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SIVAKUMARAN'S 'LAW OF NON-INTERNATIONAL ARMED CONFLICT': A CRIMINAL LAWYER'S PERSPECTIVE

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1. INTRODUCTION

One of the least clarified areas of international law is the legal regime applicable to non-international armed conflict (NIAC) – that is, where hostilities occur between state and non-state actors (NSAs) or between two or more NSAs.[1] This can be explained by the reticence of states to grant legality to such movements and their preference to label them as criminal movements or terrorist groups.[2] The result is that the regulation of NIAC is still limited to the application of Common Article 3 of the Geneva Conventions of 1949 (GCs) and their Additional Protocol II of 1977 (Additional Protocol II or AP II).[3] While Common Article 3 provides only a rudimentary framework of minimum standards, Additional Protocol II, which usefully supplements it, is still less detailed than the rules governing international armed conflict (IAC). Moreover, in contrast to Common Article 3,[4] it has not yet attained customary status.[5] This situation is a source of concern. Faced with the horrors committed in NIACs such as those in Rwanda, Sierra Leone and Liberia in the 1990s, and the awareness of an inadequate legal framework, the international

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[1] For a definition of IAC and NIAC see Geneva Convention (I) Relative to the Amelioration of the Wounded and Sick in Armed Forces in the Field (entered into force 21 October 1950) 75 UNTS 31 (GC I), common arts 2 and 3; Geneva Convention (II) Relative to the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (entered into force 21 October 1950) 75 UNTS 85 (GC II), common arts 2 and 3; Geneva Convention (III) Relative to the Treatment of Prisoners of War (entered into force 21 October 1950) 75 UNTS 135 (GC III), common arts 2 and 3; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (GC IV), common arts 2 and 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 609 (AP II), art 1(2).

[2] See, eg, Ruprecht Polenz, 'NATO Doc. 174 PCTR 07 E rev 1, The Fight against Terrorism – Impact and Implications for the Atlantic Alliance', NATO Parliamentary Assembly, 6 October 2007, http://www.nato-pa.int/default.asp?shortcut=1175; Ben Saul, 'Terrorism and International Humanitarian Law' in Ben Saul (ed), *Research Handbook on International Law and Terrorism* (Edward Elgar 2014) 208, 212.

[3] GCs I–IV and AP II (n 1); Jean-Marie Henckaerts, 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict' (2005) 87 *International Review of the Red Cross* 175, 177.

[4] A well accepted customary rule: see *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion [1966] ICJ Rep 226, [79], [82] (with respect to the Geneva Conventions); *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v US*), Merits, Judgment [1986] ICJ Rep 500 [218] (with respect to common art 3).

[5] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol I: Rules* (International Committee of the Red Cross and Cambridge University Press 2005, revised 2009) xxxiv–xxxv.

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criminal law (ICL) community decided to resort to international human rights law (IHRL) and ICL to fill the gaps of international humanitarian law (IHL) applicable to NIAC.[6]

A first consequence thereof has been the expansion of the notion of war crimes and, in some instances,[7] the attempt to extend the scope of application of the grave breaches provisions[8] from IAC to NIAC.[9] The question that follows is whether, in the light of these developments, it is still appropriate to consider IHL as the only legal regime governing NIAC. Professor Sandesh Sivakumaran, Associate Professor in Public International Law at the University of Nottingham (United Kingdom) and winner of the 2012 Paul Reuter Prize and of the 2013 Francis Lieber Prize, provides an answer in his book *The Law of Non-International Armed Conflict*. This expression thus indicates a (new)[10] body of international law in which rules stemming from different legal regimes (IHL, IHRL and ILC) coexist and influence each other. He examines the genesis of this novel, interdisciplinary body of law and the way ahead, thereby contributing with a major piece of work in a field – the regulation of NIAC – that greatly needed further research.

The aim of this review essay is to discuss some of the legal questions that may arise from the application of the law of NIAC from a criminal law perspective. These will be addressed in Section 3, following this introduction and the review of Sivakumaran's main findings in Section 2. The conclusions will be drawn in Section 4.

In order to facilitate the reading, Sivakumaran will be referred to as 'the author', while 'the reviewer' indicates the author of this review article.

2. REVIEW

Sivakumaran's well researched book, which contains references to sources that are generally difficult to find – such as the practice of NSAs and the initiatives of non-governmental organisations like Geneva Call[11] – is divided into three parts.

[6] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press, 2012) 54–55.

[7] See, eg, 311.0 Swiss Criminal Code, 1 January 1942; art 246c(2) para 2 provides that the conduct amounting to grave breaches under para 1 of the Code are to be considered in equal terms to grave breaches when committed in times of NIAC.

[8] GC I (n 1) art 50; GC II (n 1) art 51; GC III (n 11) art 130; GC IV (n 11) art 147; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3 (AP I), arts 11, 85.

[9] Roberta Arnold, 'The Development of the Notion of War Crimes in Non-International Conflicts through the Jurisprudence of the UN Ad Hoc Tribunals' (2002) 3 *Humanitäres Völkerrecht* 134–42.

[10] Whether this is really a 'new' body of law in the view of some academics (eg Christophe Paulussen from TMC Asser Instituut) is not clear. That would assume, to use Paulussen's words, some sort of comprehensiveness or unity of the system. However, given that there is so much indistinctness about the rules, how they are formed and the exact correlation between IHRL and IHL, he questions whether we can really say so. He questions whether we are talking about a situation that simply needs greater clarity about which, and the extent to which, existing bodies of law (IHRL and IHL) apply to this situation. These views were exchanged informally between the reviewer and Paulussen in 2014.

[11] Geneva Call is a neutral and impartial non-governmental organisation dedicated to promoting respect by armed non-state actors (ANSAs) for international humanitarian norms in armed conflict and other situations of violence, in particular those related to the protection of civilians: see the organisation's website at http://www.genevacall.org.

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In Part I – 'Regulating non-international armed conflicts' – the author illustrates the genesis of the new law of NIAC. He examines the first ad hoc regulatory efforts of NIAC, the systematic approach that followed the adoption of the GCs and the Additional Protocols, and recent trends.

In Part II – 'The substantive law of non-international armed conflict' – the author first explains the distinction between NIAC and other scenarios involving violence and then illustrates the scope of application of the 'Geneva Law'[12] as opposed to the 'Hague Law'.[13] Finally, he discusses the implementation and enforcement of IHL by judicial and non-judicial means, and provides practical examples.

In Part III – 'Moving forward' – Sivakumaran analyses the legal developments needed to properly address the problems raised by NIAC.

