

Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts

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Abstract

Transnational non-State armed violence calls for a reconsideration of the existing concepts of the *ius contra bellum*, the *ius in bello* and international human rights law, and international criminal law in order to see whether new concepts such as the category of ‘transnational armed conflict law’ are needed. This article suggests that current international law can adequately deal with transnational armed conflicts without having to devise fundamentally new legal categories. Instead, it is possible, though intellectually demanding, to adjust and to fine tune the existing legal concepts including, in particular, the right to self-defence and the law of non-international armed conflict, and to construe on that basis an overall legal framework that provides for both a coherent and a reasonably balanced answer to the challenges posed.

1. Introduction

In current public international law, ‘transnational armed conflict’ is not a term of art. And yet, the latter is probably a fairly accurate descriptive term for a phenomenon which may be defined as cross-border armed violence between a State and a (collective) non-State actor. In light of the more recent experiences that States faced with non-State actors such as the PKK, Al Qaeda, Hezbollah and Hamas, there can be no doubt that this phenomenon is a current one. However, and contrary to a widespread perception, the phenomenon is not entirely new. If we go back to the nineteenth century, the *West Florida* incident of 1818 marks the beginning of a line of cases¹ that, in retrospect, appear to foreshadow the debate that gained adequate prominence only after the horrific attack of 11 September 2001.

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¹ For a perusal of those cases, see C Kreß, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater* (Duncker & Humblot, Berlin 1995) 218ff.

The study aims to shed some light on the (emerging) legal framework governing our phenomenon from three angles. First, the applicable *ius contra bellum* rules will be outlined. This will be followed by a somewhat more detailed treatment of the legal issues pertaining to the *ius in bello* and international human rights. The third part of the piece will be devoted to international criminal law. In order not to unduly expand the scope of the article, the reflections put forward will be of a rather cursory nature. In particular, many more technical details will be left aside. Instead, an attempt will be made to indicate in what way the rules of the aforementioned four bodies of international law could work together to provide for an integrated legal framework.

In the hope that this may facilitate understanding, the legal considerations will be exposed on the basis of the following hypothetical case scenario.

Arcadia is a State without a functioning government (some would call it a ‘failed State’) and with quite a number of organized armed groups operating on its soil. One of those groups, the *Anti-Utopia Fighters (AUF)*, entertains a rather efficient command system, bases and training camps on *Arcadia*’s territory. The *AUF* hits the State *Utopia* through continuous cross-border strikes which are directed against the civilian population and include a great number of suicide attacks. After having suffered massive civilian casualties, the State *Utopia*, which is functioning and generally law abiding, decides to launch a military operation in *Arcadia* to target members of the *AUF* with a continuous combat function² and to destroy the latter’s military bases in *Arcadia*. The political leadership of the *AUF* resides in the State *Oceania*. At a given moment in time, five members of the *AUF* with a continuous combat function are driving through *Oceania*’s desert without posing the threat of an imminent attack against *Utopia*. Still, *Utopia* sends an unmanned drone to target the five individuals to prevent future attacks. It does so without *Oceania*’s consent and after the latter State had informed *Utopia* about its inability to intern the five individuals.

This example has been chosen for two reasons. First, there is no question of attributing the acts of *AUF* to *Arcadia* under the international law of State responsibility.³ Conversely, in most problematic cases of the recent past, there was an argument about whether or not the acts of the (seemingly) non-State actors

² The term is borrowed from ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (ICRC, Geneva 2009) 16, 32ff and is to be understood accordingly.

³ For the authoritative view of the ILC on attribution, see J Crawford (ed), *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, Cambridge 2002) 91ff.

could be attributed to their host State.⁴ For the purposes of this study, there is no need to enter into the debate on effective versus overall control.⁵ Neither will an attempt be made to explore the emergence of a special rule of attribution for cases of transnational armed violence.⁶ Second, in the hypothetical case scenario, the legal status of the State that has suffered non-State armed violence is not affected by any argument of (prior) illegal conduct such as colonialism, racism or illegal occupation. This, again, is analytically helpful as the legal and political debate about instances of prior State practice is very often clouded by the controversies surrounding the status of the host State.⁷ It is thus hoped that the example will help us to focus on the legal questions pertaining to transnational armed violence pure and simple.

2. *Ius Contra Bellum*

The question of whether non-State actors are bound by the prohibition on the use of force shall be dealt with rather quickly. It is submitted that the answer must be negative.⁸ Even the most recent practice does not support the position that the meaning of Article 2(4) of the UN Charter has undergone a fundamental extension through subsequent practice. Accordingly, the customary prohibition on the use of force also remains confined to the conduct of States. In the

⁴ On Al-Qaeda see D Jinks, 'September 11 and the Laws of War' (2003) 28 *Yale JIL* 12ff, vs Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (CUP, Cambridge 2004) 49; on Hezbollah, see T Ruys, 'Crossing the Thin Blue Line: an Inquiry into Israel's Recourse to Self-Defense against Hezbollah, (2007) 43 *Stanford JIL* 265, 274ff; on both, see M Sassòli, 'Transnational Armed Groups and International Humanitarian Law', Harvard University Program on Humanitarian Policy and Conflict Research Occasional Papers Series (Winter 2006) Number 6, 4ff; there has been little argument, however, about the non-attributability of PKK acts to Iraq; see C Antonopoulos, 'The Turkish Military Operation in Northern Iraq of March–April 1995 and the International Law on the Use of Force' (1996) 1 *JCSL* 33, 52ff.

⁵ For the latest pronouncement of the ICJ, see *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, (Judgment) General List No 91 [2007] §385ff (and in particular §399ff); for a critique, see A Cassese, 'The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 *EJIL* 649.

⁶ On this question, see T Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Hart Oxford, 2006) 231ff, vs. M Lehto, *International Responsibility for Terrorist Acts: A Shift Towards More Indirect Forms of Responsibility* (Lapland University Press, Rovaniemi 2008) 486ff.

⁷ We have demonstrated this at length in our study, Kreß (n 1) 42ff (130).

⁸ For a (perhaps) different position, see A Slaughter and W Burke White, 'An International Constitutional Moment' (2002) 43 *Harvard Intl LJ* 1.

example, *AUF* has thus not violated the prohibition on the use of force. This, however, is not a legal question of paramount practical importance.

A. *The Right to Self-Defence against Non-State Armed Attacks*

What matters is whether *Utopia* is entitled under international law to respond to *AUF*'s violence through the use of armed force on the territory of *Arcadia* without thereby violating the international prohibition on the use of force. It is submitted that it is so entitled. This position rests on the ground that Article 51 of the UN Charter enshrines a right to self-defence against armed attacks carried out by non-State actors even when those acts cannot be attributed to the host State. This is a controversial position⁹ and the ICJ has yet to pronounce itself clearly on the matter.¹⁰ It is thus a position that would deserve being explained at length. In order not to unduly expand the scope of this article, however, the point will not be argued in detail here. Instead, reference is made to a monograph that this author devoted to the subject a while ago.¹¹ Suffice it to say that the reading of Article 51 of the UN Charter which is adopted in this study is borne out both by a textual interpretation and by the close inspection of the international practice since the UN Charter's entry into force. It will perhaps sound provocative to some, but it is respectfully submitted that this reading of Article 51 of the UN Charter is only confirmed by, but does not result from, the international reaction to the armed attack on the USA on 11 September 2001. In fact, a right to self-defence against non-State armed attacks already existed before the occurrence of this incident.¹²

⁹ For only one detailed argument against a right to self-defence against non-State armed attacks, see C Wandscher, *Internationaler Terrorismus und Selbstverteidigungsrecht* (Duncker & Humblot, Berlin 2006) 178, 243; for a nuanced position, see Lehto (n 6) 492ff.

¹⁰ In §139 of its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* 2004, the Court seems to confine the right to self-defence under Art 51 of the UN Charter to 'the case of armed attack by one State against another State', though it adds a kind of *caveat* at the end of the same paragraph; in §147 of its Judgment in the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* 2005, the Court uses explicitly dilatory language which may be taken to indicate an ongoing process of judicial reflection on the matter; for the position adopted in the above text, see Judge Kooijmans' Separate Opinion §§36 to 31, and Judge Simma's Separate Opinion §§7–13. For an interesting recent analysis of the ICJ case law on the matter, see K Trapp, 'Back to Basics; Necessity, Proportionality, and the Right of Self-Defence against non-State Terrorist Actors' (2007) 56 *ICLQ* 142ff.

¹¹ Kreß (n 1) 274ff and *passim*; developments after 1994, especially after 11 September 2001, have confirmed this position; for a helpful analysis of those developments, see C Tams, 'The Use of Force against Terrorists' (2009) 20 *EJIL* 378ff.

¹² For perhaps the clearest position of the same view, see Y Dinstein, *War, Aggression and Self-Defence* (CUP, Cambridge 1988), 221ff (cf 244ff of the 4th edn 2005).

B. The Conditions and the Scope of the Right to Self-Defence against Non-State Armed Attacks

The crucial question is about the conditions and the scope of the right to self-defence against non-State armed attacks. Those must reflect the specificities of 'transnational' self-defence action to respond to a non-State armed attack.

