

The Fight Against the Islamic State and *Jus in Bello*

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Abstract

This article examines several questions relating to international humanitarian law (*jus in bello*) with respect to the conflicts against the Islamic State. The first question explored is the classification of conflicts against the Islamic State and the relevant applicable law. The situation in Iraq is a rather classic non-international armed conflict between a state and a non-state actor with third states intervening alongside governmental forces. The situation in Syria is more controversial, especially with respect to the coalition's airstrikes against the Islamic State on Syrian territory. If the Syrian government is considered as not having consented to the coalition's operations, then, according to this author's view, the coalition is involved in two distinct armed conflicts: an international armed conflict with the Syrian government and a non-international armed conflict with the Islamic State. The second question analyzed in the article bears on the geographical scope of application of international humanitarian law. In this context, the article examines whether humanitarian law applies: in the entire territory of the state in whose territory the hostilities take place, in the territories of the intervening states, and in the territory of a third state.

Keywords

armed conflict; classification; geographical scope of application; targeted killing; transnational conflicts

I. INTRODUCTION

Aside from all the relevant *jus ad bellum* issues, the rise of the Islamic State (or the Islamic State of Iraq and the Levant, ISIL)¹ and the military operations conducted against it by foreign states in both Iraq and Syria also raise several interesting questions in relation to the application of *jus in bello* (international humanitarian law, IHL). As always when it comes to the application of IHL, the first crucial point revolves around the classification of conflicts. The transnational character of the conflict seems to challenge the established dichotomy between international and non-international armed conflicts.² The foreign interventions against ISIL in Iraq

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1 The Islamic State is also referred to as the Islamic State of Iraq and al-Sham (ISIS), the Islamic State of Iraq and the Levant (ISIL) or Daesh; see Irshaid, 'Isis, Isil, IS or Daesh? One group, many names', *BBC News*, 2 December 2015, available at www.bbc.com/news/world-middle-east-27994277.

2 See R. Bartels, 'Transnational Armed Conflict: Does it Exist?', in *Scope of Application of International Humanitarian Law, Proceedings of the 13th Bruges Colloquium*, (2013) 43 *Collegium* 114, at 115–17; C. Von der Groeben,

and Syria add to the complexity of the classification. This question is not theoretical; it has concrete consequences in terms of applicable law. The treaty rules applicable in international armed conflicts (IACs) are more developed than those applicable in non-international ones (NIACs).³ The gap between the legal regimes regulating the two types of armed conflicts has been bridged to a certain extent through customary international law.⁴ However, this extension has not gone completely unchallenged and has been met with some scepticism by a few states, the most prominent among them being the United States.⁵ Thus, at least with respect to these states, the determination of the restraints imposed by IHL on their operations will depend to some extent on the classification of conflicts.

Moreover, classification of conflicts may have a direct impact on international criminal responsibility for war crimes committed during military operations against ISIL. In the Rome Statute of the International Criminal Court (ICC), the war crimes applicable in an IAC are more numerous than those applicable in a NIAC.⁶ Violations of IHL rules as fundamental as the prohibition of attacks directed against civilian objects and the prohibition of disproportionate attacks constitute war crimes only when committed in the context of an IAC.⁷ Thus, since some of the states conducting airstrikes against ISIL in Iraq and Syria are parties to the Rome Statute,⁸ whether certain conduct will come under the material jurisdiction of the ICC may depend on the classification of the conflict the intervening states are involved in.⁹ This distinction may be relevant even for states that are not parties to the Statute, in case of scrutiny of their operations by international bodies¹⁰ or non-governmental organizations, if these bodies use the ICC Statute as a point of reference.

Transnational Conflicts and International Law (2014), 25 ff.; H. Duffy, *The 'War on Terror' and the Framework of International Law* (2015), 351–2.

- 3 J. d'Aspremont and J. de Hemptinne, *Droit International Humanitaire*, (2012), 72; M. Sassoli and L.M. Olson, 'The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts', (2008) 90 *International Review of the Red Cross* 599, at 601.
- 4 See J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (2005), Vol. I: Rules. One hundred and forty-two IHL rules out of the 161 identified as customary are applicable both to IACs and NIACs.
- 5 J.B. Bellinger and W.J. Haynes, 'A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law', (2007) 89 *International Review of the Red Cross* 443.
- 6 1998 Rome Statute of the International Criminal Court, 2187 UNTS 90, Arts. 8(2)(a)–(2)(c), 8(2)(e) ('*Rome Statute*').
- 7 *Ibid.*, Arts. 8(2)(b)(ii), 8(2)(b)(iv).
- 8 For example, Australia, Belgium, Canada, France, and the United Kingdom.
- 9 Journalists in the UK and Canada have voiced allegations that the intervening states' airstrikes have caused more civilian casualties than the states parties to the coalition are ready to admit. See the *Airwars* project, which tracks the international war against ISIL and other groups in Iraq and Syria and assesses the claims of civilian casualties, available at airwars.org. See also A. Ross, 'Hundreds of civilians killed in US-led air strikes on Isis targets – report', *Guardian*, 3 August 2015, available at www.theguardian.com/world/2015/aug/03/us-led-air-strikes-on-isis-targets-killed-more-than-450-civilians-report; T. Sawa, L. Fortune and G. Bdiwe, 'Coalition bombing linked to 48 allegations of civilian casualties in Iraq, Syria', *CBC News*, 30 October 2015, available at www.cbc.ca/news/world/fifth-estate-canada-airstrikes-record-coalition-1.3296285.
- 10 For example, the Human Rights Council's Commission of Inquiry on Syria. However, it is reported that the Commission will not investigate airstrikes in Syria by foreign nations. See, S. Malo, 'U.N. war crimes team will not investigate foreign air strikes in Syria', *Reuters*, 16 December 2015, available at news.trust.org/item/20151216230747-x1ept.

The second crucial question raised in the context of the fight against ISIL relates to the geographical scope of application of IHL. This question is exemplified by the attacks linked to ISIL and conducted outside the territory of Iraq and Syria, for example in Tunisia,¹¹ Yemen,¹² and Libya.¹³ The attacks were claimed either by ISIL or by groups pledging allegiance to ISIL. The most prominent example for Western countries may be the 13 November 2015 attacks in Paris, claimed by ISIL, in which more than 100 people were killed and many more were wounded.¹⁴ In a blog post published on 11 January 2016, a Judge Advocate in the US Air Force raised the salient question:

if “Paris” happened in the United States, would the rules of engagement center on law enforcement principles or the laws of war? ... [T]here are significant differences between past isolated terror attacks and those like Paris that make answering this question more difficult than it may seem. When it comes to ISIS in the US, an argument may be made that either legal regime — or both — actually apply.¹⁵

This statement hints at the difficulties of identifying the geographical scope of application of IHL in the fight against ISIL. Deciding in favour of the application of IHL in situations such as the Paris attacks means that the lawfulness of the use of lethal force will be judged first and foremost according to IHL rules regulating the conduct of hostilities. These rules appear, at least in some cases, to be more permissive than those of international human rights law (IHRL) regulating resort to force.¹⁶

The present article will explore these questions. First, it will examine the classification of conflicts and the applicable law in relation to the foreign interventions against ISIL in Iraq and Syria (Section 2). Second, it will address the issue of the geographical scope of application of IHL in the context of the fight against ISIL (Section 3).

2. CLASSIFICATION OF CONFLICTS AND APPLICABLE LAW

This section assesses the classification of armed conflicts in the fight against ISIL in Iraq and Syria. As noted above, the main focus is the conflicts involving the foreign

11 “Tunisia attack on Sousse beach “kills 39”, *BBC News*, 27 June 2015, available at www.bbc.com/news/world-africa-33287978.

12 M. Ghobari and M. Mukhashaf, ‘Suicide bombers kill 137 in Yemen mosque attacks’, *Reuters*, 20 March 2015, available at www.reuters.com/article/us-yemen-attack-bomb-idUSKBN0MG11J20150320.

13 UN Security Council, Security Council Press Statement on Libya, UN Doc. SC/12194, 8 January 2016.

14 ‘Attaques à Paris: le point sur l’enquête et le déroulé des attaques’, *Le Monde*, 13 November 2015, available at www.lemonde.fr/societe/article/2015/11/13/fusillade-meurtriere-a-paris_4809485_3224.html.

15 A. A. Jackson, ‘ISIS in the United States: Which Legal Regime Applies?’, *Just Security*, 11 January 2016, available at www.justsecurity.org/28745/isis-united-states-legal-regime-applies/.

16 C. Droegge, ‘The interplay between international humanitarian law and international human rights law in situations of armed conflict’, (2007) 40 *Israel Law Review* 310, at 344. According to Droegge ‘International humanitarian law accepts the use of lethal force and tolerates the incidental killing and wounding of civilians not directly participating in hostilities, subject to proportionality requirements. In human rights law, on the contrary, lethal force can only be resorted to if there is an imminent danger of serious violence that can only be averted by such use of force’. This is without prejudice to the issue of the extraterritorial application of HR treaties or to the debate about whether IHL rules relating to the conduct of hostilities may be considered as *lex specialis* with respect to HRL.

states intervening in both countries, in particular the operations conducted by the US-led coalition named 'Operation Inherent Resolve'.¹⁷ We will thus not deal with the NIACs opposing ISIL to other armed groups operating in these countries.¹⁸ After analysing the coalition's operations in Iraq, whose classification does not present particular difficulties (Section 2.1), we will turn to the military operations of the coalition in Syria, whose classification is somewhat more complicated (Section 2.2).

2.1. Conflict against the Islamic State in Iraq

At the beginning of 2014, after days of intense fighting with the Iraqi security forces, ISIL seized the city of Fallujah, in the Anbar province.¹⁹ Hostilities spread rapidly throughout the first half of 2014 and ISIL took control of part of the Iraqi territory including several cities.²⁰ On 29 June 2014, ISIL proclaimed the establishment of a caliphate in the territories under its control in Iraq and Syria.²¹ Following an appeal by the Iraqi government,²² the US launched airstrikes in Iraq in August 2014.²³ Soon after, a coalition was formed in order to coordinate the military intervention against ISIL, codenamed *Operation Inherent Resolve*.²⁴ Several states joined the US in the airstrikes.²⁵ Military operations continue to this day.

2.1.1. Classification of conflicts

As is the case with all NIACs, it is very hard to establish with precision the beginning of the NIAC opposing the Iraqi governmental forces to ISIL. According to established case law by the International Criminal Tribunal for the Former Yugoslavia (ICTY), two criteria are relevant for establishing the existence of a NIAC: (i) the intensity of the conflict and (ii) the organization of the parties.²⁶ The Tribunal has proposed a

17 US Department of Defense, Operation Inherent Resolve, Strikes in Iraq and Syria, available at www.defense.gov/News/Special-Reports/0814_Inherent-Resolve.

18 See e.g., Human Rights Council, Report of the independent international commission of inquiry on the Syrian Arab Republic, UN Doc. A/HRC/27/60, 13 August 2014, at 4–5.

