

WHOSE ARMED CONFLICT? WHICH LAW OF ARMED CONFLICT?

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TABLE OF CONTENTS

I.	INTRODUCTION	476
II.	TRIGGERS AND THRESHOLDS.....	476
III.	FORCE, CONSENT, AND CLASSIFICATION	482
IV.	CRITICISMS AND RESPONSES	486

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I. INTRODUCTION

When does an armed conflict begin? When does the law of armed conflict apply? It depends. There are two kinds of armed conflict and two laws of armed conflict. There are international armed conflicts (IACs) between states and non-international armed conflicts (NIACs) between states and organized armed groups or between such groups. This distinction matters because the law of IAC differs from the law of NIAC in certain important respects.

Accordingly, it is quite important to know when a state is in an IAC with another state, a NIAC with an armed group, or both at the same time. For example, is the United States in an IAC with Syria, a NIAC with Daesh, or both? These are the types of questions this short article will address.

My point of departure is the much-discussed 2016 Commentary on the First Geneva Convention recently released by the International Committee of the Red Cross (ICRC). This is as it should be, since the modern distinction between IAC and NIAC largely originates with Common Articles 2 and 3 of the Geneva Conventions of 1949.

The University of Georgia School of Law hosted a wonderful event examining a number of issues raised by the Commentary, including the duty to “ensure respect” for the Convention by other Parties, as well as incidental harm to sick and wounded combatants. This Article grows out of that rich discussion.

II. TRIGGERS AND THRESHOLDS

When and where does the law of NIAC apply? Since most contemporary armed conflicts are fought between states and organized armed groups, or between such groups, these are important questions for both international lawyers and policy makers. The answers may affect the jurisdiction of U.S. military commissions, the detention of Taliban commanders and ISIL members, legal constraints on Saudi-led military operations in Yemen, and accountability for war crimes in Syria. This section will focus on the trigger and threshold of NIAC.

The ICRC’s Commentary clearly states that an IAC “can arise when one State unilaterally uses armed force against another State even if the latter does not or cannot respond by military means.”¹ Accordingly, the law of

¹ ICRC, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD ¶ 237 (2d ed. 2016), <https://ihl-databases.icrc.org/ihl/full/GCI-commentary>.

armed conflict constrains the first use of armed force by one state against another. Let's call this a *unilateral trigger*.

In addition, "there is no requirement that the use of armed force between the Parties reach a certain level of intensity before it can be said that an [international] armed conflict exists."² Accordingly, minor skirmishes between states' armed forces, or the capture of a single soldier, "would spark an international armed conflict and lead to the applicability of humanitarian law."³ Let's call this a *nominal threshold*.

Unfortunately, the Commentary is not so clear with respect to non-international armed conflict. The Commentary endorses the view that NIACs "are protracted armed confrontations occurring between governmental armed forces and . . . one or more armed groups, or between such groups."⁴ This passage, as well as some cited authority, seem to suggest a *bilateral trigger*, requiring "armed clashes," "combat zones," or, simply, "fighting."⁵

The Commentary also states that, for the law of NIAC to apply, "[t]he armed confrontation must reach a minimum level of intensity."⁶ Read alongside the Commentary's discussion of IAC, it seems that this "minimum level of intensity" would not be met by minor skirmishes or by the capture of a single soldier or fighter.

The Commentary seems to accept a unilateral trigger and nominal threshold for IAC (quadrant 1) but a bilateral trigger and significant threshold for NIAC (quadrant 4).

	Nominal threshold	Significant threshold
Unilateral trigger	2016 Commentaries: IAC 1	2
Bilateral trigger	3	2016 Commentaries: NIAC 4

² *Id.* ¶ 236.

³ *Id.* ¶ 237.

⁴ ICRC, HOW IS THE TERM "ARMED CONFLICT" DEFINED IN INTERNATIONAL HUMANITARIAN LAW? (Mar. 2008), <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> (citing Prosecutor v. Tadic, Case No. IT-94-1-A, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995)).

⁵ See, e.g., ICRC, *supra* note 1.

⁶ ICRC, *supra* note 4.

In my view, we should accept a unilateral trigger and nominal threshold for both IAC and NIAC.

First, if an armed group is sufficiently organized, then a first strike by or against that group should trigger a NIAC. Consider the following case:

Daesh: Daesh fighters pour over the Syria-Iraq border, killing Iraqi civilians, capturing Iraqi territory and taking over Iraqi government institutions. Iraqi forces flee, offering no resistance.

If we accept a bilateral trigger for NIAC, then the law of armed conflict does not apply until Iraqi forces “respond by military means,”⁷ resisting Daesh’s advance. Until that time, Daesh fighters do not violate the law of armed conflict or commit war crimes. This result seems deeply unattractive. Although the Daesh fighters violate Iraqi criminal law, it seems hard to accept that they do not violate the law of armed conflict. Now consider the following scenario:

Consent: State A attacks organized armed Group G on the territory of State T, with the consent of State T. There is no pre-existing armed conflict between State A and Group G. State A does not take feasible precautions in attack and recklessly kills many civilians.