(i) The requirement for intensive armed violence

First, the cross-border armed violence must reach a certain level of intensity.¹³ However, in the case of a series of non-State attacks over time, none of which is large-scale on its own, a State may have recourse to self-defence if it can demonstrate that the attacks emanate from the same non-State group.¹⁴ This requirement of a quantitative threshold, which - contrary to the view held by the ICJ since *Nicaragua* - does not apply in cases of cross-border armed violence carried out by a State,¹⁵ mirrors - at least to an extent - the threshold to be passed to transform internal turbulence into a non-international armed conflict.¹⁶ Even though State practice on the matter is not altogether clear, it would seem to bear out the existence of this threshold.¹⁷ At the same time, the threshold requirement reflects the fact that self-defence action on the territory of another State, which has not itself launched an armed attack, is of an extraordinary nature and it ensures that the consequences for public order that flow from such a military response are not triggered too soon.¹⁸ Without going into any detail, State practice concerning the transnational violence carried out by the PKK against Turkey, by Hezbollah and Hamas against Israel and by Al Qaeda against the United

¹³ For the same view, see the Separate Opinions of Judges Kooijmans and Simma, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* 2005, at §29 and §13 respectively.

¹⁴ For a detailed argument on the so-called accumulation of events doctrine, see Kreß (n 1) 196ff; for a helpful fresh look at the issue, see Tams (n 11) 388ff.

¹⁵ For the unconvincing view espoused by the ICJ, see *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 [101 (§191)]; *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* [2003] ICJ Rep 161 [186ff (§51)]; for critiques, see most recently J Green, *The International Court of Justice and Self-Defence in International Law* (CUP, Cambridge 2009); and earlier Kreß (n 1) 187ff; Dinstein (n 12) 4th edn 193ff.

¹⁶ For a more detailed analysis, see below section 2D.

¹⁷ For an attempt at a comprehensive analysis of the practice until 1994, see Kreß (n 1) 291ff.

¹⁸ This position is not uncontroversial. Although he does not deal with the argument set out in the above text explicitly, it would seem that Dinstein (n 12) 244, does not confine the right of self-defence against non-State armed attacks to instances of large-scale non-State violence.

States of America on 11 September 2001 indicates when the threshold in question will be passed.

(ii) The subsidiarity of the right to self-defence as part of the necessity requirement

Second, self-defence against a non-State armed attack is necessary only if the attack cannot be repelled or averted by the State from whose territory the non-State group operates.¹⁹ States relying on self-defence therefore must show that the territorial State's action is not effective in countering the non-State threat.²⁰ Whether this is the case depends on circumstances such as the nature and gravity of the threat as well as the territorial State's attitude *vis-à-vis* the group operating on its territory.

(iii) The proportionality requirement of the right to self-defence

Third, where the host State is not actively supporting the non-State group, the self-defence measures must, as a rule,²¹ be directed against the non-State group responsible for the armed attack in question and their (quasi-)military installations.²² In addition, as a matter of principle and in light of State practice, a case can be made that the standard of strategic proportionality regarding the acceptable overall damage caused to civilians as a result of the exercise of the right to self-defence must be more stringent than in a case of self-defence against an armed attack carried out by another State.²³

(iv) The territorial limitation of the right to self-defence

Finally, but very importantly, the right to self-defence against a non-State armed attack justifies a forcible response only on the territory of the State

¹⁹ It should be noted that a weak host State of the non-State actors may well wish to secure the logistical support of the State that is under the non-State armed attack in order to repel this attack; see Trapp (n 10) 147 (fn 33).

²⁰ This requirement is probably implied when Dinstein (n 12) 4th edn 250, writes: 'The absence of alternative means for putting an end to the operations of the armed bands or terrorists has to be demonstrated beyond reasonable doubt'.

²¹ An exception may at best be contemplated with a view to minimizing the overall damage caused by the military action.

²² Kreß (n 1) 235, 292; for the same view, see Dinstein (n 12) 4th edn 250; Trapp (n 10) 155ff.

²³ The principle should be that the requirement of strategic proportionality must be most stringent when there is only (and at best) nominal responsibility of the State from whose territory the non-State armed attack emanates for this attack. Such is the case where a ('failed') State is unable to prevent the non-State armed attack. The term 'nominal responsibility' is borrowed from Dinstein (n 12) 4th edn 245.

from whose territory the non-State armed attack occurs.²⁴ The mere presence of members of the violent non-State group on the territory of a third State and even isolated armed violence carried out by those members from within this third State do not amount to a non-State armed attack emanating from that third State and do thus not warrant self-defence action by the target State on the territory of that third State. A possible counter-argument would be that this implies an artificial distinction between several armed attacks while there is in reality only *one* non-State armed attack emanating from a plurality of host States.

Yet the distinction drawn is a necessary one in light of the fact that the exercise of the right of self-defence must be specifically justified *vis-à-vis* every State on whose territory self-defence action is taken. At this juncture of the analysis, it is important to stress that the application of Article 51 of the UN Charter to non-State armed attacks must not cloud the fact that the main function of this provision remains to provide a justification for a use of force by a State on the territory of another State. For this simple but fundamental reason an inter-State reading of Article 51 of the UN Charter (as well as of the customary right to self-defence) is necessary also in a case where the right to self-defence is used to repel a non-State armed attack.²⁵ Where members of a non-State armed group that has launched an armed attack are moving between more than one State territory, it may be *factually* tempting to speak of *one* non-State armed attack that stretches over many State territories and that may eventually reach a global scope. From a legal perspective, however, such an automatic extension of the geographical scope of the right of self-defence is unwarranted because it loses sight of the necessary inter-State reading of the right to self-defence under current international law. It must therefore always be shown that the non-State armed violence emanating from the State on whose territory armed force is used, has reached (or is about to reach) the required quantitative threshold.

It bears adding that this position does not introduce a hitherto unknown limitation into the application of the right to self-defence under international law. Quite to the contrary, a corresponding logic applies in the context of an armed attack by State A on State B with members of the armed forces of A being present on the territory of State C, which is not otherwise involved in the armed attack by State A. State A may then consider extending its self-defence action onto the territory of State C. Under the existing *ius contra bellum*, such geographical extension of forcible action taken in self-defence can no longer be

²⁴ Cf §39 of N Schrijver and L van de Herik, *Leiden Policy Recommendations on Counterterrorism and International Law* (2010) <http://law.leiden.edu/organisation/publiclaw/publicinternationallaw/news/minister-verhagen-receives-leiden-policy-recommendations.html> at <http://www.grotiuscentre.org/cms/ACE/files/Leiden%20Policy%20Recommendations%201%20April%202010.pdf>.

²⁵ Recently, this point has been well made by Trapp (n 10) 146; Trapp, 'The Use of Force against Terrorists: A Reply to Christian J. Tams' (2009) 20 *EJIL* 1053.

justified by a mere reference to the traditional law of neutrality. It rather presupposes that B's conduct carried out from within the territory of C amounts in and of itself to an armed attack against A.²⁶

The suggested geographical limitation ensures that the right to self-defence against non-State attacks will only exceptionally evolve into a right to use force on the territory of more than one State. To clarify that point with a view to '9/11': If it is assumed that the armed violence carried out by Al Qaeda against the USA was not attributable to the State of Afghanistan, it constituted a non-State armed attack against the United States of America emanating from Afghanistan. This armed attack carried out by Al Qaeda from Afghanistan might well have begun before and was likely to continue after 11 September 2001 as long as Al Qaeda preserved its quasi-military infrastructure in that country.²⁷ It did not, however, extend to Yemen in November 2002 simply because of the fact that members of Al Qaeda may have been present on the territory of that State at this moment in time.

As of yet, and contrary to the position articulated above, the US administration under President Obama appears to maintain the idea of being the victim of *one* ongoing armed attack by Al Qaeda which is of a geographically undefined nature. At the same time, it constitutes a welcome step in the right direction that the new US Legal Advisor has stated that 'the sovereignty of the other states involved' constitutes a relevant consideration in the decision as to whether armed force will be used 'in a particular location'.²⁸

Returning to our hypothetical case scenario, the situation under the *ius contra bellum* is thus as follows: *Utopia* did not violate the international prohibition on the use of force through its military operation in *Arcadia* against members of the *AUF* and against its bases. However, in the absence of a (non-State) armed attack emanating from *Oceania*, *Utopia* could not rely on self-defence to justify the use of force on the territory of *Oceania* directed against the five *AUF* members travelling in that State.

²⁶ M Bothe, 'The Law of Neutrality' in D Fleck (ed), *The Handbook of International Humanitarian Law* (2th edn OUP, Oxford 2008) 581.

²⁷ There is the famous '*Hamburg*' argument according to which Al Qaeda's armed attack also emanated from Germany because of the substantial involvement of the '*Hamburg cell*' in the violent operation. This argument cannot simply be ignored. It, first, underlines the need to further elaborate the criteria for establishing the territorial origin of a non-State armed attack. Second, if, *arguendo*, Al Qaeda's armed attack of 11 September 2001 also emanated from Germany, it is worth stating that there was no indication that this armed attack was likely to be continued from Germany with this State being unwilling or unable to suppress it. This, however, would have been necessary to seriously raise the question of a right of the United States of America to use armed force in self-defence on Germany's soil.

