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Some Reflections on the Threshold for International Armed Conflict and on the Application of the Law of Armed Conflict in any Armed Conflict

The Howard S. Levie Distinguished Essay

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The Howard S. Levie
Distinguished Essay:

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T.D. Gill

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The thoughts and opinions expressed are those of the author and not necessarily those of the U.S. government, the U.S. Department of the Navy, or the U.S. Naval War College.

I. INTRODUCTION

In this essay I will first present some questions for discussion relating to the threshold for the existence of an armed conflict between two or more States. In particular, I will explore the main arguments for and against the “first shot” approach in relation to the existence of an international armed conflict and pose the question whether applicability of a particular provision or customary rule of international humanitarian law (IHL, a.k.a. the law of armed conflict/LOAC) to a specific factual situation is or should be synonymous with the existence of an armed conflict to which the entire corpus of IHL relating to international armed conflicts becomes applicable.

In that context I will discuss some of the aspects of the relationship between the law governing the use of force in international relations, also referred to as the *jus ad bellum* and the law of armed conflict. I will present some arguments as to why I think there are persuasive reasons for distinguishing between the application of a particular rule of IHL when the situation requires it and acceptance of the proposition that any clash between the armed forces of a State, no matter how brief or inconsequential, or the non-consensual presence of the armed forces of a State on the territory of another State, results in the existence of an armed conflict between those States triggering, in principle, the full applicability of the law of armed conflict.

Finally, I will briefly discuss the application of IHL in the context of non-international armed conflict, including a few words on the International Committee of the Red Cross’s (ICRC) “support-based approach” (SBA), which is meant to apply to situations involving multinational forces operating in support of a government. As this piece is meant to serve as a catalyst for discussion on a number of doctrinal issues, it will not deal with specific factual examples of armed clashes and conflicts in any detail, nor will I attempt to provide a review of or comment on the relevant literature relating to conflict thresholds and classification. Instead, it is my intention to provide some food for thought and fuel for further discussion of these issues in the context of exploring the grey areas or “twilight zone” of the humanitarian law of armed conflict.

II. THE ICRC “FIRST SHOT” THRESHOLD FOR INTERNATIONAL ARMED CONFLICT AND THE INTERNATIONAL LAW ASSOCIATION USE OF FORCE INTENSITY CRITERION COMPARED

It is generally accepted that the Geneva Conventions and their Additional Protocols do not provide a clear definition of armed conflict or more than a rough indication of when an armed conflict can be said to have begun. Common Article 2 gives some indication, but aside from reference to “declared war or other armed conflict” and adding that the conventions apply in cases of occupation of territory even if such occupation meets with no resistance, there is little in the way of explanation of what the conditions for armed conflict are and when a conflict can be said to have begun.¹ In view of the reference to application of the conventions to situations of occupation, the question also can be asked whether applicability of the conventions is necessarily the same thing as the existence of an armed conflict. In the famous *Tadić* decision of 1995 the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia provided the closest thing we have to a definition of an armed conflict. The Tribunal stated, “we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”² That is a low threshold that corresponds to Jean Pictet’s 1952 commentary to Common Article 2 of the Geneva Conventions:

Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to human personality is not measured by the number of victims.³

1. *See, e.g.*, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

2. Prosecutor vs. Tadić, Case No. IT-94-1-AR-72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Int’l Crim. Trib. for the former Yugoslavia Oct. 2, 1995).

3. COMMENTARY TO GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD 32 (Jean Pictet ed., 1952) (footnote omitted).

From this perspective any situation resulting in an armed confrontation is automatically an armed conflict. The underlying rationale, which is evident from his words, is the need to ensure protection to persons adversely affected by an armed conflict regardless of the intensity, duration, or scope thereof. The more recent ICRC commentary of 2016 extends this approach to include any non-consensual presence of the armed forces of one State on the territory of another, even in the absence of any armed clash or situation of occupation.⁴ This extension of the low threshold approach makes a mere violation of territorial sovereignty by State agents an international armed conflict, even if they are not members of the armed forces, as long as they are acting on State instructions and are armed.⁵

Although this approach is the prevailing one in the literature, is reflected in a number of decisions by international tribunals, and has a good deal of merit, at least in so far as it purports to make the application of IHL provisions independent of political or subjective considerations and aims to afford victims of war the broadest possible protection, there are other views on the matter. One is found in the 2010 *Final Report of the Use of Force Committee* of the International Law Association (ILA) in which a degree of intensity is required before an armed conflict could be said to exist and which makes no distinction in that respect between conflicts between States and conflicts in which at least one of the parties is an organized armed group.⁶ This position is shared by a number of other commentators and a significant amount of State practice.⁷ This position argues that border skirmishes, naval and aerial

4. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD ¶ 237 (2016), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518>.

5. *Id.* ¶¶ 226, 229.

6. Int'l Law Assoc., Use of Force Comm., Final Report on the Meaning of Armed Conflict in International Law 2 (2010), http://www.rulac.org/assets/downloads/ILA_report_armed_conflict_2010.pdf [hereinafter ILA Report].

7. In addition to the authors of the ILA Report, *id.*, see, e.g., Christopher Greenwood, *Scope of Application of International Humanitarian Law*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 48 (Dieter Fleck ed., 2d ed. 2008); MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 46 (1982) (commentary to art. 1). For examples of State practice, see ILA Report, *supra* note 6, at 13–14. More recent examples include various naval incidents in the South China Sea, aerial intrusions by manned and remotely piloted aircraft over various countries in the Middle East, clashes between border guards on the Indo-Chinese border and along the “Line of Control” in Kashmir,

incidents, and the like do not constitute armed conflicts as they lack the requisite degree of intensity and/or duration. This position would not extend the application of IHL to such armed incidents and avoids making every incident involving the armed forces, no matter how brief or inconsequential, into an armed conflict, which seems to correspond more closely to reality and tends to de-escalate such encounters.

What are the main strengths and weaknesses of these respective approaches? The “first shot” approach is clear and unambiguous and makes the application of IHL virtually automatic any time there is an armed clash between two (or more) States. This largely removes the possibility of subjective application of IHL obligations—at least in theory—and provides for the widest possible extension of protection to any persons affected by the armed conflict. These are strong points in favor of accepting this approach and the reason why it has such strong support from both the ICRC and much of the academic community. It is also probably at least partly why it has been applied in a number of decisions by international tribunals.⁸

But alongside these points in support of this approach, there are a number of downsides to it. By determining that any clash between States amounts to an armed conflict to which the full panoply of conventional and customary humanitarian law rules applies *de jure* as soon as a situation arises in which any of the rules in question are in fact applied, the door is opened to far more than just the humanitarian protection of war victims. The law of

and the seizure of three Ukrainian patrol vessels off the coast of Crimea by Russian coast guard vessels, to name just several. In relation to the incident involving the seizure of two Ukrainian patrol boats and an auxiliary vessel by Russian coast guard vessels, I am purposely leaving aside the very real possibility that the seizure of the vessels took place in the context of an ongoing armed conflict between the Russian Federation and Ukraine as a result of the continued occupation of the Crimea since 2014 and as such would be governed by IHL/LOAC. But since neither State referred to this possibility in relation to the incident, I include it in the list of low-level armed incidents which arguably do not constitute an armed conflict in themselves.

8. See ICRC COMMENTARY ON THE FIRST GENEVA CONVENTION, *supra* note 4, ¶ 218, referring, *inter alia*, to the abovementioned statement by the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Tadić*, *supra* note 2. The *Tadić* Appeals Chamber decision set the standard for the application of IHL in subsequent cases before the ICTY and other tribunals. Rogier Bartels points out that after an initial period subsequent to the *Tadić* Appeals Chamber ruling, the ICTY and other tribunals seemingly took a lax approach towards conflict classification, essentially failing to distinguish whether a conflict was international or non-international. See Rogier Bartels, *The Classification of Armed Conflicts by International Courts and Tribunals*, 20 INTERNATIONAL CRIMINAL LAW REVIEW 595 (2020).

targeting in IHL allows for “status based” targeting of anyone possessing combatant status, irrespective of whether they pose an immediate threat at the time of targeting. It allows for the destruction, capture, or “neutralization” of any military objective that would confer a perceptible military advantage, including when this would result in significant collateral effects, as long as these are not excessive in relation to the anticipated military advantage. It allows for the capture of merchant vessels pertaining to the adversary in international waters and the seizure of the merchant vessels of neutral or non-belligerent States if they are adjudged to be transporting contraband. It allows for the severing of aerial, maritime, and digital communications of the adversary State with the outside world. It allows for the detention without trial of persons subject to capture as prisoners of war, and of civilians who are deemed to pose a security threat to the detaining power for the duration of the conflict or, in the case of civilians, for as long as is deemed necessary for security. It allows for the seizure of military equipment of the adversary as war booty as well as for the occupation of (some or all of) the territory of the adversary State and the requisitioning of other public goods the occupying power deems necessary for its security or its administration of the occupied territory. These are but some of the consequences of a situation of armed conflict.⁹

