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Transnational Conflicts and International Law

*To my parents, my brother and my sister in deep love and
gratitude*

Preface

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List of Abbreviations

ACHR	American Convention on Human Rights
AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977
CIL	Customary International Law
ECHR	European Convention on Human Rights
FARC	Fuerzas Armadas Revolucionarias de Colombia (Revolutionary Armed Forces of Colombia)
GC	Geneva Conventions
IAC	International Armed Conflict
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IRA	Irish Republican Army
NIAC	Non-International Armed Conflict
PKK	Partiya Karkeren Kurdistan (Kurdish Workers' Party)

PoW

RoE

UN

Prisoner of War

Rules of Engagement

United Nations

A. Introduction

“We must define the nature and scope of this struggle, or else it will define us.”¹

I. Background

In today’s post-September 11th world, the relevance and importance of state struggles with violent non-state armed groups is ever increasing, as these multifaceted conflicts permeate throughout the globe. The United States continues to fight members of Al Qaeda and several other terrorist groups, not only within the U.S., but also in foreign countries such as Yemen, Somalia, Afghanistan, Pakistan and Iraq.² Today, conflicts between states and non-state armed groups, in particular, are of significant international importance; this includes the Colombian operation against a FARC base in Ecuador,³ Israel’s fight against Hezbollah in Lebanon⁴ or Hamas in Gaza,⁵ and Turkish operations against the PKK in northern Iraq.⁶ Even within Europe conflicts between states and non-state armed groups still take place as can be witnessed in Eastern Ukraine.⁷ Furthermore, an international marine force remains actively engaged in an increasing struggle with piracy in the Horn of Africa.⁸ However, despite the aforementioned struggles, the 2001 terrorist attacks on New York City’s World Trade Center remain of utmost importance. The terrorist attack served as the primary catalyst for the restructuring of world-views on conflicts between states and non-state armed groups.⁹ In the past, conflicts generally occurred within a particular state, whereas modern conflicts now transcend individual nations’ political systems and geographic borders.¹⁰ The

global nature of such conflicts is a cause for concern within the international community; it raises the question as to how international law addresses such global conflicts. Rules of international law that are applicable to such state border-transcending conflicts remain a debated issue. This book aims to contribute to the debate from an International Humanitarian Law and International Human Rights Law perspective.

II. Transnational Conflicts

In the following section, conflicts between states and non-state armed groups will be defined and categorized as transnational conflicts. The term transnational conflict has been used to reference conflicts that occur across state-borders, as opposed to conflicts between states.¹¹ The term *transnational* highlights that a conflict, although having occurred between a state and a non-state (i.e. private) actor, does not limit itself to the national arena, but rather occurs on the territory of two or more states. Thus, this book defines the term *transnational conflict* as any incidents of violence that, (1) is carried out between a state (henceforth: conflict state) and a non-state armed group that does not act on behalf of a state, and (2) that occurs across national borders and, as a result, affects another state (henceforth: territorial state).

According to the aforementioned definition, transnational conflicts encompass conflicts with various non-state armed groups. In fact, non-state armed groups differ in regard to their organization, their openness to violence and their political and religious agendas. While this book aims to present a broad perspective on non-state actors and their impact on the respective laws, transnational terror

organizations, such as Al Qaeda, remain the primary focus.¹²

The conflict between the U.S. and Al Qaeda began far prior to the 9/11 terror attacks. Al Qaeda was originally formed in 1988 at the end of the conflict against the Soviet Union in Afghanistan, in order to support the struggle of oppressed Muslims worldwide.¹³ Al Qaeda did not always oppose the U.S. Prior, Al Qaeda's goals, as stated in meeting minutes in August and September of 1988, were solely "*to lift the word of God, to make His religion victorious*".¹⁴ One decade later, on February 23rd, 1998, Al Qaeda issued a *Fatwa* against the United States in an Arabic newspaper published in London called *Al-Quds al-Arabi*. The *Fatwa* was co-signed by Osama Bin Laden, Ayman al-Zawahiri and other Islamist leaders, and reads as follows,

"(t)o kill Americans and their allies, both civil and military, is an individual duty of every Muslim who is able, in any country where this is possible, until the Aqsa Mosque and the Haram Mosque are freed from their grip and until their armies, shattered and broken-winged, depart from all the lands of Islam, incapable of threatening any Muslim".¹⁵

The conflict between the U.S. and Al Qaeda was brought to broader public attention due to the 1998 U.S. embassy bombings in Tanzania and Kenya and, ultimately, because of the 9/11 attacks. The U.S. response to these attacks was the launch of the global war on terrorism and the invasion of Afghanistan, which ultimately lead to the end of the Taliban regime in late 2001. Numerous attacks lead by Al Qaeda have followed since, although it is difficult to determine which terrorist attacks the organization was actually responsible for.

