *Id.*

151. *See Mohammed v. Ministry of Defense*, [2014] EWHC 1369, ¶¶ 228–94 (QB) (U.K.).

152. *Id.* ¶ 298.

153. *See, e.g., Sean Aughey & Aurel Sari, Sorry Sir, We're All Non-State Actors Now: A Reply to Hill-Cawthorne and Akande on the Authority to Kill and Detain in NIAC*, EJIL: TALK! (May 9, 2014), <http://www.ejiltalk.org/sorry-sir-were-all-non-state-actors-now-a-reply-to-hill-cawthorne-and-akande-on-the-authority-to-kill-and-detai-in-niac/> [<http://perma.cc/DDM7-Y3MF>] (archived Jan. 27, 2016); Sean Aughey & Aurel Sari, *The Authority to Detain in NIACs Revisited: Serdar Mohammed in the Court of Appeal*, EJIL: TALK! (August 5, 2015), <http://www.ejiltalk.org/the-authority-to-detain-in-niacs-revisited-serdar-mohammed-in-the-court-of-appeal/> [<https://perma.cc/WXD5-TMQS>] (archived Feb. 8, 2016); Lawrence Hill-Cawthorne & Dapo Akande, *Does IHL Provide a Legal Basis for Detention in Non-International Armed Conflicts?*, EJIL: TALK! (May 7, 2014), <http://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts/> [<http://perma.cc/Z5HD-DAK6>] (archived Jan. 27, 2016); Ezequiel Heffes, *Guest Post: Detention in NIACs: A Pledge in Favour of the Application of IHL*, OPINIO JURIS (May 16, 2014, 5:48 AM), <http://opiniojuris.org/2014/05/16/guest-post-detention-niacs-pledge-favour-application-ihl/> [<http://perma.cc/VJ7H-8VRK>] (archived Jan. 27, 2016); Derek Jinks, *Does IHL Authorize Detention in NIACs?*, JUST SECURITY (May 5, 2014, 9:20 AM), <http://justsecurity.org/10144/ihl-authorize-detention-niacs/> [<http://perma.cc/LNL6-8HUD>] (archived Jan. 26, 2016); Kubo Mačák, *No Legal Basis Under IHL for Detention in Non-International Armed Conflicts? A Comment on Serdar Mohammed v. Ministry of Defence*, EJIL: TALK! (May 5, 2014), <http://www.ejiltalk.org/no-legal-basis-under-ihl-for-detention-in-non-international-armed-conflicts-a-comment-on-serdar-mohammed-v-ministry-of-defence/> [<http://perma.cc/7XBQ-CYA9>] (archived Jan. 27, 2016).

154. *See* U.N. Human Rights Comm., General Comment No. 35: Article 9 (Liberty and Security of the Person), U.N. Doc. CCPR/C/GC/35, ¶¶ 64–68 (Dec. 16, 2014). The general comment stipulates that “[s]ecurity detention authorized and regulated by and complying with international humanitarian law in principle is not arbitrary,” but it does not address explicitly whether such authority exists in NIAC. *Id.* ¶ 64. It is possible to argue that the specific reference to IAC in ¶ 66 with regard to procedural and substantive norms which limit the ability to derogate, but the absence of any such specific reference to IAC regarding the authority to detain, is an indication that the HRC believes that such authority exists in NIAC. *See id.* ¶ 66. However, this

potential of an extensive application of IHRL in the context of a NIAC. In addition, it is suggested that IHRL has a greater restrictive role in targeting of individuals in NIAC than in IAC.¹⁵⁵

B. The Role of IHRL in the Regulation of NIACs and the Classification of Transnational Armed Conflicts

The discussion in the previous section shed light on the motives behind the dominant approach to the classification of transnational armed conflicts as NIACs. While in the past the alternative to classification of a conflict as an IAC was the less protective law of NIACs, today the alternative consists of a mixture of NIAC norms and IHRL norms. If one accepts the position that IHRL is a favorable legal regime from a humanitarian point of view, then the classification of transnational armed conflicts as NIACs is a convenient avenue for the greater application of IHRL to such conflicts.¹⁵⁶ While it is beyond the scope of this Article to analyze the potential differences in the level of protection afforded by IHL and IHRL, it suffices to note that most authors agree that IHRL norms are more protective than IHL norms regarding targeting and detention,¹⁵⁷ which are the main subjects of controversy in the discourse on transnational armed conflicts.