²⁸ H Koh, 'The Obama Administration and International Law', *Remarks at the Annual Meeting of the American Society of International Law* 25 March 2010, <http://www.state.gov/s/l/releases/remarks/139119.htm>.

3. *Ius in Bello* and International Human Rights Law

As was stated at the outset, it is the purpose of this article to look at transnational armed conflict from all relevant legal angles. This leads to the question of whether *Utopia*, in its forcible response to the non-State armed attack, acted in conformity with the law of armed conflict and/or international human rights law. Now the focus is no longer on the international legal protection of the territorial integrity of *Arcadia* and *Oceania*, but on the protection international law provides for the individuals concerned.²⁹ The first aspect to clarify is the applicable armed conflict and/or human rights framework once transnational armed violence has erupted. To begin with, the potentially triangular legal relationship between *Arcadia*, *Utopia* and the *AUF* will be looked at from an armed conflict perspective.

A. The Problems with a 'Pure International (Inter-State) Conflict Model'

One way to deal with the matter is to adopt a straightforward international (inter-State) armed conflict model.³⁰ According to such a model, there exists only an international armed conflict between the State that suffers non-State armed violence (here: *Utopia*) and the State on whose territory the non-State group operates (here: *Arcadia*). This international armed conflict is triggered not by the transnational non-State violence (here: by the *AUF*) but only by the use of force carried out by *Utopia* on *Arcadia*'s territory without the latter's consent. The lack of actual fighting between those two States is irrelevant.³¹

There are at least two noteworthy consequences flowing from such an approach. First, the *AUF* fighters would have to be considered as civilians within the meaning of Article 51 of the *First Additional Protocol to the Geneva Conventions* (AP I) because they did not 'belong' to *Arcadia* within the meaning of Article 4 §2 of the *Third Geneva Convention* (GC III).³² As a result thereof, those fighters could be targeted only 'for such time as they take a direct part in hostilities' (Art 51 [3] AP I). Second, the attacks carried out by the members of *AUF* before the forcible response by *Utopia* could not be classified as war crimes because, at that moment in time, there was not yet an armed conflict at all.

There are significant problems with this 'pure international (inter-State) armed conflict model'. It seems highly artificial, to say the least, not to qualify the non-State group, ie those who actually fight on one side of the conflict, as a party to the armed conflict. The same holds true for the idea that the non-State

²⁹ This is irrespective of the more technical legal question as to whether the law of armed conflicts provides for *international rights* of the protected individuals.

³⁰ This would seem to be the position taken by Dinstein (n 12) 4th edn 245, who specifies that the international armed conflict is 'short of war'.

³¹ Sassòli (n 4) 5; this, however, constitutes a bone of contention to which I shall come back (below section C).

³² Cf the analysis conducted by Sassòli (n 4) 11ff.

fighters are civilians taking a ‘direct part in hostilities’ because there simply are no hostilities between at least two (other) parties in which the non-State fighters could take a direct part. Apart from distorting the actual situation of hostilities, the ‘pure international (inter-State) armed conflict model’ would severely hamper the exercise of the right to self-defence under Article 51 of the UN Charter, because it would restrict the power of the self-defence State to target the non-State fighters to the period of time in which they take a direct part in hostilities.³³ In our case scenario, *Utopia* would have to confine the targeting of members of the *AUF* on ‘such time’ as they take a direct part in the hostilities. It is submitted that such a limited power is inadequate to deal with ‘hit and run scenarios’ and that it is not accepted in State practice.³⁴ Finally, it would appear somewhat incoherent to subject the conduct of hostilities by the organs of the self-defence State to the law of war crimes while excluding the initial armed attack by the non-State forces from this body of law.

B. The Flaws of a ‘Pure International (State v Non-State Party) Armed Conflict Model’

This model was (at least originally) adopted by the Bush administration in the USA³⁵ and is adhered to by the Supreme Court of Israel.³⁶ Correctly, it starts from the following premise set out by Roy S Schöndorf in an extraordinarily thoughtful study on the subject of transnational armed violence:

³³ For an excellent elaboration upon this fundamental point, see D Kretzmer, ‘Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?’ (2005) 16 *EJIL* 189ff; see also R Schöndorf, ‘The Targeted Killings Judgment: A Preliminary Assessment’ (2007) 5 *J Intl Crim Justice* 305. One could, of course, try to remedy this problem by a ‘membership’ approach to the construction of the requirement of ‘for such time’. This is, essentially, the line taken by the Supreme Court of Israel Sitting as the High Court of Justice, Judgment of 11 December 2005, *The Public Committee against Torture in Israel et al v The Government of Israel et al* HCJ 769/02 (for an English translation, see http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf (visited on 10 January 2010)), §39. However, it is less than easy to reconcile such an interpretation with the natural meaning of the words ‘for such time as they take a direct part in hostilities’. Therefore it is quite plausible that the ICRC’s

³⁴ Similarly, Dinstein (n 12) 4th edn, recognizes the possibility of a certain ‘interval between the armed attack and the forcible response’. This author does not explain, however, how this exercise of the right of self-defence may be reconciled with his ‘pure international armed conflict model’.

³⁵ See eg George W Bush, ‘Memorandum: Humane Treatment of Al Qaeda and Taliban Detainees’ 7 February 2002, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf> (visited on 10 January 2010) §2c.

³⁶ See above (n 33) §18; for an illuminating analysis of the Supreme Court’s reliance on (and apparent generalization of) Antonio Cassese’s occupation law argument, see Schöndorf (n 33) 303ff.

[C]haracterizing the situation as an armed conflict between states, when the real conflict is between the state and a non-state actor, is an artificial solution which is in many respects a symptom of the larger difficulty with the position of non-state actors in international law.³⁷

Therefore, the 'pure international (State v non-State party) armed conflict model' would recognize the existence of an armed conflict only between the non-State actors (here: *AUF*) and their target State (here: *Utopia*). This conflict would then be classified as international in character because of its transnational nature. This latter classification, however, is flawed as a matter of current international law. According to Common Article 2 of the GCs and the underlying customary international law, the concept of international armed conflict implies the existence of armed violence between two States. While Article 1 §4 AP I makes it clear that there is no obstacle in principle to extension of the concept of international armed conflicts to hostilities between States and non-State groups, it is equally clear that the special conditions of the latter (and controversial!) treaty provision are not fulfilled in the scenario of transnational armed violence under scrutiny in this study. And the international reaction to the initial US approach after 9/11 and to the judgment of the Supreme Court of Israel was not such that the idea encapsulated in Article 1 §4 AP I could have undergone a quite considerable extension through subsequent practice to the effect that the concept of international armed conflict now includes every form of cross-border armed violence of a certain degree of intensity.³⁸

C. The Merits of a 'Pure (Transnational) Non-International Armed Conflict Model'

This model³⁹ avoids the artificiality of the first and the inaccuracy of the second model referred to above in that it classifies the transnational armed violence between the non-State actor and its target State as a non-international armed conflict. In doing so, however, it unquestionably faces the problem that the idea of a 'transnational' non-international armed conflict is supported neither by the genesis of Common Article 3 of the GCs nor by the text of Article 1 §1 of AP II. And yet, there can be little doubt that the concept of 'transnational' non-international armed conflict captures best the situation of intensive cross-border violence between an organized non-State group and a State. First, it would reflect the basic fact that the actual hostilities are between a non-State group (here: *AUF*) and a

³⁷ R Schöndorf, 'Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?' (2004) 37 *New York UJ Intl L Politics* 26.

³⁸ For early expressions of the same view, see Sassöli (n 4) 4ff; J Pejic, 'Terrorist Acts and Groups: A Role for International Law?' (2004) 75 *BYBIL* 81ff.

³⁹ For an exposition of this model, see A Paulus and M Vashakmadze, 'Asymmetrical War and the Notion of Armed Conflict: A Tentative Conceptualization' (2009) 91 *Intl Rev Red Cross* 112.

State (here: *Utopia*). Second, it would reflect the fact that the State acting in self-defence (here: *Utopia*) is actually doing what the territorial State (here: *Arcadia*) should have done in the first place. Had the territorial State acted according to its international obligation to prevent non-State actors from using its soil to launch an armed attack upon another State and had it been necessary to use the military to fulfil this obligation because of the strength of the non-State armed group, a non-international armed conflict would have occurred. It is hard to see why the legal situation should be fundamentally different just because the self-defence State acts in place of the territorial State. Third, and importantly, the classification of the transnational armed violence as non-international armed conflict would allow for the application of a more realistic targeting rule because it is then possible to recognize the existence of non-State armed forces (here: the ‘armed forces’ of the *AUF*) and to allow the State party to the armed conflict (here: *Utopia*) to target non-State fighters with a continuous combat function at any time during the armed conflict.⁴⁰ Only such a rule of targeting complements (instead of undermines) the right to self-defence against non-State actors under Article 51 of the UN Charter. Fourth, the ‘non-international armed conflict model’ allows for a symmetrical application of war crimes law in the case of massive transnational armed violence. With the powerful precedent of the US Supreme Court’s decision in *Hamdan v Rumsfeld, Secretary of Defense et al.*,⁴¹ with a sound basis on basic principles of the armed conflicts, and with a growing measure of scholarly support⁴² there is now reason to expect that customary law might continue to evolve towards fully endorsing the idea of ‘transnational’ non-international armed conflicts.