If we accept a bilateral trigger for NIAC, then the law of NIAC does not apply until Group G responds with military force, resulting in “armed clashes.”⁸ Since State T consents, the law of IAC does not apply either. It follows that State A does not violate the law of armed conflict or commit war crimes. This result seems intolerable.

Importantly, human rights law may not be sufficient to protect civilians or armed forces in cross-border cases like those described above. On most views, human rights law does not apply to the conduct of non-state armed groups that do not yet exercise territorial control and that fulfill government-like functions. Moreover, according to some militarily active states, human rights law does not constrain extraterritorial lethal targeting by state armed forces. Yet, in my view, such conduct should be constrained by international law.

We should also accept only a nominal intensity threshold for NIAC. Consider the following case:

⁷ See, e.g., ICRC, *supra* note 1, ¶ 22.

⁸ *Id.* ¶ 280.

Capture: Members of organized armed *Group G* mistakenly cross the unmarked border between *State T*, in which they normally operate, and *State A*. They encounter a unit of *State A*'s soldiers, and a minor skirmish ensues. No one is killed, but one group member is captured by the soldiers while one soldier is captured by the group and taken back across the border into *State T*.

In this case, it seems that both the group member and the soldier should be entitled to humane treatment under Common Article 3 of the Geneva Conventions.⁹ Moreover, if there are civilians present when the skirmish occurs, then it seems that the conduct of the skirmish should be constrained by customary rules including distinction, precautions, and proportionality. If those rules are flagrantly violated, then those violations should amount to war crimes.

In my view, if an organized armed group has the capacity to sustain military operations then any military operation by or against that group should be constrained by the law of armed conflict. The organization and capacity of the group is sufficient to distinguish military operations by or against the group from “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.”¹⁰

Some might worry that applying the law of armed conflict to first uses of low intensity force will displace or reduce the protections of human rights law. Fortunately, that is not the case. Acts, including uses of lethal force, that are not prohibited by the law of NIAC may be prohibited by human rights law—or so I shall argue.

In an earlier exchange, Deborah Pearlstein writes that “it is not possible as a matter of law to reconcile the basic human rights law prohibition on killing with the basic [law of armed conflict] LOAC acceptance of the power to kill as a first resort.”¹¹ I reject the view that the LOAC confers a “power to kill as a first resort”¹² that displaces, overrides, or determines the content of the human right to life.

⁹ See Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 75 U.N.T.S. 135.

¹⁰ ICRC, HOW IS THE TERM “ARMED CONFLICT” DEFINED IN INTERNATIONAL HUMANITARIAN LAW? (Mar. 2008), <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

¹¹ Deborah Pearlstein, *The NIAC Threshold*, OPINIO JURIS (Oct. 4, 2016, 4:43 PM), <http://opiniojuris.org/2016/10/04/the-niac-threshold>.

¹² *Id.*

As the ICRC observes elsewhere, “[t]he law relating to the conduct of hostilities is primarily a law of prohibition: it does not authorize, but prohibits certain things.”¹³ The LOAC does not permit but instead prohibits, does not authorize but instead limits, does not enable but instead constrains. These prohibitions, limitations, and constraints partially overlap with those contained in human rights law. Nevertheless, killings that are not prohibited by the LOAC may be prohibited by human rights law. Certainly, the LOAC cannot authorize what human rights law forbids.

The International Covenant on Civil and Political Rights (ICCPR), American Convention on Human Rights (ACHR), and African Charter on Human and Peoples’ Rights (ACHPR) prohibit the arbitrary deprivation of life.¹⁴ Measures derogating from this prohibition are prohibited.¹⁵

The general prohibition on arbitrary killing applies alongside the specific prohibitions of the LOAC. As the Inter-American Commission on Human Rights observes, “humanitarian law generally afford[s] victims of armed conflicts greater or more specific protections than do the more generally phrased guarantees in . . . human rights instruments.”¹⁶ Importantly, these specific protections provide clearer guidance to combatants than the general prohibition of arbitrary killing can provide.¹⁷

The prohibition on arbitrary deprivation of life may “prohibit status-based targeting in NIACs when all other relevant principles (proportionality, distinction, etc.) are observed.”¹⁸ In this regard, I agree with the ACHPR’s Comment:

Where military necessity does not require parties to an armed conflict to use lethal force in achieving a legitimate military objective against otherwise lawful targets, but allows the target

¹³ ICRC, COMMENTARY ON THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I) ¶ 5 (1987), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/TreatyXsp?action=OpenDocument&documentId=D9E6B6264D7723C3C12563CD002D6CE4>.

¹⁴ International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Organization of the American States, American Convention on Human Rights art. 4, Nov. 22, 1969 O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; African Charter on Human and Peoples’ Rights art. 4, June. 27, 1981, 21 I.L.M. 58 [hereinafter ACHR].

¹⁵ ICCPR, *supra* note 14, art. 4(2); ACHR, *supra* note 14, art. 27.