19 L. Sly, 'Al Qaeda force captures Fallujah amid rise in violence in Iraq', *Washington Post*, 3 January 2014, available at www.washingtonpost.com/world/al-qaeda-force-captures-fallujah-amid-rise-in-violence-in-iraq/2014/01/03/8abaeb2a-74aa-11e3-8def-a33011492df2_story.html.

20 ICRC, 'Iraq: Civilians and medical facilities bear brunt of fighting in Fallujah', News Release 14/87, 26 May 2014, available at www.icrc.org/eng/resources/documents/news-release/2014/05-26-iraq-fallujah-medical-civilian.htm.

21 T. Coghian and D. Haynes, 'Isis declares the creation of its own Islamic state', *The Times*, 30 June 2014, available at www.thetimes.co.uk/tto/news/world/middleeast/iraq/article4133916.ece.

22 Letter dated 25 June 2014 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General, UN Doc. S/2014/440, 25 June 2014; Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, UN Doc. S/2014/691, 22 September 2014.

23 US Department of Defense, Statement by Pentagon Press Secretary Rear Admiral John Kirby on Airstrikes in Iraq, News Release No. NR-419-14, 8 August 2014, available at archive.defense.gov/Releases/Release.aspx?ReleaseID=16878.

24 See US Department of Defense, *supra* note 17.

25 The states that have conducted airstrikes in Iraq – and still do so – include Australia, Belgium, Canada, Denmark, France, Jordan, the Netherlands, and the UK. See US Department of Defense, *supra* note 17.

26 See, among many, ICTY, *Prosecutor v. Limaj et al.*, Judgement, Case No. IT-03-66-T, T.Ch., 30 November 2005, para. 84; ICTY, *Prosecutor v. Haradinaj et al.*, Judgement, Case No. IT-04-84-T, T.Ch. I, 3 April 2008, para. 38; ICTY, *Prosecutor v. Boškoski and Tarčulovski*, Judgement, Case No. IT-04-82-T, T.Ch. II, 10 July 2008, para. 175. See also E. David, *Principes de droit des conflits armés* (2012), at 133–41; d'Aspremont and de Hemptinne, *supra* note 3, at 66–70; S. Sivakumaran, *The law of non-international armed conflict* (2012), at 164–80. While these

list of indicative factors relevant in determining whether the required threshold of intensity and organization has been met.²⁷ Also, the ICRC Commentary to the 1977 Second Additional Protocol defines the notion of internal disturbances,²⁸ which serves as ‘the lower threshold of the concept of armed conflict’.²⁹ However, despite these elements, the moment when a situation of internal disturbances transforms itself into a NIAC is notoriously difficult to identify. In any case, it seems clear that in 2014, there was a NIAC between the Iraqi governmental forces and ISIL.³⁰ The conflict cannot be viewed as international because, despite its name, the Islamic State is not a state under international law,³¹ nor is it a non-state actor acting under the (overall) control of another state.³² Therefore, the conflict does not oppose the Iraqi governmental forces to the forces of another state.³³

The intervention of the coalition of foreign states alongside the Iraqi governmental forces does not change this classification. Indeed, according to state practice and international case law, the intervention by a foreign state or states in a NIAC on the side of the government does not internationalize the pre-existing NIAC.³⁴

conditions are relevant for applying both Common Article 3 and the 1977 Second Additional Protocol to a NIAC, additional conditions need to be fulfilled in order for the 1977 Additional Protocol to be applied. As it will be shown below, this protocol is not applicable in this case; see Section 2.2.1.

- 27 For the intensity of the conflict, these factors include ‘the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict’. See ICTY, *Haradinaj* 2008 Trial Judgement, *supra* note 26, para. 49. For further references, see ICTY, *Boškoski and Tarčulovski* 2008 Trial Judgement, *supra* note 26, paras. 177–8. As to the organization of the parties, relevant for dissident armed groups, the indicative factors identified by the ICTY, include ‘the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords’. ICTY, *Haradinaj* 2008 Trial Judgement, *supra* note 26, para. 60. For further references, see ICTY, *Boškoski and Tarčulovski* 2008 Trial Judgement, *supra* note 26, paras. 199–203.
- 28 Y. Sandoz et al. (eds.), *Commentary on the Additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), 1355, para. 4475.
- 29 *Ibid.*, at 1354, para. 4473.
- 30 ICRC, *Annual Report 2014* (2015), 480.
- 31 R. van Steenberghe, ‘La légalité de la participation de la Belgique à la lutte armée contre l’Etat islamique en Irak’, (2015) 134 *Journal des Tribunaux* 641, at 651–2; Y. Shany, A. Cohen and T. Mimran, ‘ISIS: Is the Islamic State a State?’, *The Israel Democracy Institute*, 14 September 2014, available at en.idi.org.il/analysis/articles/isis-is-the-islamic-state-really-a-state/; A.-L. Chaumette, ‘Daech, un “Etat” islamique?’, (2014) LX *Annuaire français de droit international* 71.
- 32 According to the well-established case-law of international criminal tribunals, the control required in order for armed groups to be considered as acting on behalf of a state for the purposes of applying IHL (designated as ‘overall control’) is defined as having ‘a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group’. For a recent confirmation of this definition, ICC, *Prosecutor v. Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/04-01/06, T.Ch. I, 14 March 2012, para. 541 with further references.
- 33 Article 2 common to the four 1949 Geneva Conventions; see Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, 75 UNTS 31, at 32.
- 34 ICC, *Prosecutor v. Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, 15 June 2009, para. 246; ICC, *Prosecutor v. Mbarushimana*, Decision on the confirmation of charges, ICC-01/04-01/10-465-Red, PTC I, 16 December 2011, paras. 101–2. The ICRC asserts that ‘[t]here have been numerous instances in which assisting States, which are fighting in the territory of a non-neighbouring host State alongside its

For example, Mrs Claire Landais, Director of Legal Affairs of the French Ministry of Defence, noted that France views the French military operations in Mali (operation Serval launched in January 2013 at the request of the Malian government³⁵), and in Iraq against ISIL as non-international.³⁶ This also reflects the position adopted by the ICRC, which confirms that such ‘multinational’ NIACs remain NIACs.³⁷

It should be noted that in such cases (foreign intervention alongside a state in a NIAC opposing the host state and a non-state armed group operating within the host state’s territory) there is no new NIAC between the intervening states and the armed group. The NIAC is the same as the one that existed before the intervention. The only difference is that, while before the intervention the adversary of the armed group was only the host state, now the group has to fight against more than one state. Thus, no separate evaluation is required in order to determine whether the hostilities between the intervening states and the armed group rise to the level of intensity required for a NIAC to exist. Indeed, the criterion of intensity is considered as established due to the previous confrontations between the armed group and the host state government. The same goes for the criterion of the organization of the parties. As a result, the military operations of the intervening states are integrated into the pre-existing NIAC and are regulated by IHL since the very first strike. This has been confirmed in the context of the coalition’s airstrikes against ISIL in Iraq: we are not aware of any state having argued that IHL does not apply to the initial phase of its military operations claiming that the hostilities between its forces and ISIL had not yet reached the required level of intensity.³⁸ This classification is the logical consequence of the invitation addressed by Iraq to the intervening states. The opposite solution would result in IHL not being able to regulate the initial phase

armed forces against one or more organized armed groups, have accepted the applicability of Common Article 3 and of other relevant provisions of IHL to this type of conflict; ICRC, *International humanitarian law and the challenges of contemporary armed conflicts*, Report prepared for the 32nd International Conference of the Red Cross and the Red Crescent, Doc. 32IC/15/11, 31 October 2015, at 15, available at www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts.

- 35 See, the intervention of the representative of Mali before the Security Council, UN Security Council, 6905th meeting, UN Doc. S/PV.6905, 22 January 2013, at 6. See also Mali – Statement by M. François Hollande, President of the Republic, following the select defence council, 12 January 2013, available at basedoc.diplomatie.gouv.fr/vues/Kiosque/FranceDiplomatie/kiosque.php?fichier=baen2013-01-14.html. For more similar statements, see Christakis and Bannelier, ‘French Military Intervention in Mali: It’s Legal but ... Why? Part I’, *EJIL Talk!*, 24 January 2013, available at www.ejiltalk.org/french-military-intervention-in-mali-its-legal-but-why-part-i/#more-7483.
- 36 C. Landais, ‘Entre l’application du droit et les hostilités, cadre légal et règles d’engagement’, Intervention at a Round Table on *La distinction entre conflits armés internationaux et non-internationaux: défis pour le DIH?*, 4 September 2015, at 1–6, available at www.ihl.org/wp-content/uploads/2015/11/Landais.pdf.
- 37 ICRC, *International Humanitarian Law and the challenges of contemporary armed conflicts*, Report, 31IC/11/5.1.2, October 2011, at 10, available at app.icrc.org/e-briefing/new-tech-modern-battlefield/media/documents/4-international-humanitarian-law-and-the-challenges-of-contemporary-armed-conflicts.pdf. See also D. Akande, ‘Classification of Armed Conflicts: Relevant Legal Concepts’, in E. Wilmschurst (ed.), *International Law and the Classification of Conflicts* (2012), 32 at 62.
- 38 Also, in a joint report covering the period from 11 September to 10 December 2014, the OHCHR and the UN Assistance Mission for Iraq (UNAMI) asserted that the coalition states intervening in Iraq were parties to a NIAC, without undertaking any evaluation of whether the conditions for the existence of a NIAC were fulfilled with respect to each state of the coalition. See, OHCHR – Human Rights Office of UNAMI, *Report on the Protection of Civilians in Armed Conflict in Iraq: 11 September – 10 December 2014*, at 3 and 17, available at www.ohchr.org/Documents/Countries/IQ/UNAMI_OHCHR_Sep_Dec_2014.pdf.

of the operations of invited states, thus allowing the host state to circumvent the application of IHL by inviting foreign states to fight a non-state actor in its stead.³⁹

One case needs to be distinguished from the aforementioned analysis: Turkey's intervention in Iraq in December 2015. At the beginning of December 2015, several hundred Turkish soldiers entered Northern Iraq without Iraq's consent.⁴⁰ These actions were considered by Iraq as a hostile act⁴¹ and Turkey was asked to withdraw its troops from Iraqi territory within 48 hours.⁴² Iraq complained that Turkey's actions were 'in flagrant violation of the provisions and principles of the Charter of the United Nations' and were 'an act of aggression under the Charter and the relevant provisions of international law'.⁴³ The invocation of Turkey's *jus ad bellum* violation by Iraq is indicative of the absence of consent by Iraq with respect to the presence of Turkish forces in its territory.⁴⁴ Although Turkey did withdraw part of its troops during the following days,⁴⁵ on 30 December 2015, the Iraqi Prime Minister denounced the continued presence of Turkish soldiers in Iraqi territory.⁴⁶ Given the absence of Iraq's consent concerning the presence of the Turkish troops within its territory⁴⁷ this situation constitutes an IAC, despite the absence of direct hostilities between the forces of the two states, according to Common Article 2, paragraph 2 of the Geneva Conventions.⁴⁸

2.1.2. *Applicable law*

What is the applicable law to the NIAC in Iraq? In view of the universal state participation to the Geneva Conventions, there is no doubt that Common Article 3 to the Geneva Conventions applies to this conflict, along with customary IHL.⁴⁹ Also, conventions imposing an obligation on states parties to 'never, under any

39 And possibly circumvent IHRL as well, if the invited states reject the extraterritorial application of IHRL.

40 'Turkish troops go into Iraq to train forces fighting Isis', *Guardian*, 4 December 2015, available at www.theguardian.com/world/2015/dec/04/turkish-troops-iraq-train-forces-fighting-isis.