It should be added that the ‘pure non-international armed conflict model’ will necessarily reach its limits in the following three situations which all go beyond our hypothetical (failed State) case scenario: in the case of an armed confrontation between the armed forces of the State acting in self-defence (here: *Utopia*) and the armed forces of the host State (here: *Arcadia*); in the case of capture and detention of armed forces of the State acting in self-defence by the host State; and in the case of an occupation of a part of the host State’s territory by the State acting in self-defence. In all three cases the law of international armed

⁴⁰ ICRC (n 2) 16, 32ff, but see also 77ff. For the purpose of this study, it is not necessary to enter into the debate whether the notion of ‘continuous combat function’ as developed in the ICRC’s *Direct Participation* study constitutes the best and most practicable way to define membership of non-State armed forces; for a sceptical view, see M Schmitt, ‘Targeted Killing in International Law’ (2009) 103 *AJIL* 817.

⁴¹ Judgment of 29 June 2006 (2006) 548 US 67.

⁴² See most recently §63 Schrijver and van der Herik (n 24); see also Paulus and Vashakmadze (n 39) 95; N Melzer, *Targeted Killing in International Law* (OUP, Oxford 2008) 257ff, 261; Sassòli (n 4) 8ff; Kretzmer (n 33) 194ff; Pejic (n 38) 85ff; Jinks (n 4) 1; for a contrary view, see M Milanovic, ‘Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing *Hamdan* and the Israeli *Targeted Killings Case*’ (2007) 89 *Intl Rev Red Cross* 381.

conflict must apply and thereby 'the pure non-international armed conflict model' would be replaced by a model under which the laws of international and non-international armed conflict apply concurrently ('concurrency model'). This, however, does not reveal a flaw in the 'pure non-international armed conflict model'. It simply reflects the basic fact that the 'pure non-international armed conflict model' can only apply as long as its premise holds true, that is, the absence of elements of an actual inter-State armed conflict. As soon as this premise fails due to the existence of elements of a genuine inter-State armed conflict, the 'concurrency model' must govern the situation.⁴³

D. The Doubts Regarding the Need for a New and Sui Generis 'Law of Extra-State Armed Conflict' or 'Transnational Armed Conflict'

In two recent studies it has been argued that transnational armed violence requires us to overcome the traditional dichotomy between international and non-international armed conflict and to recognize the emergence of a third category of armed conflict. While Schöndorf suggests the use of the term 'law of extra-State armed conflict',⁴⁴ Geoffrey Corn and Eric Talbot prefer the term 'transnational armed conflict'⁴⁵ (so that the title of this article would finally turn into a term of art).

Yet, a new category of armed conflict law should only be recognized in the case of a compelling need and, as of yet, such a need would not seem to have been clearly established. Geoffrey Corn and Eric Talbot fail to provide an elaborate argument in order to demonstrate the advantages of their suggested model over a 'pure non-international armed conflict model'. Schöndorf, however, makes the following point:

[D]oubts arise whether the rules regulating the protection of non-combatants in intra-state armed conflicts are appropriate for hostilities that take place outside the territory of the state. In this respect, the parallel to inter-state armed conflicts is more compelling.⁴⁶

This is an important argument. It can, however, be countered on two levels. First, it can be argued that the law of non-international armed conflict would have to apply, whatever its limits regarding the protection of non-combatants, where the

⁴³ The considerations in the above text regarding the delimitation between the 'pure non-international armed conflict model' and the 'concurrency model' refine the analysis put forward in C Kreß, 'Völkerstrafrecht der dritten Generation gegen transnationale Gewaltakte Privater?' in G Hankel (ed), *Die Macht und das Recht. Beiträge zum Völkerrecht und Völkerstrafrecht am Beginn des 21 Jahrhunderts* (Hamburger Edition, Hamburg 2008) 391ff.

⁴⁴ Schöndorf (n 37) 1.

⁴⁵ G Corn and E Jensen, 'Transnational Armed Conflict: A "Principled" Approach to the Regulation of Counter-Terror Combat Operations' (2009) 42 *Israel L Rev* 46.

⁴⁶ Schöndorf (n 37) 40.

host State (here: *Aracadia*) would, through the use of the military instrument, fulfil its international duty to prevent the non-State group (here: *AUF*) from attacking the foreign State (here: *Utopia*). If the limits of non-international armed conflict law had to be accepted in this case, why should it be different where the foreign State acts in place of the host State? Second, it is submitted that the premise of Schöndorf's argument, that the law of non-international armed conflict suffers from significant shortcomings regarding the protection of non-combatants, no longer holds true. Irrespective of controversies in detail, there can be little doubt that the ICRC's *Customary Law* study⁴⁷ is right to acknowledge that, under customary law, there are no longer important differences between international and non-international armed conflict law regarding the conduct of hostilities. For example, the principles of distinction and of proportionality now apply essentially in the same way in international and non-international armed conflicts.⁴⁸ A good case can be made to go even one step further and to argue that a 'non-international armed conflict model' offers a better prospect for enhanced non-combatant protection than an 'international armed conflict model'. The reason for this prospect lies in the fact that the *lex specialis* character of the targeting and detention rules of armed conflict law *vis-à-vis* the much more restrictive standards of international human rights law is much more firmly established in a situation of international armed conflict than it is with respect to all situations of non-international armed conflict.

E. Transnational Armed Violence and the Threshold for the Applicability of a 'Non-International Armed Conflict Model'

It is of crucial importance to determine the threshold that must be met to apply the non-international armed conflict model to the targeting of non-State fighters in the course of an operation of self-defence. If this question is placed into context and looked at from a perspective of the interplay between the *ius contra bellum* and the *ius in bello* side, two theoretical possibilities can be recognized which, for the sake of convenience, will be called 'congruity model' and 'discrepancy model'.

Under the 'congruity model', the *ius contra bellum* threshold for the use of self-defence against a non-State attack and the *ius in bello* threshold for the application of the law of non-international armed conflict are identical. This would mean that the occurrence of a non-State armed attack within the meaning of Article 51 of the UN Charter would inevitably trigger the applicability of the law of 'transnational' non-international armed conflict. Such congruency would certainly reduce legal complexity. Yet, it must be recognized that the congruity model does not apply as a matter of logical necessity. Given the conceptual

⁴⁷ JM Henckaerts and L Doswald-Beck (eds), *Customary International Humanitarian Law* (CUP, Cambridge 2005).

⁴⁸ Henckaerts and Doswald-Beck (n 47) Volume I: Rules 3ff.

distinction between the *ius contra bellum* and *ius in bello* one can also conceive of a lower threshold for the right to self-defence against a non-State armed attack compared with the threshold for the applicability of the law of non-international armed conflict. Within the area of 'discrepancy', the targeting and the detention of non-State fighters carried out in the exercise of the right to self-defence would then, however, be an exercise of extraterritorial law enforcement which would be governed by international human rights law.⁴⁹ Scholarly honesty requires us to recognize the significant difficulty of deducing from the relevant international practice a clear answer to the question as to whether the 'congruity' or the 'discrepancy' model better reflects the *lex lata*. It can be said, however, that any possible area of discrepancy would be rather limited. The reason is that the more recent international practice concerning the *ius in bello* suggests that the threshold for the application of the whole body of customary non-international armed conflict law, including the rules on the conduct of hostilities, cannot be far away from that of *ius contra bellum*. This recent practice is illuminating in two respects.

First, it does not support the idea that the legal quality of a non-State party to a non-international armed conflict depends on the *willingness* (instead of the *capability*) of the respective organization to generally comply with that body of law.⁵⁰ This international practice leads to the application of non-international armed conflict law even in the absence of the slightest hope that this body of law will be applied symmetrically on the ground. One may wonder why States clearly tend to accept the applicability of a 'symmetrical legal regime' in cases of 'asymmetrical compliance'. Probably the position of States can be explained by the simple (and quite understandable) reason that they do not wish to lose the advantages flowing from an armed conflict model in the areas of targeting and detention because the enemy non-State armed group follows a strategy of terrorizing the civilian population in complete defiance of armed conflict law.⁵¹

⁴⁹ For the purposes of this study, it is not necessary to deal with the controversies surrounding the (possible) extraterritorial scope of application of certain international human rights instruments; for a recent study on the subject, see M Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 *Human Rights L Rev* 411. Instead it suffices to say that, as a matter of principle and customary international law, the targeting of individuals must be subjected to the limits of the international human right to life if this targeting occurs outside an armed conflict.

⁵⁰ For a very clear statement to this effect based on a careful analysis of the pertinent international practice, see *Prosecutor v Boskoski et al* (Judgment of 10 July 2008) ICTY IT-04-82-T, §205.