A mirror image of the motives behind the classification debate is presented by David Kretzmer, who describes a shift in the willingness of states to classify conflicts as armed conflicts.¹⁵⁸ In the past, states were reluctant to recognize the existence of an armed conflict for several reasons, including the desire of states to avoid IHL regulation of their conduct and states' concerns with regard to enhancing the political legitimacy of the other side to the conflict.¹⁵⁹ A possible shift

conclusion is not inevitable and General Comment 35 seems to leave the issue unsettled.

155. See INT'L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 35 (2015); ICRC CHALLENGES 2011, *supra* note 87, at 20.

156. But see Natasha Balendra, *Defining Armed Conflict*, 29 CARDOZO L. REV. 2461, 2502 (2008) ("In some situations, applying IHL as *lex specialis* will result in equal or more protections for the individual . . .").

157. See, e.g., Monica Hakimi, *A Functional Approach to Targeting and Detention*, 110 MICH. L. REV. 1365, 1381–82 (2012) ("Applying IHL and HRL concurrently is straightforward when they lead to comparable outcomes. But on targeting and detention, IHL is understood to be more permissive."); Milanovic, *Norm Conflicts*, *supra* note 86.

158. See Kretzmer, *Rethinking*, *supra* note 42, at 18–22.

159. See *id.* at 21–22; see also Abresch, *supra* note 143, at 755–57 (discussing the refusal of Russia, Turkey and the United Kingdom to recognize the application of IHL to their internal conflicts); Avril McDonald, *Terrorism, Counter-Terrorism and the Jus in Bello*, in *TERRORISM AND INTERNATIONAL LAW: CHALLENGES AND RESPONSES* 57, 62 (Michael N. Schmitt ed., 2002) ("The British Government never recognized the situation in Northern Ireland as an armed conflict precisely because it did not want to recognize in the IRA any international legal status.").

in this position can be seen in recent years. States have started to recognize the legitimizing role of IHL regarding the ability to use lethal force in comparison to the limiting effect of IHRL and domestic law enforcement regulation.¹⁶⁰ The seminal examples of this shift are the official recognition by both Israel and the United States of the existence of an armed conflict in their twenty-first century asymmetrical conflicts.¹⁶¹

Kretzmer's account focuses on the threshold of application of IHL. He discusses the creation of CA3 in a world where IHRL was almost irrelevant and suggests that, in light of the legitimizing and apologetic role of IHL, the more protective norms of IHRL should provide the normative framework in low intensity internal conflicts.¹⁶² This position is in line with the literature that suggests that some situations within the "war on terror" do not reach the threshold of an armed conflict under IHL and therefore law enforcement norms should govern it.¹⁶³ In the same way, advancing the application of IHRL in asymmetrical conflicts seems to be an important consideration in the classification of such conflicts as NIACs and provides an answer to the initial problem, as Jens Ohlin writes with regard to a similar approach towards the substance of the norms of NIACs: "On the other hand, human rights lawyers often have the opposite interest. They seek to cabin IHL to its lowest possible ebb, thus increasing the space available for IHRL to fill the gap."¹⁶⁴ This is not to suggest that all those who classify transnational armed conflicts as NIACs should adopt this classification for the purpose of replacing IHL with IHRL, but rather that such considerations play a prominent role, although perhaps not explicitly. In the overall contemporary classification debate, this may go some way towards explaining the striking difference between the classification positions regarding the two types of conflicts discussed in this Article.

160. See Kretzmer, *Rethinking*, *supra* note 42, at 22–31. For criticism on the legitimizing role of IHL in the current "war on terror," see, e.g., KENNEDY, *supra* note 1; Berman, *supra* note 1. For a historical account of the legitimizing role of IHL, see Jochnick & Normand, *supra* note 1.