41 'Prime Minister Dr. Haider Al-Abadi: I did not ask any country to send foreign ground troops, and we will treat any sent as hostile act', Prime Minister's Media Office, 3 December 2015, available at pmo.iq/pme/press2015en/3-12-20152en.htm; 'Iraq summons Turkish ambassador over troops near Mosul', *BBC News*, 5 December 2015, available at www.bbc.com/news/world-middle-east-35012902.

42 S. Kalin, 'Turkey to stop sending soldiers to Iraq after Baghdad protests', *Reuters*, 6 December 2015, available at www.reuters.com/article/us-mideast-crisis-iraq-turkey-idUSKBN0TPoLC20151206.

43 UNSC, *Letter dated 11 December 2015 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council*, UN Doc. S/2015/963, 14 December 2015, at 2.

44 The violation of *jus ad bellum* does not *ipso facto* mean that the situation will be classified as an IAC. Indeed, the material scope of application of Art. 2(4) of the UN Charter and the one of Common Art. 2 are not identical. Thus, in view of the distinction between *jus ad bellum* and *jus in bello*, the facts of each conflict need to be analyzed twice: once in order to determine whether *jus ad bellum* is violated and a second time in view of determining what the classification of the conflict is; see V. Koutroulis, '*Jus ad/contra bellum*', in R. van Steenberghe, (ed.), *Droit international humanitaire: un régime spécial de droit international?* (2013), 174–8.

45 'IS conflict: Turkey withdraws some troops from Iraq camp', *BBC News*, 14 December 2015, available at www.bbc.com/news/world-middle-east-35091674.

46 S. Hameed and E. Toksabay, 'Iraqi PM says Turkey not respecting agreement to withdraw troops', *Reuters*, 30 December 2015, available at www.reuters.com/article/us-mideast-crisis-iraq-turkey-idUSKBN0UDrGJ20151230.

47 On consent see *infra* notes 71–2 and accompanying text.

48 Speaking before the UN Security Council, the representative of Iraq asked the Council to 'condemn the Turkish occupation and [its] illegal incursion' in Iraqi territory. See, UNSC, 7589th meeting, UN Doc. S/PV.7589, 18 December 2015, at 3.

49 The ICRC customary law study does not distinguish between NIACs as defined in Common Article 3 and NIACs as defined in Additional Protocol II. According to Pejic, this is because 'it was found that states did

circumstances' use certain weapons⁵⁰ are also applicable independently of whether Iraq is a party to these treaties or not. Things get more complicated with other IHL conventions specifying that they apply to NIACs occurring in the territory of a high contracting party. This is for example the case with the 1954 Hague Convention for the protection of cultural property in the event of armed conflict,⁵¹ the 1999 Second Protocol to this Convention,⁵² or the 1977 Second Additional Protocol to the Geneva Conventions.⁵³ The point of reference in this case is Iraq, as the state on whose territory the conflict takes place. The fact that Iraq is not party to some of these Conventions, such as the 1977 Second Additional Protocol and the 1999 Second Protocol to the 1954 Hague Convention, means that the NIAC against ISIL does not take place 'in the territory of a high contracting party'. Therefore, these instruments do not apply to operations against ISIL in Iraq,⁵⁴ even when these operations are conducted by states parties to the two Protocols.⁵⁵

It should also be noted that Iraq acceded to the 1980 Certain Conventional Weapons Convention and to all its Protocols on 24 September 2014. Following the amendment adopted in 2001, the Convention and its Protocols apply to NIACs 'occurring in the territory of one of the High Contracting Parties'.⁵⁶ After the entry into force of the Convention and its Protocols with respect to Iraq (six months after 24 September 2014⁵⁷), the NIAC will be 'occurring in the territory of' a High Contracting Party and, thus, both Iraq and the intervening states will be bound to apply the Convention and its Protocols.⁵⁸

2.2. Conflict against the Islamic State in Syria

The evolution of ISIL in Syria has been parallel to the one in Iraq. According to the fifth report of the UN Commission of inquiry on Syria, from May to July 2013,

not make such a distinction in practice'. See, J. Pejic, 'The Protective Scope of Common Article 3: More than Meets the Eye', (2011) 93 *International Review of the Red Cross* 189, at 191.

50 See, e.g., the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 2056 UNTS 211, Art. 1(1)(a); 2008 Convention on Cluster Munitions, 2688 UNTS 39, Art. 1(1)(a).

51 1954 Convention for the Protection of Cultural Property in the Event of an Armed Conflict, 249 UNTS 240, Art. 19.

52 1999 Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 2253 UNTS 172, Art. 22(1).

53 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), 1125 UNTS 609, Art. 1(1).

54 See also van Steenberghe, *supra* note 31, at 647.

55 Australia, Belgium, Canada, France, Jordan, the Netherlands, and the UK are all parties to the 1977 Second Additional Protocol. Belgium, Canada, Jordan and the Netherlands are also parties to the 1999 Protocol. Iraq is a party to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and, therefore, the Convention does apply to all its states parties operating in Iraq in the context of the conflict with ISIL. For a full list of state parties to IHL treaties, see, ICRC, State parties to the following international humanitarian law and other related treaties as of 26 Jan 2016, available at www.icrc.org/ihl.

56 2001 Amendment to the Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects.

57 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects (with Protocols I, II and III), 1342 UNTS 137, Art. 5(2)–(3).

58 This is of course without prejudice to the obligations stemming from the relevant applicable rules of customary IHL.

ISIL developed its own stronghold in the north of Syria.⁵⁹ Since August 2013, ISIL is reported as having reinforced its control over areas in northern Syria, running them through local administrations.⁶⁰ In the eighth report of the UN Commission of inquiry on Syria (covering the period from 20 January to 15 July 2014), ISIL is described as being ‘far better organised and financed owing to the seizure of considerable resources and military equipment in Iraq’ and as having ‘consolidated its control over large areas in northern and eastern governorates’ of Syria.⁶¹ Some direct confrontations with Syrian governmental forces are reported, although it seems that the main bulk of hostilities was directed towards other opposition groups.⁶²

After the proclamation of the caliphate on 29 June 2014 and in view of the atrocities reported, a US-led coalition of states launched a military campaign against ISIL and other terrorist groups in Syrian territory in September 2014.⁶³ However, contrary to Iraq, in this case there was no formal request from the Syrian government addressed to intervening states. The only state that was invited to conduct military operations in Syria was Russia.⁶⁴ Moreover, although the coalition has occasionally coordinated its operations with the ones by rebel groups fighting ISIL and offered assistance to such groups, there does not seem to be sufficient evidence to consider that these groups operate under the overall control of the intervening foreign states.⁶⁵

2.2.1. *Classification of conflicts*

Identifying with precision the beginning of the NIAC opposing the Syrian governmental forces and ISIL is subject to the same difficulties as the ones already exposed with respect to the NIAC in Iraq. According to the UN Commission of Inquiry, ISIL committed a series of war crimes during the second half of 2013.⁶⁶ This means that

59 Human Rights Council, Report of the independent international commission of inquiry on the Syrian Arab Republic, UN Doc. A/HRC/24/46, 18 August 2013, at 6, para. 33.

60 *Ibid.*, at 30, para. 3.

61 Human Rights Council, August 2014 Report of commission of inquiry on Syria, *supra* note 18, at 5, para. 16.

62 *Ibid.*, at 4–5, paras. 10, 16.

63 US White House, Office of the Press Secretary, Statement by the President on Airstrikes in Syria, 23 September 2014, available at www.whitehouse.gov/the-press-office/2014/09/23/statement-president-airstrikes-syria. According to this statement, the US’ allies are Saudi Arabia, the United Arab Emirates, Jordan, Bahrain, and Qatar. On 16 March 2015, with the exception of Qatar, the same countries are mentioned as having conducted airstrikes against ISIL in Syria. See, US Department of Defense, Operation Inherent Resolve Airstrike Videos Now Available, Media Release No. 20150302, 16 March 2015, available at www.defense.gov/Portals/1/features/2014/0814_iraq/CENTCOM-Media-Advisory-Airstrike-Video-in-Support-of-Operation-Inherent-Resolve.pdf. On 3 February 2016, Australia, Canada, France, Turkey, and the UK were included among the countries having participated in the airstrikes in Syria. See US Department of Defense, Operation Inherent Resolve, *supra* note 17.

64 See, speeches by the Russian Minister of Foreign Affairs and the Syrian representative, UNSC, 7572th meeting, UN Doc. S/PV.7527, 30 September 2015, at 4 and 30 respectively. See also Russian Federation, Ministry of Foreign Affairs, ‘Foreign Minister Sergey Lavrov’s opening remarks at talks with UN Special Envoy on Syria Stefan de Mistura, Moscow October 13, 2015’, Press service – Statements and speeches by Minister of Foreign Affairs Sergey Lavrov, 13 October 2015, available at www.mid.ru/en/press_service/minister_speeches/-/asset_publisher/7OvQR5KJWVmR/content/id/1845813; ‘Syria conflict: Putin defends Russia’s air strikes’, *BBC News*, 12 October 2015, available at www.bbc.com/news/world-middle-east-34502286.

65 For the definition of ‘overall control’, see *supra* note 32.

66 Human Rights Council, Report of the independent international commission of inquiry on the Syrian Arab Republic, UN Doc. A/HRC/25/65, 12 February 2014, at 7–8 (paras. 25, 28, 33), 9 (para. 41), 10 (para. 50), 11 (paras. 60–1), 12 (paras. 70–1), 13–14 (paras. 79, 80, 84), 18 (paras. 119–20, 123–6).

the Commission considers IHL to be applicable to ISIL as a belligerent party to a NIAC. However, it is not clear whether, in the eyes of the Commission, the war crimes committed at the relevant period took place only in the context of NIACs opposing ISIL to other rebel groups, or whether there was also a NIAC between ISIL and the Syrian governmental forces. Be that as it may, in 2014, in view of the direct (albeit not numerous) confrontations between the Syrian army and ISIL, the number of casualties, the extent of material destruction, the involvement of the UN Security Council and, most importantly, the exercise of control by ISIL over part of the Syrian territory, it appears clear that a NIAC existed between the Syrian government and ISIL.⁶⁷

In terms of classification of conflicts, Russia's intervention in Syria is similar to the intervention of the US-led coalition in Iraq: Russia joins in the pre-existent NIAC between the Syrian armed forces and ISIL and becomes a party to the conflict alongside the Syrian government.⁶⁸ The developments made above apply here *mutatis mutandis*.⁶⁹

The classification of the military operations conducted by the US-led coalition in Syrian territory against ISIL is much more challenging. There is no doubt that IHL applies to the coalition's airstrikes in Syria.⁷⁰ The question is whether we are before a conflict that is international, non-international or both. In this author's view, the crucial element in this respect is the consent to the foreign intervention on behalf of the government of the state on whose territory the intervening states are conducting their military operations. This question has been dealt with in detail in a previous contribution to this issue.⁷¹ If the consent exists, then the classification

67 Cf. the factors relevant for determining that the hostilities are of sufficient intensity in order for a situation to be classified as a NIAC, *supra* note 27. The control of territory, towns and villages is explicitly cited as a relevant factor by the ICTY; see, ICTY, *Limaj* 2005 Trial Judgement, *supra* note 26, paras. 143, 146, 158, 163; ICTY, *Bošković and Tarčulovski* 2008 Trial Judgement, *supra* note 26, para. 177; ICTY, *Prosecutor v. Đorđević*, Public Judgement with Confidential Annex Volume I of II, Case No. IT-05-87/1-T, T.Ch. II, 23 February 2011, para. 1523.

