

Legal Challenges in the Concurrent Application of International Humanitarian Law and Human Rights Law to the Conflict in the Southern Border of Thailand*

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กฎหมายสิทธิมนุษยชนระหว่างประเทศ ต่อสถานการณ์ความขัดแย้งในพื้นที่
จังหวัดชายแดนภาคใต้

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Abstract

The conflict in the Southern Border Provinces (SBPs) of Thailand has been classified as a Non-International Armed Conflict (NIAC) under International Humanitarian Law (IHL). This article reappraises the conflict classification based on situational developments, against the requisite criteria of intensity and organization. The ramifications of the concurrent application of IHL and IHRL to the conflict will then be discussed. It argues that the application of both regimes to this context poses a number of legal challenges to affected persons, i.e., the enjoyment of the right to life, the right to liberty and the right to an effective remedy. Not only does it unnecessarily compromise the protection afforded by IHRL, it adversely affects the conflict as well.

Keywords: Southern Borders Provinces of Thailand, International Humanitarian Law, International Human Rights Law, Non-International Armed Conflict, Internal Disturbances

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บทคัดย่อ

สถานการณ์ความขัดแย้งในพื้นที่จังหวัดชายแดนภาคใต้ของประเทศไทย เดิมถูกจัดเป็นการขัดกันทางอาวุธที่ไม่มีลักษณะระหว่างประเทศภายใต้กฎหมายมนุษยธรรมระหว่างประเทศ บทความนี้มีจุดประสงค์เพื่อเปิดโอกาสให้มีการประเมินการจำแนกประเภทการขัดกันทางอาวุธดังกล่าวใหม่ โดยพิจารณาจากพัฒนาการของสถานการณ์ความรุนแรง ประกอบกับองค์ประกอบของการขัดกันทางอาวุธที่ไม่มีลักษณะระหว่างประเทศ กล่าวคือ เกณฑ์ความรุนแรงและเกณฑ์การจัดตั้งของกลุ่มติดอาวุธ

นอกจากนี้ บทความนี้จะวิเคราะห์ถึงผลกระทบจากการปรับใช้กฎหมายมนุษยธรรมระหว่างประเทศและกฎหมายสิทธิมนุษยชนระหว่างประเทศ ต่อสถานการณ์ความขัดแย้งในพื้นที่จังหวัดชายแดนภาคใต้ โดยนำเสนอว่าการบังคับใช้กฎหมายระหว่างประเทศดังกล่าว ก่อให้เกิดข้อท้าทายทางกฎหมายในการให้ความคุ้มครองสิทธิของผู้ที่ได้รับผลกระทบ กล่าวคือ สิทธิในชีวิต, สิทธิในเสรีภาพและสิทธิที่จะได้รับการเยียวยา ซึ่งข้อท้าทายเหล่านี้ส่งผลเป็นการลดทอนความคุ้มครองแก่บุคคลดังกล่าวภายใต้กฎหมายสิทธิมนุษยชนระหว่างประเทศ รวมทั้งมีผลกระทบในเชิงลบต่อสถานการณ์ความขัดแย้ง

คำสำคัญ: พื้นที่จังหวัดชายแดนภาคใต้, กฎหมายมนุษยธรรมระหว่างประเทศ, กฎหมายสิทธิมนุษยชนระหว่างประเทศ, การขัดกันทางอาวุธที่ไม่มีลักษณะระหว่างประเทศ, เหตุการณ์ความไม่สงบภายใน

1. Introduction

The conflict in the Southern Border Provinces (SBPs)¹ of Thailand has been ongoing for two decades, since the resurgence of violence in 2004. The majority residents in these provinces are Malay-Muslims. Little recognition, if not, repression of their ethnic minority identities led to the first major independence movement in the 1940s,² which was responded to by harsh State repression. In January 2004, coordinated armed operations occurred, followed by violent incidents at the Krue Se mosque and Tak Bai district.³ The Martial Law was imposed enables military officers to arrest and detain

¹ The Southern Border Provinces (SBPs) comprise of three provinces Narathiwat, Pattani and Yala, and the four south-eastern districts of Songkhla province: Chana, Na Thawi, Saba Yoi and Thepa.

² Jay Lamey, "Peace in Patani? The Prospect of a Settlement in Southern Thailand," [online] Available from : <https://doi.org/http://dx.doi.org/10.5334/sta.bt> [29 December 2022]; See also Thanet Aphornsuvan, "Origins of Malay Muslim "Separatism" in Southern Thailand, (Asia Research Institute Working Paper No. 32, October 2004)," [online] Available from : https://ari.nus.edu.sg/wp-content/uploads/2018/10/wps04_032.pdf [24 January 2025]

³ In April 2004, massacre of 32 alleged guerrillas was taken place at the historic Krue-Se mosque in Pattani. On the same day there were arson and violent attacks by groups of insurgents resulted in 108 fatalities. Later in October 2004, forceful confrontations between security forces and peaceful protesters at Tak Bai, Narathiwat resulted in death of total 85 persons from gunfire and suffocation during transportation to an army

suspects for interrogation without a court warrant.⁴ The Emergency Decree and the Internal Security Act were later enacted, granting overbroad power to security forces. The State repression continues with the intensification of violence and widespread human rights abuses by all sides.⁵

Armed violence has harmed people of all ethnic groups and religions. As of December 2024, more than 7,600 individuals have died and over 14,000 have suffered injuries, with civilians accounting for over half of the total casualties.⁶ Extra-judicial killings, detentions without trial and enforced disappearances, the culture of impunity and failure to investigate killings by any side properly,⁷ continue to foster injustice and frustration among local populations. The conflict has been classified as a Non-International Armed Conflict (NIAC), by commentators⁸ and the Rule of Law in Armed Conflicts (RULAC),

base.; See Final Report of the Independent Commission of Enquiry on the Krue Se Mosque Case, July 26, 2004; Srisompob Jitpiromsri, et al., “Special Issue: Quagmire of Violence in Thailand’s Southern Borderlands Chapter 1: Introduction”, in **Asian Affairs: An American Review**, 45, 2 (2018), p.43-55.

⁴ Section 15*bis* of Martial Law, B.E. 2457 (1914)

⁵ Amnesty International, “Thailand: Torture in the Southern Counter-Insurgency,” [online] Available from : <https://www.amnesty.org/en/documents/asa39/001/2009/en/> [10 August 2021]; Sunai Phasuk, “Southern Thailand Peace Efforts Should Promote Rights,” [online] Available from : www.hrw.org/news/2020/02/07/southern-thailand-peace-efforts-should-promote-rights [28 October 2020]

⁶ สถานวิจัยความขัดแย้งและความหลากหลายทางวัฒนธรรมภาคใต้ สถาบันสันติศึกษา (Center for Conflict Studies and Cultural Diversity (CSCD), Institute for Peace Studies), “สถิติสะสมเหตุการณ์ชายแดนใต้ (Summary of Incidents in Southern Thailand)” [ออนไลน์] แหล่งที่มา : <https://cscd.psu.ac.th/th> [13 กุมภาพันธ์ 2568]; ศรีสมภพ จิตรภิรมย์ศรี, “ฐานข้อมูลศูนย์เฝ้าระวังชายแดนใต้” [ออนไลน์] แหล่งที่มา : <https://deepsouthwatch.org/th/node/12816> [10 มกราคม 2565]; Human Rights Watch, “No One Is Safe Insurgent Attacks on Civilians in Thailand’s Southern Border Provinces,” [online] Available from : <https://www.hrw.org/report/2007/08/27/no-one-safe/insurgent-attacks-civilians-thailands-southern-border-provinces> [28 August 2007]

⁷ Duncan McCargo, “Thaksin and the Resurgence of Violence in the Thai South: Network Monarchy Strikes Back?”, in **Critical Asian Studies**, 38, 1 (2006), p.39-71; See also Neil J. Melvin, “Conflict in Southern Thailand: Islamism, Violence and the State in the Patani Insurgency”, in **Stockholm International Peace Research Institute**, (September 2007), p.28; See also ดอน ปาทาน และสุภลักษณ์ กาญจนขุนดี, **สันติภาพในเปลวเพลิง**, (เนชั่นบุ๊คส์, 2004), หน้า 15-313; See also Anyamane Keawakho, “Without justice, little hope for peace by Vitit Muntarbhorn, Bangkok Post,” [online] Available from : <https://crcfthailand.org/2008/09/11/202/> [24 January 2025]

⁸ See e.g., Benjamin Zawacki, “Politically Inconvenient, Legally Correct: A Non-International Armed Conflict in Southern Thailand”, in **Journal of Conflict and Security Law**, 18, 1 (April 2013), p.151-179; Tirawat Pratumthong, “International Humanitarian Law and Legal Protection for Life and Body of Civilians in Armed Conflict Situations in the Southern Border Provinces”, in **Graduate Law Journal**, 16, 1 (2023), p.29; For organization threshold argument See Panitan Wattanayagorn, “Organized Movements and Violence in Thailand’s Southern Border Provinces: Push and Pull Factors, its Operations and Possible Solution”, in **Journal of Public Administrative and Politics**, 10, 2 (2021), p.80.