161. HCJ 769/02 Public Committee Against Torture in Israel v. Government of Israel PD 62(1) 507, ¶ 11 [2005] ("[The government of Israel's] position is . . . that the current conflict between Israel and the terrorist organizations is an armed conflict . . ."); Bush Memorandum, *supra* note 110.

162. See Kretzmer, *Rethinking*, *supra* note 42, at 39–40, 45.

163. See, e.g., Lubell, *The War Against Al-Qaeda*, *supra* note 87, at 441; Mary Ellen O'Connell, *When Is a War Not a War? The Myth of the Global War on Terror*, 12 ILSA J. INT'L & COMP. L. 535, 538 (2005) ("Outside the real wars of Afghanistan and Iraq, al Qaeda's actions and our responses have been too sporadic and low-intensity to qualify as armed conflict."); Sassòli, *Use and Abuse*, *supra* note 87, at 202–03.

164. Ohlin, *supra* note 143, at 36.

As mentioned above, the politics of IHL are often presented as a binary tension between the LOAC camp and the IHL camp.¹⁶⁵ IHRL was regarded by many as a parallel, rather than a conflicting, normative source in the effort to humanize warfare.¹⁶⁶ The exclusive approach to classification helps to rethink the binary description of the politics of IHL. This Article demonstrates that the politics of IHL can better be thought of as revealing a tertiary tension within a triangle comprised of the state apologetics camp, the IHL camp, and the IHRL camp. According to this more nuanced account of the politics of IHL, the IHL pragmatic ethos is not only challenged by state apologetic positions, such as the “legal black hole” position with regard to the classification of transnational armed conflicts, which argues that IHL does not apply at all to these conflicts.¹⁶⁷ It is also challenged by the exclusive approach, which limits the role of IHL in the regulation of these conflicts by providing a greater role for IHRL norms through the classification of these conflicts as NIAC. These IHRL norms do not share the basic principles of IHL that form the basis of the pragmatic compromise of IHL between military necessity and humanity.

Indeed, the emergence of this triangle can be explained by other models of decision making. It can be seen as a result of the institutional politics of different international law regimes.¹⁶⁸ For example, it can be argued that the inclusive approach, and especially the customary IHL project, is grounded in the ICRC’s desire to maintain the relevance of its expert vocabulary,¹⁶⁹ while the exclusive approach is a result of the institutional bias of human rights bodies. This tension provides some explanation for the division between the exclusive and inclusive approaches. This Article does not suggest that alternative accounts have no explanatory force but rather that these accounts cannot fully explain the classification debate. The debate does not follow exactly the institutional division between IHL and IHRL experts. The substantive question regarding the normative desirability of the two regimes in the regulation of

165. Luban, *supra* note 1, at 315–16.

166. See, e.g., Gabriella Blum, *Re-envisioning the Law of Internal Armed Conflict: A Reply to Sandesh Sivakumaran*, 22 EUR. J. INT’L L. 265, 265 (2011) [hereinafter Blum, *Re-envisioning*] (describing the move to ICL and IHRL as another tool of humanitarian advocates, in addition to the customary IHL project).

167. See *supra* note 85 and accompanying text.

168. See generally Martti Koskenniemi, *The Politics of International Law—20 Years Later*, 20 EUR. J. INT’L L. 7 (2009). For a general description of the different models of judicial decision-making relevant to a complex interpretive community such as the legal model, the attitudinal model, the rational choice model and the new-institutionalist model, see Keren Weinshall-Margel, *Attitudinal and Neo-Institutional Models of Supreme Court Decision Making: An Empirical and Comparative Perspective from Israel*, 8 J. EMPIRICAL LEGAL STUD. 556, 557–59 (2011).

169. See Koskenniemi, *supra* note 168, at 9.

asymmetrical conflicts seems to play a significant role in the classification debate in a way that crosses institutional lines.¹⁷⁰

Reconsidering the pragmatic compromise of IHL with regard to asymmetrical conflicts lies outside the scope of this Article,¹⁷¹ which only exposes the underlying tension at the basis of the classification debate and seeks to enable an open discussion of its desirability. In this regard, it is important to note that the characteristics of transnational armed conflicts are often, as explained below, dissimilar to the characteristics of internal armed conflicts. Although the use of formalistic arguments provides an easier basis for establishing one's position, the formalistic writing on classification does not provide an opportunity to engage in a comprehensive discussion on the normative desirability of the exclusive approach to classification. The following Part critically evaluates the desirability of the application of this exclusive approach to transnational armed conflicts.

