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International Law Meeting Summary

Classification of Conflicts: The Way Forward

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INTRODUCTION

With changing forms of armed conflict that may involve multi-national operations, transnational armed groups, and organized criminal gangs, the need for clarity of the law is all-important. At the launch of *International Law and the Classification of Conflicts* (OUP, 2012), the speakers considered the future trends in the law relating to the classification of armed conflict.

The meeting was held on the record.

SUMMARY

Sir Daniel Bethlehem KCMG QC

The divide between non-international and international armed conflict: can the gulf be bridged?

There exists a normative gulf between the law governing international armed conflict (IAC) and non-international armed conflict (NIAC). The law of NIAC is considerably more under-developed than the law governing IAC.

Common Article 3 of the 1949 Geneva Conventions and Additional Protocol II (APII) both outline the minimum standards to be observed by all parties to a NIAC. However, particularly with regard to APII, there is variable geometry of legal application; not all states are party to APII and the provisions of APII are considerably under-developed in comparison to Additional Protocol I (API). Given the gulf between API and APII, issues such as combatant status and combatant immunity in situations of NIAC remain unresolved.

The uncertainty that exists with the treaty law governing NIAC leads academics and practitioners to look to customary international law for guidance. There is a great deal of fluidity and movability as to what can be considered as being customary international law. The guidance provided by customary international law has been critically important with regard to the detention of combatants and civilians, accountability and fundamental rights.

The gulf that exists between the law governing IAC and NIAC raises questions of legal uncertainty with regard to the applicable legal framework. This legal uncertainty is an issue for law-abiding states, such as the United Kingdom (UK), for whom law is important. Legal advisers in government departments face considerable difficulty with classifying armed conflicts that their state may be engaged in, and with classifying conflicts that other states may be engaged in. For example, the armed conflict in Afghanistan shifted in 2002 from being an IAC to a NIAC. However, given that there are 130,000 foreign personnel from fifty states at the behest of a government whose administrative control does not extend beyond Kabul, classification as a NIAC may seem contrary to reason.

Classifying armed conflicts which other states are engaged in is critically important for judging violations of the applicable law by the parties to the conflict. With regard to the 2006 Israel-Lebanon conflict, there was uncertainty as to whether the armed conflict could be classified as an IAC, due to the geographical scope of the conflict crossing an international

boundary; or whether it was a NIAC as the conflict was between Israel and Hezbollah, a non-state armed group.

Modern armed conflicts are increasingly being fought through coalitions and alliances consisting of several states. Each state within a coalition or alliance will have varying obligations under international humanitarian law (IHL) and other bodies of law. Given that the United States is not party to API, APII, or the European Convention on Human Rights, it has differing legal obligations than those possessed by the UK. Therefore, in order to determine the legal obligations of states in complex alliances such as NATO, there is a need for a high degree of clarity in the legal framework governing IAC and NIAC.

The uncertainty that exists between the law governing IAC and NIAC brings into question the credibility of IHL. Several academic commentators and judges have stated that a legal black hole exists. As such, questions arise as to whether other bodies of law should apply to fill the gulf that exists between the two frameworks.

It is crucial for the purposes of credibility and certainty that efforts are made to bridge the gap between the law governing IAC and NIAC. One of the more difficult means of bridging the gap would be the conclusion of a new treaty that combines the law governing IAC and NIAC into a single substantive instrument. Whilst more beneficial in the long-term, such an instrument would take several decades to negotiate and enter into force.

Rather than creating new substantive law, a second possibility is for states to negotiate and draft a protocol that fuses the current law governing IAC and NIAC. Alternatively, states may seek to combine the legal framework of IAC and NIAC through unilateral declarations. For example, the UK could declare that it will regard itself bound by all of its international armed conflict obligations in all of the conflicts it engages in, notwithstanding their classification - followed by a series of interpretive declarations. Such unilateral declarations by states may have the effect of fusing the law governing IAC and NIAC. What would be required, however, is a state or group of states to take the initiative in order for other states to follow suit and make similar declarations.

In sum, a gulf exists between the law governing IAC and NIAC that gives rise to uncertainty and brings the credibility of IHL into question. This is particularly problematic when it is considered that armed conflicts are increasingly becoming the subject of litigation. Although it would be difficult and challenging to address the gulf, there are means of doing so.