Since the prevailing theory also assumes that IHL extends throughout the territory of the opposing States, no matter how far removed from the theater of operations, and is applicable in the international commons anywhere the vessels, aircraft, or military personnel of the adversary State may be located, even in outer space, the possibility of the conflict becoming worldwide in scope or extending beyond the Earth’s atmosphere is real.¹⁰

9. See ILA Report, *supra* note 6, at 4 (referencing a number of the consequences of an armed conflict).

10. The geographical and temporal scope of IHL is treated by Jann Kleffner, *Scope of Application of International Humanitarian Law* in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 43 (Dieter Fleck ed., 3d ed. 2013). The reference to the “general close of military operations” is to be found in Article 6, Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, although some provisions of IHL are meant to apply beyond that temporal threshold in relation to protection of persons detained by the opposing party and occupied territory. This raises the possibility of applying specific provisions of IHL in situations where this enhances protection of persons adversely affected in the context of armed conflict and the actual existence of armed conflict itself. The applicability of IHL to hostilities in outer space is currently being examined in the context of a manual devoted to application of international law in outer space and has received some attention in the literature. One example is a recent article by Dale Stephens, *The International Legal Implications of Military Space Operations: Examining the*

Moreover, because the temporal duration of armed conflict is not completely settled law despite the seemingly clear reference to “the general close of military operations,” this creates a situation which leaves the door potentially open for the ongoing application of IHL for a prolonged or even indefinite period. Finally, most commentators take the position that once an armed conflict is underway the law relating to the use of force no longer has any effect on how, when, and where force is applied since its function is to determine the legality of the recourse to force and not how force is actually applied.¹¹ Additionally, in the event of any clash between IHL and human rights law, the more specific norm will prevail, which in the case of an international armed conflict means IHL will virtually always take precedence over human rights law to the extent the two clash. Consequently, the humanitarian law of armed conflict will have predominant application and legal effect for the duration of the armed conflict, more or less setting aside any conflicting legal obligations and at the least acting alongside those which it does not collide with and influencing the application of any parallel obligations arising from other bodies of (international) law.¹²

While this all makes sense in the event that the force employed or occupation of territory is reasonably prolonged and/or intensive (the “sense” of these consequences increases as the intensity and duration of the clash increase), it makes much less sense to allow all of these effects to kick in as soon as one side uses force against another State. Examples of these lesser uses of force would be engaging in a strike aimed at a single person, an incidental exchange of fire between border guards or during a naval or aerial incident, or whenever military or paramilitary forces acting on behalf of a

Interplay between International Humanitarian Law and the Outer Space Legal Regime, 94 INTERNATIONAL LEGAL STUDIES 75 (2018).

11. This seems to be how most authors view the consequences of the equal application of IHL to all parties to an armed conflict. These authors pay no heed to *jus ad bellum* considerations when discussing, for example, targeting. One notable exception to this who sees a continued relevance for *ad bellum* considerations once an armed conflict has commenced without conflating the two bodies of law is Christopher Greenwood, who in the wake of the Falklands/Malvinas conflict set out a different approach, followed more or less here in this essay. See Christopher Greenwood, *The Relationship between the Ius ad Bellum and Ius in Bello*, 9 JOURNAL OF INTERNATIONAL STUDIES 221 (1983).

12. There is abundant literature dealing with the relationship between IHL and other bodies of law. The International Law Commission dealt with the issue of the relationship of different branches of international law in its sophisticated and comprehensive study on the fragmentation of the international legal system. See Report of the Study Group of the Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

State are temporarily present without consent on the territory of another State. This is the principal rationale behind the approach put forward in the ILA committee report and it has considerable persuasiveness in not allowing for the extension of belligerent “rights” or prerogatives to situations that are incidental in nature and or inconsequential in their effects.

However, this approach also has potential negative consequences, of which at least one is very problematic. Although the threshold for the existence of an armed conflict is not conclusively spelled out in this intensity-based approach, it is possible to apply the same or similar threshold criteria used for determining the existence of a non-international armed conflict to determine the existence of an international armed conflict. These criteria relate to the intensity and/or duration of the force applied, so application of the criteria need not necessarily be a problem. But another possibly much more serious consequence of an intensity criterion for the application of IHL to clashes between States is the potential legal gap it can create. If a low intensity use of force does not trigger the application of IHL and there is no jurisdiction or effective control over the targeted individual by the opposing State, there is equally no *de jure* applicability of human rights law, nor any guarantee that application of domestic law or regulation by extra legal means would provide an adequate legal framework.¹³ This potentially opens a yawning gap in legal protection. For example, if there were an aerial incident in which the military aircraft of two States clashed over international waters and one of the aircraft was shot down, unless some rule(s) of IHL were to apply, perhaps in combination with other bodies of international law, there would quite likely be no applicable law to such a scenario, which would result in what is, from a legal, moral, and policy perspective, an unacceptable outcome. There cannot, or in any event should not, be any situation in which the use of (potentially) lethal force is not subject to legal regulation.

13. Human rights law is applicable in situations of either *de jure* exercise of jurisdiction (i.e., within a State’s territory or on board its vessels or aircraft) or, according to most human rights oversight bodies and courts, in situations where State agents exercise effective control over individuals or territory outside the State’s territory, although the modalities of such control are not necessarily uniform between different human rights law regimes. *See, e.g.*, Jann Kleffner, *Human Rights and Humanitarian Law: General Issues*, in *THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS* 35 (T.D. Gill & Dieter Fleck eds., 2d ed. 2015); GERD OBERLEITNER, *HUMAN RIGHTS IN ARMED CONFLICT: LAW, PRACTICE, POLICY* (2018); DARAGH MURRAY, *PRACTITIONERS GUIDE TO HUMAN RIGHTS IN ARMED CONFLICT* (2016) (all of which discuss how human rights law and IHL relate, interact, and apply to military operations above and below the threshold of armed conflict).

III. A POSSIBLE ALTERNATIVE APPROACH COMBINING ELEMENTS OF BOTH THE “FIRST SHOT” AND INTENSITY APPROACHES AND THE APPLICATION OF *AD BELLUM* CONSIDERATIONS TO TARGETING

Since both of the approaches set out above have real and potential advantages and disadvantages it seems worthwhile to try to maximize the advantages of both without including their respective drawbacks or creating new negative consequences that would be as bad or worse as the ones that one is trying to avoid in the first place. A starting point could be to separate the applicability of at least some humanitarian law provisions from the existence of an armed conflict. Put differently, it makes sense to apply specific rules and principles of IHL to situations not amounting to an armed conflict where that would ensure or enhance protection of those (potentially) affected by any use of force, while reserving the full applicability of the law of armed conflict to situations that cross a certain threshold of intensity and/or duration and constitute an armed conflict. If one were to say, for example, that the basic humanitarian protections set out in Common Article 3, together with the rule that attacks may only be directed against military objectives and the requirement for humane treatment of detainees apply to any situation involving an armed clash, including those below the threshold of armed conflict, it would be a good starting point that went a long way towards ensuring that the object and purpose underlying the Geneva Conventions of protection of persons who were injured, in distress, or captured or detained were respected in any situation in which force was used. But by making the full applicability of all the rules of the law of armed conflict, including, in particular, those allowing for the exercise of potentially far-reaching belligerent “rights” and prerogatives, dependent upon a reasonably high threshold of intensity; and perhaps for some rules, such as the law of blockade, also the duration of the conflict, the negative effects of the “first shot” approach could be largely avoided. But this is probably not enough in itself to resolve all the potential issues that are raised by separating applicability of (some) IHL rules from the notion of armed conflict. What kind of rules should be applied in relation to targeting of persons and objects in situations below the threshold of armed conflict, to whom and to what, where, and how long would the basic humanitarian protective rules apply? What is the threshold for its application, when does a situation below the threshold of armed conflict cross the threshold, and what are the consequences of this? I will attempt here to set out some possible answers in an attempt to stimulate some reflection and discussion on when IHL should apply and whether

there is a case to be made for severing the applicability of some IHL provisions (aside from those few IHL provisions which are already applicable outside the context of an armed conflict) from the threshold of armed conflict and where that threshold for an international armed conflict lies or should lie. I will also offer some thoughts on how IHL relates to other bodies of law, in particular the law governing the use of force in relation to the targeting of persons subject to attack and military objectives under IHL and to the exercise of belligerent “rights” (better seen as prerogatives) in armed conflict in a more general sense.