2.1. Regulating NIAC

In Part I (Chapters 1–4) Sivakumaran explores the various historical approaches adopted by states to regulate the conduct of hostilities in times of NIAC. In Chapter 1 he illustrates the initial efforts characterised by ad hoc recognitions of belligerency, the conclusion of bilateral agreements with NSAs, and unilateral declarations. The downside of these approaches, however, was the absence of a pattern and the delegation of the qualification of a state of NIAC to the parties thereto.[14] The codification of IHL eventually paved the way for a systematic regulation that was encouraged also by the UN International Conference of Human Rights of Tehran in 1968, the Diplomatic Conference of the Red Cross and Red Crescent in 1974–77 and the adoption of Additional Protocol II in 1977.[15]

However, as mentioned, IHL failed to address several aspects of NIAC, so that judicial bodies in particular:[16]

> transformed the law of non-international armed conflict primarily through drawing on the law of international armed conflict, either analogizing the law of non-international armed conflict to it, or extending its scope of application to cover non-international armed conflicts.

The question raised by Sivakumaran is 'whether, and if so to what extent, NIAC *should be* regulated in the same fashion as IAC'.[17] In the opinion of Sivakumaran and the reviewer, the regimes regulating IAC and NIAC are different, because these two scenarios are different. To treat them as if they were identical could be counter-productive. For instance, the author expresses some well-founded concerns with regard to the expansion of IHRL into the realm of IHL. He sees, in particular, a danger in the development by judicial bodies of the human rights law of NIAC.[18]

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[12] ie the regulation of the protection of specific categories of persons.
[13] ie the regulation of the conduct of hostilities.
[14] Sivakumaran (n 6) 29.
[15] ibid 53.
[16] ibid 54.
[17] ibid 53.
[18] ibid 95.

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In his view, the use of IHRL as a means to directly regulate NIAC 'would constitute a fundamental shift in the regulation of NIAC'.[19] IHRL was designed to govern the relationship between states and individuals; if it were applied to regulate NIAC, this vertical relationship would need to be reconsidered. Thus, the first lesson to be learned is that when addressing the conduct of hostilities in NIAC, one must be mindful of the interplay between the various legal regimes that coexist under the law of NIAC and of its possible consequences.

2.2. The Substantive Law of NIAC

Part II (Chapters 5–11), which focuses on the substantive law, begins with a review of the attempts undertaken by states since the early 1940s to move away from ad hoc approaches to determine a NIAC.[20] The first major change was the adoption of Common Article 3 of the GCs.[21] In Sivakumaran's view, the peculiarity of the definition of NIAC provided in this provision lies in its factual determination, 'irrespective of terminology, recognition by the parties, or consent';[22] to use his words, '[a] factual situation, that of a non-international armed conflict, brings the law of non-international armed conflict into play'.[23] Common Article 3 contains a *negative* definition, which means that its content must be inferred *e contrario* from the definition of international armed conflict provided by Common Article 2 GCs.[24] However, as observed by Sivakumaran, no one can say what the drafters meant exactly by the words 'armed conflict not of an international character'.[25] In examining the difference between IAC and NIAC,[26] the author concludes that the latter generally develops into IAC through (i) the intervention of troops of an outside state; and (ii) a non-belligerent state taking control over a non-state armed group. There are then more complex scenarios, such as wars of national liberation and situations of outside state intervention. Further difficulties arise when a NIAC has some cross-border components. In this case, according to some (including the author[27] and the reviewer), as long as no state party is involved, this type of conflict remains of a non-international nature,[28] whereas

[19] Examples are offered from case studies on the situation of the LTTE in Sri Lanka, the FARC in Colombia and the SPLM in Sudan: ibid 98.
[20] ibid 156.
[21] ibid 156–62.
[22] ibid 155.
[23] ibid.
[24] Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)* (International Committee of the Red Cross and Martinus Nijhoff 1987) 1348; James Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law' (2003) (85)850 *International Review of the Red Cross* 313, 317–18. Pursuant to this, IAC covers all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.
[25] Sivakumaran (n 6) 155.
[26] See, in particular, ibid Ch 6.
[27] ibid 235.
[28] ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts – Report', 31st International Conference of the Red Cross and Red Crescent, 31IC/11/5.1.2, Geneva, October 2011, 10; Roberta

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according to others,[29] the transnational element should be sufficient to make it international;[30] they amount to *transnational* or *extra-state armed conflicts* that are a subset of NIAC. In Sivakumaran's opinion, an advantageous solution may be a flexible definition, which could nevertheless carry with it the risk of allowing 'for situations to be characterized according to the political interests of the actors concerned, sometimes in complete variance with the facts on the ground'.[31]

A related issue (see Chapter 7 for further detail) is the scope of application of IHL under such circumstances. According to the author, 'the law of NIAC extends to fighters who are located in the border regions of another state',[32] a view which was supported by the International Criminal Tribunal for Rwanda (ICTR) in the *Kayishema* trial judgment,[33] so that[34]

> a focus on persons, objects, and the like that are affected by the armed conflict and the conduct at issue rather than any geographic location would prove a more appropriate solution to the question of the geographic scope of application of the law.

The author then[35] examines the definition of NIAC provided by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case:[36]

> [...] 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.

However, even this failed to clarify the distinction between NIAC covered by Common Article 3 and Additional Protocol II[37] and the importance of the identity of the actors for the determination of a NIAC.[38]

A further important message from Sivakumaran's book is that, according to Article 1 of Additional Protocol II, the criteria that determine the existence of NIAC should always be applied by taking into account the realities of the field,[39] by providing, for example, that its scope should

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Arnold, *The ICC as a New Instrument for Repressing Terrorism* (Transnational 2004) 114–16; for arguments both in support and against see Saul (n 2) 215–16.

[29] See, eg, HCJ 769/02 *The Public Committee Against Torture in Israel and the Palestinian Society for the Protection of Human Rights and the Environment v Israel and Others* ILDC 597 (IL 2006) [2006].

[30] Sivakumaran (n 6) 235.

[31] ibid 155.

[32] ibid 251.

[33] ICTR, *Prosecutor v Kayishema and Ruzindana*, Judgment, ICTR-95-1-T, Trial Chamber II, 21 May 1999, [176]; for arguments both in support and against see Saul (n 2) 215–16.

[34] Sivakumaran (n 6) 252; also referring to Louise Arimatsu, 'Territory, Boundaries and the Law of Armed Conflict' (2009) 12 *Yearbook of International Humanitarian Law* 157, 189.

[35] Sivakumaran (n 6) 165.

[36] ICTY, *Prosecutor v Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, Appeals Chamber, 2 October 1995, [70].

[37] Such as the prohibition of the use of terror as a warfare strategy, which is proscribed by arts 4(d)(2) or 13 AP II (n 1).

[38] Sivakumaran (n 6) 204; Antonio Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 *European Journal of International Law* 649, 652.