V. CRITICAL THOUGHTS ON THE EXCLUSIVE APPROACH IN LIGHT OF THE IHRL-IHL DEBATE

In addition to exposing the indeterminacy and politics of the classification of conflicts in a way that has not been discussed before, stepping out of the formalistic interpretive exercise enables us to rethink the exclusive approach without the chains of formalistic arguments. The real interpretive choice is not between the application of the law of NIAC and a legal black hole, but between the law of NIAC and the law of IAC, and their respective relations to IHRL. This Part aims to shed light on the major considerations that should be taken into account when acknowledging the interpretive choice regarding the classification of transnational armed conflicts.

From a humanitarian perspective, the clear advantage of classifying transnational armed conflicts as NIACs is, as discussed above, the application of the more protective IHRL regime to these conflicts. This advantage is most important in low intensity conflicts

170. For example, the ICRC, an IHL organization, seem to classify cross-border armed conflicts between state and non-state armed groups as NIAC. See ICRC CHALLENGES 2011, *supra* note 87, at 10.

171. This issue is much debated in both just war theory and IHL literature. See, e.g., Benvenisti, *The Legal Battle*, *supra* note 39; Michael L. Gross, *Asymmetric War, Symmetrical Intentions: Killing Civilians in Modern Armed Conflict*, 10 GLOBAL CRIME 320 (2009); David Rodin, *The Ethics of Asymmetric War*, in THE ETHICS OF WAR: SHARED PROBLEMS IN DIFFERENT TRADITIONS 153 (Richard Sorabji & David Rodin eds., 2006); Marco Sassòli, *Introducing a Sliding-Scale of Obligations to Address the Fundamental Inequality Between Armed Groups and States?*, 93 INT'L REV. RED CROSS 426 (2011); Yuval Shany, *A Rebuttal to Marco Sassòli*, 93 INT'L REV. RED CROSS 432 (2011).

where concerns regarding the legitimating aspect of IHL and the fear of manipulation and abuse of IHL norms by (at least some) states are strongest.¹⁷² In this regard, the law of NIAC also has another possible advantage. The threshold of application of IHL in cases of an NIAC demands that the violence cross a certain threshold of intensity, a requirement traditionally believed to be absent in situations of IAC.¹⁷³ As a result, the classification of transnational armed conflicts as NIACs ensures that in cases of low intensity violence the applicable regime will only be that of IHRL, since IHL will not be applicable at all in those situations.¹⁷⁴ The traditional position regarding the lack of an intensity threshold for IACs, however, is not grounded in the text of CA2, and in recent years some support has developed for the recognition of such a threshold even in conflicts between states.¹⁷⁵ Therefore, it seems possible to apply a threshold requirement in cases of transnational armed conflicts, even if classified as IACs.¹⁷⁶

In addition, the law of NIAC might be a more suitable legal framework for the regulation of conflicts in which non-state actors participate, since the norms of IAC were specifically designed to suit state actors.¹⁷⁷ However, there are also other concerns that must be taken into account, some of which are relevant to the general IHL-IHRL debate in NIACs, and some that are specifically relevant to transnational armed conflicts.

First, the inequality of the law of NIAC and the absence of combatant immunity in such conflicts undermines the legitimacy and

172. See LUBELL, *supra* note 107, at 242; Kretzmer, *Rethinking*, *supra* note 42, at 42–43 n.107.

173. See GC: COMMENTARY, *supra* note 22, at 32 (“Any difference arising between two states and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2 . . .”).