In relation to the question when the basic rules of humanitarian protection referred to above would start to apply, the logical answer would be “as soon as any armed incident took place which necessitated their application.” This would ensure that any armed clash, no matter how brief, would trigger the protective effect of IHL to the extent necessary. Anyone adversely affected in the context of such a clash would benefit without any distinction whatsoever on the basis of the legality of the actions which led to the clash or the positions of the parties. Hence, equal application of this protection would be ensured. Anyone wounded, in distress at sea, bailing out from an aircraft, offering surrender, or in the hands of another State involved in such an incident would benefit from the same protection as they would have with a lower threshold of armed conflict. Civilians would be immune from attack, as would military personnel entitled to protection from attack, including, in particular, medical and religious personnel and members of peacekeeping missions that had not become party to an armed conflict. Persons who were in the hands of another State involved in an armed incident would receive treatment identical to prisoners of war or interned civilians, as the case may be. However, instead of being held for the indeterminate duration of an armed conflict, or as long as security considerations made it necessary in the case of detained civilians, they would have to be repatriated as soon as the incident was over. They could be handed over without any undue delay to their national authorities, an impartial third party such as the ICRC, or a diplomatic representative of a third State or international organization agreed to by the States concerned.

On the other hand, targeting in the context of such armed incidents would be restricted to those persons and objects that were directly involved in the armed incident and only to the extent they posed a threat of death or serious injury to persons or capture or serious damage to essential material or installations. Even then, use of force would be prohibited if there were

other non-forcible alternatives available and adequate to address the situation. In short it would be identical or analogous to unit level self-defense under the customary international law governing self-defense, except it would have its basis in a combination of the principles of *ad bellum* necessity and proportionality as part of the law governing self-defense under international law. This would be without any distinction as to which party may have violated the prohibition of the use of force by engaging in an (incipient) armed attack at the tactical level, and alongside IHL rules based on the principle of distinction while being informed by and applied in parallel with considerations of human rights law relating to the strict necessity of using (potentially) lethal force and the limitation of force to what was required to safeguard life or other essential interests.¹⁴ This would ensure that no “legal gap” would exist, whereby no body of law would apply to targeting in situations falling below the threshold of armed conflict. It would also avoid the potential conflation of the legality of the recourse to force with the actual exercise of force, which could happen if one only applied the *jus ad bellum* as the

14. While this combination may look like a rather improvised cocktail at first, it in fact already has a wide degree of acceptance and application, albeit not necessarily in exactly the same way as formulated here. I have purposely identified the targeting rules of IHL based on the principle of distinction as a core set of obligations that can be, and is, applied regularly to military operations of all types, including below the threshold of armed conflict in the form of targeting directives or rules of engagement (ROE) requiring that force may only be used against military objectives. I am simply arguing that this set of obligations should apply as *IHL* even in situations below the threshold of armed conflict, instead of merely as ROE or other non-legal directives, which is to say it would be considered as a principle of customary law applicable at all times. This would ensure that it was applicable to everyone and not dependent on how ROE were formulated and what their legal effect was. The same essentially applies to the notion of necessity as part of the right of self-defense as being the ultimate test under *ad bellum* law of whether a need to apply force exists. In this context it signifies an immediate necessity to react to ongoing or impending force and the absence of feasible alternatives to the use of force. Proportionality *ad bellum* would restrict the use of force to the immediate proximity of the threat and only for as long as the incident lasted. Finally, human rights bodies regularly apply and interpret human rights law in the context of other applicable law and in light of the factual situation. In relation to the right of life it provides for a strict test of necessity regarding the use lethal force when no other options are available. So there is nothing very revolutionary in my proposal. What I am *not* proposing is applying the principle of so-called “restrictive military necessity,” which, according to some writers, exists in IHL/LOAC. In my opinion it is debatable whether such a principle exists in IHL/LOAC in the first place (as opposed to military necessity *stricto sensu* as part of the general framework of IHL). Even if it does, whether it applies to the actions of individuals instead of acting as a foundational principle of IHL/LOAC alongside humanity is debatable.

standard for targeting of persons and objects during the confrontation itself. However, the *jus ad bellum* would be directly relevant in relation to not only whether it was necessary to apply force but also to where and how long any use of force would be legitimate in an *ad bellum* context. This in turn would limit any force used to the immediate vicinity of the incident and only for as long as the situation lasted. This flows from the application of *ad bellum* considerations of necessity and proportionality that govern an incidental use of force in the context of what is sometimes referred to as “on the spot reaction” or “unit level self-defense.”¹⁵ The difference would be that the targeting limitations would apply to both “sides” involved in an armed incident due to the application of IHL targeting rules deriving from the principle of distinction and of human rights law, irrespective of whether they were acting in conformity with *jus ad bellum* in resorting to force in the first place. This because the principles of necessity and proportionality governing any use of force, viewed in context with human rights law, would apply at all times to all “parties” irrespective of whether they were acting in conformity with the UN Charter or other (putative) legal justifications for recourse to force.

If a use of force by a State was not restricted in its intensity and duration and formed, in itself or in combination with a series of closely related incidents, a reasonably intensive application of force against another State, or otherwise resulted in occupation of another State’s territory, the threshold for the existence of an international armed conflict would be crossed and more rules of the law of armed conflict would become applicable. The intensity criteria used to determine the threshold of an international armed conflict could (and should) be identical to or very similar to those used to determine the existence of a non-international armed conflict, which have been set out in a number of international decisions and have gained broad acceptance.¹⁶ These include the type of weapons used, the number of casualties resulting from any use of force by either party, the types of targets

15. For a treatment of unit level self-defense, also referred to as “on the spot reaction,” see YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 261–64 (6th ed. 2017); J.F.R. BODDENS HOSANG, *RULES OF ENGAGEMENT AND THE INTERNATIONAL LAW OF MILITARY OPERATIONS* 83–93 (2020). For a reference by the ICJ to this modality of self-defense, see *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, ¶ 73 (Nov. 6).

16. The ICTY elaborated on the criteria for the existence of a NIAC in various decisions following *Tadić*. These were summarized in the *Boškoski* Trial Chamber decision, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT 04-82-T, Judgment, ¶ 177 (Int’l Crim. Trib. for the former Yugoslavia July 10, 2008), and included, among others, the criteria named here.

engaged, the (apparently intended) effects on the targeted State, and the duration of the application of force, to name some logical choices. In relation to occupation that did not include the use of force by either party, the question of whether the threshold was met would depend on the nature and effect of the non-consensual presence of foreign armed forces on the targeted State. Has the State engaged in a non-consensual presence expelled the civil or military authorities of the territorial State or otherwise interfered with the administration of its territory? Has it taken over or exercised any governmental functions? Is its presence in any way directed against the territorial State or its population? Is the presence more than transitory or incidental? These are some of the most relevant considerations.

Once an international armed conflict exists it makes sense from both a military and a humanitarian perspective to apply more of the rules of the humanitarian law of armed conflict. Which ones is a question worth asking. Does the existence of an armed conflict automatically mean that all the rules become, or should become, applicable? One could argue that they do, but that only those rules that actually need to be applied as a result of a factual situation will in fact be applied. That is the way it is generally done now; all the IHL rules are *de jure* applicable, but we only use the rules we need to in a specific context. Again, the advantage of this approach is that the applicability is unambiguous and not subject to subjective considerations. But it leaves the initiative in the hands of any State that wants to use any or all the force it has at its disposal once the threshold of armed conflict is passed, even if the conflict is (relatively) limited in scope and duration. Consequently, the law can be used as an instrument to further one's interests if there are, in principle, no limitations on which rules of the law of armed conflict apply. So, for instance, if a given State has a preponderance of air power, it can engage in bombardment of any object constituting a military objective that makes a contribution to military action and arguably confers a military advantage once the threshold for an armed conflict is passed. In relation to military objectives by nature, this is virtually automatically considered to be the case. The same seems to apply to leadership and command and control functions and these have been routinely targeted as a matter of course in many recent conflicts, including those with relatively limited scope and objectives.¹⁷ If a military objective is one by virtue of its use, purpose (i.e., future