While Al Qaeda continues to exist even post Osama bin Laden's assassination in May 2010, it remains relatively dormant ever since. Moreover, it has been weakened and is limited in its operations.¹⁶ The conflict between the U.S. and Al Qaeda triggered the recent debate on international law as

applied to transnational conflicts. This book analyzes various approaches to this debate, which range from applying International Humanitarian Law (IHL) to developing a new legal regime within IHL, to applying a transnational law enforcement regime, based on International Human Rights Law (IHRL).¹⁷

III. Structure of the Analysis

The international law which is primarily relevant to transnational conflicts will be introduced in chapter B. Chapter C analyzes the applicability of IHL to transnational conflicts. Chapter D discusses an alternative law enforcement approach based on IHRL. Subsequently, chapter E addresses prospects of international law regulating transnational conflicts, with a discussion and comparison of the IHL approach and the law enforcement approach. In conclusion, chapter F puts forth a recommendation for an integrated approach between IHL and an IHRL-based transnational law enforcement regime. This book evaluates existing legal regimes, their applicability to transnational conflicts, and possible approaches to overcome the divide between armed conflict and law enforcement regimes. It aims to contribute to current views as well as further the understanding of legal challenges raised by the phenomenon of transnational conflicts.

¹ Barack Obama, *Remarks by the President at the National Defense University*, May 23, 2013, online available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> (last visited May 24, 2013).

² See, e.g., Walter Pincus, *U.S. Strike Kills Six in Al Qaeda*, *Washington Post*, Nov. 5, 2002, at A01; Erik Eckholm and David Johnston, *Qaeda Suspect, Sound Asleep at Trail's End, offers no Resistance*, *N.Y. Times*, Mar. 3, 2003; *Uzbek rebel "killed" in Pakistan*, *BBC News*, Oct. 2, 2009; *"Drone Attack" kills Taliban Wife*,

BBC News, Aug. 5, 2009; *US bombs Islamist town in Somalia*, BBC News, Mar. 3, 2008; Jeffrey Gettleman and Eric Schmitt, *U.S. Kills Top Qaeda Militant in Southern Somalia*, N.Y. Times, Sep. 14, 2009.

³ Jeremy McDermott, *FARC Aura of Invincibility Shattered*, BBC News, Mar. 1, 2008, <http://news.bbc.co.uk/2/hi/americas/7273320.stm> (last visited Jan. 21, 2011).

⁴ For a good account of the conflict between Israel and Hezbollah in 2006 see Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, 250 *et seq.* (2010).

⁵ Jodi Rudoren and Anne Barnard, *Israeli Military Invades Gaza*, N.Y. Times, July 17, 2014.

⁶ Paul de Bubern, *Turkey Launches Major Land Offensive into N. Iraq*, Reuters, Feb. 22, 2008, <http://uk.reuters.com/article/idUKL22614485.CH.242020080222> (last visited Jan. 21, 2011); Peter Hilpold, *Die Kurden zwischen Irak und der Türkei*, in *Krisenherde im Fokus des Völkerrechts*, 73-97 (Thomas Giegerich and Alexander Proelß eds. 2010).

⁷ *The Ukraine Crisis Reaches a New Level*, N.Y. Times, July 1, 2014.

⁸ Sharon Otterman and Mark McDonald, *11 Pirates Seized by French Navy*, N.Y. Times, Apr. 15, 2009.

⁹ Thomas Bruha and Matthias Bortfeld, *Terrorismus und Selbstverteidigung*, 49 *Vereinte Nationen* 161, 161 (2001).