68 Amnesty international also considers Russia to be party to the NIAC in Syria. See, Amnesty International, 'Civilian objects were not damaged': Russia's Statements on its Attacks in Syria Unmasked, 23 December 2015, at 24, available at www.amnesty.org/en/documents/mde24/3113/2015/en/. The fact that Russian airstrikes are intentionally directed against other armed groups (such as Jabhat al-Nusra) also makes Russia a party to the NIACs opposing the Syrian government to those groups.

69 See *supra* notes 34–9 and accompanying text.

70 The US Central Command that is in charge of Operation Inherent Resolve has referred explicitly to the application of IHL to the coalition's operations. See, US Central Command, *CJTF-OIR Completes Civilian Casualty Investigation*, News Release No. 20150506, 21 May 2015, available at www.centcom.mil/news/news-article/cjtf-oir-completes-civilian-casualty-investigation; US Central Command, *Jan. 15: U.S. Central Command releases results of Iraq and Syria civilian casualty assessments*, News Release No. 20160115-02, 15 January 2016, available at www.centcom.mil/news/press-release/jan-15-u.s.-central-command-releases-results-of-iraq-and-syria-civilian-ca; US Central Command, *Jan 22: CENTCOM releases results of Iraq and Syria civilian casualty assessments*, News Release No. 20160122-04, 22 January 2016, available at www.centcom.mil/news/press-release/jan-22-centcom-releases-results-of-iraq-and-syria-civilian-casualty-assessm; US Central Command, *Jan. 29: U.S. Central Command releases results of Iraq and Syria civilian casualty assessments*, News Release No. 20160129-05, 29 January 2016, available at www.centcom.mil/news/press-release/jan-29-u.s.-central-command-releases-results-of-iraq-and-syria-civilian-ca. Canada has also confirmed that IHL applies to its operations in Syria; Government of Canada, Royal Canadian Air Force, *First airstrike conducted in Syria under Operation Impact*, News Article, 9 April 2015, available at www.rcfc-arc.forces.gc.ca/en/article-template-standard.page?doc=first-airstrike-conducted-in-syria-under-operation-impact/i89a1pdr.

71 See the contribution by Bannelier-Christakis, this Symposium, doi: [10.1017/S0922156516000303](https://doi.org/10.1017/S0922156516000303).

of the conflict involving the US-led coalition is similar to the classification of the coalition's intervention in Iraq or of Russia's intervention in Syria: a NIAC opposing the states of the coalition to ISIL. There is no IAC because there is no opposition between two or more states.⁷²

What if no consent exists on behalf of the Syrian government? Then the US-led coalition conducts hostilities in the territory of Syria against ISIL without the consent of the Syrian government but also without any open hostilities between the coalition and Syrian governmental forces. The classification of such conflicts has been the subject of extensive debate. Some scholars consider such conflicts as purely non-international: the absence of military confrontation between the intervening state(s) and the state on whose territory the intervention takes place implies that no conflict can be considered as existing between them; thus, the only conflict which does exist is the one between the intervening state(s) and the non-state armed group – in this case, between the US-led coalition and ISIL. Since one of the belligerent parties is not a state, this conflict can only be a NIAC.⁷³ Another view is that such conflicts are purely international because they cross the borders of a state.⁷⁴ However, if one accepts, as the majority of state practice and scholars do, that it is the identity of the belligerent parties and not territory which is decisive for the classification of conflicts,⁷⁵ it is difficult to see how such conflicts may be classified as purely international. A third view considers these conflicts as *sui generis* or 'hybrid', neither IAC nor NIAC.⁷⁶ This proposition did not find any support in state practice, and thus remains a proposal de *lege ferenda*.⁷⁷

A fourth view considers that military interventions such as the one conducted by the US-led coalition in Syria trigger an IAC between the intervening state(s) and the

72 Akande, *supra* note 37, at 73.

73 See, among many, T. Hoffmann, 'Squaring the Circle? International Humanitarian Law and Transnational Armed Conflicts', in M.J. Matheson and D. Momtaz (eds), *Rules and Institutions of International Humanitarian Law Put to the Test of Recent Armed Conflicts* (2010), 217, at 253–4; A. Paulus and M. Vashakmadze, 'Asymmetrical war and the notion of armed conflict: a tentative conceptualization', (2009) 91 *International Review of the Red Cross* 95, at 111–12.

74 Apparently, this was also the view of Israel and Lebanon with respect to the classification of the 2006 Israel/Hezbollah conflict. See, Human Rights Council, Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled 'Human Rights Council' – Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1, UN Doc. A/HRC/3/2, 23 November 2006, paras. 59, 62. This view was endorsed by the Commission, *ibid.*, paras. 55–60. See also Supreme Court of Israel, *The Public Committee against Torture in Israel et al. v. The Government of Israel et al.*, Supreme Court of Israel, 13 December 2006, HCJ 769/02, para. 18; J. Stewart, 'The UN Commission of Inquiry on Lebanon: A Legal Appraisal', (2007) 5 *Journal of International Criminal Justice* 1039, at 1042–3; A. Bianchi and Y. Naqvi, *International Humanitarian Law and Terrorism* (2011), 79.

75 See among many, M. Sassoli, 'Transnational Armed Groups and International Humanitarian law', Program on Humanitarian Policy and Conflict Research, Harvard, (2006) 6 *Occasional Paper Series* 1, at 8–9; J. Pejic, 'Extraterritorial targeting by means of armed drones: Some legal implications', (2014) 96 *International Review of the Red Cross* 67, at 78; S. Vité, 'Typology of armed conflicts in international humanitarian law: legal concepts and actual situations', (2009) 91 *International Review of the Red Cross* 69, at 89–90; Sivakumaran, *supra* note 26, at 232.

76 See G.S. Corn, 'Hamdan, Lebanon, and the Regulation of Armed Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict', (2006) 40 *Vanderbilt Transnational Law Journal* 295; R.S. Schönendorf, 'Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?', (2004) 37 *New York University Journal of International Law and Politics* 26.

77 G.S. Corn and E. Talbot Jensen, 'Transnational Armed Conflict: A "Principled" Approach to the Regulation of Counter-Terror Combat Operations', (2009) 42 *Israeli Law Review* 46, at 50.

state on whose territory the hostilities take place.⁷⁸ The absence of consent on behalf of the latter state is the crucial element in classifying the conflict as international, in other words, as opposing two (or more) states. In our view, this is indeed the most plausible classification under existing IHL.

Three main arguments may be raised against this conclusion. First, it may seem counterintuitive to assert that an IAC exists between two states despite the absence of active military confrontation between them. However, the absence of hostilities is not decisive for the purposes of the classification of a conflict as international. In this respect, Common Article 2, paragraph 2 to the four Geneva Conventions recognizes the applicability of the Conventions (and thus the classification of the situation as an IAC) to an occupation which meets with no armed resistance on behalf of the occupied state.⁷⁹ This paragraph confirms the applicability of the Conventions to situations where the states involved do not actually engage in open hostilities,⁸⁰ for example because the targeted state is not in a position to react to the military operations of another state. This may be because it has no army, or because – as may very well be Syria's current position – its armed forces are already involved in another armed conflict and the state is reluctant or unable to open a new front of active hostilities against militarily powerful states. When one or more states resort to multiple airstrikes⁸¹ affecting another state's territory and population without its consent, it is logical to conclude that such strikes trigger an IAC, irrespective of whether the targeted state reacts militarily or not. Moreover, if military reaction by the targeted state were a necessary condition for the existence of an IAC, this would lead to the absurd result that, in every IAC, the very first attack conducted by the attacking state(s) would not be regulated by IHL. This author is not aware of any such claim having been put forth by states.

Second, those denying the existence of an IAC in situations like the coalition's intervention in Syria invoke the absence of an *animus belligerendi* on behalf of the intervening state(s) against the state in whose territory the intervention takes place. This argument was raised, for example, with respect to the classification of the conflict triggered by Colombia's intervention against the FARC in the territory of Ecuador, without the latter's consent: it has been asserted that no IAC existed between Colombia and Ecuador, because the use of force by Colombia was directed against the FARC not against Ecuador.⁸² In this author's view, this argument is unconvincing. Firstly, it is highly doubtful whether the subjective intentions of a party to the

78 Akande, *supra* note 37, at 73–7; Sassoli, *supra* note 75, at 5; Stewart, *supra* note 74, at 1042–3.

79 See Geneva Convention (I), *supra* note 33, at 32.

80 R.R. Baxter, 'The Duties of Combatants and the Conduct of Hostilities (Law of The Hague)', in UNESCO, *International Dimensions of Humanitarian law* (1988), at 95, 98. Art. 2(2) was included in the Conventions in order to cover situations of occupation without any hostilities whatsoever, such as the occupation of Czechoslovakia by Germany before the Second World War. See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136, at 175, para. 95. See also V. Koutroulis, *Le début et la fin de l'application du droit de l'occupation* (2010), 26–9.

81 According to the US Department of Defense, on 5 February 2016, more than 3,500 strikes were conducted on Syrian territory (around 3,300 by the US alone and some 200 by the other states participating in the coalition). See US Department of Defense, Operation Inherent Resolve, *supra* note 17.