Dr Sandesh Sivakumaran

The threshold for non-international armed conflict

The vast majority of modern armed conflicts are not of an international character. Despite this, it remains extremely difficult to ascertain when internal tensions or internal disturbances transform into a NIAC. In certain situations, such as when a third state intervenes in a conflict in another state through its troops, or when an armed group is being used as a proxy force by a third state, it can also be difficult to determine when a conflict is of non-international character as opposed to international.

The conventional IHL instruments provide little guidance as to when a NIAC can be said to exist. Common Article 3 of the 1949 Geneva Conventions refers to an armed conflict not of an international character, but does not go on to identify when such a conflict exists. APII provides some guidance, stating that a NIAC can be said to exist when a state is engaged in conflict on its territory with an organized armed group exercising such control over territory so as to enable the group to conduct sustained and concerted military operations and to implement the provisions of the Protocol. The definition provided by APII refers to a subset of NIAC; it identifies only a certain type of NIAC to which the Protocol applies. The definition does not assist with the broader notion as to what constitutes a NIAC.

The jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) provides significant guidance as to when a NIAC can be said to exist. In *Tadić*, the Appeals Chamber of the ICTY held that a NIAC exists whenever there is “*protracted armed violence between governmental authorities and armed groups or between such groups within a State.*”¹ Thus, the ICTY in *Tadić* identified two elements which must exist in order for a situation of violence to be distinguished from isolated acts of violence and be classified as a NIAC: the intensity of violence and the organisation of the armed group.

Subsequent jurisprudence from the ICTY has interpreted the *Tadić* criteria to provide important indicia as to the level of intensity of violence required and as to what constitutes an organized armed group. Trial Chambers have relied on a number of factors relevant for assessing the ‘intensity’ criterion, including: the number, duration and intensity of confrontations; the number of

¹ Prosecutor v. Dusko Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995, paragraph 70.

casualties; the type of weapons and military equipment used; the number of persons and type of forces partaking in the fighting; the extent of material destruction; and the number of civilians fleeing combat zones.² Indicative factors of organisation include: the existence of a command structure and disciplinary rules and mechanisms within the group; the fact that the group controls a certain territory; the ability of the group to access weapons, military equipment, recruits and military training; and its ability to plan, coordinate and carry out military operations.³

Despite the guidance and indicia provided by the ICTY, recent events have confirmed that it is still difficult to identify when a NIAC can be said to exist. For example, when did the situation in Libya transform from an internal protest involving the targeting of protestors by the Libyan authorities to a NIAC? Similarly, with regard to Syria, the *Tadić* intensity of violence requirement had been satisfied for some time, but at what stage was the Free Syrian Army (FSA) organized enough to be considered an organized armed group?

One of the reasons it is difficult to categorise conflicts is that there is no authoritative body that systematically analyses situations of violence and characterises them publically as being an IAC, a NIAC or not a conflict. Various actors and bodies could conceivably take on the role of categorising conflicts so as to determine which provisions of IHL are applicable.

The parties to the violence are best placed to characterise the situation given that they are closer to the facts. However, being parties to the violence, they will have self-interest in the characterisation of the conflict and will be unable to characterise the situation in an impartial manner. In so far as the state is concerned, there may be a tendency to deny that a particular violent situation amounts to an armed conflict, be it international or non-international. States often classify armed groups operating on their territory as criminals or terrorists in order to deny the existence of an armed conflict. Similarly, in so far as the armed group is concerned, there may be a tendency to exaggerate a situation as an armed conflict.

Given the self-interest of the parties to the violence, third states could take on the role of classification. Certain states, particularly those in the surrounding region or those with a close diplomatic relationship with the state in question, may not wish to characterise situations of violence on a systematic basis

² Prosecutor v. Haradinaj et al. (Trial Judgment), IT-04-84-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 3 April 2008, paragraph 49.

³ Ibid., paragraph 60.

given the implications for the security of their own state or the integrity of their diplomatic relationship with the state concerned. Thus, it may be preferential for international organisations, such as the UN or the International Committee of the Red Cross (ICRC), to assume this role.