Geneva Academy of International Humanitarian Law and Human Rights.⁹ Although it was declassified briefly, owing to the stable decrease of violence during 2019-2021, before reclassification in 2022.¹⁰

Nevertheless, there are discernible developments that warrant reassessment, to determine the applicable international laws and consider their consequences. The next part reappraises factual circumstances on the grounds, against the constitutive elements of a NIAC under IHL. Legal challenges in the concurrent application of International Humanitarian Law (IHL) and International Human Rights Law (IHRL) to the conflict, will be discussed. It explores whether the parallel application of international laws and domestic legislations, provides multi-layered protection or undermines them. Finally, the article draws attention back to the law enforcement paradigm, to pave the way towards normalcy and the restoration of peace.

2. Conflict in the Southern Border of Thailand and IHL Applicability?

Although Article 3 common to the Four Geneva Conventions (Common Article 3), refers to ‘an armed conflict not of an international character’, IHL does not provide its definition. The International Criminal Tribunal for the former Yugoslavia (ICTY),¹¹ indicated constitutive elements of a NIAC as a ‘protracted armed violence between governmental authorities and organized armed groups, or between such groups within a State’.¹² The two criteria which are intensity of the violence and organization of the parties to the conflict, have to be objectively assessed from actual conduct on a case-by-case basis.¹³

⁹ The Rule of Law in Armed Conflicts (RULAC), Geneva Academy of International Humanitarian Law and Human Rights, “Non-International Armed Conflict in Thailand,” [online] Available from : www.rulac.org/browse/conflicts/non-international-armed-conflict-in-thailand#collapse2accord [22 August 2022]

¹⁰ Geneva Academy of International Humanitarian Law and Human Rights, “Renewed Fighting Prompts the Reclassification of a Non-International Armed Conflict in Southern Thailand,” [online] Available from : <https://www.geneva-academy.ch/news/detail/559-renewed-fighting-prompts-the-reclassification-of-a-non-international-armed-conflict-in-southern-thailand> [15 November 2023]

¹¹ The ICTY was established to prosecute individuals responsible for serious violations of IHL, committed after the breakup of the Socialist Federal Republic of Yugoslavia in the 1990s.

¹² ICTY, Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, Para 70.

¹³ ICTY, Prosecutor v. Kunarac, Kovac and Vokovic, Case No. IT-96-23 and IT-96-23/1 (Appeals Chamber),

2.1 Intensity

The minimum degree of the ‘intensity’ of the armed conflict must be distinguishable from internal disturbances, civil unrest or unorganized insurrections. The ICTY judgement stated that indicative factors for an armed conflict include ‘the number, duration and intensity of individual confrontations, etc.’¹⁴

The number of Incidents and casualties in the SBPs reached its peak in 2007 but has decreased steadily since 2013.¹⁵ There are predominantly one-sided attacks of a non-military nature i.e., assassinations, emplacement of improvised explosive devices (IEDs), ambushes, arson attacks, drive-by shootings, machete attacks, etc., to avoid direct confrontations.¹⁶ For instance, there were only 11 prolonged firefights between security forces and insurgents in 2022.¹⁷ The San Remo Manual on the Law of Non-International Armed Conflict, indicates that NIACs are ‘armed confrontations’ occurring within the State.¹⁸

12 June 2002, Para 56; ICTY, Prosecutor v. Limaj, Judgement, IT-03-66-T, 30 November 2005, Para 170; ICTY, Prosecutor v Rutaganda, Case No ICTR-96-3, Judgement, 6 December 1999, Para 93.

¹⁴ ICTY, Prosecutor v. Ramush Haradinaj et al., Trial Chamber I (Judgment), Case No. IT-04-84-T, 3 April 2008, Para 49.

¹⁵ Srisompob Jitpiomsri, “The Deep South of Thailand: 15 Years in Fields of Open Conflict, Violence and Peace Narratives”, in *Asian International Studies Review*, 20, 1 (2019), p.79-108; ศรีสมภพ จิตรภรณ์ศรี, “ฐานข้อมูล ศูนย์เฝ้าระวังชายแดนใต้” [ออนไลน์] แหล่งที่มา : <https://deepsouthwatch.org/th/node/12816> [10 มกราคม 2565]; See also The Patani Working Group for Monitoring on International Mechanisms, Civil Society Assembly For Peace (CAP), The Federation of Patani Students and Youth (PerMAS) and Manushya Foundation, **Joint UPR Submission: Armed Conflicts & The Human Rights Situation in the Southern Border Provinces in Thailand, for the UN Universal Periodic Review of Thailand (3rd UPR Cycle)**, (39th Session of the UPR Working Group, 25 March 2021); สำนักข่าวอิศรา, “17 ปีไฟใต้...ความรุนแรงยังไม่จางหาย สารพัดเหตุร้ายผสมโรง” [ออนไลน์] แหล่งที่มา : www.isranews.org/article/south-news/south-slide/94729-anniversary.html [5 มกราคม 2564]

¹⁶ Srisompob Jitpiomsri, “The Deep South of Thailand: 15 Years in Fields of Open Conflict, Violence and Peace Narratives”, in *Asian International Studies Review*, p.79-108; Human Rights Watch, “Thailand: Separatists Target Civilians for Attack,” [online] Available from : <https://www.hrw.org/news/2007/08/28/thailand-separatists-target-civilians-attack> [28 August 2007]; International Crisis Group, “Thailand: The Evolving Conflict in the South: Asia Report No. 241 - 11 December 2012,” p.5 [online] Available from : <https://www.crisisgroup.org/asia/south-east-asia/thailand/thailand-evolving-conflict-south> [24 January 2025]

¹⁷ Zachary Abuza, “In 2023, Expect More Violence in Thailand’s Insurgency-Hit Deep South,” [online] Available from : www.benarnews.org/english/commentaries/asean-security-watch/abuza-deep-south-outlook-01062023110624.html [6 January 2023]

¹⁸ International Institute of Humanitarian Law, “The Manual on the Law of Non-International Armed Conflict With Commentary,” p.2 [online] Available from : <https://www.legal-tools.org/doc/ccf497/pdf> [24 January 2025]

The SBPs violent attacks rarely project mutual violence between the insurgents and military forces, to constitute direct hostilities. Even though, the State armed forces are employed to contain the situation along with the police forces. It is indicative rather than determinative of IHL applicability.¹⁹

Despite the fatal destructive capacity, armed confrontation between opposing parties is a quintessential precondition of a NIAC.²⁰ The International Criminal Court (ICC) Trial Chamber held that a NIAC exists, owing not only to its duration but also the volume of attacks.²¹ The BRN (Barisan Revolusi Nasional, National Revolution Front) the main separatist armed group in the SBPs, has demonstrated its ability to carry out coordinated armed operations.²² Amidst prolonged duration without mutual hostilities, these patterns of violence are arguably sporadic terrorist attacks. The Thai Government also claimed that the violence in the SBPs is intertwined with local criminal elements and attacks are limited to certain areas and sporadic in nature.²³ Moreover, the Emergency Decree that had been implemented across all 33 districts of the SBPs, was lifted in 16 districts, owing to a decrease of violence.²⁴

However, the protracted nature of intermittent violence in the SBPs cannot be categorically excluded from analysis. The ICTY trial chamber explained that although isolated acts of terrorism may not reach the threshold of an armed conflict. Protracted

¹⁹ ICTY, Prosecutor v. Boskoski, Case No. IT-04-82-T, 10 July 2008, Paras. 177-178.

²⁰ ICTY, Prosecutor v. Boskoski, Case No. IT-04-82-T, 10 July 2008, Paras. 187 and 190; See also Jann K. Kleffner, “The Legal Fog of an Illusion: Three Reflections on ‘Organization’ and ‘Intensity’ as Criteria for the Temporal Scope of the Law of Non-International Armed Conflict”, in *International Law Studies*, 95 (2019), p.169.