82 F. Szesnat and A.R. Bird, 'Colombia', in Wilmshurst (ed.), *supra* note 37, at 236–7.

conflict may be allowed to dictate the application of IHL.⁸³ After all, this influence was precisely what the states that negotiated the Geneva Conventions sought to prevent by replacing ‘war’ with the notion of ‘armed conflict’, a replacement which was meant to make the application of IHL dependent only on the facts on the ground.⁸⁴ The relevance of the *animus* of the parties for the classification of conflicts is a minor one: it serves to exclude cases where force is used by mistake or accident (such as the targeting of the Chinese embassy during the 1999 NATO bombings in Kosovo) or violent acts by individual members of armed forces, not ordered or approved by their hierarchy. In other words, it excludes cases of *unintentional* resort to force by a state against another state.⁸⁵ Secondly, from the moment a state conducts military operations within the territory of another state without its consent, these operations are, by definition, not only directed against the targeted non-state actor but also against the territorial state itself. Thus, it is difficult to see why, in order for an IAC to exist, it is necessary for a state to actively wish to target another state with the specific purpose of destroying its forces. When the US-led coalition conducts its 3500 strikes in Syria, even if the final aim of the strikes is ISIL, the damage resulting from the strikes on population and infrastructure is damage suffered by Syria. In pursuing its ultimate objective of fighting ISIL, the coalition accepts such damages as an unavoidable consequence of its actions. In this sense, the coalition’s actions are also directed against Syria. When a man fathers a baby, he does not need to be actively seeking to do so in order to be recognized as the father and be bound by the legal obligations flowing from this action. Similarly, when a state conducts hostilities and destroys targets within the territory of another state without the latter’s consent, it does not need to be actively seeking to target that state in order to be recognized as a party to an international conflict with that state; the conflict exists and the intervening state is bound by the legal obligations flowing from this factual reality.

Three, it has been suggested that placing consent at the centre of the debate on classification of conflicts conflates *jus ad bellum* and *jus in bello*.⁸⁶ This argument is grounded on the principle that the application of *jus in bello* should not be influenced by the legality of the use of force under *jus ad bellum* (the so-called principle of the equality of belligerents).⁸⁷ It is of course correct that the question whether a resort to force violates *jus ad bellum* is distinct from the question of whether the said

83 Such an approach implies that the same actions with the same consequences on the targeted state have different legal consequences depending on the intention of the attacking state. See, Akande *supra* note 37, at 75. See also Pejic, *supra* note 75, at 77–8.

84 R. Kolb, *Advanced Introduction to International Humanitarian Law* (2014), at 96–8; Koutroulis, *supra* note 80, at 24.

85 See, UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004), 29; T. Ferraro, ‘The applicability and application of international humanitarian law to multinational forces’, (2015) 95 *International Review of the Red Cross* 561, at 576; Bartels, *supra* note 2, at 118.

86 N. Lubell, ‘The War (?) against Al-Qaeda’, in Wilmshurst (ed.), *supra* note 37, at 432–3.

87 V. Koutroulis, ‘And Yet It Exists: In Defence of the “Equality of Belligerents” Principle’, (2013) 26 *LJIL* 449; M. Sassoli, ‘*Ius ad Bellum* and *Ius in Bello* – The Separation between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare: Crucial or Outdated?’, in M.N. Schmitt and J. Pejic (eds.), *International Law and Armed Conflict: Exploring the Faultlines – Essays in honour of Yoram Dinstein* (2007), 241; A. Roberts, ‘The equal application of the laws of war: a principle under pressure’, (2008) 90 *International Review of the Red Cross* 931.

resort to force triggers the application of *jus in bello*, and that the two questions should be examined separately.⁸⁸ It is however difficult to see why '[t]he underlying question for classification must be that of identifying the parties to the conflict, rather than consent'.⁸⁹ In this case, consent is a crucial element in the identification of the parties to the conflict. Furthermore, consent is not exclusively a *jus ad bellum* rule to begin with. It is rather a concept of general international law, as is attested by its inclusion among the circumstances precluding wrongfulness in the ILC draft articles on state responsibility.⁹⁰ As such, consent may be examined, on the one hand, in order to determine whether *jus ad bellum* has been violated and, on the other hand, in order to establish whether an armed conflict between two states exists. There is a case of conflation only if the IAC is considered as existing because *jus ad bellum* has been violated; if, in other words, the classification of the conflict as an IAC is considered as being the *legal consequence* of the violation of *jus ad bellum*.⁹¹ With the exception of such reasoning, consent may influence both the application of *jus ad bellum* and that of *jus in bello*. The fact that the same concept of general international law may be taken into account in the analysis of *jus ad bellum* and *jus in bello* does not mean that this analysis conflates the two sets of rules.⁹²

The ICJ seems to have followed the same approach in its 2005 judgment on the *Armed Activities in the Territory of the Congo* case. The Court established that the Ugandan armed forces were present inside Congolese territory since September 1997, following an invitation by the Congolese President, which was withdrawn in August 1998.⁹³ The Court engaged in a detailed analysis in order to determine when the consent by the Democratic Republic of the Congo was withdrawn,⁹⁴ and on the basis of the results held that Uganda had violated *jus ad bellum* since August 1998.⁹⁵ Turning to the violations of IHL, the Court did not dwell at all on establishing the date of the beginning of the conflict. Significantly, both the states parties to the dispute and the Court seem to have taken for granted that the relevant facts for the application of IHL (including the determination of the existence of an occupation) were actions by Ugandan armed forces that took place after the Democratic Republic of the Congo withdrew its consent.⁹⁶

88 Lubell, *supra* note 86, at 432.

89 *Ibid.*

90 ILC, Draft articles on the responsibility of States for internationally wrongful acts, 2001 YILC, Vol. II (Part II), at 72–4.

91 This reasoning conflates the two sets of rules especially because it implies, *a contrario*, that when *jus ad bellum* is not violated, an IAC does not exist. See Koutroulis, *supra* note 44, at 174–8.

92 The same applies with, for example, the criteria for statehood. A tribunal or scholar may apply these criteria in order to determine whether an entity may be considered to be a state or not. This determination will necessarily affect both the application of *jus ad bellum* and *jus in bello*. This analysis does not conflate *jus ad bellum* with *jus in bello* any more than taking into account consent does.

93 ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, [2005] ICJ Rep. 168, at 196–7, para. 45. The declarations and opinions of certain judges confirm that the equality of belligerents principle had not escaped the Court's mind when dealing with the legal issues in the case. *Ibid.*, at 321, para. 58 (Judge Kooijmans, Separate Opinion) and at 358–9, para. 4 (Judge *ad hoc* Verhoeven, Declaration).

94 *Ibid.*, at 196–9, paras. 42–54 and 209–12, paras. 92–105.

95 *Ibid.*, at 227, para. 165.

96 *Ibid.*, at 227 ff., paras. 167 ff, and 239 ff, paras. 205 ff.

Aside from the above, by virtue of the equality of the belligerents principle, the legality of the coalition's intervention under *jus ad bellum* does not affect the classification of conflicts and the application of *jus in bello*. In other words, even if the coalition's intervention in Syria does not violate *jus ad bellum* (for example, because the right to self-defence against non-state actors is accepted), this does not affect the existence of an IAC between the intervening states and Syria.

In conclusion, the airstrikes of the US-led coalition trigger an IAC between the coalition and Syria. This means that there are two distinct conflicts currently taking place in Syria: a NIAC between the coalition and ISIL and an IAC between the coalition and Syria.⁹⁷

One final question that needs to be addressed in this context relates to the identification of the parties to the two conflicts. In the context of the IAC between the coalition and Syria, any state that has conducted airstrikes in Syrian territory should be considered party to the conflict. Turning to the NIAC against ISIL, a distinction should be made between those states of the coalition that also participate in the NIAC against ISIL in Iraq (e.g., the US, Canada, or Australia), and the states who participate only in the strikes against ISIL in Syria (e.g., Saudi Arabia, the United Arab Emirates, Bahrain, etc.).⁹⁸ For the first group of states, there is little doubt that they are parties to a NIAC. In their case, the strikes in Syria can be seen as the mere continuation of their NIAC against ISIL in Iraq. The *jus ad bellum* argument according to which the coalition states intervene in Syria on the basis of the – extraterritorial – exercise of Iraq's right to collective self-defence⁹⁹ is also an indication pointing in this direction.

What about the states of the coalition intervening against ISIL for the first time in Syria? Taken individually, the hostilities between them and ISIL do not immediately rise to the level of intensity required for a NIAC to exist. This would mean that the very first military operations by Saudi Arabia, or Bahrain conducted in Syria would not be regulated by IHL. To the best of our knowledge, none of the coalition states has invoked this argument in order to refuse the application of IHL. In reality, applying this reasoning would result in a very complex situation in terms of the temporal – not to mention territorial – scope of application of IHL. Imagine an airstrike in Syria, in October 2014, conducted jointly by US and Saudi aircrafts: while US aircrafts would operate under IHL rules, the Saudi aircrafts would not. This means, for example, that while US would be allowed to invoke the principle of proportionality in order to justify collateral damage, this argument could not be invoked by Saudi Arabia. Along the same lines, the commission of war crimes would only be conceivable for the US pilots but not for the Saudi ones. To conclude, it seems clear that, instead of evaluating the existence of the NIAC separately for each member of the coalition, the coalition's operations should be viewed as a whole, both in Iraq and Syria. In this context, all airstrikes against ISIL are carried out under the same military operation,

97 For the same classification of the 2006 conflict between Israel and Hezbollah taking place within the territory of Lebanon, see I. Scobbie, 'Lebanon 2006', in Wilmshurst (ed.), *supra* note 37, at 408, 410; Duffy, *supra* note 2, at 351–2.

98 See *supra* note 63.

99 See the contribution by Tsagourias, this Symposium, doi: [10.1017/S0922156516000327](https://doi.org/10.1017/S0922156516000327).

Operation Inherent Resolve.¹⁰⁰ This analysis of the parties to the conflict reflects the facts on the ground and is thus in conformity with the ‘principle of effectiveness’,¹⁰¹ which is central in applying IHL.

2.2.2. *Applicable law*

Common Article 3 and customary IHL apply to the NIAC between the coalition states and ISIL, as do the conventions that prohibit the use of certain weapons in all circumstances.¹⁰² As was the case with foreign interventions in Iraq, ratification by Syria is crucial with respect to conventions that apply to NIACs occurring in the territory of a high contracting party.¹⁰³

The IAC between the coalition states and Syria triggers the application of all the relevant IHL instruments to which the states involved are parties, as well as of customary IHL. The parallel existence of an IAC and a NIAC raises interesting questions in terms of the applicable law. It is submitted that, in the vast majority of cases, the military operations of the coalition will simultaneously be part of both conflicts. For example, on 24 September 2014 one of the first airstrikes in Syria targeted ISIL-controlled oil refineries.¹⁰⁴ Being directed against ISIL, the strike was undoubtedly part of the NIAC between the coalition and ISIL. However, the destruction of oil refineries constitutes destruction of Syrian infrastructure and as such the strike is also part of the IAC between the coalition and Syria. In general, when the coalition strikes destroy ISIL-held refineries, roads, bridges or buildings, they destroy Syrian infrastructure. When they result in civilian casualties, they kill or injure the Syrian civilian population. Leaving aside attacks against ISIL with no impact whatsoever on Syrian territory, infrastructure or population (for example, a sniper taking out an ISIL fighter), in all other cases, it is impossible to distinguish between the two conflicts. Therefore, the relevant airstrikes will necessarily be considered as part both of the NIAC against ISIL and of the IAC with Syria. This implies that, in order for these operations to be lawful under IHL, they have to respect the rules applicable in IACs. Given the current nature of the coalition’s military operations (airstrikes), this parallel application of IHL rules regulating IACs and NIACs does not change much in terms of applicable law, since most of the rules relating to the conduct of hostilities have acquired customary status and are applicable to both conflicts anyway.¹⁰⁵ It may however prove important in terms of (a) the application of some rules whose customary status is contested by coalition

¹⁰⁰ Indeed, in its news releases, the US Central Command refers jointly to airstrikes committed against ISIL in Iraq and Syria.