Various organs of the UN have, in the past, characterised situations of violence as being an IAC or a NIAC. [Given the multinational composition of the UN and its organisational principles of neutrality and impartiality, it would be difficult for any UN organ to engage in the classification of violent situations on a systematic basis. The ICRC's mandate of protecting victims of armed conflict makes it the obvious choice as being the authoritative body that systematically analyses situations and characterises them publically as being an IAC, a NIAC or not a conflict. The ICRC does characterise situations of violence for its internal organisational purposes. On certain occasions, as it did most recently with regard to Syria, the ICRC has released public statements classifying situations of violence as amounting to an IAC or a NIAC. However, the ICRC refrains from releasing its views publically on a systematic basis, as it has to work with both parties to the violence or conflict to fulfil its mandate.

International criminal courts or tribunals, such as the ICTY or the International Criminal Court (ICC), characterise situations of violence in order to determine the applicable provisions of International Criminal Law. Such determinations are often made following a cessation of the conflict, with a long period of time having passed since the commencement of hostilities. Therefore, for the purposes of determining the IHL framework applicable during the conflict, the classification as to whether the conflict is international or non-international in character is too late.

Given the lack of an independent authoritative organisation or body that is able to systematically characterise situations of armed conflict in order to determine the applicable IHL framework, it would be beneficial if a new organisation or body were to be created to make such determinations. The body might consist of an expert group of practitioners and academics; it might be a policy institution or a non-governmental organisation. What is required is a body that could ascertain the *Tadić* indicia of intensity of violence and organisation of the armed group in order impartially and systematically to determine when an armed conflict can be said to exist and as to whether the armed conflict is international or non-international in character so as to identify the applicable IHL framework.

Dr Noam Lubell

The geographical scope of an armed conflict

Defining the geographical scope of an armed conflict is assumed to be a relatively simple matter. If two parties are engaged in an armed conflict, then the geographical scope of the conflict is the region where hostilities are taking place. The legal reality, however, is not that simple. The rationale for defining the area of armed conflict is that the rules governing targeting and the regulation of force differ according to which IHL framework is applicable.

For a state to be engaged in an armed conflict, it does not necessarily mean that the whole territory of the state is part of that conflict. For example, whilst Iraq was a zone of armed conflict in 2003, the territory of the United States did not form part of the conflict zone. Similarly, during the Falklands War, the mainland territories of the UK and Argentina were largely unaffected by the armed conflict in the Falklands Islands. Even in situations of NIAC, the whole territory of a state may not be considered to be the zone of conflict, as hostilities may be localised to specific regions.

The geographical scope of an armed conflict could, therefore, be held as being any territory or region where actual hostilities are taking place. However, there is no clear agreement on the definition of what constitutes 'hostilities' and whether there is a need for temporal consistency within a specific geographical area to eliminate occasional flare-ups from a zone of conflict.

Much of the discussion concerning the geographical scope of an armed conflict is based on the traditional notion of armed conflict, particularly with regard to NIAC. Technological developments, such as the use of unmanned drones and cyber operations, require a reassessment of the traditional paradigm of armed conflict. Both of these technological developments have reduced the significance of geographical boundaries and the need for states and organized armed groups to engage in a conflict with soldiers on the ground.

With regard to the use of unmanned drones, can a drone strike in a remote location from any hotspot of the conflict zone be considered as part of an existing armed conflict? This assessment is critical for determining whether the drone strike is governed by IHL in order to assess its legality. In essence, IHL is applicable to any act that forms part of an existing armed conflict, even if it is beyond the geographical scope of that conflict. As the ability to take a direct part in hostilities is not limited to those individuals in close proximity to

the battle space and can include participation by remote means, any individual partaking directly in hostilities is subject to IHL, regardless of where they are taking that action. Thus, IHL, rather than other bodies of law, would regulate a drone strike against such persons.

The association of drone strikes with existing armed conflicts does not mean that there is an uncontrollable geographical expansion of the battle space. States cannot claim that any individual, regardless of their location, is a combatant and, therefore, a legitimate target for the purposes of IHL. For an individual to be classed as a legitimate target, they must be part of the armed group or organisation with which the state is actually engaged in an armed conflict. For example, a number of the armed groups in the Waziristan area of Pakistan are not engaged in hostilities with the United States in Afghanistan. As such, those armed groups cannot be subjected to drone strikes, as they are not party to the conflict in Afghanistan. In addition, individuals who are marginally associated with an armed group engaged in an armed conflict with a state, or individuals who used to be part of the conflict, cannot be targeted; they must be taking a direct part in hostilities.