17. With regard to targeting law and the notion of "military advantage," see, e.g., Michael Schmitt, *Targeting*, in THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS, *supra* note 13, at 269, 277–81; W.H. BOOTHBY, THE LAW OF TARGETING 98–107 (2012). "Leadership targeting" has been routinely engaged in by various States with both

use), or location, attacking it must confer a perceptible military advantage under the circumstances ruling at the time. But this is arguably the case with regard to a wide range of potential targets, as the bombardment of bridges, roads, electrical power plants, and even TV stations in past conflicts illustrate. If a State has a clear advantage in naval capacity it can impose a blockade of the other State's coast, as Israel did in its 2006 armed conflict with Lebanon, or cut off specific ports from access to the open sea, as Russia has done with regard to part of the Ukrainian coast in the Black Sea. If a State has advanced cyber capabilities, it can use these to take out critical functions in the target State, degrading its communications and the ability of the political and military leadership to effectively function, as long as these operations are not deliberately directed against purely civilian data systems and are not excessive in relation to the anticipated military advantage sought. This leaves a wide choice of potential targets in the digital domain open to attack or subject to operations that might have the same effects as an attack, but don't technically qualify as such because they are not violent in nature or because data may not constitute an "object" for purposes of applying targeting law.¹⁸ In short, since in principle everything is allowed under IHL that is not specifically prohibited or limited, once an armed conflict is deemed to exist the law of armed conflict allows for the application of a great deal of coercion, unless one chooses for whatever reason to exercise restraint. Restraint is, however, often in short supply and this leaves the door open for abuse of

manned and unmanned aircraft in a whole range of situations, some of which included so-called "personality strikes" directed against individuals that were conducted either outside the context of a recognizable conflict or where in any case it was open to question whether IHL was applicable. See, e.g., Agnes Callamard, *The Targeted Killing of General Soleimani: Its Lawfulness and Why It Matters*, JUST SECURITY (Jan. 8, 2020), <https://www.justsecurity.org/67949/the-targeted-killing-of-general-soleimani-its-lawfulness-and-why-it-matters/>. This type of targeting was also engaged in during the aerial campaign against Libya in 2011, which had its legal basis in a UN Security Council resolution to protect civilians. For the official NATO position, see Jorge Benitez, *NATO's Official Policy on Killing Gaddafi*, ATLANTIC COUNCIL (July 13, 2011), <https://www.atlanticcouncil.org/blogs/new-atlanticist/nato-s-official-policy-on-killing-gaddafi/>. For a comprehensive analysis of the conflict, see M. Cherif Bassiouni, *The NATO Campaign: An Analysis of the 2011 Intervention*, in LIBYA: FROM REPRESSION TO REVOLUTION 197 (M. Cherif Bassiouni ed., 2013).

18. On the ongoing controversy regarding the targeting of data under IHL/LOAC, see Paul A.L. Duchaine, *Military Cyber Operations*, in THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS, *supra* note 13, at 456, 474–75. See also Paul A.L. Duchaine & T.D. Gill, *From Cyber Operations to Effects: Some Targeting Issues*, NETHERLANDS MILITARY LAW REVIEW (Aug. 17, 2018), https://puc.overheid.nl/mrt/doc/PUC_248377_11/1/.

the law by engaging in acts that are not in themselves necessarily in violation of any specific rule of IHL, but that can have a devastating effect on the target State, widen or prolong the conflict, and have long lasting consequences.

One way to avoid this is to apply the law relating to the use of force, in particular the *ad bellum* considerations of necessity and proportionality, to the nature of the targets that could be engaged, as well as to the duration and geographical scope of targeting. *Jus in bello* rules of IHL relating to the conduct of hostilities would also apply, with the *ad bellum* rules acting to some extent as a parallel level restraint on the exercise of belligerent prerogatives under the law of armed conflict. Such application of *ad bellum* necessity and proportionality considerations clearly must be on an equal basis for all parties, irrespective of whether the initial or ongoing resort to force by a particular party was lawful in the *ad bellum* context to ensure it is not dependent on subjective factors and provides for an equal scope of action. In other words, while the law relating to the use of force is separate from the law of armed conflict and each have their own respective spheres of application, they do not operate in isolation from each other but are instead components of an overarching legal system.¹⁹ Both will apply to any situation in which force is used, including once an armed conflict is underway. While *ad bellum* law will not affect the *obligations* of the parties under IHL, and IHL will allow for both parties to target persons and objects subject to attack under the principle of belligerent equality, there is no reason why *ad bellum* considerations of necessity and proportionality cannot limit the scope of the application of IHL rules relating to the targeting of persons and objects subject to attack, as long as both sides have the same rights and obligations in terms of limiting the scope of the conflict. So, if an armed conflict is relatively limited in scope, for example, as a result of an incursion by one State into another over a disputed parcel of territory, or an armed incident escalates into a more prolonged and/or intensive exchange of fire between two States, *ad bellum* considerations of necessity and proportionality would be relevant in determining

19. In addition to Greenwood, *supra* note 11, see Christopher Greenwood, *Self-Defence and the Conduct of International Armed Conflict*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE 273 (Yoram Dinstein ed., 1989). On the same basic theme, the present author has also taken the position that while separate, the *ius ad bellum* and *ius in bello* are both relevant to targeting and that the criteria from both must be met for an act to be fully in compliance with international law. T.D. Gill, *Some Considerations on the Role of the Ius ad Bellum in Targeting*, in TARGETING: THE CHALLENGES OF MODERN WARFARE 101 (Paul A.L. Ducheine et al. eds., 2016).

the scope of targeting to what was strictly necessary and proportionate in terms of the overall situation. Those *ad bellum* considerations would rule out, for example, the targeting of the political and military leadership of the opponent, its communications and industrial infrastructure, and military objectives by nature that posed no direct threat to the operations of the State in question in an armed conflict of limited scope and duration. It would also affect the geographical and temporal scope of the application of targeting rules to what was necessary and proportionate under the circumstances. The rationale for this is quite straightforward; why should a party be allowed to target someone or something subject to attack simply because IHL does not prohibit its being targeted if it is not strictly necessary or would widen or prolong the scope of the conflict?

One might ask why *ad bellum* considerations should influence targeting of objects which are subject to attack under IHL, but one could equally ask why they should not? The idea that once an armed conflict starts *ad bellum* considerations become irrelevant ignores what the respective functions of *ad bellum* law and IHL/LOAC are and is based on a mistaken presumption that the separation of the law relating to the use of force and the equal application of humanitarian law of armed conflict requires the complete exclusion of *ad bellum* law once an armed conflict commences. But this is neither a logical corollary to the principle of equal application of IHL, nor an accurate rendition of the functions of both sets of rules. The law relating to the use of force not only determines under which conditions a recourse to force is lawful, but also influences what degree of force is acceptable for the duration of its application. Otherwise, the notions of necessity and proportionality in the *ad bellum* context would be virtually meaningless; they are obviously meant to regulate in an overall sense the degree to which force is lawful in relation to the purpose underlying the resort to force for as long as force is applied. While necessity and proportionality are part of the right of self-defense, they do not directly relate to the execution of a mandate given by the UN Security Council authorizing the use of force (usually designated as “all necessary means”) for a particular purpose. But here too the execution of the mandate is predicated on the degree of force required to achieve the objective of the mandate and may not exceed what is required to that end. So, the degree of

force required to execute the mandate is very close to necessity and proportionality in the context of self-defense, and hence no distinction as to how necessity works in relation to any use of force will be made in this essay.²⁰

The function of targeting rules under IHL/LOAC is distinct but not totally unrelated. They determine which persons and objects are protected from attack and by implication allow for the targeting of persons and objects which are not protected. They set out rules for prohibiting attacks on persons and objects subject to attack that would result in excessive incidental and collateral effects among civilians and other protected persons and objects in relation to the concrete and direct military advantage anticipated at the time the attack is undertaken. They also provide for feasible precautionary measures to prevent or limit such effects as far as possible under the circumstances ruling at the time. These considerations are primarily relevant at the tactical and operational level since the overall objective of “winning the war” is not part of an IHL proportionality assessment.²¹ However, none of this is negatively affected by taking *ad bellum* considerations into account when determining what kind of targets may be engaged so long as the application of IHL rules is not applied differently to the parties to the conflict based on considerations of which side is acting lawfully in terms of resorting to force. A lawful target under IHL remains a lawful target for both sides, irrespective whether *ad bellum* considerations are taken into account or not. But this doesn’t mean that these two bodies of law are mutually incompatible or that anything that is allowed under IHL should be automatically subject

20. Necessity (and proportionality), as part of self-defense, is obviously not applicable to action undertaken to restore peace and security in the context of the UN collective security system. But, as is clear from the language used in Security Council mandates authorizing the use of “all necessary means,” it is a principle of general application in the use of force. In any situation amounting to an armed conflict, necessity and proportionality, as part of the law governing the use of force, will act alongside IHL in regulating the degree of force allowable to achieve the objective of, for example, warding off an attack or suppressing a breach of the peace. For an analysis of the function of necessity and proportionality as principles regulating the overall scope of the force permissible in the context of self-defense, see TOM RUYTS, “ARMED ATTACK” AND ARTICLE 51 OF THE CHARTER 91 (2010); CHRISTIAN HENDERSON, THE USE OF FORCE AND INTERNATIONAL LAW 229–39 (2018). For a more comprehensive analysis by the present author, see T.D. Gill & K. Tibori Szabo, *Twelve Key Questions on Self-Defense against Non-State Actors*, 95 INTERNATIONAL LAW STUDIES 457, 490–92 (2019).