¹⁰¹ Vité, *supra* note 75, at 72.

¹⁰² See *supra* notes 49–50 and accompanying text.

¹⁰³ See, e.g., 1954 Convention on Cultural Property, *supra* note 51, Art. 19. States Parties to the Convention include Syria, Jordan, Saudi Arabia, Bahrain and the US. However, the United Arab Emirates and the UK are not. The 1999 Protocol to the Convention does not apply to Syria for the same reasons for which it does not apply to Iraq: Syria is not a party to the Protocol and, thus, the NIAC against ISIL does not occur ‘within the territory of one of the Parties’ as required by Art. 22(1).

¹⁰⁴ US Central Command, U.S. Military, Partner Nations Conduct Airstrikes Against ISIL in Syria, News Release No. 20140929, 24 September 2014, available at www.centcom.mil/news/news-article/u.s.-military-partner-nations-conduct-airstrikes-against-isil-in-syria.

¹⁰⁵ Henckaerts and Doswald-Beck, *supra* note 4.

states,¹⁰⁶ and (b) war crimes. Thus, for example, an attack by France or the UK against ISIL in Syria violating the principle of proportionality is part of both a NIAC and an IAC and, having a nexus with an international conflict, may constitute a war crime under Article 8, paragraph 2(b)(iv) of the Rome Statute.¹⁰⁷ The same goes for attacks directed against civilian objects, which are also among the Statute's war crimes applicable only to IACs.¹⁰⁸ It should be noted that the parallel existence of an IAC and NIAC is only valid for the intervening states and Syria. ISIL on the other hand is only involved in a NIAC. This means that, should the coalition states decide to put forces on the ground in Syria, if ISIL fighters launch a disproportionate attack against them, this attack will not be considered as a war crime under the Rome Statute since it takes place in the context of a NIAC.

Having set out the main aspects with respect to the classification of conflicts and the applicable law to the coalition's military operations against ISIL, we will now turn to one of the most interesting parts of the application of IHL to the fight against ISIL: the geographical scope of application of IHL.

3. THE GEOGRAPHICAL SCOPE OF APPLICATION OF INTERNATIONAL HUMANITARIAN LAW IN THE CONTEXT OF THE FIGHT AGAINST ISIL

The territory controlled by ISIL already spreads in two different countries. Moreover, as was already noted in the introduction, attacks by or linked to ISIL have taken place in several countries, including Tunisia, Libya, and France.¹⁰⁹ The coalition fighting ISIL in Iraq and Syria is also composed of states from around the world.¹¹⁰ Finally, ISIL itself is an organization of transnational character since thousands of nationals by several countries have joined its ranks,¹¹¹ while 34 groups from all around the world have reportedly pledged allegiance to it.¹¹² How should the geographical scope of application of IHL be appreciated in this case?

At this stage of the hostilities, where military operations basically consist of airstrikes conducted by the coalition, this question translates into whether IHL is applicable to an airstrike targeting ISIL fighters independently of where they are found. In other words, can the coalition invoke IHL in order to justify a strike against ISIL fighters which is conducted anywhere in the Syrian or Iraqi territory

106 See for example, Bellinger and Haynes, *supra* note 5, at 461 (relating to the prohibition of anti-personnel use of exploding bullets).

107 Rome Statute, *supra* note 6.

108 *Ibid.*

109 See *supra* notes 11–14 and relevant text. See also UNSC, *Report of the Secretary-general on the threat posed by ISIL (Da'esh) to international peace and security and the range of United Nations efforts in support of Member States in countering the threat*, UN Doc. S/2016/92, 29 January 2016, at 2, para. 5.

110 See *supra* notes 25 and 63 and accompanying text.

111 According to a report published by the UN Counter-Terrorism Committee on December 2015, 'more than 25,000 foreign fighters from more than 100 member States have travelled to Iraq and the Syrian Arab Republic, primarily to join terrorist entities such as ISIL, the Nusrah Front and cells, affiliates, splinter groups and derivative entities of Al-Qaida'. UNSC, *Letter dated 15 December 2015 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council*, UN Doc. S/2015/975, 29 December 2015, at 24, para. 78.

112 UNSC, *2016 Report of the Secretary-general on ISIS*, *supra* note 109, at 3, para. 7.

(Section 3.1), in the territory of a state party to the coalition such as the US, France or Belgium (Section 3.2), and in a third state, such as Tunisia (Section 3.3)? As explained in the introduction, the interest in invoking IHL is that, in some cases, its rules appear to be more permissive than the IHRL rules regulating resort to force.¹¹³

3.1. Is IHL applicable to an airstrike against an ISIL fighter anywhere in Iraq and Syria?

The first question is whether IHL applies to the targeting of ISIL fighters anywhere in Iraqi or Syrian territory, namely also in an area far from the battlefield or ‘the actual theatre of combat operations’.¹¹⁴ There are no specific provisions in IHL conventional instruments dealing with the geographical scope of application of NIACs. Thus, the starting point of the analysis is the following *dictum* by the ICTY in 1995 *Tadić* Appeals Chamber decision:

the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of the hostilities. ... [I]nternational humanitarian law appl[ies] in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.¹¹⁵

Confirmed by subsequent case law,¹¹⁶ and shared by the ICRC¹¹⁷ and many scholars,¹¹⁸ this statement points towards the application of IHL to the entire territory of Iraq and Syria.

The opposite view is that the application of IHL rules relating to the conduct of hostilities does not extend beyond the ‘actual context of hostilities’.¹¹⁹ Rather surprisingly, this view seems to find some support in ICTY case law. Indeed, in reaching its conclusion on the broad geographical scope of application of IHL in NIACs, the Appeals Chamber apparently had in mind the provisions relating to the

¹¹³ See *supra* note 16 and accompanying text.

¹¹⁴ ICTY, *Prosecutor v. Tadić*, Decision on the Defence motion for interlocutory appeal on jurisdiction, Case No. IT-94-I, A.Ch., 2 October 1995, para. 69.

¹¹⁵ *Ibid.*, at para. 70.

¹¹⁶ ICTY, *Prosecutor v. Tadić*, Opinion and Judgement, Case No. IT-94-I-T, T.Ch., 7 May 1997, para. 573; ICTY, *Prosecutor v. Delalic et al. (Celebici)*, Judgement, Case No. IT-96-21-T, T.Ch., 16 November 1998, paras. 185 and 193-4; ICTY, *Prosecutor v. Blaskic*, Judgement, Case No. IT-95-14-T, T.Ch., 3 March 2000, paras. 69-70; ICTY, *Prosecutor v. Kordic and Kerkez*, Judgement, Case No. IT-95-14/2-T, T.Ch., 26 February 2001, para. 27; ICTY, *Prosecutor v. Kunarac et al.*, Judgement, Case No. IT-96-23 & IT-96-23/1-A, A.Ch., 12 June 2002, para. 57; ICTY, *Prosecutor v. Halilovic*, Judgement, Case No. IT-01-48-T, T.Ch. I, Sect.A, 16 November 2005, para. 26; ICTY, *Limaj* 2005 Trial Judgement, *supra* note 26, para. 84: ‘The geographic ... framework of this test [*i.e.* the definition of a NIAC] is also settled jurisprudence: crimes committed anywhere in the territory under the control of a party to a conflict ... fall within the jurisdiction of the Tribunal’; ICTR, *Prosecutor v. Akayesu*, Judgement, Case No. ICTR-96-4-T, T.Ch., 2 September 1998, paras. 635-6.

¹¹⁷ Chesney, ‘Guest Post from the ICRC’s Daniel Cahen Responding to My Post on SYRIA/LOAC’, *Lawfare*, 17 July 2012, available at www.lawfareblog.com/guest-post-icrcs-daniel-cahen-responding-my-post-syrialoac.

¹¹⁸ See, among many, H. Olásolo, *Unlawful Attacks in Combat Situations: From the ICTY’s Case Law to the Rome Statute* (2008), 52; L. Moir, ‘The Concept of Non-International Armed Conflict’, in A. Clapham et al., *The 1949 Geneva Conventions: A Commentary* (2015), 391, at 404; I. Henderson, ‘Civilian Intelligence Agencies and the Use of Armed Drones’, (2010) 13 *Yearbook of International Humanitarian Law* 133, at 154-6; C. Gray, ‘The Meaning of Armed Conflict: Non-international Armed Conflict’, in M.E. O’Connell (ed.), *What Is War? An Investigation in the Wake of 9/11* (2012), 69, at 88-9; Pejic, *supra* note 75, at 94-5.

¹¹⁹ D. Kretzmer et al., ‘“Thou Shall Not Kill”: The Use of Lethal Force in Non-International Armed Conflicts’, (2014) 47 *Israel Law Review* 191.

treatment of persons deprived of their liberty, or persons *hors de combat* in general.¹²⁰ In analysing the geographical scope of application of the Geneva Conventions, the Appeals Chamber held that ‘some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited’.¹²¹ This statement was made in the context of the analysis of IHL provisions applicable in IACs and not in NIACs. Be that as it may, the reasoning behind the distinction put forth by the Appeals Chamber – namely that there are some IHL rules which are ‘bound up with hostilities’ and whose geographical scope of application should be limited to areas of active hostilities as opposed to other IHL rules dealing, for example, with detainees – is equally valid for NIACs.

This view has met with the objection that it would preclude a state from attacking a rebels’ munitions store far from the area of active hostilities,¹²² or, in general, from striking the rebels in its rear area.¹²³ Moreover, in most conflicts, it would be difficult to clearly identify a stable area of ‘active hostilities’ in the first place. In its case law, when determining the geographical scope of application of IHL, the ICTY does not seem to have distinguished between rules relating to the conduct of hostilities and rules relating to the protection of victims of war. For example, there is no indication that the Tribunal appreciates the *ratione loci* applicability of IHL differently depending on whether the rule is one regulating the conduct of hostilities or the protection of persons *hors de combat*.¹²⁴

Therefore, *ratione loci*, IHL would be applicable to an airstrike launched against an ISIL member anywhere in the territory of Iraq or Syria. This position seems to be confirmed by state practice in the context of the NIAC in Afghanistan: ISAF troop contributing countries do not appear to limit the application of IHL only to areas of active hostilities.¹²⁵

Whether IHL may successfully be used to justify such an attack as a legal regime more permissive than IHRL is a different story. The ICRC, for example, distinguishes between ‘collective hostilities opposing identifiable units’ and the ‘targeting of isolated individuals’:

¹²⁰ ICTY, 1995 *Tadić* decision, *supra* note 114, paras. 68–9.