174. See Shany, *supra* note 1, at 24 n.55 (“At least from one normative aspect, the Hamdan approach appears to me to be preferable: [w]hile all, or almost all, inter-state violence is governed by IHL . . . IHL applies in non-international contexts only when violence reaches a high threshold of intensity . . . Thus, the move from the ‘law and order’ paradigm to the ‘armed conflict’ paradigm is justified only when the phenomenon is of such a magnitude that escapes the scope of coverage of ‘law and order’ measures. This standard appears to limit the discretion of governments on when and how to invoke the exceptional powers conferred upon them by the armed conflict paradigm.”). *But see* Kretzmer, *supra* note 42, at 40 (arguing that at least with regard to CA3 the common position is that the threshold of its application is very low as well).

175. See INT’L LAW ASS’N, FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW (2010), <http://www.ila-hq.org/download.cfm/docid/2176DC63-D268-4133-8989A664754F9F87> [<http://perma.cc/4RSM-66CK>] (archived Jan. 28, 2016). *But see* ICRC CHALLENGES 2011, *supra* note 87, at 7–8.

176. This debate over the intensity requirement in IACs can essentially be seen as another manifestation of the same competing positions regarding the desirable legal framework that should govern violent conflicts. A comprehensive analysis of the substantive arguments and the underlying ideological tension of this issue lie beyond the scope of this Article.

177. See *supra* Section II.B.1.

effectiveness of its regulation. Indeed, even if transnational armed conflicts were classified as IACs, it is doubtful that states would be willing to recognize that members of armed groups fulfill the criteria required in order to gain combatant immunity.¹⁷⁸ States are reluctant to contribute to even a hint of the appearance of legitimacy on the part of non-state armed groups. In addition, due to the differences in power, states are less concerned with the consequences of denial of combatant status, since far fewer state soldiers are expected to be captured by the armed group.¹⁷⁹ However, states also clearly benefit from adherence to IHL rules by non-state armed groups, and this might incentivize them to make some compromises if it will result in more compliance by non-state actors. In addition, the reluctance to recognize combatant status in transnational armed conflicts, which involve foreign armed groups, is weaker than the reluctance to recognize the same status in situations of a local rebellion, which directly questions the legitimacy of the government in power. Lastly, if the existence of such status in transnational armed conflicts was widely recognized in the international law community, it might generate pressure on states to recognize the combatant status of members of armed groups who only attack legitimate targets due to an increased focus on this issue.

Second, there is grave doubt as to whether IHRL imposes obligations on non-state actors, specifically non-state armed groups.¹⁸⁰ When IHRL is used as an interpretive tool for norms of

178. See HCJ 769/02 Public Committee Against Torture in Israel v. Government of Israel PD 62(1) 507, ¶ 24 [2005] (“[T]he terrorist organizations from the area, and their members, do not fulfill the conditions for combatants. It will suffice to say that they have no fixed emblem recognizable at a distance, and they do not conduct their operations in accordance with the laws and customs of war.”) (citation omitted). One might argue that this is not a good example, since those organizations openly admitted that they were directly targeting civilians. It remains to be seen whether in cases of real fulfillment of the conditions states will still deny combatant status to members of organized armed groups.

179. This resembles the reasons for the reluctance of states to sign CA3’s special agreements, presented in Part I. However, signing a bilateral agreement with an armed group might be perceived as conferring legitimacy on the armed group, rather than the mere application of a legal norm to its individual members.

180. The dominant view is that non-state armed groups have no human rights obligations. See, e.g., MOIR, *supra* note 18, at 194; Yaël Ronen, *Human Rights Obligations of Territorial Non-State Actors*, 46 CORNELL INT’L L.J. 21, 47 (“[A]t present, customary international human rights law does not seem to extend beyond states, nor, obviously, does treaty law.”). There is a growing literature on the possibility that, at least in some situations, human rights apply to non-state actors, especially in cases where the armed group controls a territory. See, e.g., ICRC CHALLENGES 2011, *supra* note 87, at 14–15 (describing the application of IHRL to non-state actors as *de iure* lack of applicability, but possibly *de facto* applicable in cases of state-like armed groups); CRAWFORD, *supra* note 40, at 127–28; LIESBETH ZEGVELD, *THE ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW* 148–51 (2002). However, this position is controversial and, in any case, only covers some of possible asymmetrical conflicts. ICL could also potentially mitigate the lack of direct human rights obligations