[39] AP II (n 1), which develops and supplements art 3 common to GC I–IV (n 1) without modifying its existing conditions of application, is to apply to all armed conflicts which are not covered by art 1 AP I (n 8), and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces

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only cover conflicts taking place between a state and organised armed groups. However, as observed by Sivakumaran,[40] in practice armed groups involved in a NIAC will usually be underground organisations. The secrecy revolving around their often decentralised and horizontal structure, along with the anonymity of their members,[41] is usually the only way to ensure the survival of these groups, especially in the context of guerrilla warfare. It would be wrong, however, to conclude that they are not organised or that they do not have a responsible command, which makes them suitable for qualification as non-state parties to a NIAC.[42] Also, the secrecy per se does not give any significant indication as to the status of these groups under IHL. This aspect might have serious consequences under some criminal law legislation.[43] The lack of a transparent structure could, in fact, lead to the group being subjected to provisions outlawing the mafia and analogous international criminal organisations, notwithstanding the group's compliance with IHL.[44] As observed by the author:[45]

> Perhaps even more important [NB than the definition of NIAC] is the identity of the actor that characterizes the situation. … The state may also view the armed group as criminals or terrorists and any violence to which it resorts as mere disturbances or criminal acts. Accordingly, the parties are frequently unable to provide an impartial assessment of the situation.

In examining the 'Geneva Law',[46] Sivakumaran observes that even if it was only through the creative use of IHRL and ICL to fill the gaps of IHL that the law of NIAC could be developed, one should be mindful of the risks hidden beyond the apparent similarities between the three regimes (IHL, IHRL and ICL).[47] One may take as an example the war crimes provisions that were drawn from IHL to be later developed by ICL. Since criminal charges require a precise legal basis, the content of the IHL war crimes provisions was drafted in a narrower fashion for ICL purposes.

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or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol.

[40] Sivakumaran (n 6) 184.

[41] ibid 173.

[42] Ibid 175, 183.

[43] eg the Swiss Criminal Code (n 7) art 260 *ter*.

[44] This problem arises in particular with regard to Swiss Criminal Code (n 7) art 260 *ter*, which outlaws international organised crime. Its application may become problematic when the group at stake has been conducting hostilities within the framework of a NIAC not recognised as such by the affected state. As observed by Sivakumaran (n 6) 210: '[I]nsufficient attention has been paid to armed groups, their structure, and workings. Little attention has been paid to why it is that organization of the armed group is an element of the definition of a non-international armed conflict. Even less has been paid to the relationship between organization and enforcement of the law. Furthermore, the notion of responsible command is traditionally interpreted by reference to a hierarchical pyramidal structure which does not always map onto the structure of armed groups. The structure of armed groups is also often compared with that of the armed forces of the state, skewing the notion of organization. The important nexus between the scope of application of the law and its substantive content also remains under-explored. In sum, the element of organization and the workings of armed groups are only just starting to be understood'.

[45] Sivakumaran (n 6) 156.

[46] ibid Ch 8 'The Protection of Civilians and Persons *Hors de Combat*'.

[47] ibid 99–100.

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The same holds true in particular with regard to the concept of command responsibility under ICL, which is narrower than the concept of responsible command under IHL.[48] This means that unless one juggles carefully with IHL and ICL war crimes provisions, the risk is that a narrower reading of war crimes required under ICL (for example, the war crimes of deportation and forcible transfer[49]) could ultimately replace the broader interpretation of the *respective* IHL rules.[50]

In addressing the 'Hague Law',[51] Sivakumaran introduces the debate on the understanding of 'acts of terrorism' pursuant to international anti-terrorism conventions[52] and the provisions contained in IHL outlawing specific acts of belligerence aimed at terrorising the civilian population, such as Articles 4(2)(d) and 13(2) of Additional Protocol II. He examines the *Galić* case[53] in which the ICTY, on the basis of Articles 4(2)(d) and 13(2), concluded that the IHL prohibition of attacks against the civilian population encompasses the prohibition of 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population'.[54] Pursuant to these provisions and the following jurisprudence, under given specific circumstances this conduct may amount to a war crime under ICL. Unfortunately, however, the author does not discuss the issue of the concomitant application of anti-terrorism legislation and IHL, a trend that was initiated with the post 9/11 war on terror,[55] and a problem that has resurfaced recently in relation to the problem of so-called 'foreign fighters'.[56]

Worth mentioning, finally, is Sivakumaran's illustration of potentially useful forms of implementation and enforcement of the law of NIAC, such as codes of conduct, unilateral declarations and bilateral agreements of armed groups. Not infrequently, especially through their political wing, NSAs engage with international actors and commit to abide by the rules;[57] they also issue invitations to UN agencies and non-governmental organisations (NGOs) to verify their compliance with the law. Unfortunately, however, as observed by the author, these initiatives

[48] Roberta Arnold and Stefan Wehrenberg, 'Die Strafbarkeit des Vorgesetzten nach Art. 264k StGB' [2013] *Military Law and the Laws of War Review* 3; Roberta Arnold, 'Article 28 Responsibility of Commanders and Other Superiors' in Otto Triffterer and Kai Ambos (eds), *Commentary to the Rome Statute for an International Criminal Court* (3rd edn, Nomos Verlagsgesellschaft 2015).
[49] Sivakumaran (n 6) 335.
[50] ibid 100.
[51] See ibid, Ch 9 'Conduct of Hostilities' for details.
[52] For a complete list of the United Nations Conventions on terrorism deposited with the Secretary-General of the UN, see the UN Treaty Collection at https://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml.
[53] ICTY, *Prosecutor v Galić*, Judgment, IT-98-29-A, Appeals Chamber, 30 November 2006, [87].
[54] Sivakumaran (n 6) 341. See also Arnold (n 28) 66–111, discussing in detail the criminalisation of the use of terror in times of armed conflict; Roberta Arnold, 'The Judicial Contribution of the Special Court for Sierra Leone to the Prosecution of Terrorism' in Charles C Jalloh (ed), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (Cambridge University Press 2014) 260–88.
[55] On this see, in particular, Saul (n 2) 213, 219 and 225–31; Arnold (n 28); Roberta Arnold, 'Terrorism, War Crimes and the International Criminal Court' in Saul (n 2) 282–98.
[56] Sandra Kraehenmann, 'Foreign Fighters under International Law', Geneva Academy of International Humanitarian Law and Human Rights, Academy Briefing No 7, October 2014.
[57] Sivakumaran (n 6) 439–40.

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are usually ignored or not accepted by states, which fear that to do otherwise could imply the recognition of a NIAC on their part and the granting of legitimacy to the NSA.[58]

2.3. Moving Forward

In the third and final part, Sivakumaran concludes that the methodology by which the law of NIAC was created and interpreted in the mid-1990s has changed dramatically over time and the substantive law that exists today is vastly different.[59] Despite this, a number of gaps still continue to exist not only with regard to the substantive norms, but also with regard to the mechanisms of implementation and enforcement. Developments are needed particularly with regard to (i) the notions of combatant immunity[60] and prisoners of war; (ii) the protection of the natural environment; and (iii) the regulation of the relationship between a NSA and persons and objects in territory under its control.