¹²¹ *Ibid.*, para. 68. Blank also notes that the ICTY ‘explicitly viewed LOAC’s protective obligations as potentially far greater in geographic reach than the exercise of authority inherent in the conduct of hostilities’. See, L.R. Blank, ‘Debates and Dichotomies: Exploring the Presumptions Underlying Contentions About the Geography of Armed Conflict’, (2013) 16 *Yearbook of International Humanitarian Law* 297, at 307. See also K. Fortin, ‘Syria and the geographical scope of international humanitarian law: moving towards a localised approach?’, *Armed Groups and International Law*, 2 October 2012, available at armedgroups-internationallaw.org/2012/10/02/syria-and-the-geographical-scope-of-international-humanitarian-law-moving-towards-a-localised-approach/.

¹²² Fortin, *ibid.*

¹²³ Henderson, *supra* note 118, at 155.

¹²⁴ See C. Droege, ‘Elective affinities? Human rights and humanitarian law’, (2008) 90 *International Review of the Red Cross* 501, at 535; Fortin, *supra* note 121.

¹²⁵ For example, it is reported that Sweden originally considered that IHL was applicable only in some areas of Afghanistan but then changed its position and accepted that the conflict extends even to areas where the rebel groups’ capability for conducting attacks is limited compared to other parts of the country. Denmark, Norway and Hungary are reported as viewing the situation in Afghanistan to be an armed conflict without any indication of geographical limits. See O. Engdahl, ‘Multinational peace operations forces involved in armed conflict: who are the parties?’, in K. Mujezinovic Larsen et al. (eds.), *Searching for a Principle of Humanity in International Humanitarian Law* (2013), 234–6.

[i]n situations of collective hostilities opposing identifiable units, IHL/LOAC clearly applies even to engagements taking place away from the main battlefields (think for instance of a one-off attack launched against a military installation or troop convoy in a location with no prior history of military confrontations). But it certainly gets more complicated when one contemplates the targeting of isolated individuals taking place outside of the active battle zones. . . . Within the territory of the country where the NIAC is taking place – and this is a hotly debated issue – the resort to lethal force under the IHL/LOAC principle of military necessity may not always be acceptable depending on the surrounding circumstances, taking also into consideration the restraints imposed on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law.¹²⁶

Few would disagree with the proposition that IHL applies to collective hostilities opposing identifiable units away from the main theatre of operations. As for the IHL/IHRL conundrum, in such ‘battlefield-like’ situations, IHL and IHRL do not seem to lead to substantially different results anyway and the use of lethal force would probably be legal under both sets of rules.¹²⁷

In reality, the IHL/IHRL controversy revolves mostly around the targeting of isolated individuals far from the battlefield. In this last case, several considerations come into play: what is the interplay between IHL and IHRL? What are the limits (if any) placed by military necessity on the use of force under IHL? Is the targeted person a member of the armed group (does he/she assume a continuous combat function)¹²⁸ or is he/she directly participating in hostilities?¹²⁹

We will examine the concrete example of an attack claimed by ISIL that killed at least 10 people near the city of Basrah, in Southern Iraq, in early October 2015.¹³⁰ Basrah is far from any area controlled by or subject to hostilities involving ISIL. Assuming that the attack was indeed conducted by an ISIL fighter assuming a continuous combat function, the question is whether the Iraqi government could launch an airstrike against the author of the attack. Having determined that both IHL and IHRL¹³¹ apply in this case, the question is which of the two legal regimes takes precedence over the other. Also, is the answer the same if the ISIL fighter is attacked (a) while he/she is driving towards the place where the bomb will be planted and (b) while he/she is sleeping at a hotel in Basrah, three days before the attack?

126 ICRC’s Daniel Cahen cited by Chesney, *supra* note 117.

127 Sassoli and Olson, *supra* note 3, at 613: ‘[i]n a ‘battlefield-like’ situation, arrest is virtually always impossible without exposing the government forces to disproportionate danger. A fighter presents a great threat to life, even if that threat consists of attacks against armed forces. The immediacy of that threat might be based not only on what the targeted fighter is expected to do, but also on his or her previous behaviour. In such situations, lethal force could therefore be used, even under human rights law’ (notes omitted).

128 N. Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009), 33: ‘under IHL, the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities’.

129 According to the ICRC, direct participation in hostilities is composed of three constitutive elements: threshold of harm, direct causation and belligerent nexus. See, *ibid.*, at 46–64 (recommendation V and commentary).

130 ‘Iraq violence: More than 60 people killed in bombings’, *BBC News*, 5 October 2015, available at www.bbc.com/news/world-middle-east-34447851.

131 For example, Iraq is party to the 1966 International Covenant on Civil and Political Rights. See list of states parties to the Covenant, available at treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtsg_no=IV-4&chapter=4&lang=en.

To be sure, the appreciation of the legality of such operations is very difficult to make in the abstract and will necessarily involve ‘a complex assessment based on a wide variety of operational and contextual circumstances’.¹³² With this caveat in mind, launching an airstrike against an ISIL fighter on a deserted road while he/she is driving towards the place of the intended attack may very well be legal under both IHL and IHRL as the only way to prevent the explosion from taking place. In this scenario, the death of the fighter and the potential civilian victims of the airstrike, for example the passengers of another car that happens to be driving by the same road at the moment of the strike, would be justified under IHL as collateral damage and may equally be considered as necessary under IHRL.¹³³ However, if the two sets of rules are found to result in different outcomes regarding the legality of the strike – if the strike is considered to be illegal under IHRL – it has been suggested that the circumstances of the case may very well justify IHL being considered as *lex specialis*:

the impossibility of arresting a fighter, the danger inherent in an attempt to do so, the danger the fighter represents for government forces and civilians and the immediacy of this danger may cause the conclusion to be reached that humanitarian law is the *lex specialis* in that situation.¹³⁴

It is probably the scenario under (b) that would prove to be more problematic. Indeed, in this case, it is doubtful that an airstrike could be covered by the required degree of necessity under IHRL. However, it is equally debatable whether IHL itself would justify such an attack. According to recommendation IX of the ICRC’s interpretative guidance on the notion of direct participation in hostilities, ‘the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.’¹³⁵

The ICRC’s position is that the combination of the principles of humanity and military necessity in IHL requires that ‘no more death, injury, or destruction be caused than is actually necessary for the accomplishment of a legitimate purpose in the prevailing circumstances’.¹³⁶ Although, here as well, everything depends on the appreciation of the relevant circumstances, the commentary to the recommendation IX asserts that this restriction ‘may become decisive where armed forces operate against selected individuals in situations comparable to peacetime policing ... where a party to the conflict exercises effective territorial control’.¹³⁷ One of the examples given is the scenario of a civilian directly participating in hostilities via his / her mobile phone while sitting in a restaurant. The commentary states that:

¹³² Melzer, *supra* note 128, at 80.

¹³³ See, for example, ECHR, *McCann and others v. UK*, Appl. No. 18984/91, Gd.Ch., judgment, 27 September 1995, paras. 147–50, 192–214; *Isayeva v. Russia*, Appl. No. 57950/00, judgment, 24 February 2005, paras. 179–201; *Abuyeva and others v. Russia*, Appl. No. 27065/05, judgment, 2 December 2010, paras. 196–203; *Finogenov and others v. Russia*, Appl. No. 18299/03 and 27311/03, judgment, 20 December 2011, paras. 227–36; *Abakarova v. Russia*, Appl. No. 16664/07, judgment, 15 October 2015 (referral to the Grand Chamber pending), paras. 83–91.

¹³⁴ Sassoli and Olson, *supra* note 3, at 614.

¹³⁵ Melzer, *supra* note 128, at 77.

¹³⁶ *Ibid.*, at 80.

¹³⁷ *Ibid.*, at 80–1.

[s]hould the restaurant in question be situated within an area firmly controlled by the opposing party it may be possible to neutralize the military threat posed by the civilian through capture or other non-lethal means without additional risk to the operating forces or the surrounding civilians.¹³⁸

This interpretation does seem to reflect the views of some states.¹³⁹ Among scholars, recommendation IX has proven controversial, being contested by some¹⁴⁰ and receiving support from others.¹⁴¹ Be that as it may, under this view, even if IHL were applied as *lex specialis*, it would not justify the targeted killing of the ISIL fighter in the restaurant or in his hotel room. All in all, the controversies relating to the interpretation of IHL and IHRL show that the debate over the geographical scope of application of IHL may not be as decisive an element in determining the legality of an airstrike as it is sometimes thought to be.

3.2. Is IHL applicable to an airstrike against an ISIL fighter in the territory of a state party to the coalition?

The question that lies in the heart of this subsection is whether an ISIL fighter can lawfully be targeted under IHL while he/she is found in the territory of a state party to the coalition operating in Iraq and Syria, such as France or Belgium.¹⁴² Considering that the geographical scope of application of IHL extends to the territory of the states intervening in the fight against ISIL means that, in these states as well, an attack against an ISIL fighter will have to be examined both under IHL and IHRL. This again raises the question of the interplay between the two sets of rules. As in the scenario examined in the previous section, what is at stake here is the possibility to invoke IHL as a justification for what may otherwise be a violation of IHRL.

The question of the application of IHL to the territory of states parties to an extraterritorial NIAC is unregulated by conventional IHL. States members of the coalition conducting airstrikes against ISIL in Iraq and Syria certainly qualify as belligerent parties in the NIAC against ISIL. Thus, it is plausible to consider attacks by ISIL in the territory of one of these states as falling within the context of the ongoing armed conflict between the coalition and ISIL and, therefore, as regulated by IHL. As suggested in legal scholarship, this would be in line with the ‘widely accepted territorial interpretation of the scope of IHL that is independent from the concept of hostilities and extends to the geographical borders of the relevant state(s)’.¹⁴³

¹³⁸ *Ibid.*, at 81.

¹³⁹ See the practice cited in the 2009 ICRC interpretative guidance, Melzer, *supra* note 128, at 79 and 81, notes 251, 216, and 220.

¹⁴⁰ See the scholars cited by R. Goodman, ‘The Power to Kill or Capture Enemy Combatants’, (2013) 24 *EJIL* 819, at 820, footnote 8.

¹⁴¹ *Ibid.*, at 819–53; A. Bellal and L. Doswald-Beck, ‘Evaluating the Use of Force During the Arab Spring’ (2011) 14 *Yearbook of International Humanitarian Law* 3, at 31.

¹⁴² This case concerns the NIAC between the states parties to the coalition and ISIL. It is therefore independent from the IAC between the coalition states operating in Syrian territory and Syria.

¹⁴³ N. Lubell and N. Derejko, ‘A Global Battlefield? Drones and the Geographical Scope of Armed Conflict’, (2013) 11 *Journal of International Criminal Justice* 65, at 70. For the same view, in favour of the application of IHL to the territory of states involved in an extraterritorial NIAC, see L. Arimatsu, ‘Territory, Boundaries and the Law of Armed Conflict’, (2009) 12 *Yearbook of International Humanitarian Law* 157, at 178; J. Kleffner, ‘Scope of Application of International Humanitarian law’, in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2013), 56–7.

On the other hand, state practice with respect to such cases indicates that attacks by ISIL outside the territory of Iraq and Syria have been treated under a law enforcement paradigm rather than under IHL. France's reaction to the 13 November 2015 attacks is a telling example in this respect. Despite the bellicose rhetoric adopted by French authorities in the aftermath of the attacks,¹⁴⁴ the reaction to the attacks on behalf of the French and Belgian authorities was a typical law enforcement operation of search for and arrest of suspected criminals.