Secondly, the law governing the use of force by states, *jus ad bellum*, regulates the spread of conflict, rather than IHL, or *jus in bello*. It is the *jus ad bellum* that regulates whether a state can use force against, or on the territory of, another state. Therefore, even if an armed group is operating from the territory of a third state, it does not give licence to the state engaged in an armed conflict with that group to conduct military operations on the territory of the third state. In order to do so, the state engaged in an armed conflict with the armed group would either have to get the consent of the third state to conduct military operations on its territory, or meet the self-defence requirements proscribed by Article 51 of the UN Charter. Without either of these preconditions, the geographical expansion of the scope of the armed conflict would be unlawful under *jus ad bellum*.

Cyber operations present more complex challenges with regard to defining the geographical scope of an armed conflict. Questions arise as to whether the cyber-sphere can be regarded as a zone of conflict or as forming part of the battle space. Cyber space is not a space in the physical sense, resulting in a sphere that does not observe state borders or geographical territorial boundaries. As a result, cyber operations can be conducted from any location around the world, with no need for military apparatus. Cyber operations will pass through networks that are not confined to a single state and will not have any regard for the concept of state neutrality, or the IHL principles of distinction and proportionality. Cyber operations can have striking

consequences for how the geographical scope of an armed conflict and the battle space is defined.

The use of unmanned drones and cyber operations has changed our perception of the notion of armed conflict. The ability to apply force from remote locations could enable a state or armed group to achieve its military objectives without having to utilise any traditional military apparatus or hardware. The increasing use of unmanned drones and cyber operations will result in a contortion of the geographical scope of conflict and of the battle space. There would no longer be one primary geographical location that could be held as being the zone of conflict. Rather, there would be a series of locations throughout a particular region or around the world that would form the zone of conflict.

Professor Phillip Leach

The relevance of international human rights

IHL and International Human Rights Law (IHRL) are two distinct, but complementary bodies of law. Following recent developments, the two regimes are, to an extent, overlapping and there is now a degree of complementarity between the two.

IHL and IHRL apply concurrently in situations of IAC and NIAC. The concurrent application of both bodies of law in situations of armed conflict has been confirmed by the UN General Assembly; the UN Human Rights Council; the European Court of Human Rights (ECtHR); and the Inter-American Court of Human Rights. It was most recently affirmed by the International Court of Justice in two advisory opinions: the Advisory Opinion on the Legality of the Threat or Use of a Nuclear Weapon and the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.

Despite the recognition that both bodies of law are applicable in situations of armed conflict, there are a number of unresolved questions as to the application of IHRL in situations of armed conflict, as the jurisprudence of international human rights bodies and regional courts has not been consistent and uniform on the matter.

In cases concerning the armed forces or security forces of a state in situations of armed conflict, the ECtHR does not refer directly to provisions of IHL within its jurisprudence. The ECtHR has, however, begun to engage with IHL concepts, such as the need to minimise incidental civilian losses during

military operations and the need to limit the use of weapons that are unable to adhere to the IHL principle of distinction.

The ECtHR has developed an extensive body of case law on the application of Article 2 of the European Convention on Human Rights (ECHR), the right to life. Generally, the ECtHR has considered the application of Article 2 of the ECHR within a law enforcement paradigm. Since 2005, the ECtHR has begun to engage with concepts of IHL with regard to cases concerning Russia and the insurgency phase of the Second Chechen War.