21. See *supra* note 17 and sources cited therein regarding proportionality and precautions in attack within the context of IHL. See also Int’l Law Ass’n Study Group on the Conduct of Hostilities in the 21st Century, *The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare*, 93 INTERNATIONAL LAW STUDIES 322 (2017).

to attack during an armed conflict, even if doing so would clearly be incompatible with the limitations posed by *ad bellum* considerations of necessity and proportionality seen against the factual context of the conflict.

So while destroying the General Staff or the National Security Council (or their equivalents) of the opposing State would clearly confer a direct and probably substantial military advantage in any armed conflict and would presumably not violate the principle of distinction, since the targeted individuals would in all likelihood be subject to attack, this would not be a lawful targeting in *ad bellum* terms in the context of a relatively limited conflict, such as have occurred along the Indo-Pakistan frontier or between Israel and Lebanon on a number of occasions. Neither would it likely be necessary or proportionate in *ad bellum* terms to degrade the communications infrastructure, attack the electrical power grid, or attack an industrial installation that supplied equipment to the armed forces, simply because they might qualify as lawful military objectives when a conflict is relatively limited in scope and/or duration. This also applies to the exercise of belligerent “rights” at sea and in the cyber domain. A naval blockade (as opposed to a possible interdiction of a significantly more limited scope for a specific purpose) has no place in a conflict of limited intensity or duration. Neither does attacking the critical digital infrastructure of the opposing State by cyber means, even if it (partly) fulfills a military function and would convey significant military advantage. The reason for this is that completely closing off access to a State’s coast or disrupting the core functions of a State are not likely to be necessary or proportionate in *ad bellum* terms within the context of an armed conflict of relatively limited scope and/or duration. In short, targeting in an armed conflict is, or should be subject to *both* IHL (is the target a lawful military objective, would targeting it confer a military advantage, and can it be targeted without causing excessive collateral effects) and *ad bellum* considerations of necessity and proportionality. Is it necessary to target this particular military objective to obtain the lawful goal of executing a UNSC mandate, or warding off an ongoing or imminent attack and would targeting it probably lead to an aggravation or prolongation of the conflict when this can be avoided? Consequently, in relation to targeting, *ad bellum* considerations can act as a restraint on the applicability of particular IHL rules allowing for targeting or the exercise of particular belligerent prerogatives when this would be clearly incompatible with the scope of the conflict. Moreover, *ad bellum* considerations should be integrated into the targeting rules of engagement and directives of all parties to an armed conflict alongside IHL rules relating to conduct of hostilities. Also, for that matter, human rights law where targeting is not

done in the context of conduct of hostilities between opposing parties, but rather in the context of maintenance of order and exercise of authority over persons or territory inside or outside the context of an ongoing armed conflict, often referred to as the “law enforcement paradigm.”²²

On the other hand, in an armed conflict between two or more States, there is no reason to limit the protective scope of IHL as soon as a situation arises which triggers application of the relevant provisions. So, persons captured would be treated as POWs under Geneva Convention III or civilian detainees under Geneva Convention IV, territory occupied would trigger the application of the law of belligerent occupation once the conditions were met, and so forth. All of the obligations and prohibitions on any party to an armed conflict under IHL would apply as soon as any situation arose where they needed to be applied. So *ad bellum* law would not be displacing IHL, undermining the notion of equal application of IHL, or otherwise affecting the relationship between the two bodies of law, other than to admit that *ad bellum* law does not dissipate or fly out the window as soon as IHL kicks in—not even if one were to reject the “first shot” approach and require a degree of intensity and/or duration for an armed conflict to exist.

These *ad bellum* considerations can also affect the targeting of persons and objects subject to attack alongside IHL rules relating to targeting. One thing that would have to be done in terms of adjusting the law is to ensure that the *ad bellum* considerations of necessity and proportionality applied equally to all parties in the context of determining which type of targets were permissible to be engaged, irrespective of whether the resort to force was lawful under *ad bellum* law. In short, the factual scope of the conflict should be the primary determining factor in applying *ad bellum* considerations of necessity and proportionality to targeting alongside IHL and not the “justice” of the cause of the parties. This means that if the conflict was of medium/high intensity from the onset or gradually, or more rapidly, escalated into what constituted a “war” in a factual if not necessarily in a formal legal sense, *ad bellum* considerations relating to targeting would become increas-

22. For in depth treatment of the interplay between IHL and human rights law and their respective roles in the conduct of hostilities and the exercise of authority over persons or territory, often referred to as the “law enforcement paradigm,” see Nils Melzer & Gloria Gaggioli Gasteyger, *Conceptual Distinction and Overlaps between Law Enforcement and the Conduct of Hostilities*, in THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 63, *supra* note 13.

ingly less relevant as the conflict moved up the scale of intensity and duration.²³ Once a conflict reached this stage, the full exercise of belligerent “rights” (actually these are more accurately seen as prerogatives) by all parties within the limitations posed by IHL would become much more plausible and acceptable from both a legal and a policy standpoint. The parties would still have to keep in mind that even such conflicts always have limits and are waged for a particular purpose. Targeting should reflect those considerations, even in the most intensive of armed conflicts that amounted to full-scale war.

In summary, the approach set out in rough outline above involves two major points. Firstly, raising the threshold for the existence of an international armed conflict to avoid potential escalation of a situation involving an incidental armed clash between two States. Secondly, ensuring that the humanitarian purpose of IHL is not undermined or a potential legal gap is opened by applying a basic set of protections to any situation involving a use of force under the threshold of armed conflict. In such cases, any force used would have to conform to the strict necessity of “unit level” self-defense. Also, these cases would employ a sliding scale of applicability of IHL rules relating to targeting and the exercise of belligerent “rights” or prerogatives once the threshold of intensity for the existence of an international armed conflict was met (using the same or similar criteria for determining the threshold for international armed conflict (IAC) as are now used in determining the existence of a non-international armed conflict (NIAC)). The range of permissible targets and exercise of other belligerent prerogatives and “rights” would be linked to the scope and intensity of the conflict. In that context, the considerations of *ad bellum* necessity and proportionality would act alongside other applicable law in determining which targets were open to being engaged. These could be integrated into rules of engagement and targeting directives and instructions to ensure that in addition to meeting the requirements for lawful attack under IHL, the engagement of the target or application of a particular belligerent prerogative was necessary and proportionate in *ad bellum* terms and would not needlessly lead to aggravation of the conflict. Finally, if a conflict were to take place at the upper end of the intensity scale, this would mean that the full range of permissible targets and exercise of belligerent prerogatives within the limits posed by IHL, such as

23. On the application of the principles of necessity and proportionality *ad bellum* once an armed conflict reaches the stage of intensity of a “war,” see Dinstein, *supra* note 15, at 281–88.

imposition of a blockade or leadership targeting, would be(come) permissible options as long as they did not result in needlessly prolonging or expanding the conflict and were not clearly disproportionate in relation to the scale of the application of force by the opposing party.

IV. A FEW WORDS ON THE APPLICATION OF IHL IN THE CONTEXT OF NON-INTERNATIONAL ARMED CONFLICT, AND IN RELATION TO THE ICRC'S "SUPPORT-BASED APPROACH"

I would now like to turn to the application of the humanitarian law of armed conflict in the context of NIAC and subsequently say a few words on the ICRC's "support-based approach." Firstly, I will say a few words regarding the application of IHL to different levels of intensity of NIAC and then turn to why I don't think the support-based approach is either a necessary or useful interpretation of the law or good policy. For the record, I rely on a definition of a NIAC in this context as any armed conflict of a reasonably sustained and intensive nature whereby at least one of the parties is an armed group and in which any party to it has a degree of organization which enables it to plan and conduct *military* operations and has some kind of internal hierarchy and disciplinary structure which makes it possible to incorporate and enforce the rules of IHL. It can be an internal NIAC between an organized armed group and the State's government, a conflict in which armed groups oppose each other, an internal conflict involving one or more armed groups that has "spilled over" into a neighboring State or spans several States, or where an organized armed group conducts operations from the territory of one State against another State. All of these are NIACs from the perspective of the nature of the parties and applicable IHL regime.

A. Lowering the Threshold of Non-International Armed Conflict

In this section I examine two questions. First, how realistic and wise is it to lower the threshold of non-international armed conflict, while at the same time progressively expanding the scope of the legal regime applicable in the context of NIAC? Second, is there a case for linking the applicability of certain rules of the humanitarian law of armed conflict to the scale of the conflict?