²¹ ICC, Prosecutor v. Katanga, Trial Chamber, ICC-01/04-01/07, 7 March 2014, Paras. 1216-1218.

²² International Crisis Group, “Southern Thailand’s Stop-Start Peace Dialogue: Crisis Group Asia Briefing N°176, 25 May 2023,” [online] Available from : icg-prod.s3.amazonaws.com/s3fs-public/2023-05/b176-southern-thailands-peace-dialogue.pdf [24 January 2025]; Mariyam Ahmad, “Coordinated bombings, arson attacks hit Thai south,” [online] Available from : <https://www.benarnews.org/english/news/thai/thai-deep-south-hit-bombings-arson-03222024053516.html> [22 March 2024]

²³ Thailand’s information and clarifications on the draft Amnesty International report on the situation in the Southern Border Provinces of Thailand. See Amnesty International, “Appendix II They Took Nothing but His Life,” [online] Available from : https://www.amnesty.or.th/files/5515/5497/4999/2011_southern_report_EN.pdf [24 January 2025]

²⁴ “ประกาศ เรื่อง การขยายระยะเวลาการประกาศสถานการณ์ฉุกเฉินที่มีความร้ายแรงในเขตท้องที่จังหวัดนราธิวาส ยกเว้น อำเภอยี่งอ อำเภอสุไหงโก-ลก อำเภอแว้ง และอำเภอสู้คริน จังหวัดปัตตานี ยกเว้นอำเภอยะหริ่ง อำเภอปะนาเระ อำเภอมายอ อำเภอไม้แก่น อำเภอทุ่งยางแดง อำเภอกะพ้อ และอำเภอแม่ลาน และจังหวัดยะลา ยกเว้นอำเภอเบตง อำเภอยะหา อำเภอรามัน อำเภอ กาบัง และอำเภอกรงปินัง,” *ราชกิจจานุเบกษา*, เล่มที่ 142 ตอนพิเศษที่ 12 ง, วันที่ 20 มกราคม 2568, หน้า 47-48.

terrorist acts, ‘are relevant to assessing the level of intensity, with regard to the existence of an armed conflict’.²⁵ Thereby repetition of one-sided armed attacks on a temporal continuum in the SBPs, can be accumulative of intensity assessment. Indeed, protracted armed violence need not be continuous or uninterrupted and ‘there does not have to be actual combat activities in a particular location, for the norms of international humanitarian law to be applicable’.²⁶

Moreover, the cessation of active hostilities may not equate the end of an armed conflict. Rather, it is the general close of armed operations, based on an overall assessment of the circumstances that marks its conclusion.²⁷ Ongoing armed activities of a hostile nature in the SBPs, can be considered as the continuation of the ‘protracted armed violence’. It may also be impossible to pinpoint the exact moment, when violence in the SBPs ends. Some scholars suggest that, as long as *some* hostilities continue, so does a NIAC.²⁸ The ICTY also held that, until the peace settlement is achieved, ‘there is no need for the Trial Chamber to explore the oscillating intensity of the armed conflict’.²⁹ Moreover, prematurely terminating an armed conflict can create a revolving door between IHL applicability and non-applicability, leading to a considerable degree of legal uncertainty and confusion.³⁰

2.2 Organization

As for the second criterion, an armed group involved in the conflict must be considered as a party to the conflict, for the purpose of Common Article 3. An armed group must exhibit a sufficient degree of organization and command structure, in order

²⁵ ICTY, Prosecutor v. Boskoski, Case No. IT-04-82-T, Judgement (Trial Chamber), 10 July 2008, Para. 190.

²⁶ ICTY, Prosecutor v. Zejnil Delalić, IT-96-21-T, Judgement (Trial Chamber), 16 November 1998, Para. 185; ICC, Prosecutor v. Bemba, ICC-01/05-01/08, 21 March 2016, Para. 140.

²⁷ The International Committee of the Red Cross, **International humanitarian law and the challenges of contemporary armed conflicts**, (32nd International Conference of the Red Cross and Red Crescent at Geneva Switzerland, 8-10 December 2015), p.10-11.

²⁸ Sandesh Sivakumaran, **The Law of Non-International Armed Conflict**, (Oxford: Oxford University Press, 2012), p.252-254; See also Julia Grignon, “The “General Close of Military Operations” as the Benchmark for the Declassification of Armed Conflicts and the End of the Applicability of International Humanitarian Law”, in **The Canadian Yearbook of International Law**, 59 (2021), p.101.

²⁹ ICTY, Prosecutor v. Haradinaj et al., Case No. IT-04-84-T, Judgment (Trial Chamber), 3 April 2008, Para. 100.

³⁰ ICTY, Prosecutor v. Gotovina, Case No. IT-06-90-T, Judgment (Trial Chamber), 15 April 2011, Para. 1694.

to sustain military operations and to implement IHL.³¹ For instance, in 2011 the Independent International Commission of Inquiry on the Syrian Arab Republic stated that, despite the deaths of nearly 4,000 civilians and the widespread military operations in Syria. They were unable to verify a sufficient degree of the intensity and organization of the FSA, as to warrant the existence of a NIAC and the application of IHL, until 2012.³²

The BRN's organizational structure and its unified strategic attacks were previously established.³³ However, its ability to plan and coordinate military operations, to maintain the continuum of the violence, has arguably become less pronounced.³⁴ Despite its organized structure, the lower-level leadership is rather loose and the village-based cells are autonomously operational.³⁵ Within the BRN's decentralized chain of command, it is also unclear whether the BRN leaders exercise *de facto* authority over these militants,³⁶ or whether there is a responsible command mechanism. Indeed, the semi-organized group whose members sporadically participate in hostilities, with little guidance from the leadership, should not be considered as an organized armed group.³⁷

³¹ ICC, Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment (Trial Chamber), 14 March 2012, Para. 536; ICTY, Prosecutor v. Limaj, Judgement, Para. 90, 94-134; ICTY, Prosecutor v. Haradinaj et al, Trial Judgement, 3 April 2008, Case No. IT-04-84-T, Para. 60; See also International Committee of the Red Cross, "How Is the Term "Armed Conflict" Defined in International Humanitarian Law?: Opinion paper - March 2008," [online] Available from : <https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf> [24 January 2025]

³² The Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc A/HRC/S-17/2/Add.1, 23 November 2011, at Paras. 97-99; See also Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/21/50, 15 August 2012.

³³ Sascha Helbardt. **Deciphering Southern Thailand's violence: organization and insurgent practices of BRN-Coordinate**. Doctoral dissertation, Faculty of Philosophy, University of Passau, 2011 ; p.24-69.

³⁴ Zachary Abuza, "The Ongoing Insurgency in Southern Thailand: Trends in Violence, Counterinsurgency Operations, and the Impact of National Politics," [online] Available from : <https://inss.ndu.edu/Portals/68/Documents/stratperspective/inss/Strategic-Perspectives-6.pdf> [24 January 2025]

³⁵ Zachary Abuza, **Conspiracy of Silence the Insurgency in Southern Thailand**, (United States Institutes of Peace Press, 2009), p.118-120; See also Duncan McCargo, **Tearing Apart the Land: Islam and Legitimacy in Southern Thailand**, (Cornell University Press, 2008), p.174-175; Joseph Chinyong Liow and Don Pathan, **Confronting Ghosts Thailand's Shapeless Southern Insurgency**, (Lowy Institute for International Policy, 2010), p.16, 90, 93.

³⁶ Don Pathan, "Conflict Management and Resolution in Asia: The Role of Civil Societies in Thailand's Deep South," [online] Available from : https://peaceresourcecollaborative.org/wp-content/uploads/2020/01/Don-Pathan-OP18_Conflict-Deep-South-Thailand.pdf [18 October 2012]; See also Joseph Chinyong Liow and Don Pathan, **Confronting Ghosts Thailand's Shapeless Southern Insurgency**, p.17-18.