As no state of emergency had been declared in Chechnya, and no derogation had been entered under Article 15 of the ECHR, the ECtHR judged the conduct of the Russian forces against a 'normal legal background'. *Isayeva, Yusupova and Bazayeva v Russia* concerned the aerial bombing of a convoy of civilian cars leaving Grozny in 1999.⁴ The ECtHR held that there had been a violation of Articles 2, 3 and 13 of the ECHR, with Russian forces failing to observe the IHL principles of proportionality and distinction. In another case concerning the application of Article 2 of the ECHR, regarding the aerial bombing of the Chechen village of Katyr-Yurt, the ECtHR held that active resistance by Chechen insurgents against Russian law enforcement bodies justified the use of lethal force by agents of the state. Nevertheless, the ECtHR stated that the use of indiscriminate weaponry "*in a populated area outside of wartime and without prior evacuation of the civilians is impossible to reconcile with the degree of caution expected from a law enforcement body in a democratic society.*"⁵

Within all of the cases concerning Russia and the insurgency phase of the Second Chechen War, the ECtHR has accepted that the Russian operations were in pursuit of the aims of Article 2 of the ECHR. However, the ECtHR concluded that the necessary degree of care was not exercised in the planning of the operations so as to minimise to the greatest extent the risk to civilians.

More recently, in a series of cases concerning the Turkish occupation of Northern Cyprus, the ECtHR has stated that the ECHR must be interpreted in light of the general principles of international law, including IHL. Thus, the ECtHR has begun to develop its consideration of IHL, albeit through the prism of Article 2 of the ECHR, the right to life.

⁴ *Isayeva, Yusupova and Bazayeva v. Russia*, 57947/00; 57948/00; 57949/00, Council of Europe: European Court of Human Rights, 19 December 2002.

⁵ *Isayeva v. Russia*, 57950/00, Council of Europe: European Court of Human Rights, 24 February 2005, paragraph 191.

Article 1 of the ECHR imposes an obligation on states to secure the rights enshrined in the convention to all persons within their jurisdiction. The Grand Chamber of the ECtHR affirmed recently in *Al-Skeini* that the jurisdictional competence of the ECHR is primarily territorial, with certain acts performed or producing effects outside a state's territory exceptionally giving rise to the exercise of jurisdiction extraterritorially.⁶ The Grand Chamber made reference to *Bankovic*,⁷ in which the ECtHR expounded two situations where a state can be regarded as exercising jurisdiction extraterritorially for the purposes of Article 1 of the ECHR: when an individual is under the authority and control of state agents, or when a state exercises effective control over an area.⁸ Whenever a state exercises such jurisdiction over an individual or territory, the state is under an obligation under Article 1 to secure the rights and freedoms of the ECHR to all persons under its jurisdiction.⁹

The definition of 'effective control over an area' and the definition of 'under the authority and control of state agents' have been conflated in various case law developments. The case law has moved on from a territorial preoccupation of jurisdiction, as exemplified by *Bankovic*, to a cause and effect concept of jurisdiction, which is evidenced in the concurring opinion of Judge Bonello in *Al-Skeini*.

The ECtHR in *Georgia v Russia* will again consider the extraterritorial exercise of jurisdiction by a state that engages its obligations under Article 1 of the ECHR.¹⁰ The case concerns the 2008 South Ossetia conflict and the application of Article 2 (the right to life) and Article 3 (the prohibition of inhumane and degrading treatment and punishment) of the ECHR. The *Bankovic* criteria would rule out the extraterritorial application of the ECHR on the basis that Gori did not fall under the jurisdiction of Russia, as it did not exercise effective control over the area. The *Bankovic* criteria will have to be revised given that the South Ossetia conflict involved two Council of Europe states and occurred on Council of Europe territory; whereas *Bankovic* did not concern a conflict that occurred on Council of Europe territory, nor were both parties to the case Council of Europe members. As such, the ECtHR will have to move and develop the *Bankovic* criteria within that context.

6 *Al-Skeini and Others v. United Kingdom*, Application no. 55721/07, Council of Europe: European Court of Human Rights, 7 July 2011.

7 *Ibid.*, paragraph 135.

8 *Bankovic et al. v. Belgium and 16 other NATO countries*, Application No. 52207/99, Council of Europe: European Court of Human Rights, Admissibility Decision of 12 December 2001.

9 *Supra* note 8, paragraph 137.

10 *Georgia v. Russia No. 2*, Application no. 38263/08, Council of Europe: European Court of Human Rights.

It is necessary for international and regional human rights bodies and courts to consider the classification of the conflict in question before applying the relevant IHRL provisions in light of the relevant aspects of IHL. What is needed is a coherent body of interpretation of both IHL and IHRL so as to provide clarity and certainty with regards to the applicable law. A degree of flexibility is also required within both bodies of law in order to cover the many innumerable situations of conflict that will arise in the future.