In Sivakumaran's opinion, combatant immunity,[61] which is still restricted to IAC, may be a key to solving some of the inconsistencies resulting from the concomitant application of criminal law and IHL applicable to NSAs.[62] According to the author, this moreover is desirable to incentivise compliance with the law of NIAC: states should be encouraged to declare the status of NIAC while the conflict is ongoing, especially if it is of a significant intensity and duration.[63] In this regard, Sivakumaran draws attention to the work carried out by Geneva Call,[64] an NGO that engages with NSAs in order to bring them to observe – that is, to act in compliance with IHL. This includes training (in other words, teaching IHL) but is not limited to that: the organisation also provides NSAs with the opportunity to enter into Deeds of Commitment[65] with regard to the observance of IHL. As observed by Sivakumaran, the problem is that even these training activities – if the groups are labelled as terrorist movements notwithstanding their fight within the framework of a NIAC – may fall under the criminal or anti-terrorism legislation of some states. In a 2010 judgment, for instance, the US Supreme Court suggested that the training of NSAs ('terrorist organisations'), even according to IHL standards, may amount to 'knowingly providing material support or resources to a foreign terrorist organization', thereby constituting a crime under domestic law. In Sivakumaran's view, this approach needs to

[58] ibid 474, 548.
[59] ibid 513.
[60] ie the idea that persons will not be subject to prosecution under domestic law for taking part in the armed conflict and for committing lawful acts of war: ibid 514.
[61] ibid 514.
[62] ibid 525.
[63] ibid 525.
[64] ibid 533, 538–42.
[65] The Deed of Commitment is a mechanism that allows armed NSAs to pledge to respect humanitarian norms and be held publically accountable for their commitments. Deeds of Commitment are signed by the ANSA leadership and countersigned by Geneva Call and the government of the Republic and Canton of Geneva, usually at a ceremony in the Alabama Room in Geneva's City Hall, where the first Geneva Convention was adopted in 1864. The signed documents are deposited with the Canton of Geneva, which serves as custodian. For more information see the website of Geneva Call, http://www.genevacall.org/who-we-are/faqs.

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change.[66] He highlights the importance of the work performed by NGOs such as Geneva Call: the acts undertaken by a NSA may be an important element in arguing for the group's liability under IHL and its war crimes provisions.[67]

In Sivakumaran's opinion, a useful tool for enforcing the law of NIAC may be the judicial systems of NSAs, where these have been set up.[68] In the reviewer's opinion, however, the major obstacle is that these groups, and therefore their judicial systems, lack legitimacy. It is true that there are some situations in which the group is so well established and powerful that its activities may mirror those of the state in the areas of its judiciary, and its health and education systems. However, as observed by Sivakumaran:[69]

> the concern of affording courts of armed groups a certain legitimacy and armed groups themselves some semblance of status also forms part of the explanation as to why the international community fails to engage with these courts.

In the reviewer's opinion, the reticence of states in this regard is not to be blamed. As observed by the author, it is not a coincidence that in conflicts in which the group exercises territorial control, the establishment of courts takes place alongside the provision of education, health services, and so on. This is often 'a conscious effort' on the part of the NSA to afford services that are traditionally provided by the state 'in an attempt to normalize the situation, to present the image of a stable and functioning regime, and to create a quasi-state'.[70] However, Sivakumaran concludes that rather than ignoring the existence of these courts without offering concrete suggestions for improvement, the international community needs to grapple with them.[71] He admits that there is a tension between engagement with these courts and the risk of granting them legitimacy, but this tension is ingrained in the law of NIAC: to turn a blind eye to them would be a wasted opportunity. Engagement with the courts of a NSA is needed to encourage the enforcement of the law: 'the fact that the state is seeking to defeat the armed group should not prevent engagement on the part of the international community with the courts of armed groups'.[72]

Finally, Sivakumaran favours a stronger inclusion of NSAs in the drafting process of the law of NIAC,[73] the development of efficient monitoring and enforcement mechanisms (for instance, through self-reporting or external monitoring systems),[74] and the recognition of combatant immunity, in order to favour NSA compliance with the law.

[66] Sivakumaran (n 6) 533, 547.
[67] ibid 541.
[68] For examples, see ibid 549–56.
[69] ibid 558.
[70] ibid.
[71] ibid 562.
[72] ibid.
[73] ibid 563.
[74] ibid 566.

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3. Relevance of Sivakumaran's Findings from a Criminal Lawyer's Perspective

On the basis of Sivakumaran's findings, the reviewer has identified the following key messages that might be relevant to a criminal lawyer when confronted with a NIAC scenario:

The importance of the interplay between IHL, IHRL and ICL
The law of NIAC constitutes a (new) body of international law in which rules stemming from different legal regimes coexist and influence each other. Notwithstanding several common aspects, these have several differences.[75] It is important, therefore, to know their genesis and different objectives and to translate, rather than transpose, a rule from one regime into another.

The relevance of the realities of the field
Criminal lawyers tend to adopt a narrow approach in applying the principles of *nullum crimen* and *nulla poena sine lege*.[76] The review of the law of NIAC offered by Sivakumaran suggests that on some occasions it is appropriate to maintain a 'thinking into boxes approach' – that is, to apply the rules that stem from a specific legal regime within the context of that regime only, and that where provisions are borrowed by one regime from another, their application requires a flexible approach. On some occasions, in fact, there might be a 'clash of cultures' that can only be avoided by an interdisciplinary attitude that is aware of the 'cultural' differences that exist between the various regimes comprising the law of NIAC. Hence, when called upon to apply IHL rules for criminal law purposes, these should be interpreted in their original spirit and adapted to the new context. The *translation* as opposed to the *transposition* of the rules forming the law of NIAC is the key to their sound application.[77]

The distinction between the law enforcement and the laws of warfare paradigms
The law of NIAC is strongly influenced by IHL rules. This is considered to be *lex specialis* for warfare scenarios and has precedence over international law applicable to peacetime. One should recall this fundamental prerogative in assessing the conduct of a NSA involved in a NIAC, especially when this might fall under both the law enforcement and laws of warfare paradigms. Most international anti-terrorism conventions are applicable in peacetime only and purposefully contain clauses that provide for the precedence of the laws of warfare (the GCs and their APs) when the situation of violence has reached the threshold of an armed conflict. Notwithstanding the ongoing discussions concerning the classification of anti-terrorism operations conducted within the

[75] ibid 100.
[76] For this reason, as an example, the general clause contained in art 109 of the Old Military Criminal Code of Switzerland – which referred to the laws and customs of warfare as a basis for the prosecution of war crimes – was considered to be incompatible with the principle of legality and was replaced with a detailed war crimes catalogue in the Criminal Code and Military Criminal Code (MCC) of Switzerland: 'Message of the Swiss Federal Council for the Implementation of the Rome Statute for an International Criminal Court' (Botschaftüber die Änderung von Bundesgesetzen zur Umsetzung des Römer Statuts des Internationalen Strafgerichtshofs), 23.04.2008, BBl 2008, 3863,3882, http://www.admin.ch/opc/de/federal-gazette/2008/3863.pdf.
[77] Sivakumaran (n 6) 100.