³⁷ Gloria Gaggioli and Pavle Kilbarda, "Counterterrorism and the Risk of over-Classification of Situations

It should be emphasized that without the organization of an armed group, irrespective of the high level of violence, a NIAC cannot be established.³⁸

Nonetheless, the group's ability to implement agreements such as periodic ceasefires during Ramadan or the Deed of Commitment under Geneva Call for the Protection of Children from the Effects of Armed Conflict,³⁹ can imply its internal command structure. Even so, factions between the BRN's political and military wings, have raised concerns over the insurgent group's ability to speak with one voice.⁴⁰ After the Thai government and the BRN agreed to seek solutions in accordance with the Thai constitution, which proscribes separatism. The group's military wing signaled its disapproval, by escalating its insurgent operations.⁴¹

Indeed, the necessary level of organization of the armed group needs not be high, to the same extent as the State armed forces. Defects in its structure and hierarchy should not obstruct the application of IHL to the situation as a whole, so long as it is capable of IHL compliance.⁴² Due to the BRN's hyper-secrecy nature, the organizational structure or disciplinary system (if any) may not be clearly recognized. Besides, the structural or operational factors of the armed group are neither cumulative nor determinative requirements, for the organizational threshold.⁴³

of Violence”, in **International Review of the Red Cross**, 103, 916-917 (2021), p.203-236, 214; Noam Lubell, “The War (?) against Al-Qaeda,” in **International Law and the Classification of Conflicts**, ed E. Wilmshurst (Oxford University Press, 2012), p.24-25.

³⁸ Jelena Pejic, “The Protective Scope of Common Article 3: More than Meets the Eye”, in **International Review of the Red Cross**, 93, 81 (March 2011), p.4.

³⁹ Geneva Call, “Deed of Commitment under Geneva Call for the Protection of Children from the Effects of Armed Conflict,” [online] Available from : http://theirwords.org/media/transfer/doc/doc_brn_children_english-bcfab04b9b7e0d829b228ca02dde95f2.pdf [24 January 2025]

⁴⁰ Srisompob Jitpiomsri, et al., “Special Issue: Quagmire of Violence in Thailand's Southern Borderlands Chapter 1: Introduction”, in **Asian Affairs: An American Review**, p.43-55; See also Hadi Azmi, “Can Thai Separatists and Bangkok Agree on Peace in Talks Brokered by Malaysia?,” [online] Available from : <https://www.scmp.com/week-asia/explained/article/3162267/can-thai-separatists-and-bangkok-agree-peace-talks-brokered> [11 January 2022]

⁴¹ International Crisis Group, “Southern Thailand's Stop-Start Peace Dialogue: Crisis Group Asia Briefing N°176, 25 May 2023,” [online] Available from : icg-prod.s3.amazonaws.com/s3fs-public/2023-05/b176-southern-thailands-peace-dialogue.pdf [24 January 2025]

⁴² ICTY, Prosecutor v. Naser Oric (Trial Judgment), IT-03-68-T, 30 June 2006, Para. 254; See also Peter Margulies, “Networks in Non-International Armed Conflicts: Crossing Borders and Defining ‘Organized Armed Group’”, in **International Law Studies**, 89, 54 (2013), p.63.

⁴³ ICTY, Prosecutor v. Boškoski, IT-04-82-T, 10 July 2008, Para. 193; ICTY, Prosecutor v. Limaj, Judgement, Para. 89, 132; ICTY, Prosecutor v. Haradinaj, et al., Case No. IT-04-84-T, Judgment (Trial Chamber), 3 April 2008, Para. 69, 89; See also Rogier Bartels, “The Organisational Requirement for the Threshold of Non-

2.3 IHL Applicability to the SBPs Conflict?

Providing that, A NIAC is established based on the two objective criteria, logically when each criterion factually falls below the constitutive threshold, a NIAC ceases to exist.⁴⁴ However, the ICTY and the ICC held that a NIAC ends when ‘a peaceful settlement is achieved’, not the gradual disappearance of its constitutive elements.⁴⁵ According to the ICRC, a NIAC ends, if there is ‘a lasting cessation of armed confrontations, without real risk of resumption’.⁴⁶ It is when the fighting declines, up until the point that it dissipates entirely.⁴⁷ However, this approach is either a retrospective assessment for securing the court jurisdiction or to avoid uncertainty in IHL protection. In this context, despite the persistence of sporadic violence, there is a lack of armed confrontations and factual circumstances on the ground are relatively stable. This raises the question of whether consideration of military necessity, a cardinal principle of IHL, is still relevant. Over-classification and applying IHL to circumstances not amounting to an armed conflict, pose risks and are unnecessary.

International Armed Conflict Applied to the Syrian Opposition,” [online] Available from : <https://www.armedgroups-international.org/2012/08/09/the-organisational-requirement-for-the-threshold-of-non-international-armed-conflict-applied-to-the-syrian-opposition/> [9 August 2012]

⁴⁴ Rogier Bartels, “From Jus In Bello to Jus Post Bellum: When Do Non-International Armed Conflicts End?,” in **JUS Post Bellum: Mapping the Normative Foundations**, eds. Carsten Stahn et al. (Oxford, United Kingdom: Oxford University Press, 2014), p.297-314; Rogier Bartels, “Temporal Scope of Application of IHL: When Do Non-International Armed Conflicts End? Part 2,” [online] Available from : <http://opiniojuris.org/2014/02/19/guest-post-bartels-temporal-scope-application-ihl-non-international-armed-conflicts-end-part-2/> [19 February 2014]; Gabriella Venturini, “IHL Obligations that Survive an Armed Conflict: the Legal Framework,” in **Respecting International Humanitarian Law: Challenges and Responses**, eds. Michel Veuthey and Gian Beruto, (International Institute of Humanitarian Law, 2013), p.182; Marko Milanovic, “The End of Application of International Humanitarian Law”, in **International Review of the Red Cross**, 96, (2014), p.178–181; See also on the degradation of the organization of non-State actors bringing the end of a NIAC. Tilman Rodenhäuser, **Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law**, (Oxford University Press, 2018), p.108-110.

⁴⁵ ICTY, Prosecutor v Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj, Trial Chamber I, Judgment, 3 April 2008, Case No IT-04-84-T at Para. 100; ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, 14 March 2012, Para. 548; ICC, Prosecutor v. Bemba, ICC-01/05-01/08, 21 March 2016, Para. 141; Marco Sassòli, **International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare**, (Cheltenham, UK: Edward Elgar, 2019), p.191.

⁴⁶ ICRC, Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 2nd ed., Geneva, 2016, Para. 491.

⁴⁷ Sandesh Sivakumaran, **The Law of Non-International Armed Conflict**, p.253.

However, there is no determinative authority to endorse the SBPs conflict classifications, leaving it open to debate. Indeed, it is highly contentious how long the cessation of hostilities needs to last, for a NIAC to be considered concluded. Besides, there is no evidence of the dismantling of the armed group. Reluctantly, the Thai government acknowledges its existence through its representatives in peace dialogues.

Determination of the existence of a NIAC, will not be free from subjectivity and is influenced by diverging considerations, adopted by various actors.⁴⁸ Despite the positive developments discussed above, the conclusion of hostilities is not of complete certainty. Even so, it necessitates a thorough factual and legal assessment, to ensure appropriate humanitarian protection. The next section discusses legal challenges in the concurrent application of IHRL and IHL (if applicable) to the SBPs conflict.

3. Legal Challenges in the Concurrent Application of IHL and IHRL.

Given that the SBPs conflict continues to be classified as a NIAC, IHL and IHRL are applicable, as established in international jurisprudence,⁴⁹ UN mechanisms⁵⁰ and extensive legal literature.⁵¹ It was suggested that the relationship between the IHL and IHRL is

⁴⁸ Marko Milanovic, “The End of Application of International Humanitarian Law”, in **International Review of the Red Cross**, p.181; Jann K. Kleffner, “The Legal Fog of an Illusion: Three Reflections on ‘Organization’ and ‘Intensity’ as Criteria for the Temporal Scope of the Law of Non-International Armed Conflict”, in **International Law Studies**, p.178.

⁴⁹ ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, Para. 25; ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, Para. 106; ICJ, Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda), 19 December 2005, Paras. 216-217.

⁵⁰ Human Rights Committee, *Sarma v Sri Lanka*, CCPR/C/78/D/950/2000, 31 July 2003; Human Rights Committee, Concluding Observations: Democratic Republic of the Congo, CCPR/C/COD/CO/3, 26 April 2006 (generally applying the ICCPR in non-international armed conflicts); Human Rights Committee, General Comment No. 29: States of Emergency (Article 4), Para. 3, UN Doc. CCPR/C/21/Rev.1/Add.11 (July 24, 2001); Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant Adopted on 29 March 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, Para. 11.