¹⁰ Thomas Bruha and Matthias Bortfeld, *Terrorismus und Selbstverteidigung*, 49 *Vereinte Nationen* 161, 161 (2001) (The authors speak of a third generation of terrorism).

¹¹ See, e.g., Herfried Münkler, *The Wars of the 21st Century*, 85 *International Review of the Red Cross* 7, 20-21 (2003) (Münkler speaks of “transnational wars”).

¹² For background on this particular conflict see Lawrence Wright, *The Looming Tower: Al-Qaeda and the Road to 9/11* (2007 Vintage Books Edition); Marc Sageman, *Understanding Terror Networks* (2004); Peter Bergen, *The Longest War: The Enduring Conflict between America and al-Qaeda* (2011).

¹³ See Uppsala Conflict Data Base at http://www.ucdp.uu.se/gpdata/gpcountry.php?id=164andregionSelect=3-Northern_Americas# (last visited May 28, 2012); Jörg Föh, *Die Bekämpfung des internationalen Terrorismus nach dem 11. September 2001*, 52 (2011).

¹⁴ Peter Bergen, *The Longest War*, 18 (2011); *United States v. Enaam Arnaout*, No. 02-CR-892, Government’s Evidentiary Proffer Supporting the Admissibility of Co-Conspirator Statements, (North District of Illinois, filed Jan. 6, 2003) online available at <http://news.findlaw.com/wsj/docs/bif/usarnaout10603prof.odf> (last visited May 29, 2013).

¹⁵ For the text of the Fatwa see <http://web.archive.org/web/20060422210853/http://www.ict.org.il/articles/fatwah.htm> (last visited Feb. 19, 2012); Bernard Lewis, *License to Kill*, *Foreign Affairs*,

14-19 (1998); Lawrence Wright, *The Looming Tower: Al-Qaeda and the Road to 9/11*, 294 *et seq.* (2007 Vintage Books Edition).

¹⁶ Peter Bergen, *The Longest War*, xvii (2011) (“Though it survives intact and dangerous, al-Qaeda is hemmed in, weakened and limited in its operations. Its ability to force a decisive change in America’s Middle East policy is close to zero, even though it remains capable of dealing lethal blows around the world”); *contra* Leah Farrall, *How Al Qaeda Works*, 90 *Foreign Affairs* 128-138 (2011) (Farrall argues that the central al Qaeda organization has to be assessed and comprehended in context with its subsidiary branches and franchises).

¹⁷ For a general overview see Sylvain Vité, *Typology of Armed Conflicts in International Law: Legal Concepts and Actual Situations* 91 *International Review of the Red Cross* 69, 92-3 (2009).

B. Relevant International Law

IHL and IHRL are particularly pertinent as regards the regulation of conflicts and will both be addressed throughout this work. The following two sections serve as a brief introduction to both sets of law.

I. International Humanitarian Law

IHL, also known as the *Laws of Armed Conflict* or *jus in bello*, regulates permissible means and methods applied during the conduct of armed force.¹⁸ IHL must be distinguished from *jus ad bellum* (or *jus contra bellum*), which pertains to the circumstances under which a state may resort to the use of force against another state.¹⁹ The goal of IHL is not the preservation of peace, but rather the regulation of any armed conflict once it has begun. IHL regulates the way in which armed conflicts are carried out, including existing humanitarian concerns, most importantly the protection of civilians.²⁰

1. Dichotomy of International Humanitarian Law

IHL is applied to armed conflicts and distinguishes between *International Armed Conflicts* (IACs) and *Non-International Armed Conflicts* (NIACs). While IACs are understood as conflicts which “*arise between two or more of the High Contracting Parties*”,²¹ a NIAC is an “*armed conflict not of an international character occurring in the territory of one of the High Contracting Parties*”.²² Therefore, NIACs encompass all forms of conflicts between forces of one particular state and one or several other non-state actors.