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framework of the 'war on terror' in the aftermath of 9/11, especially now in the context of 'foreign fighters',[78] and the tendency to blur the law enforcement and laws of warfare paradigms,[79] the traditional division between peacetime and wartime still seems to be there. Therefore, in the reviewer's opinion, when assessing the conduct of a NSA, one should first qualify the scenario and decide upon the applicable legal paradigm. Once this step has been taken, the next aspect to be examined is whether the act falls under the ordinary criminal law provisions provided by domestic and transnational criminal law (the law enforcement paradigm) or, rather, under war crimes prohibited by IHL and ICL, such as in Articles 4 and 13 of Additional Protocol II (the laws of warfare paradigm).[80] In particular, criminal lawyers should not be misled by political interpretations of IHL provided by the parties to the NIAC that involve the NSA being accused. These main lessons learned and their relevance from the perspective of a criminal lawyer will now be examined in more detail.

3.1. THE INTERPLAY BETWEEN ICL AND IHL

In the reviewer's opinion, in order to properly apply the law of NIAC and overcome inconsistencies, it is fundamental to master the interplay and the different objectives of ICL, IHL and IHRL; otherwise one might arrive at solutions that, while perfectly sound under one regime, may not be under another. For instance, some authors[81] advocate the extension of the grave breaches regime to NIAC on the basis that the gravity of the prohibited conduct does not depend on the context in which it is committed. This argument, which seems logical from a criminal law perspective, overlooks the IHL rationale of the restriction of the grave breaches regime to IAC.[82] Such breaches are subject to *mandatory* universal jurisdiction,[83] which means that every state

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[78] Kraehenmann (n 56).

[79] Saul (n 2) 230; Special Tribunal for Lebanon (STL), *The Prosecutor v Ayyash and Others*, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/I, Appeals Chamber, 16 February 2011, 3: 'On the basis of treaties, UN resolutions and the legislative and judicial practice of States, there is convincing evidence that a customary rule of international law has evolved on terrorism in time of peace'.

[80] These outlaw the war crime of the intentional use of acts of terror against the civilian population of the adversary: Arnold (n 28) 197–202. On the problems related to the borderline between the law enforcement and the laws of war paradigms with regard to acts of terrorism, see Antonio Cassese and others, 'Terrorism' in *International Criminal Law – Cases & Commentary* (Oxford University Press 2011) 286–311; Adam Roberts, 'Counter-Terrorism, Armed Force and the Laws of War' (2002) 44 *Survival* 7–32, http://essays.ssrc.org/sept11/essays/roberts.htm; Yuval Shany, 'The International Struggle Against Terrorism – the Law Enforcement Paradigm and the Armed Conflict Paradigm', The Israel Democracy Institute, 10 September 2008, http://en.idi.org.il/14005.aspx; Saul (n 2) 230.

[81] Thomas Graditzky, 'Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-International Armed Conflicts' (1998) 80 *International Review of the Red Cross* 29–57; ICTY, *Prosecutor v Mucić and Others,* Judgment, IT-96–21–T, Trial Chamber,16 November 1998, [202]. See, however, the different view expressed in *Prosecutor v Tadić* (n 36) Separate Opinion of Judge Abi-Saab, [83]. For an analysis of this subject, see Deidre Willmott, 'Removing the Distinction Between International and Non-International Armed Conflict in the Rome Statute of the International Criminal Court' (2004) 5 *Melbourne Journal of International Law* 196–219.

[82] Arnold (n 9) 134.

[83] Christopher Greenwood, 'International Humanitarian Law and the Tadic Case' (1996) 7 *European Journal of International Law* 265, 275.

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must prosecute them. Other war crimes are subject to *discretionary* jurisdiction. If the grave breaches regime were to be extended to NIAC, states would be under an *obligation* also to investigate war crimes committed within the borders of a third state, in contravention of the principle of state sovereignty.

Caution should be taken also when applying the doctrine of command responsibility. IHL and also some military criminal codes[84] provide for the principle of *responsible command*, which means that an armed group should be led by someone in command and control of the group. The idea is that only groups led by someone in charge will be in a position to act in a disciplined fashion, compliant with IHL.[85] The criminal law doctrine of *command responsibility* stems from this IHL principle. The aim of this principle, however, is to ensure the accountability of commanders for failure to discharge their duties, when such failure has contributed to the commission of war crimes or other serious offences.[86] The question, therefore, is whether we can use the IHL notion of responsible command contained in Article 4 of Additional Protocol II as a legal basis for *criminal law* purposes. The issue is open, since the notions of responsible command and command responsibility are not equivalent.[87] The first indicates the (non-criminal) responsibility of a commander to properly exercise his functions – to command and control. The second, in contrast, has a purely criminal character and indicates the criminal liability of the commander whose dereliction of duty had a nexus with the perpetration of (international) crimes by his subordinates.

The interplay between IHL and ICL has an impact on the qualification of the parties to a NIAC. Whereas members of a regular armed force may be prosecuted for war crimes only (that is, violations of IHL), members of a NSA may face additional prosecution for the mere fact of having taken up arms, notwithstanding their compliance with IHL.[88] Sivakumaran observes that this asymmetry may be counterproductive since the NSA will not be motivated to comply with IHL. This is another area in which criminal lawyers will have to master the interplay between the various regimes comprising the law of NIAC: they will have to decide with particular sensibility under which paradigm – law enforcement or the laws of war – to prosecute the members of a NSA.

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[84] eg the Service Regulations of 2002 of the Swiss Armed Forces, Ch 3, preamble. See also GC III (n 1) art 4(A)(2); Michael N Schmitt, Charles HB Garraway and Yoram Dinstein, *The San Remo Manual on the Law of Non-International Armed Conflict with Commentary* (International Institute of Humanitarian Law 2006) para 4, http://www.iihl.org/iihl/Documents/The%20Manual%20on%20the%20Law%20of%20NIAC.pdf.

[85] Jean S Pictet (ed), *The Geneva Conventions of 12 August 1949: Commentary – III Geneva Convention Relative to the Treatment of Prisoners of War* (International Committee of the Red Cross 1960) 55–56.