NIAC, it does not pose a serious concern. However, applying IHRL norms to situations of NIAC to fill an alleged lacuna in the law raises the concern that these norms, at least in some conflicts, obligate only the state party to the conflict. This undermines the principle of equality of belligerents, which is another major tool used by IHL to advance compliance with its norms.¹⁸¹ Indeed, as noted earlier, the law of asymmetrical warfare suffers from the lack of equality between the parties to the conflict and a bias in favor of state interests. Nonetheless, it is very doubtful that introducing further inequality, binding states by more norms than their opponents, is the right way to mitigate this inequality.¹⁸²

Third, the normative position of the exclusive approach relies on arguments that were focused on internal armed conflicts. There are significant differences between transnational armed conflicts and internal armed conflicts that raise doubts regarding the desirability of the exclusive approach. One of the main arguments in the IHL-IHRL debate with regard to internal armed conflicts focuses on the prominence of IHRL in the context of the relationship between a state and its nationals.¹⁸³ This argument loses much of its strength in transnational armed conflicts, where states usually engage with foreign fighters. In these circumstances, IHRL cannot be seen as the regular normative framework for the relationship between the state and the members of these armed groups.¹⁸⁴

Lastly, in order to achieve its protective goal, the exclusive approach is dependent on its full acceptance: it relies on the adoption of not only its approach to classification, but also its position regarding the scope of the application of IHRL norms to NIACs and the extraterritorial application of IHRL to transnational armed conflicts. This means that even if one accepts the exclusive approach's normative value, its desirability is contingent on its adoption in full

on non-state actors. See Kretzmer, *Rethinking*, *supra* note 42, at 38. However, the notion of crimes against humanity captures only part of the relevant human rights obligations.

181. See, e.g., Kretzmer, *Rethinking*, *supra* note 42, at 37; Sivakumaran, *Re-envisioning*, *supra* note 78, at 241–42.

182. There is some explicit support in the literature for imposing more demanding obligations on states in modern asymmetrical warfare. See, e.g., Eyal Benvenisti, *The Law on Asymmetric Warfare*, in LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 929 (Mahmoud H. Arsanjani et al. eds., 2011); Gabriella Blum, *On a Differential Law of War*, 52 HARV. INT'L L.J. 163 (2011). A comprehensive discussion of these views, which do not represent the majority view, lies outside the scope of this Article.

183. See *supra* note 144.

184. See Blum, *Re-envisioning*, *supra* note 166, at 267–68 (“[T]he question whether the insurgent group is domestic or internationally-based . . . affects not only the pragmatic aspects of the application of any norm, but also the rationale for the norm to begin with. Consider, for instance, the practice of borrowing from IHRL to complement IHL: the nationality and area of operation of the non-state actor are critical for both the jurisprudential and normative bases for applying human rights obligations.”).

by the relevant actors. Not all actors necessarily accept both positions. One illustrative example of this concern is *Hamdan v. Rumsfeld*.¹⁸⁵ At first glance, *Hamdan v. Rumsfeld* seems to be a victory for the exclusive approach. The U.S. Supreme Court rejected the Bush administration's apologetic position that CA2 and CA3 did not apply to the conflict with al Qaeda and determined that CA3 did apply to the armed conflict.¹⁸⁶ The position of the Supreme Court was interpreted as either a classification of the conflict as an NIAC¹⁸⁷ or as the application of CA3 as part of customary international law regardless of the specific classification.¹⁸⁸ No matter which interpretation is adopted, the normative result remains the same—the application of the norms of NIAC to the transnational conflict with al Qaeda.¹⁸⁹

As mentioned above, this apparent victory for the exclusive approach is dependent on acceptance of the normative position regarding the role of IHRL in the regulation of transnational armed conflicts. This may therefore have been a Pyrrhic victory due to the reluctance of the United States to apply IHRL norms to these extraterritorial conflicts. The position of the United States is based on two separate claims: first, IHRL norms, especially the International Covenant on Civil and Political Rights,¹⁹⁰ do not apply extraterritorially,¹⁹¹ and second, the United States endorsed to a

185. *Hamdan v. Rumsfeld*, 548 U.S. 557, 629–36 (2006).