⁵¹ There is only one viable alternative to cope with this problem. This would be the acceptance of a new asymmetrical legal regime of (extraterritorial) law enforcement which would, despite its theoretical starting point at human rights law incorporate certain armed conflict powers of targeting and detention; for an exposition of the contours of such a new legal regime, see Kreß (n 43) 397ff. It must be noted that the term 'extraterritorial law enforcement' has been introduced into the debate by Yoram Dinstein. This author, however, uses the expression in the different context of the *ius contra bellum*; cf above (n 12).

Second, the more recent international practice, including, in particular, the evolution of the law on war crimes committed in non-international armed conflicts⁵² starting with the International Criminal Tribunal (ICTY) on the former Yugoslavia's landmark decision in the *Tadic* case,⁵³ suggests that, in terms of the intensity of the violence and the degree of organization of the non-State group, the threshold for the application of the customary law of the conduct of hostilities in non-international armed conflict is now below that of Article 1 §1 of AP I and probably tends to become more or less congruous with that of Common Article 3 GCs.⁵⁴ At first glance, this expansion of the scope of application of the law of non-international armed conflict may seem surprising because it implies the recognition by States to be bound by quite a wide range of obligations flowing from international humanitarian law already in Common Article 3 types of armed conflict. Yet, in light of the (perceived) threat posed by violent non-State actors, States seem to be more interested in availing themselves of the wider powers they can derive from the application of the law of non-international armed conflict (compared with international human rights law) than they are concerned by the restraining effect of the ensuing obligations. It follows that the *AUF*, to take again our hypothetical example, can be considered to be a party to a non-international armed conflict although it systematically defied the most basic principles of the conduct of hostilities.

This State practice reveals a fundamental change of perspective regarding the application of the law of non-international armed conflict that has recently been highlighted by David Kretzmer in a most important study.⁵⁵ In a nutshell: when Common Article 3 was included in the GCs in 1949, the basic question was to what extent States were prepared to accept restrictions in an area that was not yet governed by (hard) international human rights law. Nowadays, however, the primary effect of the application of the law of non-international armed conflict is no longer the imposition of legal restraints because the now existing *lex generalis* of international human rights law contains restraints that very significantly exceed those of armed conflict regarding targeting and detention. Instead, for States

⁵² C Kreß, 'War Crimes Committed in Non-International Armed Conflicts and the Emerging System of International Criminal Justice' (2000) 30 *Israel YB Human Rights* 103.

⁵³ According to the now famous definition suggested by the ICTY, 'an armed conflict exists whenever there is a resort to armed force between States or *protracted armed violence between governmental authorities and organized armed groups or between such groups within a State*' [emphasis added]; *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY IT-91-1-AR72, §70.

⁵⁴ For two helpful scholarly statements pointing (with nuances) in the same direction, see Paulus and Vashakmadze (n 39) 95; R Geiß, 'Armed Violence in Fragile States: Low-Intensity Conflicts, Spillover Conflicts, and Sporadic Law Enforcement Operations by Third Parties' (2009) 91 *Intl Rev Red Cross* 127.

⁵⁵ D Kretzmer, 'Rethinking the Application of IHL in Non-International Armed Conflicts' (2009) 42 *Israel L Rev* 8.

that are faced by a non-State armed attack, the resort to the armed conflict model offers the advantage of applying, as the *lex specialis*, a targeting and detention regime that is appreciably more permissive than that under international human rights law. It is submitted that this crucially decisive point must be borne in mind when the situation arises as to whether a conflict situation is to be classified as one of armed conflict. In particular, the call for ‘as wide as possible’ a scope of application for ‘international humanitarian law’ has become dangerously simplistic. Very much to the contrary, a reasonable threshold for the application of the customary law of non-international armed conflict requires the insistence on a degree of quasi-military organization of the non-State party that enables it to carry out large-scale armed violence in a coordinated manner. In that respect, the ICTY has developed a sensible set of indicative factors in *Prosecutor v Boskoski et al.*⁵⁶

On that basis, Al Qaeda may well have been a party to a non-international armed conflict in 2001 and as long as it was based in Afghanistan in the form of a quasi-military organization. This legal status would have certainly been lost, however, as a consequence of Al Qaeda’s subsequent transformation into a rather loosely connected network of terrorist cells.⁵⁷ And most certainly, individual terrorist action all over the globe carried out on the basis of an ‘Al Qaeda franchise-model’ cannot be attributed to Al Qaeda as a non-State party to a non-international armed conflict of global reach.

In our little case scenario, however, there can be little question that the organization of the *AUF* and the level of transnational armed violence was such that it triggered the applicability of the law of (non-international) armed conflict.

F. Tempering the Application of an Armed Conflict Model on Targeting and Detention in (Transnational) Non-International Armed Conflicts: Some Cursory Remarks on the Potential Relevance of International Human Rights Law

For situations of *international* armed conflict, the (otherwise rather ambiguous) jurisprudence of the ICJ (correctly) suggests that the law of armed conflict, in so far as the targeting and the detention of persons is concerned, provides for the *lex specialis* that derogates more stringent standards under any applicable international human rights law.⁵⁸ Both the fundamental change of perspective regard-

⁵⁶ See above (n 50) §194ff.

⁵⁷ The USA, however, is of the view that it continues to be party to an armed conflict with Al Qaeda: Koh (n 28): ‘In the conflict occurring in Afghanistan and elsewhere, we continue to fight the perpetrators of 9/11: a non-state actor, al-Qaeda (as well as the Taliban forces that harboured al-Qaeda)’. Not much is said, though, about the present form of organization of Al-Qaeda, except for the qualification of a ‘diffuse, difficult-to-identify terrorist enemy’.

⁵⁸ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 240 (§25); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 180 (§106).

ing the application of the law of non-international armed conflict mentioned above (above, subsection E) and the relative sparsity of the treaty regulation in Common Article 3 of the GCs and AP II beg the question whether the relationship between the law of non-international armed conflict and international human rights law in the areas of targeting and detention can be equally one of *lex specialis derogat lex generalis* under all circumstances.

It is submitted that the application of the *lex specialis* rule also makes much sense in situations of high-level non-international armed conflict, that is, in particular, non-international armed conflicts having passed the threshold of Article 1 §1 AP II. The picture becomes more cloudy, however, with respect to lower-level non-international armed conflicts. Here, the situation may differ from the typical armed conflict scenario in at least two important respects: the State party to the conflict may exercise a degree of territorial control over the ‘zone of operation’, and the identification of non-State fighters (with a continuous combat function) may pose significant difficulties for lack of ‘fixed distinctive signs recognizable at a distance’.

These differences may well require us to somewhat temper the armed conflict model first with respect to targeting. Despite remaining conceptual and terminological differences, it would seem that recent international practice is moving towards recognition of the starting point that the right to target a non-State fighter who belongs to the non-State party to a non-international armed conflict extends beyond the moment in time where the fighter concerned is about to engage in a concrete military attack. While the ICRC, in its *Direct Participation* study, affirms (quite plausibly) the existence of non-State armed forces for the purpose of the law on the conduct of hostilities and treats persons with a continuous combat function as the members of those forces,⁵⁹ the USA, for example, reaches a very similar result through its ‘functional membership approach’ to the criterion of ‘direct participation in hostilities’.⁶⁰ As a starting point under customary international law, it is thus an armed conflict model that governs the targeting in non-international armed conflict and this model, as in the case of international armed conflict, derogates the more stringent standard under any applicable international human right to life.

This, however, is not necessarily the end of the matter as, once again, more recent practice would suggest. In its *Direct Participation* study, the ICRC tempers the targeting rule with respect to members of non-State armed forces from within the law of armed conflict through an attempt to revive the restraining potential of the principle of military necessity. The ICRC holds that the principle of military necessity requires the armed forces to capture an adversary instead of

⁵⁹ See above (n 2).

⁶⁰ See Koh (n 28): ‘While we disagree with the International Committee of the Red Cross on some of the particulars, our general approach of looking at “functional” membership in an armed group has been endorsed not only by our federal courts, but also is consistent with the approach taken in the targeting context by the ICRC in its recent study on *Direct Participation of Hostilities*’ (n 2).

targeting him where this is possible without taking additional risks for the armed forces themselves or the civilian population. The ICRC has stressed that this restriction on the targeting power is particularly relevant where a party to the conflict exercises effective territorial control in a non-international armed conflict.⁶¹ In its ‘Targeted Killings Decision’, the Supreme Court of Israel has reached a quite similar result, but, interestingly, it has approached the matter from the angle of international human rights law. The Supreme Court has thus arrived at what may be called a mixed armed conflict and international human rights model for certain cases of ‘transnational armed violence’.⁶² We shall not explore in depth in this study as to which theoretical starting point is preferable. Suffice it to say that both attempts capture an important need for sophistication of the targeting regime in certain low-level non-international armed conflicts and point towards a reasonable solution.⁶³

As regards the detention of persons in order to prevent them from returning to hostilities, the determination of the legal situation is particularly difficult because of the absence of any explicit treaty regulation.⁶⁴ Yet, it would seem rather surprising if States accepted the application of a stringent human rights model on preventive detention while having resort to a (tempered) armed conflict model in the field of targeting. To insist on a human rights approach to detention in non-international armed conflict would also not appear to be very realistic and, what is worse, it could well pose an obstacle to any attempt to temper the basic armed conflict targeting rule through an emphasis on capture where possible without undue risk. In line with the most recent practice of the USA, in particular, an ‘armed conflict model’ for preventive detention in non-international armed conflicts is likely to emerge through “translation” or analogizing principles from the laws of war governing traditional international armed conflicts’.⁶⁵ Such a model could include an inherent power to detain as a corollary of the power to target.⁶⁶ The most appropriate substantive standard to govern that power would appear to be the test of ‘imperative reasons of security’ as contained in Articles 78 and 42 of GC IV. The procedural safeguards should, accordingly, include the right to challenge the lawfulness of the internment before an independent and impartial body and a right to periodical review of the

⁶¹ See above (n 2) 77ff.