[86] Arnold (n 48); Roberta Arnold and Maria L Nybondas, 'Command Responsibility and Its Applicability to Civilian Superiors – Book Review' (2013) 11 *Journal of International Criminal Justice* 943–51.

[87] Sivakumaran (n 6) 175.

[88] ibid 515; Sandesh Sivakumaran, 'Lessons for the Law of Armed Conflict from Commitments of Armed Groups: Identification of Legitimate Targets and Prisoners of War' (2011) 93 *International Review of the Red Cross* 463, 477; Jens David Ohlin, 'The Combatant's Privilege in Asymmetric and Covert Conflicts', Cornell University School of Law, Cornell Legal Studies Research Paper No 14-33, 29 July 2014, 14, 18; Nils Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (International Committee of the Red Cross 2009) 84.

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In sum, it is important to be aware of the existence of the different legal regimes that comprise international law and that have been increasingly applied to NIAC – thereby forming the new law of NIAC – and to be cautious in applying them outside their originally intended scope. In order to fill the legal gaps affecting the regulation of NIAC, lawyers need to be aware of the differences and to show some flexibility in coming up with viable but, at the same time, sound solutions in the broad spectrum. One should definitely avoid solutions that, as said, may be sound under one legal regime, such as ICL, but inconsistent with another system, such as IHL. Thus, on the one hand, lawyers confronted with NIAC will need a broad knowledge of the international legal system in order to be able to be strict and think into boxes when necessary; on the other hand they will also need to show the flexibility that is required to translate rules from one regime into another, when no other solution is available.

3.2. The Realities of the Field

When interpreting the rules of the law of NIAC – in particular, those stemming from IHL – for criminal law purposes, one should remember that the primary aim of IHL is the regulation of the conduct of hostilities. The realities of warfare should be taken into consideration and analogies with peacetime scenarios should be avoided when possible. For instance, when applying to a NSA the requirements of 'organisation' and 'control of territory' (Article 4 of Additional Protocol II), one should recall that these were set for the purposes of determining the existence of a NIAC, not the status of the NSA under criminal law.[89] Under IHL, the lack of a transparent structure is not conclusive of its lack of existence or of a group's lack of organisation. In guerrilla warfare, such an assumption would be unrealistic: guerrilla movements may rely on non-transparent or no structures at all, which makes it more difficult for their adversary to target them, but this lack of structure does not equate with their unwillingness or inability to fight in compliance with IHL. Under IHL, which takes these realities into account, what matters is the group's capability to comply with IHL; for example, under Article 260 *ter* (1) of the Swiss Criminal Code:[90]

> Any person who participates in an organisation, the structure and personal composition of which is kept secret and which pursues the objective of committing crimes of violence or securing a financial gain by criminal means, any person who supports such an organisation in its criminal activities, is liable to a custodial sentence not exceeding five years or to a monetary penalty.

It would be flawed, however, to derive from this provision the equation 'guerrilla group = lack of transparent structure = criminal organisation'. Such an assumption would fail to take into consideration the realities of the field and the fact that in NIAC, NSAs such as guerrilla movements can survive only as a result of the secrecy of their structure. This element, however, cannot be the

[89] See on this also Saul (n 2) 213.
[90] Swiss Criminal Code (n 7) art 260 *ter* (1).

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basis to hold that every NSA with a secret structure is incapable of fighting in compliance with IHL and that it should be put automatically on the same footing as a criminal organisation like the mafia. This cannot have been the intention of the drafters of IHL. In the reviewer's opinion, a distinction should be drawn between NSAs fighting in compliance with IHL and those pursuing a policy of 'ordinary' crimes (such as thefts, robberies, murder of civilians) or acts of terrorism (as defined under the international anti-terrorism conventions).[91] To do otherwise might jeopardise the whole credibility of IHL. This is what the reviewer means by suggesting the necessity, for criminal lawyers, to keep a bird's eye view over the various regimes comprising the law of NIAC, in order to prove, where necessary, the flexibility that is required to translate and apply IHL rules for criminal law purposes.

There are circumstances, however, when the realities of the field should be considered with caution. For instance, under the doctrine of command responsibility, it might seem self-evident to expect a superior to punish subordinates for breaches of the law. This is even more true when the NSA has reached such a degree of control over part of a territory to resemble a quasi-state, with its own judicial system. In this regard, Sivakumaran holds that the court of an armed group may de facto be the only forum in which violations of IHL will actually be prosecuted. This does 'not only suggest that fair trials in courts of armed groups would satisfy the duty to punish on the part of the superior, but they may well represent a useful practical means by which to do so'.[92] Nevertheless, in order to recognise the judicial system of these groups and infer the obligation of a NSA commander to comply with the duty to repress, the legitimate state would first have to delegate part of its judicial authority to the NSA. In the reviewer's opinion, the right to sentencing and deprivation of a person's liberty should remain in the exclusive power of the state. At the same time, one cannot expect the NSA commander to refer subordinates to the judicial authorities of the state being fought against.[93] Therefore, if the NSA has developed a functioning judicial system, reference thereto could be made for purposes of determining customary law and practice, but should not be relied upon for imposing on NSA leaders the duty to repress under the doctrine of command responsibility.

3.3. The Law Enforcement and the Laws of Warfare Paradigms

By definition, NIACs involve parties that act on the borderline between the law enforcement and laws of warfare paradigms.[94] As soon as internal disturbances develop into a NIAC, the members of a NSA fighting it become subjects of IHL, but may nevertheless face criminal charges under

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[91] For a list of the existing United Nations conventions on terrorism, see the UN Treaty Collection Database, https://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml. On the problem of the concomitant application of IHL and anti-terrorism legislation, see also Kraehenmann (n 56) 23 ss.

[92] Sivakumaran (n 6) 559, with reference to ICC, *Prosecutor v Bemba*, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, ICC-01/05-01/08, 15 June 2009, [501].

[93] Sivakumaran (n 6) 559.

[94] On this see International Humanitarian Law, Anti-Terrorism Laws and Non-State Actors, Centre for Military & Security Law, Australian National University College of Law, Briefing Note, December 2013, 5ff; Roberts (n 80).