The full body of IHL primarily addresses IACs, whereas NIACs are solely addressed in Art. 3 of the Geneva Conventions (GC) and The Additional Protocol II to the Geneva Conventions (AP II). The rules corresponding to each of the aforementioned conflict types form two distinct legal regimes within IHL: the laws of IACs and the laws of NIACs. While the dichotomy of IACs and NIACs has been repeatedly criticized and questioned,²³ it continues to characterize the *lex lata* accepted by all states worldwide.²⁴ The differences between the two legal regimes of IACs and NIACs make it imperative to accurately assess the exact type of an occurring armed conflict. The applicable law directly depends on whether or not a conflict is an IAC or a NIAC. In a recently published report, the International Law Association suggests that IACs and NIACs share the common criterion of armed conflict, in which a common conflict threshold must be met.²⁵ This point of view, however, is misleading:²⁶ While the term *armed conflict* emphasizes that IHL applies only to violent situations, the threshold of violence that must be met to distinguish between an IAC or NIAC differs significantly. There is no common threshold of violence for IACs and NIACs.²⁷

In an IAC, no minimum threshold of violence must be met.²⁸ Any use of force by a state against another state is sufficient for the application of IHL²⁹ as the relationship between any two states is generally not characterized by the use of force. If one state should resort to force at any point, the gravity and exceptionality of the use of force would require the application of international law. Further proof would not be necessary. In such cases, it is the IAC legal regime that grants the protection of the sick, wounded, prisoners and civilians from the very onset of violence.³⁰

In the event of a NIAC, a threshold of violence must be met in order to qualify a conflict as an *armed conflict*. In non-international conflicts, in which only one state party is

involved, a threshold of violence is required to separate a NIAC from any other form of inner-state violence below the NIAC level. Occasionally, isolated and sporadic acts of violence may occur within a certain state, but these do not automatically trigger the application of the laws of NIAC.³¹ The state's sovereignty must always be respected.

2. *Internationalized Non-International Armed Conflict*

The umbrella term *internationalized non-international armed conflict*³² is frequently used in reference to all non-international armed conflicts in which a second state is involved. The second state may be an ally of the conflict state or of the non-state party.³³ Internationalized non-international armed conflicts are not a legal category but rather are used as a descriptor. There is no independent legal regime of internationalized non-international armed conflicts within IHL. The legal treatment of internationalized non-international armed conflicts is therefore disputed.³⁴ Some authors argue that in any instance involving external intervention by a state, the conflict should be characterized as an IAC, regardless of whether the state intervenes on the side of the conflict state or the non-state party.³⁵ This position is driven by the intention to apply the more comprehensive laws of IAC to internationalized non-international armed conflicts. However, the aforementioned view must be rebutted, as a conflict that involves non-state actors can, *de lege lata*, not be characterized as an IAC so long as non-state actors do not act on behalf of a state.³⁶

According to the "*Theory of Pairings*", "*Idea of Differentiation*" and the German "*Komponententheorie*", a reference to the respective opposing parties involved in a conflict must be made in order to categorize the situation and determine the applicable law.³⁷ The analysis may result in four different relationships, each of which corresponds to

a different legal regime:³⁸ (1) the relationship between the conflict state and the non-state party, that qualifies as a NIAC and is regulated by the applicable laws of NIAC, (2) the relationship between the non-state party and a second state that intervenes on behalf of the conflict-state, in which case the laws of NIAC must also be applied, (3) the relationship between the conflict state and a second state that intervenes on behalf of the non-state actor, which must be seen as an IAC and thereby regulated by the laws of IAC, and (4) the relationship between two states that intervene on opposing sides, which would also result in an IAC and thereby regulated by the laws of IAC. The *Theory of Pairings* should be approved as it provides a more accurate view and allows for all situations to be qualified correctly under the existing International Humanitarian Law. As a result, IACs and NIACs may coexist depending on the parties involved in international non-international armed conflicts.³⁹ Internationalized non-international armed conflicts are therefore often and perhaps more accurately described as *mixed conflicts*.⁴⁰

II. International Human Rights Law

IHRL, although often regarded as an entity, is not a separate body of norms. *Brownlie* correctly states,

“human rights problems occur in specific legal contexts. The issues may arise in domestic law, or within the framework of a standard-setting convention or within general international law”.⁴¹

Throughout this book, IHRL is referenced in order to encompass a number of international treaties, which can be divided into global and regional human rights treaties. Global treaties are accessible to all states, while regional treaties are only accessible to the states of that specific region.