To start, I would like to pose a question regarding the wisdom of the steady lowering of the threshold of non-international armed conflict over the course of the past twenty-five years or so viewed against the background

of the exponential increase in the number and density of IHL rules which are deemed to apply in NIAC since *Tadić*. In 1995 in *Tadić*, the International Criminal Tribunal for the former Yugoslavia (ICTY) first decided that whatever was unacceptable in international armed conflict must be equally unacceptable in the context of NIAC. The rules applicable to NIAC were further expanded when the ICRC published its customary IHL study some ten years later.²⁴ I pose the question simply to invite some critical reflection on the realism of, on the one hand lowering the threshold for the existence of a NIAC well below anything contemplated when the Geneva Conventions and their Additional Protocols were adopted, while at the same time applying a vastly expanded corpus of IHL rules to any NIAC. Furthermore, these rules are being applied to NIAC regardless of factors such as the organizational capacity of the parties, intensity of the conflict, and degree of control over territory and relative strength of the contending parties. These are some of the more obvious factors which will influence the ability of an armed group (and some States for that matter) to be able to comply with such an expanded set of rules that extend way beyond what States were prepared to accept in the context of NIAC when Common Article 3 and Additional Protocol II were first adopted. The question then is how realistic is it to expect that parties in *any* NIAC, regardless of the intensity and duration of the conflict, the degree of organization of the parties, and other relevant factors, would be able to incorporate a comprehensive and sophisticated set of rules such as the 141 rules of customary IHL that the ICRC deems applicable to NIAC into the conduct of their operations and enforce them adequately? Indeed, the rules applicable to NIAC have been expanded to the extent that many commentators now wonder why any distinction between IAC and

24. The threshold for application of IHL to internal conflicts contemplated by the drafters of Common Article 3 was a good deal higher than it is now. See SANDESH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* 156–62 (2012). The threshold for Additional Protocol II is closer to what many delegations sought during the diplomatic conference of 1949 and is set out in Article 1. The Appeals Chamber of the ICTY opined in its 1995 decision on the interlocutory appeal in the *Tadić* case that “what is inhumane, and consequently proscribed in international wars cannot but be inhumane and inadmissible in civil strife.” *Prosecutor v. Tadić*, Case No. IT-94-1-AR-72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 119 (Int’l Crim. Trib. for the former Yugoslavia Oct. 2, 1995). While this statement referred to weapons which are banned as inherently indiscriminate or inhumane, such as chemical weapons, and in that context is reasonably non-controversial, it has been used to justify the application of the law relating to the conduct of hostilities in international armed conflict to non-international conflicts without any distinction being made, as is largely the case in the context of the ICRC Customary IHL Study released in 2005 and in subsequent decisions of the ICTY.

NIAC is even necessary.²⁵ How realistic is it to, on the one hand lower the threshold for NIAC to somewhere in the grey area that separates “sporadic armed violence” from NIAC, while at the same time expanding the scope of the rules applicable to the conflict to approximate those applicable in traditional interstate conflicts?

Nobody would deny that it is desirable that the IHL rules afford the maximum amount of protection possible to civilians and civilian objects; provide safeguards for humane treatment of persons under the control of a party to the conflict; and provide the basic humanitarian protection and fundamental guarantees contained in Common Article 3 for both civilians and persons *hors de combat*. But the humanitarian law of armed conflict must be realistically capable of being applied and enforced if it is to have more than hortatory significance. So, the rules should also be capable of being internalized and “digested,” that is to say implemented and enforced by any party to a NIAC, if they are to apply across the board in any NIAC. But while some rules are capable of being readily implemented irrespective of the degree of sophistication and organization of the parties,²⁶ other rules are a good deal more dependent upon the nature and intensity of the conflict, the organizational capacity of the parties, and other factors in order to be realistically capable of being complied with.²⁷ If one takes a close look at, for example, what is set out in the ICRC customary humanitarian law study in relation to the taking of precautions and application of the proportionality rule in conducting attacks, the capacity of the parties to meet such obligations will be likely dependent upon a whole range of factors—even assuming they are willing to do so and don’t reject IHL as an alien or imposed set of rules from “outside.”

25. The ICTY Appeals Chamber opined that maintaining the distinction between interstate conflict and NIAC “would ignore the very purpose of the Geneva Conventions.” *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgment, ¶ 172 (Int’l Crim. Trib. for the former Yugoslavia Feb. 20, 2001). This opinion was endorsed by various commentators as a major advance. Some observers were not so convinced. For a more critical perspective, see John F. Murphy, *Will-o’-the-Wisp? The Search for Law in Non-International Armed Conflicts*, 88 INTERNATIONAL LAW STUDIES 15 (2012).

26. Examples of these rules include the fundamental guarantees in NIAC contained in Common Article 3 and the basic principle that attacks must be directed against persons and objects subject to attack.

27. Examples of these factors include whether they control sufficient territory to avoid co-location of military objectives with civilians and whether they have the organizational capacity and means to effectuate an orderly and humane evacuation of civilians from a zone of operations.

Target verification by members of an armed group will, for example, be of a radically different order than what a party with access to remote sensors and aerial reconnaissance can be expected to do, at least if one is talking about the use of indirect fires such as rockets, artillery, or other systems capable of firing beyond visual range. One can readily agree that when launching an attack there must be reasonable certainty that the object or person to be engaged is a lawful military objective. This does not mean, however, that it can be realistically expected that many armed groups (but not all) will be able to do much in the way of target verification beyond ascertaining the nature of the target with what is visible to the naked eye or with the assistance of simple visual enhancement such as a telescopic sight on a rifle or a pair of binoculars. Similarly, the ability of an armed group to carry out a targeting process in which the means of warfare to be used in a particular attack were selected with a view to avoiding or minimizing harm to civilians presupposes a high degree of training and organization and a choice of weapons and munitions often beyond what many armed groups possess. Likewise, the ability of an armed group to carry out orderly evacuations of civilians or provide for hospital and safety zones will depend greatly on their degree of organization and level of control over territory, to name just several other examples of rules that are assumed to apply in any conflict. To simply assume that such obligations apply in any NIAC, irrespective of such considerations, is to expect the impossible. At the end of the day what use is it to proclaim the existence of rules designed for application by State armed forces with access to (relatively) advanced technology and legal advice and extend their applicability in principle to any NIAC, when probably only a limited number of armed groups are capable—even if willing—of meaningful compliance? I do not have a ready-made answer to the question of which rules should apply across the board, or only in certain circumstances if one is willing to admit there should be some differentiation in the degree of regulation based on objective factors. But I do think it would make sense to think about when certain rules should apply in the context of a NIAC with a view to the capability of the parties to meet the obligations laid down in them and not simply wish a rule into existence because it “looks nice.” So, I offer this question as an invitation to start thinking about this challenge and to apply all the characteristics of IHL (balancing humanitarian, military, and practical considerations) to the question of when a specific rule would apply in NIAC. The analysis should include the possibility of applying the rule with any realistic chance of compliance and taking into account objective factors such as the nature, duration, and intensity of the conflict, the degree of organization of

the parties, and the degree of control over territory. It should also include purely humanitarian considerations.

As a start to this discussion, I offer this proposal to help get it off the ground. The threshold for NIAC is somewhat less problematic than it is for conflicts between States according to the “first shot” approach, since there is at least a threshold of intensity and (perhaps to a lesser extent) duration required, alongside a reasonable degree of organization in order to qualify as a NIAC. While this probably needs some further clarification so as to clearly and definitely exclude widespread spontaneous and semi-organized violence, as well as organized violent criminal activity, the criteria of organization and intensity are themselves realistic and capable of being applied reasonably objectively.²⁸ But in a similar fashion as proposed above in relation to the application of LOAC rules relating to the conduct of hostilities in international armed conflicts according to the scale and duration of the conflict, it makes sense to also apply the rules relating to the conduct of hostilities in a NIAC along a sliding scale in which the degree of intensity of the conflict and organizational capacity of the contenders will determine which rules of IHL/LOAC would apply or, more to the point, would be realistically capable of being applied.

28. The designation of “civil disturbance or unrest” is, it is submitted, vague and open-ended and probably leaves too much doubt about where the threshold of armed conflict exactly lies. It leaves the door potentially open to apply the law of armed conflict to situations that, while sometimes violent, are nowhere near any reasonable threshold for moving up the scale of intensity from law enforcement methods of controlling violence to conducting hostilities. To illustrate how the vagueness of this designation is potentially open to abuse think of how various governments have reacted to widespread civil unrest in the recent past. For example, the use of the armed forces to suppress protests in Myanmar, Egypt, Syria, Belarus, and elsewhere, or the increasing militarization of the suppression of criminal activity in several Latin American countries—to name several examples—all of which have resulted in widespread human rights abuses and excessive force being used, even rising to the level of crimes against humanity in some cases. During the protests in the United States following the death of George Floyd in the summer of 2020, some of which saw serious breakdowns in public order and widespread property damage and looting, but nothing remotely resembling an armed insurrection, the then-President of the United States, Donald Trump, threatened to implement the Insurrection Act of 1807 to quell the disturbances, although this threat was not supported by the governor of any state or by key members of his own cabinet or the leadership of the armed forces. See Dareh Gregorian et al., *Trump Says He Will Deploy Military If State Officials Can't Control Violence*, NBC NEWS, (June 1, 2020, 9:25 PM), <https://www.nbcnews.com/politics/politics-news/trump-considering-move-invoke-insurrection-act-n1221326>.