⁵¹ Marco Sassòli and Laura Olson, “The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts”, in **International Review of the Red Cross**, 90, 871 (2008), p.599-627, 615; See also William Schabas, “Lex specialis? Belt and suspenders? The parallel operation of human rights law and the law of armed conflict, and the conundrum of jus ad bellum”, in **Israel Law Review**, 40 (2007), p.592-613, 597; Kenneth Watkin, “Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict”, in **American Journal of International Law**, 98, 1 (2004), p.25; J Cerone, “Jurisdiction and Power: The Intersection of Human Rights Law &

governed by the *lex specialis* principle.⁵² The UN Special Rapporteur on extrajudicial, summary, or arbitrary executions, also acknowledged that the existence of the international legal framework governing the conduct of hostilities in NIAC, limits the full effect of human rights.⁵³ However, IHL should not always be held as more specific. The total displacement of IHRL as an entire regime, instead of the relevant norms, poses significant risks.⁵⁴ This could allow States to exploit more permissive rules of IHL on the sole basis of national security. Rather, its simultaneous application is supposed to coordinate the two levels of protection.⁵⁵ However, the extent to which the two regimes operate and regulate a NIAC is vague.

Thailand is bound by its international human rights obligations e.g., the International Covenant on Civil and Political Rights (ICCPR) in its entirety, for the absence of derogation. If the SBPs conflict is a NIAC, it will be regulated by Common Article 3 and customary IHL. As Thailand is not a party to the Protocol Additional to the Geneva Conventions, relating to the Protection of Victims of Non-International Armed Conflicts 1977 (Additional Protocol II). Moreover, Thailand adopts a dualist approach, which requires implementing legislation to incorporate international treaties into national law. There is a domestic implementation of the Third Geneva Convention on Prisoners of War 1949, yet excludes the provision of Common Article 3.⁵⁶ There are relevant criminal law

The Law of Non-International Armed Conflict in an Extraterritorial Context”, in **Israel Law Review**, 40 (2007), p.396, 401.

⁵² ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, Para. 64; Sean Aughey and Aurel Sari, “Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence”, in **International Law Studies**, 91 (February 2015), p.60-118.

⁵³ Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc.A/68/382, 13 September 2013, Para. 52.

⁵⁴ Noam Lubell, “Challenges in Applying Human Rights Law to Armed Conflict”, in **International Review of the Red Cross**, 87 (2005), p.737; Marko Milanovic, “Norm Conflicts, International Humanitarian Law and Human Rights Law,” in **Human Rights and International Humanitarian Law, Collected Courses of the Academy of European Law, Vol. XIX/1**, ed. Orna Ben-Naftali (Oxford University Press, 2010), p.5-8.

⁵⁵ Gloria G. Gaggioli and Robert Kolb, “A Right to Life in Armed Conflicts? : the Contribution of the European Court of Human Rights”, in **Israel Yearbook on Human Rights**, 37 (2007), p.115-163; See also Françoise J. Hampson, “The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body”, in **International Review of the Red Cross**, 90, 871 (September 2008), p.549-572.

⁵⁶ “พระราชบัญญัติบังคับการให้เป็นไปตามอนุสัญญาเจนีวาเกี่ยวกับการปฏิบัติต่อเชลยศึก ลงวันที่ 12 สิงหาคม พ.ศ. 2492 พ.ศ. 2489,” ราชกิจจานุเบกษา เล่มที่ 72 ตอนที่ 83, วันที่ 18 ตุลาคม 2498, หน้า 1443, (Implementation of the Geneva Convention on the Treatment of Prisoners of War 1949 Act, B.E. 2498)

provisions but the extent to which, Common Article 3 and customary IHL, will be implemented, remains to be settled.

3.1 *The Right to Life and Targeted Killings*

In NIACs, it is vital to define the scope of the human right to life i.e., when an individual may be lethally targeted. According to the ICJ's advisory opinion, it is prohibited to arbitrarily deprive someone of their life but IHL as the *lex specialis*, will define what constitutes an arbitrary deprivation of life.⁵⁷ In IHL, civilians who do not take a direct part in hostility, are protected against direct attack. People who do so, on a merely spontaneous, sporadic, or unorganized basis, are targetable only for the time being. Once cease their direct participation in hostility, their underlying immunity from an attack is restored. While members of a non-State armed group are targetable, based on their 'continuous combat function'.⁵⁸

In operational terms, it is indistinguishable between a person taking a direct part in hostilities and a member of an organized armed group, whose 'continuous combat function', is also determined by direct participation in hostilities.⁵⁹ Therefore, a person who either for such time directly participates in hostilities or has a function within the armed groups, that constitutes direct participation in the hostilities, can be lethally targeted. Whereas members of the State armed forces can be lawfully targeted at all times. Are military personnel's rights to life, discriminately deprived of?

This proposition is impractical and unbalanced towards the members of State armed forces, who are considered its members, regardless of their non-combat function.⁶⁰

⁵⁷ ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, Para. 64.

⁵⁸ Nils Melzer, "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law", in **International Committee of the Red Cross**, (May 2009), p.33, 71; See also Rogier Bartels, "When Do Terrorist Organisations Qualify as 'Parties to an Armed Conflict' Under International Humanitarian Law?," [online] Available from : <https://doi.org/10.2139/ssrn.3209305> [28 January 2023]

⁵⁹ Michael N. Schmitt, "International Humanitarian Law and the Targeting of Non-State Intelligence Personnel and Objects", in **Duke Journal of Comparative & International Law**, 30, 309 (2020), p.338; See also Kenneth Watkin, "Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance", in **International Law and Politics**, 42 (2010), p.641.

⁶⁰ Droege Cordula, "Elective Affinities? Human Rights and Humanitarian Law", in **International Review of the Red Cross**, 90 (2008), p.501, 527; Michael N. Schmitt, "The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis", in **Harvard National Security Journal**, 1 (2010), p.5, 22-24.

The ICRC Commentary on the Additional Protocol II also provides that ‘[t]hose belonging to armed forces or armed groups may be attacked at any time.’⁶¹ Thus, insurgents and military personnel are legitimate targets, unless placed *hors de combat*, on the basis of their status alone, irrespective of whether they pose an imminent threat. These divergent views on what constitutes direct participation in hostilities and who may be lethally targeted in hostilities (function or status-based), vastly weaken civilians’ protection.

In the SPBs, compliance with the principle of distinction and verification of a legitimate target is not straightforward. Particularly when insurgents intermingle with local villagers and participate in part-time guerrilla activities.⁶² Owing to the dissident group’s security concerns, they are loosely affiliated and do not expressly distinguish themselves from civilians. The fluid nature of membership and lack of objectively identifiable criteria, grants State officials a significant degree of discretion, in determining legitimate targets. Consequently, innocent civilians, e.g., young Malay-Muslim men, are often mistakenly attacked. Even though a person’s alleged membership in particular ethnic or religious groups, should not be considered as representing a threat to national security and be targeted accordingly.

Under IHL, a person who directly takes part in hostility may be subjected to lethal force, without a prior attempt to arrest or detain. Even though it has been argued that, IHL is ‘far from giving the right to kill’.⁶³ Lethally targeting legitimate targets under IHL, is lawful. This might provide justification for counterinsurgency operations in the SBPs, which often end with security forces killing suspects.⁶⁴ Indeed, insurgence always constitutes a crime under domestic law and should be handled by criminal procedure, not extra-judicial executions.

⁶¹ Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, ICRC, Geneva, 1987, Para. 4789.

⁶² Sascha Helbardt, “Anatomy of Southern Thailand’s Insurgency: Some Preliminary Insights,” [online] Available from : <https://www.newmandala.org/wp-content/uploads/2010/01/Anatomy-of-Southern-Thailand-TAIS-Insurgency.pdf> [3 February 2025]

⁶³ G.Gaggioli, *L’influence mutuelle entre les droits de l’homme et le droit international humanitaire à la lumière du droit à la vie*, (Editions A. Pedone, 2013), p.252.

⁶⁴ International Crisis Group, “Southern Thailand’s Stop-Start Peace Dialogue: Crisis Group Asia Briefing N°176, 25 May 2023,” [online] Available from : [icg-prod.s3.amazonaws.com/s3fs-public/2023-05/b176-southern-thailands-peace-dialogue.pdf](https://www.icg-prod.s3.amazonaws.com/s3fs-public/2023-05/b176-southern-thailands-peace-dialogue.pdf) [3 February 2025]

In IHL paradigm, everyone is entitled to the human right to life without distinction. Deliberate killings are only allowed, if they are in defence of an immediate threat, that is absolutely necessary.⁶⁵ IHL deems it is disproportionate for the officials to have recourse to lethal force, not as a last resort when capture is feasible. For instance, the Israeli Supreme Court held that, in a preventive strike against terrorists, in the context of an armed conflict, ‘A civilian taking direct part in hostilities, may not be targeted such time as he is doing so, if a less harmful means can be employed’.⁶⁶

Moreover, the proportionality principle in IHL acknowledges collateral damage to civilians, albeit must be spared. If such losses are not excessive, compared to the direct military advantage anticipated, it is a lawful conduct of hostility.⁶⁷ Such calculated effect is obviously illegitimate under IHL, unless can be justified in a highly exceptional case i.e., absolute necessity.⁶⁸ Despite its protective regime, by the virtue of military necessity, IHL authorizes the deprivation of life as well.