⁶² See above (n 33) §40.

⁶³ For an early statement pointing in this direction, see Kretzmer (n 33) 201ff; for more recent statements of a similar kind, see Milanovic (n 42) 389ff; Paulus and Vashakmadze (n 39) 119ff.

⁶⁴ For some recent thoughts on this topic, see Corn and Jensen (n 45) 74ff.

⁶⁵ Cf Koh (n 28).

⁶⁶ Cf Koh (n 28): ‘As a nation at war, we must comply with the laws of war, but detention of enemy belligerents to prevent them from returning to hostilities is a well-recognized feature of the conduct of armed conflict, as the drafters of Common Art 3 and Additional Protocol II recognized and as our Supreme Court recognized in *Hamdi v Rumsfeld*’.

lawfulness of continued detention on an individualized basis.⁶⁷ It is noteworthy that this armed model regime for detention is clearly more stringent than the prisoner of war detention model applicable in international armed conflict because of the individual and continuous right to review and its operation is likely to face considerable practical difficulties in high-level non-international armed conflicts. At the same time the regime is conspicuously more permissive than a human rights model and one may certainly ask whether it could be tempered further for lower-level armed conflict scenarios through the recognition of a right to *judicial* review as it exists under international human rights law. Not only this last question but the detention issue in general will no doubt remain a matter of intensive and controversial debate for some time to come. Some may see the undeniable legal uncertainties in the field of detention as a weakness of the 'pure non-international armed conflict model'. Yet, it is not a weakness of this model. It only reveals the compelling need for States to continue to discuss the matter at the international level with a view to reaching a common understanding on the legal regime governing the detention of persons not only in 'transnational' non-international armed conflicts, but in non-international armed conflicts in general.⁶⁸

G. On the Geographical Scope of a 'Transnational' Non-International Armed Conflict

Until this point of the armed conflict and international human rights law analysis of our hypothetical case scenario, we have not touched upon the fact that *Utopia* also targeted five individuals on *Oceania*'s soil. Before looking more closely into this matter, it is useful to restate the finding under the *ius contra bellum* (from above, section 2 *in fine*) that this use of force violated the prohibition on the use of force. This conclusion holds true irrespective of the legal conclusions drawn under the law of armed conflict. For whatever the powers under the law of armed conflict may be, they cannot override the restrictions on the extraterritorial use of armed force under the *ius contra bellum*. It bears emphasizing this fundamental point because, at times, the debate about the possibility of a 'global armed conflict with *Al Qaeda*' sounded as if the existence of an armed conflict provided for a conclusive answer as to whether or not armed force could be used.

Quite to the contrary, in cases of transnational conflicts as in all other situations involving the State use of armed force, the existence of a *ius in bello* power to target cannot remedy the international responsibility that a State incurs in the case of an extraterritorial use of armed force that violates the *ius contra bellum*.

⁶⁷ For the best treatment of the issue and for the details, see J Pejic, 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence' (2005) 87 *Intl Rev Red Cross* 375.

⁶⁸ For a similar suggestion, see §73 of Schrijver and van der Herik (n 24).

In such a case, the armed conflict power to target is important not so much for the State concerned, but for its soldiers, because it excludes their individual criminal responsibility for actually carrying out the use of armed force. The picture changes, of course, where the host State consents to an operation of targeting killing. In such a case, there is no violation of the prohibition on the use of force, so that the international legality or illegality of the forcible action necessarily depends on whether or not there was an armed conflict. If we modify our hypothetical case scenario accordingly and have *Oceania* consent to *Utopia*'s targeted killings on its soil, the latter State has thus not acted in violation of the prohibition on the use of force, though it may still have violated the right to life of the five individuals concerned. Whether this is the case, depends on the existence of an armed conflict at the time of the attack because the armed conflict model on targeting would then have derogated the otherwise applicable human rights standard.

This brings us to the question of whether there was an armed conflict in *Oceania* when *Utopia* targeted the five members of the *AUF* on *Oceania*'s soil. Under the 'pure international armed conflict model' (above, subsection A), the first question would be whether the targeted killings triggered the application of the law of international armed conflict between *Utopia* and *Oceania*. The answer to this question depends on the existence or not of a minimum threshold as regards the intensity of violence also for international armed conflicts. Assuming that there is no such threshold, international armed conflict law would govern the targeting as the *lex specialis*. The five individuals would then have to be qualified as civilians and its targeting would be illegal because they did not take a direct part in the hostilities within the meaning of Article 51 §3 of AP I (if construed in accordance with the more plausible specific acts approach) when targeted (cf. see above subsection A). However, as was pointed out above (subsection B), the preferred model to deal with intensive transnational armed violence is the 'pure non-international armed conflict model'. Under this model, the five individuals are to be classified as members of the armed forces of the non-State party to the conflict and could, in principle, be targeted at any time under the *lex specialis* of the armed conflict law (above, subsection F).

The key question, however, is whether this targeting rule also applied in *Oceania* even though the *AUF* had no significant (quasi-)military presence on the latter State's soil. This raises the question of the geographical dimension of a 'transnational' non-international armed conflict. It is useful to start the analysis with a look at the traditional form of a non-international armed conflict which is that within the boundaries of one State. In that respect, the ICTY stated in *Prosecutor v Tadic* that the law of armed conflict applies 'in the whole territory under the control of a party, whether or not actual combat takes place there'.⁶⁹ This suggests that, as a rule, a classic 'internal' non-international armed conflict stretches over the entire territory of the State concerned. There is certainly

⁶⁹ *Prosecutor v Tadic* (n 53) §70.

room to carefully reflect about this rather sweeping statement and to see whether it could be nuanced. But let us take the *Tadic* view as the starting point for our analysis.

If we transpose this view to the case of a ‘transnational’ form of a non-international armed conflict it would not seem to follow that the latter automatically extends to all places in the world where there is some ‘emanation’ of the non-State party, for example in the form of the presence of a member of its armed forces. Rather, the most far reaching conclusion from applying the *Tadic* view would be that the armed conflict extends to the whole territory of the State party to the non-international armed conflict and to the whole territory on which the non-State party holds its (quasi-)military presence which enables it to carry out sufficiently intensive armed violence. It is hard to see how one can go even further and hold that the mere fact that some members of the armed forces of the non-State party are present on the territory of a third State could trigger the geographical extension of the armed conflict to the territory of that State as well. Again, such an extension can only be envisaged if the non-State party has established an actual (quasi-)military infrastructure on the territory of the third State’s soil that would enable the non-State party to carry out intensive armed violence also from there. This would mean that the geographical scope of the non-international armed conflict between the *AUF* and *Utopia* may at best have extended to the whole territory of *Utopia* and *Arcadia*, but did not also extend to the territory of *Oceania*. This approach to defining the geographical limits of the concept of ‘transnational’ non-international armed conflict not only mirrors the definition of non-State armed attack under the *ius contra bellum* [as set out above, section 2B(iv)], it also corresponds with the line the great majority of States have taken so far as regards assertions that there is a ‘global armed conflict between the US and *Al Qaeda*’. While the USA appears to maintain the view that there is an armed conflict with *Al Qaeda* that extends beyond Afghanistan without any specific geographical delimitation,⁷⁰ this position does not seem to have been endorsed by other States, including those that have been hit by terrorist attacks attributed to perpetrators affiliated in one way or another with *Al Qaeda*.

One may finally ask whether *Utopia* had a targeting power *vis-à-vis* the five members of the *AUF* on *Oceania*’s soil on the basis of an analogy to the law of neutrality. The argument would run as follows: *Oceania* was a (quasi-)neutral State with respect to the ‘transnational’ non-international armed conflict and it therefore had a duty to intern the five individuals in order to prevent them from returning to the actual theatre of armed conflict.⁷¹ As it failed to comply with this duty as a (quasi-)neutral power, *Oceania*’s territory became open for legitimate acts of non-international armed conflict by *Utopia* against *AUF* targets.

⁷⁰ Koh (n 28): ‘In the conflict occurring in Afghanistan *and elsewhere*, we continue to fight the perpetrators of 9/11: a non-state actor, al-Qaeda’ [emphasis added].