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domestic law for participation in combat.[95] The situation becomes even more complicated when the NSA opposing a government in compliance with IHL resorts to illegal activities in order to finance itself. The Hamletic question under such circumstances is which paradigm should be applied. In the sections above it was argued that criminal lawyers should adopt a flexible approach in interpreting IHL for criminal law purposes. Under the Swiss legislation, for instance, Article 260 *ter* of the Criminal Code (CC) provides that '[a]ny person who participates in an organisation, the structure and personal composition of which is kept secret and which pursues the objective of committing crimes of violence or securing a financial gain by criminal means'[96] is liable to be considered a member of a criminal organisation. Reference was made above to guerrilla warfare. Guerrilla movements are very likely to meet the elements of this crime if one adopts a restrictive interpretation of the elements. A criminal lawyer, in fact, could argue that guerrilla movements do not have a transparent structure and that their objective is to commit crimes of violence. Nevertheless, if one considers the origins of this provision and the reason why the laws of war (along with their war crimes provisions) were drafted as *lex specialis*, one may argue that Article 260 *ter* of the Criminal Code[97] was drafted to address acts of violence committed *in times of peace* and that in times of armed conflict – IAC and NIAC – it is overruled by the war crimes catalogue now contained in Article 264b of the Criminal Code. The issue is far from being resolved yet, which means that under the existing legislation the same conduct of a NSA might be considered at the same time legitimate under international law and unlawful under domestic criminal law. How can this contradictory outcome be resolved?[98] Sivakumaran's suggestion is to grant combatant immunity to the members of the NSA on condition that it complies with IHL.

In the reviewer's opinion, another solution might be the drawing of a further distinction between the various wings that make up the NSA – such as the political and the military wings. Very often NSAs commit ordinary illegal activities under the aegis of their political

[95] As remarked by Sivakumaran (n 6) 71: 'One sovereignty concern that has had, and continues to have, a very real impact on the substantive law of non-international armed conflict relates to the lack of combatant privilege. Pursuant to this idea, combatants have the authority to participate in hostilities. Accordingly, they cannot be prosecuted for taking part in hostilities and committing lawful acts of war. Importantly, however, the notion of combatant, and therefore also the combatant privilege, is limited to international armed conflicts. States are unwilling to afford the combatant privilege to members of non-state armed groups that fight against them. Instead, they leave open the possibility of prosecuting such members for treason, sedition, or some other offence under domestic law. For this reason, the law of non-international armed conflict cannot be exactly equivalent to the law of international armed conflict. The lack of combatant immunity in non-international armed conflict is recognized as a hurdle for advocating compliance with the law on the part of non-state armed groups'. See also Saul (n 2) 223–28.

[96] Swiss Criminal Code (n 7).

[97] ibid, art 260 *ter*.

[98] With regard to the problem of inequality of treatment, and the concurrent application of transnational (anti-terrorism) criminal law and IHL, see Arnold (n 28) 144ff; Daniel O'Donnell, 'International Treaties against Terrorism and the Use of Terrorism during Armed Conflict and by Armed Forces' (2006) 88 *International Review of the Red Cross* 853, 863, 879. On the dual character of terrorist activity (both as a crime and in armed conflict) see Saul (n 2) 213, according to whom the two are not mutually exclusive; see, however, the discussion on the exclusion clauses contained in anti-terrorism legislation.

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wing, which is generally also entrusted with fundraising activities.[99] If the political wing of the NSA acts in breach of ordinary criminal law, its members could be charged with participation of a criminal organisation, without affecting the status of the group as such.[100]

To do otherwise – namely, to apply concomitantly to the NSA both the laws of warfare along with the legislation applicable in peacetime – might lead to inconsistencies within the system of the law of NIAC. The two paradigms are rooted in and intended for two intrinsically distinct realities; the traditional division between peacetime and wartime is moreover reflected in the various international anti-terrorism conventions, such as the 1979 International Convention against the Taking of Hostages[101] or the 1997 Convention against Terrorist Bombings.[102] These include exclusion clauses that provide for the priority of the laws of warfare (namely the GCs and their Additional Protocols of 1977) whenever the acts of violence have reached the threshold of an armed conflict. The rationale is that, under these circumstances, the notion of terrorism is narrower.[103] For instance, an armed attack against a military barracks in peacetime may qualify as an act of terrorism; by contrast, it would constitute a legitimate act of warfare in times of armed conflict. Only acts that have been perpetrated with the specific intent of terrorising the civilian population of the opposing side within the context of a NIAC may qualify as war crimes.[104]

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[99] Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012) 32, 52.

[100] The distinction between the military and political wings of a NSA seems to be the approach that was followed by the Swiss Military Justice in its judgment of 22 November 2013 with regard to a Swiss national who had supported the PKK: Military Tribunal 1, Judgment of 22 November 2013 (in French), Case No TM1 07 287, available upon request from the Swiss Military Justice. For a case report see Roberta Arnold, 'Case Report on the Judgement of the Swiss Military Tribunal 1 of 22nd November 2013 for Contribution to the PKK' [2015] *Military Law and Laws of War Review* (forthcoming). See also the case summary available on the website of the International Crimes Database Project, maintained by the TMC Asser Instituut, The Hague, http://www.internationalcrimesdatabase.org (forthcoming).

[101] International Convention against the Taking of Hostages (entered into force 3 June 1983) 1316 UNTS 206 (Hostages Convention), art 12 grants priority to the 1949 GCs and the 1977 Additional Protocols whenever they can. For more on the issue of the application of the international conventions addressing acts labelled as 'terrorist' acts (such as hostage taking, aircraft hijacking, etc) see Arnold (n 28) 15.

[102] International Convention for the Suppression of Terrorist Bombings (entered into force 23 May 2001) 2149 UNTS 256; O'Donnell (n 98) 869: 'The correct interpretation of the exclusionary clauses would seem to be that this treaty (as well as the Convention against nuclear terrorism, which contains an identical clause in Article 4(2)) is not applicable to acts of terrorism committed during an armed conflict by an armed group that is organized and under responsible command, and that exercises sufficient control over territory to be able to mount sustained military operations and apply humanitarian law – provided, of course, that the act of terrorism committed also violates international humanitarian law. It would be applicable to acts of terrorism committed by individuals who do not form part of an armed group, or by armed groups that are not organized or are not under responsible command, or by armed groups that do not control sufficient territory to be able to mount sustained military operations and apply humanitarian law'.

[103] On this see Arnold (n 28) 335; Saul (n 2) 230ff with post 9/11 measures such as UNSC Resolution 1373(2001), which authorised states to criminalise terrorism under domestic law, without providing a definition, the separation of the two regimes – the law of armed conflict and international anti-terrorism legislation – was blurred.

[104] i.e. acts committed with the primary purpose of terrifying the population of the adverse party. This is not the same as the 'peacetime' legal conception of terrorism. The meaning of terrorism under IHL is more limited: Saul (n 2) 227ff; Arnold (n 28) 69ff.