DISCUSSION

Since the geographical limits of armed conflicts are global, against whom can self-defence be claimed? Can a state claim self-defence against non-state actors?

Dr Noam Lubell:

The concept of self-defence arises because there is an attack and there is a need to repel the attack. If the attack is launched by non-state actors the right to self-defence may arise. However, the fact that the right arises does not automatically entitle a State to go into another State's territory without establishing first that there is a necessity to engage in self-defence. Thus, for example, if the other State is able and willing to prevent the non-state actors from attacking, necessity cannot be established. The practice of the last 12 years or so (and some may argue that it may go back to the [Caroline Case](#)) indicates that when self-defence arises and necessity is established, a State may be permitted to take action against non-state actors. Nonetheless, in many - if not most – cases, it will be very difficult to establish necessity.

Sir Daniel Bethlehem:

It is becoming widely accepted (if it was ever doubted before) that there is a right to self-defence against non-state actors. This right is embedded in UN Security Council Resolutions [1368](#) and [1373](#) following the 9/11 attacks. The main issue is how to treat the necessity of states to take action in self-defence when the host State is either harbouring the non-state actors or unable to take action against them.

It is argued that the existing laws of war are outdated as they are unequipped to deal with current warfare which involves new weapon systems such as drones and cyber. Should we aim at creating a new law instead of trying to fit these new systems into our outmoded laws?

Dr Noam Lubell:

Cyber operations are a classic example of an attempt to fit things into the laws of armed conflict where in fact they should not be addressed through these laws at all. The default classification of cyber operations, on one view, is that they amount to an armed conflict and so the laws of armed conflict apply. However, it is also argued that since such operations do not adhere to

the definition of attack under international humanitarian law, the restrictions on attacks, imposed by the principle of distinction, do not apply. Consequently, on this argument, it may be possible to engage in cyber operations against civilian targets as such operations are not considered as attacks, while concurrently classifying such operations as an armed conflict. One of the main challenges is to identify in each of these weapon systems which type of operation should be addressed under the laws of armed conflict and which type should not.

Sir Daniel Bethlehem:

In the [recent interpretation of Harold Hongju Koh](#), legal adviser for the US Department of State, international humanitarian law applies in cyberspace in the context of an armed conflict.

To what extent do the difficulties of classification derive from the shift of the spatial dimensions of conflicts?

Sir Daniel Bethlehem:

Weapon systems such as drones and cyber indeed give rise to shifting spatial dimensions of conflicts. One of the reasons why those new methodologies of conflict create particular difficulties in the context of classification is due to the legal divide between international armed conflict (IAC) and non-international armed conflict (NIAC) as well as between different kinds of spatial dimensions. Thus, the more one is able to identify a particular international humanitarian law that applies to the conflict (according to the division between IAC and NIAC) the easier it will be to apply it to drones and cyber operations.

Further comments

During the discussion a comment was made that one of the key problems in the classification of non-international armed conflict relates to The Hague 'permissions'. The Hague law sets out the provisions that affect the conduct of hostilities, while the Geneva law sets out the rules that protect victims of war; there is a problem in identifying the level of hostilities at which The Hague law permits actions that are not permitted at a lower level.

Another comment made during the discussion related to the difficulties in establishing belligerent occupation: the laws of armed conflict assume that on one day there is no belligerent occupation and on the following day there is effective control over the entire territory. The manner in which the UK, over time, gained control over Basra illustrates this problem, which is further reflected in the European Court on Human Rights case law.

The suggestion was made that, to avoid difficulties of classification, there should be a focus on actions that are criminal and considered as violations of international law irrespective of conflict classification. The International Criminal Tribunal for the former Yugoslavia (ICTY) adopted this approach by acknowledging that it may not have been easy at specific times to determine whether the conflict in Bosnia and Herzegovina was an international armed conflict or a civil war since it had elements of both. Nevertheless, the actions at issue were violations of the law irrespective of the conflict classification. To answer the need for classification in real time so that military legal advisers can advise on actions while they are taking place, instructions for soldiers should refer to actions and violations of international law, whether according to IAC or NIAC.