⁷¹ Cf Art 11 of the *1907 Hague Convention V Respecting the Right and Duties of Neutral Powers and Persons in Case of War on Land*.

This neutrality argument, however, is open to serious doubt. First, it is commonly held that the law of neutrality is a species peculiar to international armed conflicts⁷² and, accordingly, it does not appear that any State has resorted to that argument so far in the context of ‘transnational’ non-international armed conflict. Secondly, it is unclear how the rules on neutrality could at all apply in a situation of ‘transnational’ non-international armed conflict. As a (quasi-)neutral State can hardly be seen to be required to intern members of the armed forces of the *State* party to the non-international armed conflict, who are present on its territory, the analogy to the law of neutrality could at best operate in a discriminatory manner. This, however, makes the analogy argument appear even more audacious. Finally, one wonders whether a power to target would result as an automatic consequence of any failure by the (quasi-)neutral State to intern if the neutrality analogy is accepted in principle.⁷³ If one requires, to the contrary, a threshold to the effect that the (quasi-)neutral State’s failure to act reaches a level that allows the non-State party to establish a genuine (quasi-)military infrastructure on its territory, the neutrality argument is not needed any longer because the non-international armed conflict would then in any event have spilled over to the territory of the State concerned.

From the foregoing, some conclusions can be drawn as regards the concept of ‘global non-international armed conflict’ between a State and a violent non-State organization. As a matter of pure theory, such a conflict can be conceived of. In practice, however, it is virtually impossible that such a globalization could occur. In particular, there is no (and there was at no time) a global non-international armed conflict between the United States of America and Al Qaeda. For our hypothetical case scenario, it follows that *Utopia* had no power under non-international armed conflict law to target the five individuals in *Oceania*. Rather, the targeted killings violated the right to life of those individuals under (at least) customary international law and the latter conclusion would have held true even on the assumption that *Oceania* had consented to *Utopia*’s targeted killing operation. Interestingly, under the ‘pure non-international armed conflict model’, the targeting killings, though illegal, do not constitute war crimes. As was pointed out above, such a classification would be possible only on the basis of a ‘pure international armed conflict model’ without any threshold regarding the intensity of inter-State armed violence.

4. International Criminal Law

In the course of the previous two parts of this study, international criminal law has already been touched upon on several occasions. In this part of the analysis,

⁷² Bothe (n 26) 579.

⁷³ Bothe (n 26) 589: ‘The treatment of military personnel [...] of the parties to the conflict which are found on neutral territory is unclear in many respects’.

an attempt is made to develop the contours of the international criminal law framework governing transnational armed conflicts in a coherent fashion.⁷⁴

A. Transnational Criminal Law and International Criminal law *Stricto Sensu*

For the purpose of the following considerations, it enhances analytical clarity if a distinction is drawn between *transnational* criminal law and international criminal law *stricto sensu*⁷⁵ instead of using the concept ‘international criminal law’ *lato sensu* as covering both bodies of law. The concept ‘transnational criminal law’ as it is used here denotes a body of international treaties dealing with crimes of a transnational character. The key components of such treaties are the duties of States Parties to criminalize the prohibited conduct under their national laws and to either investigate and prosecute, or extradite a suspect apprehended on its territory (*aut dedere aut judicare*; criminal jurisdiction of the *judex deprehensionis*). Other typical elements of these treaties are provisions to facilitate extradition by making the offences concerned extraditable ones and by excluding the applicability of the traditional political offence exception. State obligations under the treaties concerned apply only *inter partes*; more precisely, they cannot create titles of criminal jurisdiction opposable to third States that exceed the limits of general international law. International criminal law *stricto sensu*, however, establishes individual criminal responsibility directly under international law. This body of law seeks to protect fundamental values of the international legal community as a whole and articulates a *jus puniendi* of that community.

B. Transnational Non-State Violence and Transnational Criminal Law

Transnational non-State violence that does not pass the non-international armed conflict threshold can be subject to international treaties against transnational terrorism.⁷⁶ At this juncture, it may be noted, that the term ‘terrorism’ has not been referred to very often in the preceding parts. The reason for this is simply that it was not necessary to use the term and that doing so could even have led to confusion. Transnational criminal law, however, is an area of law where the use

⁷⁴ This part of the intervention draws upon and, where necessary, updates our more detailed study (n 43) 323.

⁷⁵ For a more elaborate exposition of the points made in the following text, see C Kieß, ‘International Criminal Law’ in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP, Oxford 2010); the electronic version can be accessed at http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1423&recno=13&searchType=Quick&query=International+Criminal+Law; for a concurring approach see Lehto (n 6) 84ff.

⁷⁶ For a useful compilation, see United Nations (ed), *International Instruments Related to the Prevention and Suppression of International Terrorism* (UN Publications, New York 2001).

of the term ‘terrorism’ has got its proper place – at least since there is a trend towards adopting an overarching definition.⁷⁷ This trend could culminate in the adoption of a general definition as part of a ‘*Comprehensive Convention on International Terrorism*’.⁷⁸ This remarkable legal development surpasses the scope of this study. It is only in place to express one word of caution against extending the scope of such a definition of transnational terrorism to non-State acts of violence committed within a non-international armed conflict.⁷⁹ This is not to say that there should be impunity for ‘terrorist acts’ committed by non-State actors within the course of a non-international armed conflict. In fact, however, there is no such risk, because acts such as those committed by *AUF* against the civilian population in *Utopia* constitute war crimes committed in non-international armed conflicts and can be dealt with accordingly.⁸⁰ The real question is how to deal with those acts carried out by non-State actors in a non-international armed conflict that do not violate armed conflict law. For those acts, which are not war crimes, but remain criminal under the domestic law of the target State, Article 6 §5 AP II encourages States to grant ‘the broadest possible amnesty’ at the end of the conflict. This is a sensible encouragement in order to provide non-State actors with an incentive to conduct the hostilities in accordance with the law of armed conflict. This incentive should not be undermined through the imposition of a strict duty to punish under the transnational criminal law against terrorism. The latter body of law should therefore not cover non-international armed conflicts.

C. Transnational Non-State Violence and International Law Stricto Sensu

This has cleared the ground to move on to the key question of this part: to what extent transnational non-State violence that passes the level of non-international armed conflict gives rise to individual responsibility under international criminal law *stricto sensu*.

(i) War crimes committed in non-international armed conflicts

There is not much left to say on the matter as regards the law on war crimes. The ‘Pure Non-International Armed Conflict Model’ offers an appropriate legal framework to apply the law on war crimes committed in non-international armed

⁷⁷ For the first attempt to that effect, see Art 2 §1 *litt* b of the International Convention for the Suppression of the Financing of Terrorism: UN (n 76) 115.

⁷⁸ For the draft text, see UN Doc A/57/37.

⁷⁹ For an earlier word of caution to the same effect, see Pejic (n 38) 76.

⁸⁰ For the purpose of this study, it is not necessary to decide the question of whether there exists a distinct war crime of launching terror attacks against the civilian population [cf *Prosecutor v Galic* (Judgment of 5 December 2003) ICTY IT-98-29-T, §138]. The war crime of launching attacks against civilians applies in any event; for a more detailed analysis, see Lehto (n 6) 155ff.

conflict to the conduct of the members of the non-State party. Importantly, this body of law would apply irrespective of whether or not the target State reacts by way of self-defence to the non-State armed attack. International and national criminal courts will be competent to institute criminal proceedings according to their respective scope of jurisdiction.⁸¹

(ii) The crime of aggression

Secondly, it may be asked whether the customary law definition of the crime of aggression⁸² reflects the *ius contra bellum* and includes those forms of transnational non-State armed violence that amount to an armed attack within the meaning of Article 51 of the United Nations Charter (above, section 2).⁸³ From a perspective of legal consistency, it may well be argued that the answer to this question should be in the affirmative. As a matter of the *lex lata*, however, the crime of aggression presupposes a State act in violation of the prohibition on the use of force. In addition, it is noteworthy that, as of yet, there is also no indication that States wish to develop the law on this point. On the contrary, the draft definition of the crime of aggression submitted with a view to inclusion in the Statute of the International Criminal Court maintains the requirement of a State act of armed force.⁸⁴

(iii) Crimes against humanity

According to a widespread view, participation in large-scale transnational non-State violence directed against civilians such as the attacks of ‘9/11’ constitutes a crime against humanity under customary international law. For example, Roberta Arnold states that ‘Article 7 ICC Statute, in fact, proves to be the ideal provision to

⁸¹ On the jurisdiction of the *International Criminal Court* over war crimes committed in non-international armed conflicts, see HP Kaul and C Kreß, ‘Jurisdiction and Cooperation in the Rome Statute on the International Criminal Court: Principles and Compromises’ (1999) 2 *YBIHL* 143; on universal jurisdiction over war crimes committed in non-international armed conflicts, see C Kreß, ‘Universal Jurisdiction over International Crimes and the *Institut de Droit International*’ (2006) 4 *J Intl Crim Justice* 561; on the question as to whether the grave breaches regime of the GCs applies to war crimes committed in non-international armed conflicts, see C Kreß, ‘Reflections on the Iudicare Limb of the Grave Breaches Regime’ (2009) 7 *J Intl Crim Justice* 794ff.