At the lower end of the intensity scale at or just above the threshold for existence of a NIAC, the basic principle of distinction and related rules prohibiting the targeting of civilians and civilian objects, alongside some elementary considerations of proportionality and precautions, are capable of being applied by both the State and non-State entity. At least, that is, for any non-State entity that met the organizational criteria for application of IHL in any situation whereby the use of force was intensive enough to warrant the application of “the means and methods of warfare” (hostilities paradigm) against the adversary. These would figure alongside the basic guarantees of humane treatment and elementary considerations of humanity set out in Common Article 3, such as: prohibiting violence directed against persons *hors de combat*; denial of quarter; prohibiting the taking of hostages; prohibiting enforced servitude, including recruitment of child soldiers and the use of involuntary human shields; providing for the basic humane treatment of persons in captivity, including the provision of medical assistance where necessary and within the capabilities of the actors. To this should be added a basic prohibition of wanton destruction of non-essential property without any military significance or acts of violence or pillage directed against cultural property, places of worship, or facilities or installations devoted to medical purposes, or which are essential for the basic well-being of the civilian population. Finally, prohibition of the use of poisonous weapons or booby traps, unmarked anti-personnel minefields, expanding bullets, and chemical and biological weapons also belong in the list of essential rules applicable in any armed conflict. All of these safeguards are realistically capable of being met by any group with sufficient organization to qualify as a party to an armed conflict. All would almost certainly merit the qualification of customary law applicable to any party to an armed conflict. As the conflict moved up the scale of intensity and the organizational capacity of the actors correspondingly increased to approach or approximate the threshold for the application of Additional Protocol II, so too would the scope of the applicability of the rules related to conduct of hostilities, detention, treatment of civilians in territory controlled by one of the parties, and certain other rules (for example, use of uniforms and indicators). Arguably, the scope of applicability of human rights law would also increase in so far as the non-State actor had supplanted the authority of the State with its own authority and administration of territory and population.²⁹

29. On the application of human rights law to organized armed groups in non-international armed conflict, see KATHARINE FORTIN, *THE ACCOUNTABILITY OF ARMED GROUPS UNDER HUMAN RIGHTS LAW* (2017).

None of this would automatically change the status of the parties or create a completely equal and level playing field between non-State armed groups and the State(s) they were combatting because of the lack of combatant status and privilege in NIAC and the unlawfulness of rebellion or insurrection under domestic law, but it makes good sense to provide that to the extent the non-State actor conformed or at least made a good faith effort to conform as far as possible with these safeguards. That non-State actor would receive a greater degree of consideration and partial or total waiver of prosecution for acts that conformed to the law of armed conflict and human rights law, if not necessarily for the act of taking up arms against the government. Ideally, this should be a rule of law and not simply a hortatory aspiration as it now essentially is. While one might wish for more from a humanitarian perspective, this is probably as far as States might be prepared to go and as far as many, indeed probably most, armed groups would be realistically capable of going. Obviously, the lack of belligerent equality in the full sense in NIAC should not in any way stand in the way of equal applicability of IHL obligations to all parties in any conflict.³⁰ In any case, this proposal is meant as a catalyst to stimulate thinking on the topic and not as an end product. In summary, the basic idea of not assuming “one size fits all” when applying IHL/LOAC in any armed conflict is the starting point for rethinking how it should and could apply. It can serve as a way to prevent the law from being misused as a means to promote interests, while avoiding unrealistic expectations relating to the ability of non-State actors to meet a comprehensive and sophisticated set of rules when they most likely lack the capacity to do so. At the same time, it can safeguard the impartial application of the basic protections set out in the law.

B. The ICRC “Support-Based Approach” and Some Reasons for Rejecting It as Either Existing Law or Good Policy

The application of IHL to peace operations carried out by multinational forces in support of a host nation, usually under a mandate by the UN Security Council, has always been somewhat problematic. The UN, regional organizations, and, for that matter, most troop contributing countries (TCCs) participating in such operations have consistently been and often still are

30. For a discussion of whether and how the principle of belligerent equality applies to NIAC, see a recent essay by the present author: *Reconciling the Irreconcilable: Some Thoughts on Belligerent Equality in Non-International Armed Conflict*, 51 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 343 (2020).

reluctant to admit that they can become parties to an armed conflict in the context of carrying out their mandate. After the failure of the UN to prevent atrocities in the Former Yugoslavia and Rwanda in the 1990s, the pressure to provide protection to civilians from violence by armed groups and bands has triggered an expansion of the authorization by the Security Council to use force by multinational peacekeeping forces. This has in turn led to some multinational forces becoming party to an armed conflict in a number of situations, notwithstanding the basic principles underlying UN peacekeeping of consent of the parties, impartiality, and force limited to self-defense.³¹ In some cases this was due to the fact that the multinational force was mandated to carry out offensive operations in direct support of a government. In others the mandate authorized force for specific purposes such as protection of civilians and provision of general support to the host nation to provide for a secure and stable environment. This raises the question of when such support and use of force results in the multinational force becoming a party to an armed conflict. In the Secretary General's Bulletin of 1999, the UN finally recognized that the "principles of humanitarian law" will apply to its forces when they become engaged in the use of force in self-defense or execution of the mandate for the duration of their engagement. However, this does not answer the question of when a multinational peacekeeping force loses its protection from attack and becomes subject to IHL as a matter of law, rather than as a matter of internal guidelines or as a matter of policy.³² The short answer provided by most experts is that the entity conducting the peacekeeping mission can become party to a preexisting NIAC by sustained forms of support to a party to the conflict amounting to direct participation in hostilities, or as a result of crossing the threshold for applicability of IHL as a result of the intensity and organizational thresholds for the existence of a NIAC being met, on the basis of the exact same criteria as apply for any other actor in any non-international armed conflict. But that answer, simple and straightforward as it appears, has failed to end the discussion.³³

31. For comprehensive treatment of the law and UN doctrine and that of selected other international organizations on UN (mandated) peace operations, see LEUVEN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO PEACE OPERATIONS (T.D. Gill et al. eds., 2017).

32. The Secretary General's Bulletin on the Observance of Humanitarian Law, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999), is an internal UN guideline which sets out UN policy on applying IHL in the context of peace operations. It does not preclude or in any way affect the applicability of IHL to the UN as a matter of law.

33. See, e.g., LEUVEN MANUAL, *supra* note 31, r. 6.1 (with commentary).

On the one hand, the UN has remained reluctant to openly admit it has become a party to an armed conflict, except on rare occasions, even when it is clear to an impartial observer that it has in fact become a party. On the other hand, the ICRC has taken the position that a multinational force can not only become a party to an ongoing NIAC through meeting the intensity of force threshold, but also through other forms of support to the host nation. In that context, the ICRC has adopted what it refers to as the “support-based approach” to lower the threshold of applicability of IHL in situations where a multinational force providing support to a host State can become a party to an ongoing non-international armed conflict by engaging in actions not necessarily involving the use of force, but instead through providing logistical or various other forms of “non-kinetic” support to a host State that is party to such a conflict.³⁴ The basic rationale behind the SBA is to make what the ICRC refers to as a “level playing field” by ensuring that the multinational force cannot hide behind its protected status. The multinational force becomes subject to IHL as soon as it engages in more than incidental use of force or takes actions related to the conflict in support of a government engaged in an ongoing NIAC. The ICRC sees this as a consequence of the principle of belligerent equality to ensure that the parties to an armed conflict are subject to the same obligations and implicitly at least can engage in attacks on the adversary on the basis of the IHL rules governing the conduct of hostilities. The ICRC even takes the position that the forms of support which can trigger the applicability of IHL to the multinational force providing support to a government can widen the geographical scope of the conflict to include the territory of the TCCs, unless the multinational force is under the control of the UN and as a sub-organ of the Security Council would have an autonomous legal personality making it, and not the UN as a whole or the TCCs, party to the conflict.³⁵

While it may seem logical and fair to apply IHL equally to any entity which provides support of a nature to affect an ongoing conflict, the SBA

34. The “support-based approach” is ICRC policy first set out in Tristan Ferraro, *The Applicability and Application of International Humanitarian Law to Multinational Forces*, 95 INTERNATIONAL REVIEW OF THE RED CROSS 561 (2013), and later adopted by the ICRC and elaborated by the same author in *The ICRC’s Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable in This Type of Conflict*, 97 INTERNATIONAL REVIEW OF THE RED CROSS 1227 (2015).