186. *Id.* at 629–30.

187. See, e.g., Jack M. Beard, *The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterrorism Operations*, 101 AM. J. INT'L L. 56, 57 (2006); George P. Fletcher, *The Hamdan Case and Conspiracy as a War Crime*, 4 J. INT'L CRIM. JUST. 442, 444 (2006); Memorandum from U.S. Dep't of Justice, Office of Legal Counsel, for the Attorney General, Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Awlaqi 24 (Jul. 16, 2010) [hereinafter Drone Memo], <https://www.documentcloud.org/documents/1202849-u-s-drone-memo.html> [<http://perma.cc/326D-HG7S>] (archived Jan. 27, 2016).

188. See, e.g., Akande, *supra* note 87, at 77; Eran Shamir-Borer, *Revisiting Hamdan v. Rumsfeld's Analysis of the Laws of Armed Conflict*, 21 EMORY INT'L L. REV. 601 (2007).

189. This is not to say that the U.S. Supreme Court has considered both options and accepted the position of the exclusive approach in the normative debate. The parties to the case did not raise the option of classifying the conflict as a regular IAC, but rather debated the legal black hole approach against either the absence of an armed conflict at all or the classification of the conflict as NIAC. In the same way, in the Israeli Targeted Killings case, the court did not heard arguments in favor of classifying the conflict as a NIAC, but rather either as an IAC or not an armed conflict at all.

190. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95–20, 999 U.N.T.S. 171.

191. This was a longstanding U.S. position. See, e.g., U.N. Human Rights Comm., United States Responses to Selected Recommendations of the Human Rights Committee (Oct. 10, 2007) [hereinafter U.S. Responses to the HRC], <http://2001-2009.state.gov/documents/organization/100845.pdf> [perma.cc/6D2E-RP2E] (archived

large extent the *lex specialis* model in which IHL completely displaces IHRL in situations of armed conflict.¹⁹² The U.S. position is reflected in the continued application of IHL and not IHRL norms by the U.S. administration as well as in several Supreme Court judgments with respect to detentions and targeted killings in relation to the “war on terror.”¹⁹³ For example, since the Supreme Court judgment in *Hamdi v. Rumsfeld*,¹⁹⁴ detentions of Taliban and al Qaeda suspects are governed by the laws of war.¹⁹⁵ Despite much criticism, U.S. courts have accepted the position that such suspects can be held in detention until the end of hostilities even in the unique circumstances of the

Jan. 28, 2016). Some writers have suggested a possible change in the U.S. position due to the vague articulation of its position on extraterritoriality in its last periodic report to the HRC. See U.S. Fourth Periodic Report, *supra* note 133, ¶¶ 502–05. However, the recent concluding observations by the committee clearly establish that the U.S. position remains unchanged. See Human Rights Comm., Concluding Observations on the Fourth Periodic Report of the United States of America, ¶ 4, U.N. Doc. CPPR/C/USA/CO/4 (Apr. 23, 2014).

192. This was also a clear position of the U.S. administration. See U.S. Responses to the HRC, *supra* note 191. Currently, the U.S. position is much more vague and seems to accept some form of moderate complementarity. See U.S. Fourth Periodic Report, *supra* note 133, ¶¶ 506–09. *But see* Drone Memo, *supra* note 187, at 28–30 (applying only the law of NIAC to targeting of armed groups’ fighters in NIAC).

193. For the Obama administration’s position regarding detention and targeting, see, e.g., Harold Hongju Koh, Legal Adviser, U.S. State Dep’t, The Obama Administration and International Law, Speech Given at the Annual Meeting of the American Society of International Law (Mar. 25, 2010) (“As a nation at war, we must comply with the laws of war, but detention of enemy belligerents to prevent them from returning to hostilities is a well-recognized feature of the conduct of armed conflict, as the drafters of Common Article 3 and Additional Protocol II recognized and as our own Supreme Court recognized in *Hamdi v. Rumsfeld*. The federal courts have confirmed our legal authority to detain in the Guantanamo habeas cases . . . as a matter of *international law*, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law . . . a state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force.”), <http://www.state.gov/s/l/releases/remarks/139119.htm> [<http://perma.cc/RZX9-HBUK>] (archived Jan. 28, 2016). The U.S. Supreme Court relied on IHL in several judgments on the “war on terror,” but did not address IHRL at all. For a general discussion of the role of IHL in the jurisprudence of the court, see David Weissbrodt & Nathaniel H. Nesbitt, *The Role of the United States Supreme Court in Interpreting and Developing Humanitarian Law*, 95 MINN. L. REV. 1339 (2011).

194. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

195. See Koh, *supra* note 193 (“[A]s a matter of international law, this Administration has expressly acknowledged that international law informs the scope of our detention authority. Both in our internal decisions about specific Guantanamo detainees, and before the courts in habeas cases, we have interpreted the scope of detention authority authorized by Congress in the AUMF as *informed by the laws of war*. Those laws of war were designed primarily for traditional armed conflicts among states, not conflicts against a diffuse, difficult-to-identify terrorist enemy, therefore construing what is ‘necessary and appropriate’ under the AUMF requires some ‘translation,’ or analogizing principles from the laws of war governing traditional *international* conflicts.”).

“war on terror.”¹⁹⁶ The recent Department of Defense Law of War Manual is an important manifestation of the humanitarian concerns regarding the consequences of the adoption of the exclusive approach.¹⁹⁷ The Manual endorses a very restrictive position toward the application of human rights to transnational armed conflicts: it rejects the extraterritorial applicability of the ICCPR together with a strict *lex specialis* approach to the relations between IHL and IHRL.¹⁹⁸ In addition, it holds to the position that, at least in some areas, the IHL governing NIAC is less restrictive than the IHL governing NIAC.¹⁹⁹ Thus, instead of the full application of IHL norms to these transnational armed conflicts, what remains are the vague and insufficient norms of NIACs without IHRL as a useful complementary mechanism. The law of NIAC, which serves as a convenient platform for the application of IHRL in situations of armed conflict, can equally serve conservative interpretations that might compromise humanitarian protection in such conflicts. This danger might be mitigated following a shift in the approach to the scope of the application of IHRL, and the recent *Mohammed v. Ministry of Defense* case may be a step in this direction,²⁰⁰ but the potential price of holding idealized positions in a non-ideal world must be taken into account.

VI. CONCLUSION

IHL is no longer necessarily perceived as the best way to advance the protection of victims of armed conflicts. IHRL is gaining more and more influence in this area. This Article has aimed to shed light on an often neglected area of the normative debate regarding the desirable legal regime in the regulation of armed conflicts. It argues that the classification of transnational armed conflicts as NIACs is based on the desire to decrease the role of IHL in these conflicts and to allow more space for the application of the more protective IHRL.

Following its demonstration of the contingent nature of the classification positions in the interpretive debate regarding transnational armed conflicts, this Article has argued for a more conscious and cautious choice of the legal regime that governs such conflicts. IHL is grounded in the hard reality of life where armed

196. Hamdi, 542 U.S. at 521; *Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010); Eric Talbot Jensen, *Guantanamo and the End of Hostilities*, 37 S. ILL. U. L.J. 491, 504 (2013).

197. See DOD LAW OF WAR MANUAL, *supra* note 138.

198. *Id.* §§ 1.6.3.1, 1.6.3.3, 17.2.1.3.

199. *Id.* §§ 17.1.3.3, 17.2.2.2.

200. See *Mohammed v. Ministry of Defense*, [2014] EWHC 1369 (QB) (U.K.).

conflicts are inevitable, at least in the foreseeable future. It swallows the bitter pill of its legitimating aspects for the benefit of IHL's effectiveness in limiting suffering during armed conflicts. This suggests that although its value is doubtful in low intensity conflicts, in high intensity conflicts, which can also take the form of transnational armed conflicts, great care should be taken before deciding to prefer IHRL over IHL. IHRL might impose more legal restrictions than IHL, but without the pragmatic compromise of IHL, and in the absence of clear endorsement by states of the application of IHRL, its practical significance is not clear.