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The ICTY confirmed this view in the *Galić* case.[105] Moreover, acts of violence that have not been committed within the territorial border of the state affected by the NIAC,[106] or which do not otherwise have a nexus with a NIAC, shall be prosecuted as ordinary crimes.[107]

A related issue is the qualification of the financing and support of the NSA. In the *Perišić* case, the ICTY concluded that assistance provided by one army to another was insufficient in itself to trigger individual criminal liability for individual aid providers, in the absence of proof that the relevant assistance was specifically directed towards criminal activities.[108] In that case, the Appeals Chamber drew a distinction between the regular conduct of warfare, in compliance with IHL, and acts qualifying as war crimes. The Tribunal opined that even in times of war there may be groups whose objective is the commission of ordinary crimes. As long as the financing is not made with the intent to support their criminal conduct, it cannot be considered unlawful. The conflict in the former Yugoslavia, however, was an IAC and the inferring of analogous conclusions with regard to NIAC might be problematic. As mentioned, the members of the NSA do not acquire combatant immunity. They may fight in compliance with IHL but their acts could nevertheless meet the elements of ordinary crimes (such as participation in an international criminal organisation, under Article 260 *bis* of the Criminal Code). Thus, depending on the legal qualification of the NSA and its activities (ordinary crimes, legitimate acts of warfare, war crimes), its financing and the transfer of profits made by it may also qualify as criminal offences under domestic legislation.

4. CONCLUSIONS

There was a great need for a comprehensive treatment of the law applicable to NIAC. Sivakumaran skillfully met this need by identifying the emergence of a mixed body of

[105] Sivakumaran (n 6) 341. *Prosecutor v Galić* (n 53) [87]; AP II (n 1) arts 4(2)(d) and 13(2); Arnold (n 55) 291–96.

[106] This question has been the subject of debates on 'the geographical scope of the battlefield', which is beyond the scope of this article. See Noam Lubell and Nathan Derejko, 'A Global Battlefield? Drones and the Geographical Scope of Armed Conflict' (2013) 11 *Journal of International Criminal Justice* 65–88. In Sivakumaran's view, for instance, if the US admitted to be in a NIAC with Al Qaeda, the targeting of Osama bin Laden in Pakistan would be covered by IHL. In the reviewer's opinion, however, in this kind of scenario the two parties to the conflict should be bound by IHL, in so far as issues such as targeting, status of captives and the like are concerned. By contrast, the third state 'hosting' the members of the NSA should not be so bound, unless it consented to the stationing of the parties to the conflict on its soil. The cross-border element does not per se internationalise the conflict. This means that the 'host state' may apply its domestic criminal law provisions: Sivakumaran (n 6) 251. See Saul (n 2) 218–19, according to whom if one adopts a restrictive approach to common art 3, which assumed that armed conflicts would be confined to the territory of the state experiencing the conflict, then eg Al Qaeda fighters outside the primary territory would not constitute part of the existing conflict.

[107] The anti-terrorism conventions normally contain exclusion clauses which determine either their application or that of IHL: see, eg, Hostages Convention (n 101) art 12; Suppression of Unlawful Acts Against the Safety of Maritime Navigation (entered into force 1 March 1992) 1678 UNTS 221, art 2. For a list of the existing United Nations conventions on terrorism, see the UN Treaty Collection Database (n 91). For more details see Arnold (n 28) 7ff and 13ff; O'Donnell (n 98) 863; Saul (n 2) 214ff, 219ff.

[108] ICTY, *Prosecutor v Perišić*, Judgment, IT-04-81-A, Appeals Chamber, 28 February 2013, paras 54–58.

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international law – the law of NIAC – in which provisions of IHL, ICL and IHRL have converged and, at times, merged. Unlike the previous regimes governing NIAC, this new body is no longer restricted to IHL.[109] Its development can be explained with the major evolution that took place in the 1990s in the field of ICL and the latter's use as a means to fill the gaps of IHL. Sivakumaran welcomes this process but, at the same time, he draws the reader's attention to its shortcomings. Even though IHL, IHRL and ICL present various common aspects, their similarity is only superficial: they stem from different schools of thought that influenced their diversity with regard, for example, to their aims and objectives. These are not necessarily the same and the existing differences should not be neglected. Even within the same legal field (such as IHL) one should be aware of the differences regarding the rules governing IAC and NIAC and the underlying rationales. When juggling with the different rules that make up the law of NIAC, one should thus be aware of this and be mindful of the possible conflicting outcomes that may arise from their concomitant application. The substantive law of NIAC still needs improvement in order to overcome these drawbacks.[110]

The aim of this review was to illustrate Sivakumaran's findings and their relevance from the perspective of a criminal lawyer faced with the assessment of the conduct of hostilities within a NIAC. The reviewer read the book while grappling herself with the simultaneous application of different legal regimes to NIAC and while trying to relate criminal law concepts to the IHL system. Sivakumaran's findings confirm that the difficulty to come up with solutions that are compatible with both the IHL and criminal law dogmatic is intrinsic in the structure of the law of NIAC. He also gives indications as to the origins of this difficulty. For instance, the unclear status of NSAs – who are discriminated against with regard to combatant immunity and who are caught in the jurisdictional battle between the law enforcement and the laws of warfare paradigms – has to do with states' reticence to recognise belligerency. Moreover, as a consequence of the 9/11 attacks in 2001 and the resulting US 'war on terror', the tendency of states has been to blur these two paradigms. This tendency was recently reconfirmed with the international community's adoption of countermeasures against 'foreign fighters', in which language stemming from traditional counterterrorism policies is mixed with language addressing armed conflict scenarios.[111] Unfortunately, Sivakumaran did not examine the interplay between the law of NIAC and criminal law. Nevertheless, the main lessons one may learn from his overall analysis is that lawyers confronted with NIAC will need the ability to maintain, where necessary, a 'thinking into boxes approach' in order not to confuse the IHL, IHRL and ICL regimes and, at the same time, retain

[109] Sivakumaran (n 6) 568.
[110] ibid 569.
[111] See, eg, UNSC Res 2178(2014), 24 September 2014, UN Doc S/RES/2178 (2104), preamble, which reads: '*Bearing* in mind the need to address the conditions conducive to the spread of terrorism, and *affirming* Member States' determination to continue to do all they can to resolve conflict and to deny terrorist groups the ability to put down roots and establish safe havens to address better the growing threat posed by terrorism'. See also the following paragraph: '*Reaffirming* that Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law'.

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proof of flexibility where this is required to translate the rules stemming from one of the regimes comprising the law of NIAC in order to apply them in a different legal context.

The ultimate lesson learned is that NIAC will require an interdisciplinary approach, thereby forcing international and domestic lawyers, with either a criminal or public law background, to talk to each other in order to regulate an area that, many years after the adoption of Additional Protocol II, still raise numerous issues that are yet to be resolved.

As observed by Sivakumaran:[112]

> Ultimately, criminal enforcement of international humanitarian law is immensely useful. However, it is not a cure for all the world's ills: '[t]he success or failure of international humanitarian law must be measured in terms of lives saved and injuries not suffered. It is not measured by the number of prosecutions or the number of convictions'.

Only a joint and interdisciplinary approach will pave the way for the fight against impunity as one, but not the only, element of the international community's strategy to prevent armed conflicts.

[112] Sivakumaran (n 6) 82.

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