35. Ferraro, *The Applicability and Application of International Humanitarian Law to Multinational Forces*, *supra* note 34, at 568–70 (belligerent equality), 608–11 (geographical scope).

raises a number of issues and problems that, on balance, outweigh any purported “benefits” it is intended to promote. Firstly, the SBA is a more or less tailor-made concept that only applies to one specific type of actor in one specific type of scenario within a NIAC. The original concept of the SBA put forward by Tristan Ferraro was that it was designed for multinational (peacekeeping) forces providing support to a host State engaged in an ongoing NIAC with one or more armed groups. The ICRC position is that it applies to any situation where a State or organization is providing support above the level of training or material support (provision of equipment and the like) but including actions in support of a party to an ongoing NIAC, ranging from direct engagement in combat to logistical and other forms of support that have an impact on the conflict and are in support of one of the parties. Nonetheless, it is clear that the ICRC position only covers the situation whereby one or more States, usually acting through an international organization, provide assistance to a host State government engaged in an ongoing NIAC. In short, to the type of situations the original concept was designed to address, including refueling aircraft, provision of intelligence for purposes of target identification, and logistical support of forces engaged in an armed conflict.³⁶ Needless to say, these types of support are not the types of support normally provided or capable of being provided by non-State actors. This raises the question: why design an approach that only really fits one type of actor and one type of situation? Which equality does this serve?

Secondly, it seems redundant to include direct combat support or other acts constituting “direct participation in hostilities” (DPH) as one of the types of support which fit in the SBA and would cause the entity providing such support to become a party to an ongoing conflict. It is settled law that if a State or other entity provides sustained support to a party in an ongoing conflict amounting to DPH on more than an incidental basis this will cause it to become a party to the conflict, assuming it has the requisite degree of organization. If the support is sporadic and does not form a pattern of continuous direct participation, it would be more logical to view it as an incidence of DPH causing a temporary loss of protection from attack for the duration of the direct participation. While some aspects of DPH are still not completely settled, both the ICRC and most individuals who have voiced

36. In Ferraro, *The ICRC’s Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable in This Type of Conflict*, *supra* note 34, the term “foreign intervention by third parties” is repeatedly used, indicating a wider application than UN (mandated) peace operations and covering States, coalitions of States, and international (regional) organizations of various types. *See, e.g., id.* at 1230.

critique of certain aspects its *Interpretive Guidance on Direct Participation in Hostilities* agree that an incidental participation in hostilities by civilians does not automatically result in permanent loss of protection (multinational peace-keeping forces are “civilians” for the purposes of application of IHL until such time as they become a party to a conflict). They would also agree that if DPH is sustained and occurs on a regular basis in a NIAC, then the persons, group, or entity concerned will lose protection and become a party to the conflict, regardless of the form that the DPH takes.³⁷ This would include many of the activities named in the SBA such as provision of logistical support in an area where combat is occurring, provision of intelligence directly related to targeting, or refueling of aircraft directly engaged in combat, alongside the obvious candidate of direct fire support. Hence, the SBA is redundant where it restates accepted law and illogical where it contradicts the ICRC’s own position, alongside that of most other observers, to the extent it would permanently remove protection as a consequence of incidental acts amounting to DPH. To the extent it would apply to forms of support *not* amounting to DPH, it would be lowering the bar of becoming party to a conflict beyond anything presently accepted as law.

Thirdly, the SBA does not provide any additional or enhanced protection to civilians. How would making a multinational force engaging in various forms of support to a host State lose its protection from attack in any way provide additional protection to civilians beyond the degree that civilians already have under IHL? That makes no sense. Nor does making various forms of non-kinetic support to a party to a conflict a trigger for becoming party to an ongoing NIAC in any way enhance accountability, as is sometimes argued. On the other hand, removing the protected status of civilians

37. The ICRC guidance on the notion of direct participation in hostilities is clear on the issue of temporary loss of protection of civilians, *see* INTERNATIONAL COMMITTEE OF THE RED CROSS, *INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW* 70 (2009). On the other hand, during a NIAC members of an armed group with an ongoing combat function are subject to continuous loss of protection for as long as they are members of the armed group. By analogy this would include the military component of a peace support mission. So, by analogy, one or more members of a UN (mandated) multinational operation who directly participated in an act constituting DPH would be subject to temporary loss of protection from attack for the duration of their participation. If the force as a whole engaged in sustained acts amounting to DPH, it would become a party to the conflict and the military members of the force would be subject to attack for the duration of the conflict or until such time as the force disengaged from direct support. Any other reading would result in an unequal application of the DPH criteria to members of multinational operations.

means that an entire group of persons not otherwise subject to attack become so, which would be likely to expand the scope of the conflict rather than limit it. If that expansion were to apply to the territory of any State providing troops to a multinational peace support operation, it would extend the geographical application of IHL well beyond the normal confines of where IHL is applicable in a NIAC. Geography of armed conflict, particularly in NIAC, is a complex issue involving more than simply where IHL might or might not apply, but providing for potentially global application of IHL on the basis of various types of non-kinetic support to a host State government in the context of a multinational peace support operation does not in any way enhance protection of civilians, although it would potentially have the effect of exporting hostilities to a whole range of countries far removed from a conflict. Finally, even assuming that the principle of belligerent equality applies in the context of NIAC, which is not as self-evident as the authors of the SBA maintain, it does not have anything to do with the applicability of IHL *ratione personae* or *ratione loci*. Rather, it deals with the equal application of the obligations arising under IHL to all parties to a conflict, irrespective of the legality of recourse to force by one side or the other in the *ad bellum* context. Consequently, there is no role for it as a justification for the SBA. Moreover, the SBA has no basis in law, either in any international treaty or as a matter of customary law. In fact, most States and international organizations reject it. In sum, the SBA is neither binding law, nor good policy, for the reasons set out above. Instead, it makes much more sense to reemphasize that the criteria for becoming party to a NIAC—either as a result of the organization and intensity requirements being met or as a consequence of an actor engaging in actions constituting direct participation in hostilities in support of one party to an ongoing NIAC to the detriment of another on a reasonably sustained basis—are exactly the same for all relevant actors and for any type of non-international armed conflict.³⁸

38. I have set out these arguments in a blog post in response to comments in general support of the ICRC SBA by Raphaël van Steenberghe & Pauline Lesaffre, *The ICRC's "Support-Based Approach": A Suitable But Incomplete Theory*, QUESTIONS OF INTERNATIONAL LAW (May 31, 2019), <http://www.qil-qdi.org/the-icrcs-support-based-approach-a-suitable-but-incomplete-theory/>. For my reply, see *Some Thoughts on the ICRC Support Based Approach*, QUESTIONS OF INTERNATIONAL LAW (May 31, 2019), <http://www.qil-qdi.org/some-thoughts-on-the-icrc-support-based-approach/>.

V. SOME CONCLUDING REMARKS

I have attempted in this short contribution to stimulate critical reflection on the threshold for the existence of an international armed conflict, the application of rules of IHL in any type of conflict to accord with the intensity, duration, and scope of the conflict on a sort of sliding scale in which, without sacrificing the protective function of IHL, its application to the conduct of hostilities is linked to the scale, intensity, and organization of the contending parties and overall scope of the conflict. I have also argued that application of IHL rules relating to the conduct of hostilities should take account of other relevant bodies of law, including both *ad bellum* considerations of necessity and proportionality in international armed conflicts, and, in relation to armed incidents below the proposed higher threshold for the existence of an international armed conflict, of human rights law. I have also given some reasons why I think it is not realistic to, on the one hand expand the number of customary IHL rules applicable in any NIAC to approximate the density of regulation of hostilities applicable in international armed conflicts, while at the same time lowering the threshold for NIAC to the point where it is barely distinguishable from large scale violent civil unrest or organized criminal activity. I have provided some suggestions on matching the level of regulation of hostilities to the intensity and capabilities of all respective parties. Finally, I have offered some reasons why I feel that the ICRC's "support-based approach" should be rejected and argued instead that the question of when IHL applies to multinational operations should be resolved on the basis of the exact same criteria as apply to any actor in any type of conflict. While some of the proposals put forward are to some extent innovative, they are not, by any means, completely new or wholly original, nor are they intended to offer a ready-made solution to all of the problems arising in the grey areas of the law of armed conflict. But if this essay succeeds in stimulating discussion and perhaps some reassessment of some points too often accepted as "home truths" without further consideration of whether they are as self-evident as is often taken for granted, I will consider it as having fulfilled its purpose.