However, some degree of caution is necessary when evaluating such practice, since it may very well be reflective of a political choice rather than a legal conviction that IHL is not applicable and cannot be invoked at all. In deciding how to deal with suspected terrorists hiding in an apartment in Paris the French authorities chose a law enforcement action (raid by police forces)¹⁴⁵ instead of open hostilities tactics, such as destroying the apartment with a missile and then justifying the related deaths and damage by invoking direct participation in hostilities and IHL's principle of proportionality. Even if France considered IHL as applicable in its territory, this approach is easy to understand. With this caveat in mind, state practice up to now tends to show that states have not applied IHL to attacks by ISIL inside their territory.

The ICRC's view is that IHL is applicable to the territory of belligerent states involved in an extraterritorial NIAC. Although the ICRC acknowledges that state practice is inconclusive, it invokes the principle of the equality of belligerents as an argument pleading in favour of the application of IHL to the territory of all the states involved in the NIAC, because 'assisting States involved in an extraterritorial NIAC should not be able to shield themselves from the operation of the principle of equality of belligerents under IHL once they have become a party to this type of armed conflict beyond their borders.'¹⁴⁶

It should be noted that the principle of equality of belligerents does not benefit much the rebel groups (in this case, the ISIL fighters) operating in the territory of an enemy state. Even when the attack by the rebels is directed against a military objective (a French military compound or Belgian armed forces in Brussels), lawful as this attack may be under IHL, it will still constitute a crime under national law, since IHL rules applicable in NIACs do not give to non-state actors a right to participate in hostilities.¹⁴⁷ In other words, the state does not really suffer any severe consequences from 'exposing' itself to IHL and the equality of belligerents principle rather than 'shielding' itself from it. This is not to say that the application of IHL may not have any consequence whatsoever. For example, if it is accepted that incidents such as

144 J. Mullen and M. Haddad, "France is at war," President François Hollande says after ISIS attack', *CNN*, 17 November 2015, available at edition.cnn.com/2015/11/16/world/paris-attacks/; 'Hollande maintient sa position: « La France est en guerre »', *Le Monde*, 16 November 2015, available at www.lemonde.fr/attaques-a-paris/video/2015/11/16/hollande-maintient-sa-position-la-france-est-en-guerre_4811152_4809495.html.

145 G. Botelho et al., '2 killed, 8 held after France raid, but suspected ringleader's status unknown', *CNN*, 19 November 2015, available at edition.cnn.com/2015/11/18/world/paris-attacks/.

146 ICRC, *supra* note 34, at 14. See also Pejic, *supra* note 75, at 97.

147 See the statement by Mrs. Christine Beerli, Vice-President of the ICRC: 'States must follow letter and spirit of IHL', Statement, 16 April 2015, available at www.icrc.org/en/document/icrc-vice-president-states-must-follow-letter-and-spirit-ihl.

the Paris attacks amount to hostilities in the context of a NIAC and are regulated by IHL, this may impose some limits on the weapons that may lawfully be used in response to such incidents.¹⁴⁸ Along the same lines, the application of IHL may prevent actions by the rebels from being considered as terrorist offences.¹⁴⁹

In any case, it is doubtful whether the application of IHL in the territory of states parties to the conflict with ISIL would grant much leeway to the states involved. Indeed, from a legal point of view, the situation analyzed here is not different from the one examined above of an ISIL attack in an area under the control of the Iraqi government, for example in Southern Iraq. Therefore, at least if one follows the ICRC's approach as set out in recommendation IX, applying IHL in France or Belgium does not offer significant leeway with respect to what would be authorized under IHRL.

3.3. Is IHL applicable to an airstrike against an ISIL fighter in the territory of a third State?

The third and final situation, that of an airstrike against an ISIL fighter in the territory of a state non-party to the NIAC with ISIL, for example Tunisia, is rather more clear-cut.

The argument in favour of applying IHL in these cases has been only marginally invoked, and was developed mainly in the so-called 'global war on terror', a concept put forth by the US in the context of its fight against al-Qaeda. This argument views the law of armed conflict as applicable wherever a member of an armed group is found.¹⁵⁰ According to this view the *ratione personae* scope of application of IHL rules defines their *ratione loci* scope of application; the fighter thus carries the conflict with him/her wherever he/she goes. Emphasis is placed on the 'need to move away from geographic-based ideas of applicability of the law' and to establish the nexus between the conduct at issue and the conflict as the decisive factor in determining the geographical application of IHL.¹⁵¹

The ICRC has explicitly rejected this view, pointing to the 'essentially territorial focus of IHL' and asserting that the argument of a territorially unhinged application of IHL is not supported by state practice:

[a] territorially unbounded approach would imply that a member of an armed group or an individual civilian directly participating in hostilities would be deemed to

¹⁴⁸ For example, the use of riot control agents may be excluded. See, 1992 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1974 UNTS 317, Art. I(5). See, W.H. Boothby, *The Law of Targeting* (2012), 267; David, *supra* note 26, at 390–1.

¹⁴⁹ See, for example, Council of the European Union, Council Framework Decision of 13 June 2002 on combatting terrorism (2002/475/JHA), OJEC L 164/3. The decision sets down a list of terrorist offences. The eleventh paragraph of the decision's preamble explicitly excludes actions by armed forces during an armed conflict from the scope of the decision: 'Actions by armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of these terms under that law ... are not governed by this Framework Decision'. Incorporating this paragraph into Belgian law, Article 141 *bis* of the Belgian Criminal Code excludes such actions from the scope of application of terrorist offences. See Loi du 19 décembre 2003 relative aux infractions terroristes, *Moniteur Belge*, 29 December 2003, 61689, at 61691.

¹⁵⁰ See, for example, US Department of Justice, *Lawfulness of a Lethal Operation Directed Against a US Citizen Who Is a Senior Operational Leader of Al-Qaeda or an Associated Force*, White paper, 2011, available at [msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf](https://www.msnbc.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf).

¹⁵¹ See, for example, Sivakumaran, *supra* note 26, at 251, and generally 250–2.

automatically “carry” the “original” NIAC wherever they go when moving around the world. Thus, based on IHL, they would remain targetable within a potentially geographically unlimited space. With very few exceptions, State practice and *opinio juris* ... do not seem to have accepted this legal approach and the great majority of States do not appear to have endorsed the notion of a “global battlefield.” In addition, in practical terms it is disturbing to envisage the potential ramifications of the territorially unlimited applicability of IHL if all States involved in a NIAC around the world were to rely on the concept of a “global battlefield.”¹⁵²

Turning to the concrete geographical scope of application of the fight against ISIL outside Iraq, Syria and the territories of coalition states participating in the airstrikes, it is crucial to determine the actual reach of ISIL. As it was set out in the introduction, several attacks in territories of third states such as Libya or Tunisia have been claimed by ISIL or one of the 34 armed groups allegedly related to it.¹⁵³

It is highly doubtful whether the mere ideological affiliation and the act of pleading allegiance to ISIL is enough to expand the NIAC existing in Iraq and Syria to the territory of the states in which these groups operate. Unless it is proven that, in reality, the various factions operating in third countries form part of the same armed group as ISIL, such factions will not be considered as parties to the NIAC against ISIL.¹⁵⁴ Consequently IHL will not be applicable in the territory of their respective states on that basis. Thus, if IHL is applicable at all, it will be because the two conditions necessary for the existence of a NIAC (organization of the parties and intensity of hostilities) are fulfilled independently of the NIAC involving ISIL.¹⁵⁵

4. CONCLUDING REMARKS

As the previous developments have made clear, the armed conflict against ISIL is not an unprecedented situation with respect to the application of IHL. Indeed, at least some aspects of the conflict are far from exceptional: the armed conflicts between Syria and ISIL, or between Iraq and ISIL with the participation of third states in the conflict alongside Iraq following an invitation by the Iraqi government, are all classic examples of rather commonly experienced NIACs. In this regard, the precedent of the conflict against ISIL merely confirms and reinforces the already established approach as to classification of conflicts and applicable law.

¹⁵² ICRC, *supra* note 34, at 15. See also ICRC, *supra* note 37, at 22. For an example of scholars rejecting the existence of a ‘global’ NIAC see, among many, M. Milanovic and V. Hadzi-Vidanovic, ‘A taxonomy of armed conflict’, in N.D. White et al. (eds), *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Jus Post bellum* (2012), 307–8.

¹⁵³ UNSC, 2016 *Report of the Secretary-general on ISIS*, *supra* note 109, at 3, para. 7.

¹⁵⁴ For a similar conclusion with respect to the links between Al-Qaeda and other affiliated groups, see Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston*, UN Doc. A/HRC/14/24/Add.6, 28 May 2010, at 18, para. 55. See also Sivakumaran, *supra* note 26, at 233.

¹⁵⁵ See, along the same lines, Christiane Höhn, Adviser to the EU Counter-terrorism Coordinator, Council of the European Union, who rejected mixing all terrorist activity in the world into a global armed conflict and asserted that the EU follows the traditional approach of verifying whether in a certain country the two constitutive elements for a NIAC are met; C. Höhn, intervention at a conference on *The EU-US Approaches to Counter-Terrorism*, organized at the *Université libre de Bruxelles* (ULB) on 14 October 2014, available at cdi.ulb.ac.be/eu-us-approaches-counter-terrorism-retrouvez-le-podcast/.

The coalition's intervention in Syria is much more controversial in terms of its classification under IHL, albeit, again, not unprecedented. In this case, the intervention is the most recent example of a new type of conflicts that legal scholars have termed 'transnational'.¹⁵⁶ As it was observed above, until now, this precedent has not generated enough state practice in terms of views relating to classification and applicable law. On the basis of the existing IHL definitions, this author considers that – unless the consent of the Syrian government is proven – the coalition's intervention in Syria gives rise to an international conflict between the coalition states and Syria which is distinct from the NIAC between the coalition and ISIL. In turn, this means that, for the coalition's operations in Syria to be in conformity with IHL, they have to respect the IHL rules applicable in IACs.

Turning to the geographical scope of application of IHL in relation to the fight against ISIL, three specific questions were examined: first, whether IHL applies to the entire territory of Iraq and Syria; second, whether it applies to the territory of the intervening states which are parties to the conflict(s) with ISIL; and, third, whether it applies anywhere an ISIL fighter may be found, that is without any territorial limitation. International practice points to a positive answer with respect to the first question and to a negative one with respect to the third. As to the second question, there is a good argument to be made for applying IHL to the territories of the intervening states in the conflict against ISIL. However, answering the question of the application of IHL is only the first step in determining the legality of an attack against ISIL fighters. The application of IHL does not imply that such an attack will necessarily be lawful at all times. The decisive element in this respect depends to a large extent on the interpretation of the substantive rules of IHL and IHRL regulating resort to force. And, despite all the relevant studies, there is sufficient controversy on this matter to justify further research, and, by the same token, to urge caution in giving any definitive answers.

¹⁵⁶ See references in notes 2 and 77.