To a large extent, violent attacks in the SPBs conflict, e.g., bombings, arsons or ambushes, occurred during non-active hostilities. Separate crimes should be distinguished from armed conflict and be subject to the rules of law enforcement, not IHL.⁶⁹ Particularly when the government has exercised sufficient control over the SBPs and the law enforcement operations are practicable. In this context, it was suggested that IHL should prevail over IHL as *lex specialis* and IHL must be interpreted within the framework of IHL.⁷⁰ This would prohibit status-based targeting or direct recourse to lethal force, when the individual could have been detained without unreasonable risk.

⁶⁵ United Nations Basic Principles on the use of force and firearms by law enforcement officials, 1990, Art. 9; See also Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (Philip Alston), ‘Study on targeted killings’ A/HRC/14/24/Add.6, (28 May 2010), Para. 11.

⁶⁶ Public Committee against Torture et al v Government of Israel et al, 13 December 2006, Para. 40.

⁶⁷ Article 51(5)(b) of AP I

⁶⁸ Ahmet Özkan and others v. Turkey, App no. 21689/93, ECtHR [6 April 2004], Para. 305-306.

⁶⁹ ICTY, Prosecutor v. Duško Tadić IT-94-1-T, (7 May 1997) [Judgement] Para. 562.

⁷⁰ D. Murray, “Relationship between international human rights law and the law of armed conflict,” in **Practitioners’ Guide to Human Rights Law in Armed Conflict**, eds D. Akande, C. Garraway, F. Hampson, N. Lubell, and E. Wilmshurst (Oxford: Oxford University Press, 2016), p.90-91; Marco Sassòli and Laura M. Olson, “The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts”, in **International Review of the Red Cross**, 90, 871 (September 2008), p.599-627; United Nations Human Rights Office of the High Commissioner, “International Legal Protection of Human Rights in Armed Conflict,” p.63 [online] Available from : https://www.ohchr.org/sites/default/files/Documents/Publications/HR_in_armed_conflict.pdf [3 February 2025]

The deployment of military units in the SBPs neither alters the operation of the law enforcement paradigm, nor necessarily implies that it is not applicable.⁷¹ Moreover, even if IHL is applicable, it is not the more appropriate legal system. For instance, the UK High Court decision ruled that, even though deployed in the NATO operations, the shootings that were not in a combat situation, or an act of self-defence against an immediate threat. The soldiers owed a duty of care and the use of force must be approached as a last resort.⁷² In the Occupied Palestinian Territory, targeting individuals during a demonstration occurring during an armed conflict, based purely on their membership in an armed group, is also prohibited.⁷³

From an operational perspective, this proposal Arguably disregards the State security and debilitates the efficacy of military operations, to defeat an opponent.⁷⁴ However, in the SBPs context, such population is not an adversary to be defeated. Rather they are stakeholders, who should be capable of envisioning co-habiting in the community. Violence in the SBPs can and should be contained by the law enforcement measures. The application of IHL imposes unnecessary risks to civilians, disguises summary executions that foster retaliation and perpetuate vicious cycle of violence.

3.2 The Right to Liberty and Security Detention

The substance and binding character of NIAC internment regime is contentious. Conventional IHL neither contains the legal basis for internment in NIAC, its modalities nor termination.⁷⁵ Arguably, an inherent power and a legal basis to detain in NIAC for

⁷¹ Yoram Dinstein, “Concluding Remarks on Non-International Armed Conflicts”, in **International Law Studies, U.S Naval War College**, 88 (2012), p.403.

⁷² The High Court of Justice of England and Wales, *Mohamet Bici Skender v Ministry of Defence*, 2004 EWHC 786(QB)

⁷³ Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory (18 March 2019) A/HRC/40/CRP.2, Para. 106.

⁷⁴ Geoffrey S. Corn, “Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict”, in **Journal of International Humanitarian Legal Studies**, (November 2009), p.1-51.

⁷⁵ Lawrence Hill-Cawthorne, **International Law and the Procedural Regulation of Internment in Non-International Armed Conflict**, (Oxford University, 2014), p.78-120; Els Debuf, **Captured in War: Lawful Internment in Armed Conflict**, (Editions Pedone/Hart, 2013), p.470; See also Pavle Kilibarda and Gloria Gaggioli, “Detention of Suspected Terrorists in Connection with Armed Conflict: A Focus on Release and Repatriation”, in **Prisoners of War in Contemporary Conflict**, eds. Michael N. Schmitt and Christopher J. Koschnitzky (Oxford University Press, 2023)

‘imperative security reasons’, exists in custom.⁷⁶ However, the British High Court of Justice held that IHL does not confer a legal basis for detention in NIACs.⁷⁷ State practices also generally rely neither on customary nor IHL treaties but on domestic law, for providing a legal basis to intern in NIACs.⁷⁸ The Human Rights Committee’s jurisprudence also consistently applies Article 9 to detentions in NIACs.⁷⁹ Thus, the State’s human rights obligations remain intact.

The legal basis for internment can be found in Thai security legislation. The Martial Law enables the military to detain a person without charge, if there is a reasonable ground to suspect him/her.⁸⁰ The Emergency Decree also prescribes sweeping grounds for arrest and security detention e.g., suspected of being an accomplice, a perpetrator, an instigator or a supporter of an incident.⁸¹ Under these provisions, the detaining authorities are exempted from providing reasonable evidence, as would normally be required to issue an arrest warrant.⁸² It is controversial whether these legislations conform to the principle of legality and proportionality, according to IHRL. Even though customary IHL considers that arbitrary deprivation of civilians or persons *hor de combat*, is not

⁷⁶ ICRC, Commentary to the Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in the Armed Force in the Field, Para. 728 (2d ed. 2016); ICRC, Internment in Armed Conflict: Basic Rules and Challenges, Opinion Paper, November 2014.

⁷⁷ The High Court of Justice of England and Wales (EWHC), *Serdar Mohammed v. Ministry of Defence*, [2014] EWHC 1369 (QB), 2 May 2014, Paras. 243, 287.

⁷⁸ UN Commission on Human Rights, ‘Report of the Working Group on Involuntary or Enforced Disappearances: Mission to Nepal’, E/CN.4/2005/65/Add.1 (28 January 2005) Para. 45; Harold Hongju Koh, Legal Adviser, U.S. Department of State, “Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law,” [online] Available from : <https://2009-2017.State.gov/s/l/releases/remarks/139119.htm> [25 March 2010]; See also “Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: Geneva 1974-1977 - Vol.VII,” p.333 [online] Available from : https://tile.loc.gov/storage-services/service/ll/llmlp/RC-records_Vol-7/RC-records_Vol-7.pdf [3 February 2025]; Gabor Rona, “Is There a Way Out of the Non-International Armed Conflict Detention Dilemma?,” in *International Law Studies*, 91 (2015), p.37-42.

⁷⁹ U.N. Human Rights Committee, General Comment No. 35: Article 9 (Liberty and Security of Person), Para. 15, U.N.Doc. CCPR/GC/35 (16 December 2014); Human Rights Committee, ‘Concluding Observations: Sri Lanka’, CCPR/CO/79/LKA, 1 December 2003, Para. 13; Human Rights Committee, Concluding Observations: United Kingdom, CCPR/C/GBR/CO/6, 30 July 2008, Para. 14.

⁸⁰ Section 15*bis* of Martial Law, B.E. 2457 (1914)

⁸¹ Section 11(1) of Emergency Decree on Public Administration in Emergency Situations, B.E. 2548 (2005)

⁸² Section 66 of The Criminal Procedure Code

compatible with the principle of humane treatment in Common Article 3.⁸³ IHL as *lex specialis* modifies IHRL standard, in determining the arbitrariness of the detention, to take account of the existence of a NIAC.⁸⁴ To some extent, IHL legitimizes the implementation of security laws based solely on national security, which undermines the human right to liberty and security of persons.