The most important global human rights treaties⁴² are the two international covenants from 1966: the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). The Universal Declaration of Human Rights from 1948, while also an important human rights document, is not a treaty legally binding for UN member states. Rather, it is a declaration adopted by the UN General Assembly.⁴³ However, some of the rights stated in the Universal Declaration of Human Rights are directly binding for states, as they have achieved Customary International Law (CIL) status.⁴⁴ The regional human rights treaties are the *European Convention on Human Rights* (ECHR) of 1950, the *American Convention on Human Rights* (ACHR) of 1969, the *African Charter on Human and People's Rights* of 1981 and the *Arab Charter on Human Rights* of 2008.⁴⁵ The legal norms encompassed by the aforementioned sources form a complex but at times confusing system of human rights law.

The exact legal framework applicable to a specific conflict situation is generally dependent on each state's membership to the global treaties, a specific regional human rights treaty, and CIL. In addition, the exact set of norms applicable to a law-enforcement regime is also dependent on the involved state's domestic law.

A key difference between IHL and IHRL is that the former is applicable only to armed conflicts whereas the latter is a general legal framework applicable whenever a state has jurisdiction. IHRL does not address warring parties, but rather regulates the relationship between states and individuals subject to the state's jurisdiction.⁴⁶ IHL binds states and limits their authorities to guarantee their citizen's basic rights and liberties. Consequently, only the state is bound by IHRL, as it is regarded as "*the ultimate guardian of its [a state's] population's welfare*".⁴⁷ Non-state entities, such as non-state armed groups, are generally not bound by

the rules of IHRL. *Henkin* and *Bothe* argue that well-established non-state groups are bound by customary human rights law.⁴⁸ Furthermore, *Bothe* states that human rights can be applied horizontally between two non-state entities and that non-state entities can be bound through criminal law, which protects human rights values.⁴⁹ Nevertheless, it is undeniable that non-state entities are not bound by law to the same extent as states, as IHRL is based on the principle of state responsibility.⁵⁰

¹⁸ Matthias Herdegen, *Völkerrecht*, 403 (2013).

¹⁹ Matthias Herdegen, *Völkerrecht*, 403 (2013).

²⁰ Matthias Herdegen, *Völkerrecht*, 403 (2013).

²¹ Art. 2 GC.

²² Art. 3 GC; cf. Hans-Peter Gasser & Nils Melzer, *Humanitäres Völkerrecht*, 64-5 (2012); International Law Association, *Final Report on the Meaning of Armed Conflict in International Law*, 8 (2010).

²³ ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 96-7 (Oct. 2, 1995); Christopher Greenwood, *International Law and the 'War against Terrorism'*, 78 *International Affairs*, 301 (2002); James G. Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflicts*, 85 *International Review of the Red Cross*, 313-350 (2003); Frits Kalshoven, *International Armed Conflict: Legal Qualification and IHL as Lex Specialis*, in *International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence* 63, 72 *et seq.* (International Institute of Humanitarian Law ed. 2003); Roy S. Schöndorf, *Extra-State Armed Conflicts: Is there a Need for a New Legal Regime?*, 37 *New York University Journal of Law and Politics* 1, 2 (2004); Noelle Quénivet, *The Application of International Humanitarian Law to Situations of a (Counter-)Terrorist Nature*, in *International Humanitarian Law and the 21st Century's Conflicts* 25, 58 (Roberta Arnold and Pierre-Antoine Hildebrand eds. 2005); Hans-Peter Gasser & Nils Melzer, *Humanitäres Völkerrecht*, 65-6 (2012); Dieter Fleck, *The Law of Non-International Armed Conflict*, in *The Handbook of International Humanitarian Law*, ¶ 1202 (Dieter Fleck ed. 2008); Lars Mammen, *Völkerrechtliche Stellung von internationalen Terrororganisationen*, 278-9 (2008); Emily Crawford, *The Treatment of Combatants and Insurgents under the law of Armed Conflict*, 153 *et seq.* 2010; Ingrid Detter, *The Law of War*, 49 (2000).

²⁴ Hans-Peter Gasser & Nils Melzer, *Humanitäres Völkerrecht*, 66 (2012); Noelle Quénivet, *The Application of International Humanitarian Law to Situations of a (Counter-) Terrorist Nature*, in *International Humanitarian Law and the 21st*