⁸² On the crime of aggression under customary international law, see the British House of Lords in *R v Jones et al* [2006] UKHL 16, §§12, 19 (Lord Bingham); §§44, 59 (Lord Hoffmann); §96 (Lord Rodger); §97 (Lord Carswell); §99 (Lord Mance).

⁸³ For an earlier question to the same effect, see R Fife, ‘Criminalizing Individuals for Acts of Aggressions Committed by States’ in M Bergsmo (ed), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjorn Eide* (Martinus Nijhoff, Leiden/Boston 2003) 72.

⁸⁴ See draft Art 8 bis *ICC Statute* in ICC-ASP/7/SWGCA/Annex I.

prosecute acts of terrorism'.⁸⁵ Yet, more often than not, statements of that kind remain mere assertions and do not really address the key issue of whether violent transnational non-State groups can be considered as collective entities that may form the 'organizational policy' referred to in Article 7 §2(a) of the *Statute of the International Criminal Court (ICC Statute)*.⁸⁶

Traditionally, the collective entity behind a crime against humanity was the State. With good reason, the ICTY has somewhat expanded the realm of crimes against humanity so as to include systematic or widespread attacks committed pursuant to a policy of quasi-State entities in control of territory such as the '*Republika Srpska*'.⁸⁷ The term 'organizational' in Article 7 §2(a) *ICC Statute* could be construed narrowly so as to cover only this type of organization.⁸⁸ This would ensure that the application of Article 7 *ICC Statute* remains within the confines of customary international law.⁸⁹ Such a restrictive interpretation would also maintain an intimate link between the law against crimes against humanity and international human rights law. For as long as the obligations under international human rights law are incumbent on States only (or perhaps also on quasi-State entities), one may question the legitimacy of a more expansive interpretation of the law against crimes against humanity to the effect that the conduct of individuals acting for non-State organizations not reaching the level of quasi-States may be criminalized under international law. Yet, it is possible to make a case for a somewhat broader understanding of the term 'organizational' in Article 7 §2(a) of the *ICC Statute*. Such an approach would include also those organizations that pass the organizational threshold for classification as a party

⁸⁵ R Arnold, *The ICC as a New Instrument of Repressing Terrorism* (Transnational Publishers, Ardsley/New York 2004) 340.

⁸⁶ According to the more recent jurisprudence of the ICTY, there is no policy requirement for crimes against humanity under customary international law: *Prosecutor v Kunarac et al* (Judgment of 12 June 2002) IT-96-23 & IT-96-23/1-A, §98; *Prosecutor v Blaskic* (Judgment of 29 July 2004) IT-95-14-A, §120; *Prosecutor v Kordic et al* (Judgment of 17 December 2004) IT-95-14/2-A, §98; this position, however, was adopted without any serious legal argument and, on closer inspection, it turns out to be flawed; cf W Schabas, 'State Policy as an Element of International Crimes' (2008) 98 *J Crim L Criminology* 930ff, 981; C Kreß, 'The International Criminal Court as a Turning Point in the History of International Criminal Justice' in A Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP, Oxford 2009) 148.

⁸⁷ Admittedly, the formulations used by ICTY in the abstract go further and encompass 'terrorist groups': *Prosecutor v Tadic* (Judgment of 14 July 1997) IT-94-1-T, §654 or even 'criminal gangs': *Prosecutor v Blaskic* (Judgment of 3 March 2000) IT-95-14, §205; such formulations, however, have remained unsupported by a carefully prepared customary law argument and are of the nature of *obiter dicta*.

⁸⁸ For an alternative restrictive interpretation that seems less compelling to us, see M Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction Analysis and Integrated Text Vol I* (Transnational Publishers, Ardsley/New York 2005), 151ff.

⁸⁹ For a different, albeit unsubstantiated, view of the customary law on the matter, see *Prosecutor v Kunarac et al* (Judgment of 12 June 2002) ICTY IT-96-23 & IT-96-23/1-A, §98.

to a non-international armed conflict. Such a ‘harmonious interpretation’ would ensure that the realm of international criminal law *stricto sensu* governing transnational non-State violence is not too hastily expanded into the realm of the *transnational* criminal law against terrorism. The case law of international criminal courts, however, continues to reveal little caution in defining the lower limits of the realm of international criminal law *stricto sensu*. Accordingly, a Pre-Trial Chamber of the ICC stated in *Prosecutor v Bemba Gombo*:

The requirement of ‘a State or organizational policy’ implies that the attack follows a regular pattern. Such a policy may be made by groups of persons who govern a specific territory *or by any organization with the capability to commit a widespread or systematic attack against any civilian population*. [emphasis added]⁹⁰

(iv) Terrorism as a crime under International Law?

In a similar vein, Antonio Cassese opines that transnational terrorism committed outside an armed conflict has become a crime under international law.⁹¹ Cassese’s central argument is that there now seems to be agreement about the core elements of a definition of terrorism within the context of transnational criminal law. Such an agreement may well exist and it may well warrant the assertion that there is an (emerging) customary *aut dedere aut iudicare* regime with respect to transnational terrorism. Yet, it is respectfully submitted that, without more, the agreement in question does not give birth to the new crime of terrorism under international law.

D. Transnational Non-State violence and the Evolution of International Criminal Law Stricto Sensu

The foregoing remarks reflect our reluctance to recognize the international criminalization of transnational non-State activity as long as the threshold triggering

⁹⁰ *Prosecutor v Bemba Gombo* (Decision of 15 June 2009) ICC-01/05-01/08, §81. After the completion of the manuscript for this article, the question has, however, received the attention it deserves in the dissenting opinion of Judge Kaul in *Situation in the Republic of Kenya* (Decision of 31 March 2010) ICC-01/09. While the majority (*idem* §§90–93) follows the approach set out in *Prosecutor v Bemba Gombo* as cited in the above text, Judge Kaul adopts a more narrow definition, starting from the premise that an organization within the context of the policy requirement of the crime against humanity ‘should partake of some characteristics of a State’ (*idem* §51). Judge Kaul also usefully places this question of statutory construction in its much broader context of the proper scope of crimes against humanity. It is hoped that Judge Kaul’s dissent will spark the necessary debate about this crucially important issue.

⁹¹ A Cassese, ‘The Multifaceted Criminal Notion of Terrorism in International Law’ (2006) 4 *J Intl Crim Justice* 957.

the application of non-international armed conflict law has not been passed. The reason for this reluctance lies in the fact that such criminalization would move international criminal law *stricto sensu* forward into hitherto unknown terrain. We shall elucidate this point through an outline of the historical evolution of international criminal law.

The jurisdiction of the International Military Tribunal at Nuremberg was limited to aggression, war crimes in the traditional sense of inter-state armed conflicts and, if committed in execution or connection with one of the preceding crimes, crimes against humanity. By clearly linking all of these crimes with a breach of international peace in the strict meaning of the term, the first generation of international criminal law reflected, despite its revolutionary recognition of criminality directly under international law, the traditional almost entirely State-centred configuration of the international legal order. It was only on 2 October 1995, with the already mentioned and by now historic decision of the ICTY Appeals Chamber in the *Tadic* case,⁹² that a decisive step towards a second generation of international criminal law was made. In *Tadic*, the Chamber undertook a remarkable analysis of the international practice since the Spanish Civil War, and reached the conclusion that criminality directly under international law had extended to armed conflicts not of an international character. This legal determination was complemented by a second and equally significant finding that crimes against humanity under customary international law may be committed in peace time. Previously, this was settled only for genocide, as defined in the 1948 Genocide Convention. The crystallization of customary war crimes committed in conflicts not of an international character, and the emancipation of the crime against humanity as an autonomous crime under international law, moved the protective scope of international criminal law beyond *inter-State* incidents to also cover certain forms of *intra-State* strife. It is now firmly established that international criminal law *stricto sensu* encompasses situations where a government and/or armed opposition forces spread terror among the people under their power. The recent instances of large-scale transnational non-State violence have given rise to the question of whether international criminal law *stricto sensu* is about to make a third generational step and to move into the area of transnational conflicts between States and destructive private organizations. This would mean that the law's protective thrust, which was hitherto confined to situations of war and internal strife, would extend to protect States and their populations from external non-State threats. It is submitted that international criminal law has undergone a move in this direction. To date, however, this further expansion of the law remains confined to transnational non-State violence of such dimension that the armed conflict level has been reached.

⁹² See above (n 53).

5. Conclusion

Transnational non-State violence of the '9/11' type calls for a reconsideration of the existing concepts of the *ius contra bellum*, the *ius in bello* and international human rights law, and international criminal law in order to see whether new concepts such as the category of 'transnational armed conflict law' are needed. On the basis of the foregoing considerations, it is suggested that international law can adequately deal with transnational armed conflicts without having to devise fundamentally new legal categories. Instead, it is possible, though intellectually demanding, to adjust and to fine tune the existing legal concepts and to construe on that basis an overall legal framework that provides for both a coherent and a reasonably balanced answer to the challenges posed.