Regarding procedural requirements, although Common Article 3 provides a safeguard on the right to a fair trial, the degree to which it regulates internment is limited e.g., without *habeas corpus*.⁸⁵ The UN human rights bodies held that ‘[t]he right to bring proceedings before a court to challenge the lawfulness of detention ... is not derogable under international law and is not restricted even in times of armed conflict or public emergency’.⁸⁶ The obligation to bring an arrested person promptly before a judge, requires that the delay must not exceed a few days.⁸⁷ However, the Martial law authorizes security detention for up to 7 days without a judicial warrant.⁸⁸ The Emergency Decree also permits an arrest without charge and internment for an additional maximum of 30 days, without trial. During this period (37 days in total), a suspect must be detained in designated places, other than the official detention facilities.⁸⁹ These provisions are silent on an internee’s access to legal counsel and *habeas corpus*. Normal criminal procedure would be applicable, only to detention beyond this point.

⁸³ J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, (Cambridge: Cambridge University Press, 2005), p.344 (Rule 99)

⁸⁴ UN Commission on Human Rights, ‘Situation of Detainees at Guantanamo Bay’, E/CN.4/2006/120, 27 February 2006, Para. 19; See also ICRC, “Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict: Chatham House & ICRC, London, 22-23 September 2008,” [online] Available from : www.icrc.org/en/doc/assets/files/other/security-detention-chatham-icrc-report-091209.pdf [3 February 2025]

⁸⁵ Gloria Gaggioli and Pavle Kilbarda, “Counterterrorism and the Risk of over-Classification of Situations of Violence”, in *International Review of the Red Cross*, p.203-236.

⁸⁶ Human Rights Committee, General Comment No 29, Para. 11; Human Rights Committee, ‘Concluding Observations: United States of America’, CCPR/C/USA/CO/3, 15 September 2006, Para. 18; Human Rights Committee, “General Comment No. 35, Article 9: Liberty and security of person, Para. 67; See also Report of the Working Group on Arbitrary Detention, ‘United Nations Basic Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court’ WGAD/CRP.1/2015, (4 May 2015), Paras. 22-23; Human Rights Committee, ‘Concluding Observations: Israel’ CCPR/CO/78/ISR, 21 August 2003, Paras. 12-13; Human Rights Committee, ‘Concluding Observations: Israel’ CCPR/C/ISR/CO/3, 3 September 2010, Para. 7.

⁸⁷ Human Rights Committee, General Comment No. 8, Right to liberty and security of person, 30 June 1982.

⁸⁸ Section 15*bis* of Martial Law, B.E. 2457 (1914)

⁸⁹ Section 12 of Emergency Decree on Public Administration in Emergency Situations, B.E. 2548 (2005)

Furthermore, juvenile justice procedures, i.e., assistance by a multi-disciplinary team,⁹⁰ a child must be brought to the juvenile court within 24 hours of arrest,⁹¹ recourse to detention as a measure of last resort,⁹² etc., are overruled by security laws. The displacement of normal criminal procedure could result in *incommunicado* detention. Without proper judicial review, internees are significantly susceptible to torture or other ill-treatment. However, these restrictions of the right to liberty may be justified from the perspective of IHL, where it may not be practicable to apply human rights guarantees, to those interned for ‘imperative reasons of security’.⁹³

As for release, IHL permits internment for so long as there is justification necessitated by armed conflict. Although the longer the internment period, the more stringent the necessity test will be. As discussed above, it is difficult to determine the end of hostilities in the SBPs. Consequently, the State can perceive insurgency as a security threat which justifies the internment of the armed group’s members, for an overly excessive period.

Despite the equal application of IHL to all parties to the conflict, there is no available report of internment by the BRN. Besides, it does not exert governmental functions or control over any part of the territory, so as to give rise to its human rights obligations.⁹⁴ Therefore, internment by a non-State armed group in the SBPs, will not be discussed.

⁹⁰ Section 13*bis* of The Criminal Procedure Code

⁹¹ Section 72 of Juvenile and Family Court and Procedure Act B.E. 2553 (2010)

⁹² Section 74 of Juvenile and Family Court and Procedure Act B.E. 2553 (2010)

⁹³ Sean Aughey and Aurel Sari, “Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence”, in **International Law Studies**, p.60.

⁹⁴ Human Rights Council, ‘Report of the Independent International Commission of Inquiry on the Syrian Arab Republic’, UN Doc A/HRC/21/50, 16 August 2012, 47, Annex II [10]; UN Commission on Human Rights, ‘Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur, Philip Alston’, E/CN.4/2005/7, 22 December 2004, Para. 76; See also Geneva Academy of International Humanitarian Law and Human Rights, “Rules of Engagement Protecting Civilians through Dialogue with Armed Non-State Actors,” [online] Available from : <https://www.geneva-academy.ch/joomlatools-files/docman-files/Research%20documents/Rules-of-Engagement-EN.pdf> [3 February 2025]; See Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya’, UN Human Rights Council, UN Doc A/HRC/17/44, 1 June 2011, Para. 72; Andrew Clapham, “The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement,” [online] Available from : https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569636 [17 March 2010]

The State administration and judicial system in the SBPs has not been disrupted. There are alternative measures e.g., criminal procedure to effectively address security threats. IHL should not be invoked to justify the impairment of IHRL detention safeguards. Instead, in a NIAC the government is expected to ensure human rights guarantees to all conflict-related detainees.⁹⁵ For instance, the Israeli Supreme Court held that it is ‘particularly practical under the conditions of belligerent occupation, where the arrest, investigation, and trial are at times realizable possibilities’.⁹⁶

3.3 The Right to an Effective Remedy and the State’s Obligation to Investigate

Under IHRL, the duty of the State to investigate every alleged violation of the right to life by State authorities is inherent to the right to life, which is non-derogable.⁹⁷ The obligation to investigate is also attached to a State’s positive obligation, to respect and ensure respect for IHL and IHRL.⁹⁸ In international armed conflict, IHL imposes an obligation to investigate and prosecute allegations of grave breaches⁹⁹ and death in custody.¹⁰⁰ Although there is no equivalent provision in NIAC, the obligation to investigate war crimes, is regarded as customary IHL applicable in all armed conflicts.¹⁰¹ However, only a credible allegation or reasonable suspicion of war crime, e.g., willful killing of protected persons, obliges the State to open a criminal investigation.¹⁰² Death resulting

⁹⁵ Tilman Rodenhäuser, “Strengthening IHL protecting persons deprived of their liberty: Main aspects of the consultations and discussions since 2011”, in **International Review of the Red Cross**, 98, 3 (2016), p.952.

⁹⁶ The Public Committee against Torture in Israel et al v. The Government of Israel et al, “The Supreme Court of Israel sitting as the High Court of Justice, Judgment, 11 December 2005, HCJ 769/02,” Para. 40 [online] Available from : http://www.haguejusticeportal.net/Docs/NLP/Israel/Targetted_Killings_Supreme_Court_13-12-2006.pdf [3 February 2025]

⁹⁷ Human Rights Committee, Herrera Rubio v. Colombia, International Covenant on Civil and Political Rights, Communication No. 161/1983, Para. 11, U.N. Doc. CCPR/C/31/D/161/1983 (November 2, 1987)

⁹⁸ Common Article 1 to the four Geneva Conventions 1949; General Comment no 31: Nature of the General Legal Obligation on States Parties to the Covenant, Human Rights Committee, Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004)

⁹⁹ Article 49 of GC I; Article 50 of GC II; Articles 129 of GC III; Articles 146 of GC IV; Article 85 of AP I

¹⁰⁰ Article 121 of GC III; Article 131 of GC IV

¹⁰¹ J-M Henckaerts and L Doswald-Beck, **Customary International Humanitarian Law, Volume I: Rules**, p.607 (Rule 158); See also Michael N.Schmitt, “Investigating Violations of International Law in Armed Conflict”, in **Harvard National Security Journal**, 2 (2011), p.31-84.

¹⁰² The Public Commission to Examine the Maritime Incident of 31 May 2010, **Israel’s Mechanisms for**

from the lawful conduct of hostilities e.g., killing civilians directly participating in hostilities or collateral civilian losses that are not excessive, compared to the direct military advantage anticipated, will not trigger an investigation under IHL. Even if it was suggested that an investigation has to be opened, to suppress other violations of IHL or where there have been civilian casualties.¹⁰³

Despite IHRL's greater normative and procedural specificity concerning the State's duty to investigate, during armed conflict it was suggested that IHL is the *lex specialis*.¹⁰⁴ If IHL is applicable to the SBPs conflict, the threshold for initiating an investigation will be higher. Deaths caused by the excessive use of force or disguised enforced disappearances in 'hostilities', may not trigger a criminal investigation. The human rights standard of an effective investigation, i.e., promptness, effectiveness, independence, impartiality and transparency,¹⁰⁵ will also be compromised, to take account of the armed conflict.¹⁰⁶ Even if the State must take reasonable steps and feasible measures to uphold the investigative standards. Application of IHL directly undermines the victims' enjoyment of their rights to an effective remedy.

Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law (The Turkel Report, 2013), p.100, 101, 103; Michael N.Schmitt, "Investigating Violations of International Law in Armed Conflict", in **Harvard National Security Journal**, p.31; ICRC, "The Use of Force in Armed Conflicts Interplay between the Conduct of Hostilities and Law Enforcement Paradigms," p.49 [online] Available from : www.icrc.org/en/doc/assets/files/publications/icrc-002-4171.pdf [3 February 2025]

¹⁰³ Amichai Cohen and Yuval Shany, "Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts", in **Yearbook of International Humanitarian Law**, (January 2012), p.17-33; Amy M. L. Tan, "The Duty to Investigate Alleged Violations of International Humanitarian Law: Outdated Deference to an Intentional Accountability Problem", in **International Law and Politics**, 49, 181, (2016), p. 223-238.

¹⁰⁴ Gloria Gaggioli, "The Use of Force in Armed Conflicts Interplay between the Conduct of Hostilities and Law Enforcement Paradigms," p.53 [online] Available from : www.icrc.org/en/doc/assets/files/publications/icrc-002-4171.pdf [21 September 2023]; Michael N.Schmitt, "Investigating Violations of International Law in Armed Conflict", in **Harvard National National Security Journal**, p.31-84.

¹⁰⁵ Human Rights Committee, General Comment no 31; See also (Goldstone Report) Human Rights in Palestine and other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict, Para. 1611, U.N. Doc. A/HRC/12/48, September 15, 2009.

¹⁰⁶ Al-Skeini and Others v. UK, ECtHR, Appl. No. 55721/07, Judgment, 7 July 2011, Para. 164; Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary executions (Philip Alston), E/CN.4/2006/53, 8 March 2006, Para. 36; The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), Office of the United Nations High Commissioner for Human Rights, New York/Geneva, 2017, Paras. 20-22.

Furthermore, under the Martial Law and the Emergency Decree, State officials are immune from civil, criminal or disciplinary liabilities.¹⁰⁷ Operations performed under the Internal Security Act and the Emergency Decree, are not subject to the Administrative Court jurisdiction¹⁰⁸ which is generally more accessible. The Internal Security Act conditionally offers an accused of national security-related offences (e.g., terrorism, offence against life, liberty or property, etc.),¹⁰⁹ an alternative to a criminal proceeding. Completion of the alternative measures e.g., training programme placed by the court order, extinguishes the right to institute a criminal prosecution.¹¹⁰ Even though domestic law does not absolve the State from its international legal obligations. These provisions contradict the state's obligation to investigate and prosecute international crimes. Accountability is of the utmost importance, as the prevalence of impunity in the SBPs has never been adequately addressed. The Krue Se and Tak Bai tragic atrocities were administratively investigated,¹¹¹ compensated and publicly apologized. However, a criminal lawsuit regarding the Tak Bai massacre was filed by the victims and their relatives against 7 former high-ranking officials.¹¹² The case cannot proceed due to the defendants' absence from court and the statute of limitations has expired. Up until the present, no one has been brought to justice.

¹⁰⁷ Section 16 of Martial Law, B.E. 2457 (1914); Section 17 of Emergency Decree on Public Administration in Emergency Situations, B.E. 2548 (2005)

¹⁰⁸ Section 23 of Internal Security Act 2008; Article 16 of Emergency Decree on Public Administration in Emergency Situations, B.E. 2548 (2005)

¹⁰⁹ “ประกาศ เรื่อง กำหนดลักษณะความผิดอันมีผลกระทบต่อความมั่นคงภายในราชอาณาจักร ตามมาตรา 21 แห่งพระราชบัญญัติการรักษาความมั่นคงภายในราชอาณาจักร พ.ศ. 2551,” *ราชกิจจานุเบกษา*, เล่มที่ 140 ตอนพิเศษที่ 239 ง, วันที่ 27 กันยายน 2566, หน้า 21-23.

¹¹⁰ Section 21 of Internal Security Act 2008

¹¹¹ “รายงานคณะกรรมการอิสระได้สวนข้อเท็จจริงกรณีเหตุการณ์มัสยิดกรือเซะ (Report of Commission of Enquiry on Krue Se Mosque incident): ภาคแรก, 26 กรกฎาคม 2547” [ออนไลน์] แหล่งที่มา : https://prachatai.com/sites/default/files/special/report_gresae.pdf [3 กุมภาพันธ์ 2568]; “รายงานของคณะกรรมการอิสระสอบข้อเท็จจริง กรณีมีผู้เสียชีวิตในเหตุการณ์อำเภอดงไผ่ จังหวัดนราธิวาส (Report of Independent Commission of Enquiry on Death Incident at Tak Bai, Narathiwat Province 25 October 2004)” [ออนไลน์] แหล่งที่มา : <https://prachatai.com/sites/default/files/special/takbai.pdf> [3 กุมภาพันธ์ 2568]

¹¹² The defendants are; former Director of the 4th Army Area Commander , former 5th Infantry Division commander, former Director of the Royal Thai Police's Forward command centre, former Chief of Provincial Police Region 9, former Superintendent of Tak Bai Police Station, former Deputy Director of the Division of Southern Border Provinces Peace Building Centre, former Governor of Narathiwat Province, face charges under the Criminal Code for jointly committing offenses, including murder, attempted murder, and unlawful detention according to Section 288, 83, Section 288, 80, 83, and Section 310 paragraph two in conjunction with Section 290, 83 of the Thai Criminal Code.

Criminal prosecution for atrocity crimes serves as a mechanism for achieving peace in post-conflict societies and deterring future violations.¹¹³ The Minnesota Protocol on the Investigation on Potentially Unlawful Death, recommends that the State conduct a full investigation and prosecute those responsible. Even though the death resulted from a violation of IHL may not amount to a war crime, or where an investigation is not specifically required under IHL.¹¹⁴ Ensuring accountability is crucial not only to uphold the victims' right to an effective remedy. It nurtures peace and reconciliation as well. The State must fulfill its duty to investigate and uphold the rule of law, in accordance with IHRL standards, regardless of the implementation of security laws or the presence of a low-intensity conflict.

4. Conclusion: Restoring and Sustaining the Rule of Law as a Way Forward

Even though the SBPs conflict has been regarded as a NIAC and fallen within the scope of IHL. In light of situational developments, it is high time that the two-decade conflict was objectively reappraised, to determine the applicable international law. Despite the common characteristics of IHL and IHRL in protecting human life and dignity. Their concurrent application in a NIAC, does not guarantee multi-layered protection.

Therefore, it is crucial to carefully calibrate military necessity against humanitarian considerations. IHL application in the SBPs can be (ab)used to broaden the State's capabilities, to contain the situation that could be handled by law-and-order operations. Most importantly, it should not adversely affect victims, resulting in impaired humanitarian protection. This proposition also undermines the legitimacy of the enforcement of Thai security laws, while emphasizing that there can be no national security without human security.

¹¹³ M. Cherif Bassiouni, "Searching for Peace and Achieving Justice: The Need for Accountability", in **Law and Contemporary Problems**, 59 (1996), p.9; Hunjoon Kim and Kathryn Sikkink, "Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries", in **International Studies Quarterly**, 54 (2010), p.939.

¹¹⁴ The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), Office of the United Nations High Commissioner for Human Rights, New York/Geneva, 2017, Para. 21; Office of the UN High Commissioner for Human Rights (OHCHR), Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law, Guidance and Practice, New York and Geneva, 2015; Geneva Academy and ICRC, Guidelines on Investigating Violations of International Humanitarian Law, Geneva, September 2019.

Indeed, respect for human rights and the rule of law address the root causes of the SBPs conflict. Deviation from these principles i.e., excessive use of force, unlawful deprivation of liberty and impunity, exacerbates hardships for the victims and hinders peace. With this in mind, should the law enforcement paradigm be fully implemented, to pave the way toward normalcy? Those are, inter alia;

- Recourse to lethal force as a last resort when arrest cannot be effected
- Detention in accordance with IHRL and upholding judicial guarantees.
- Repeal the legislation that grants State officials immunity and effectively investigate all alleged human rights violations, to hold those responsible to account.

To address the underlying grievances that foster violence, to which IHL alone may not provide the answer.