¹⁶ *Abella v. Argentina*, Merits, Judgment, Inter-Am. Ct. H. R. (ser. L) No. 11.137, ¶¶ 159–160 (Nov. 18, 1997) (“It is, moreover, during situations of internal armed conflict that these two branches of international law most converge and reinforce each other.”).

¹⁷ In this regard, the specific rules of the LOAC relate to the general prohibition of arbitrary killing much like the specific rules of safe driving (speed limits, signaling, and so forth) relate to the general prohibition of reckless driving.

¹⁸ Pearlstein, *supra* note 11.

for example to be captured rather than killed, the respect for the right to life can be best ensured by pursuing this option.¹⁹

While we may certainly look to international humanitarian law (IHL) to inform our interpretation of which deprivations of life are “arbitrary” in armed conflict, there is no reason to assume that IHL is so perfect that it effectively prohibits all arbitrary deprivation of life in armed conflict. In the end, whether a particular deprivation of life is arbitrary remains a question of human rights law, not of IHL. Our best interpretation of human rights law, informed but not determined by looking to IHL, should prevail.

Under Article 2 of the European Convention on Human Rights (ECHR), intentional killing is generally prohibited subject to narrow exceptions.²⁰ The mere existence of armed conflict is not among these exceptions. Instead, the ECHR provides as follows:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, . . . shall be made under this provision.²¹

Accordingly, the LOAC does not automatically “lift[] a prohibition under which all states otherwise operate.”²² The UK recently conceded as much by formally derogating from the ECHR.²³ “The applicability of the LOAC, by

¹⁹ AFRICAN COMMISSION ON HUMAN AND PEOPLES RIGHTS, GENERAL COMMENT NO. 3 ON THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS: THE RIGHT TO LIFE (ARTICLE 4), No. 18, 2015), http://www.achpr.org/files/instructions.general-comments-right-to-life/generaly_comment_no_3_english.pdf.

²⁰ COUNCIL OF EUROPE, EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, AS AMENDED BY PROTOCOLS NOS. 11 AND 14, art. 2 (Nov. 4, 1950), http://www.echr.coe.int/Documents/Convention_ENG.pdf.

²¹ *Id.*

²² Deborah Pearlstein, Comment, OPINIO JURIS (Oct. 5, 2016, 10:25 PM), <http://opiniojuris.org/2016/10/04/the-niac-threshold/>.

²³ Pearlstein, *supra* note 11.

itself, does not change the UK's obligations under the ECHR. Only derogation, according to the rules of the ECHR, can do that."²⁴

Moreover, it will be for the courts to determine whether measures derogating from the ECHR exceed "the extent strictly required by the exigencies of the situation."²⁵ For example, courts may very well find that, although the law of NIAC applies throughout the territory of another state (Iraq, Afghanistan, etc.), measures derogating from the ECHR are strictly required only in certain areas. In other areas, the ECHR may very well apply with full force.

Human rights law and the law of NIAC do not conflict with each other. Instead they complement one another, as both impose constraints on violence rather than licenses to commit violence. As Additional Protocol II makes clear, human rights law "offers a basic protection to the human person," while the law of NIAC aims "to ensure a better protection for the victims of armed conflicts."²⁶ Accordingly, "when Protocol II establishes a higher standard than the Covenant [on Civil and Political Rights], it must prevail," while "provisions of the Covenant . . . which provide for a higher standard of protection than the protocol should be regarded as applicable" in appropriate cases.²⁷

Let me end this section with the following observation. If a state launches an unprovoked attack on an organized armed group, then this attack initiates a NIAC and is constrained by the law of NIAC. Of course, it does not violate the law of NIAC to target members of an organized armed group. The law of NIAC does not prohibit such an unprovoked attack, however, it may arbitrarily deprive the group members of their lives in violation of human rights law. In this way, human rights law may regulate the resort to armed force between states and non-state actors.²⁸

III. FORCE, CONSENT, AND CLASSIFICATION

When one state—say, the United States—uses military force on the territory of another state—say, Syria or Pakistan—without the consent of that state, what legal rules constrain that use of such force? What if the attacking

²⁴ Adil Haque, Comment, *OPINIO JURIS* (Oct. 6, 2016, 7:08 AM), <http://opiniojuris.org/2016/10/04/the-niac-threshold>.

²⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15, Nov. 4, 1950, 213 U.N.T.S. 222.

²⁶ MICHAEL BOETHE, KARL JOSEF PARTSCH & WALDEMAR A. SOL, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949*, at 636 (1982).

²⁷ *Id.*

²⁸ See Eliav Lieblich, *Internal Jus Ad Bellum*, 67 *HASTINGS L.J.* 687, 725 (2016).

state does not target the armed forces or institutions of the other state but instead targets an organized armed group—say, ISIL or the Taliban—operating in the other state? According to the ICRC Commentary, if one state uses military force on the territory of another state, then that use of force triggers an IAC between the two states unless the territorial state consents to the use of force.²⁹ Accordingly, the law of IAC applies to and constrains all such uses of force. Importantly, the law of IAC applies even if the intervening state exclusively targets an organized armed group operating in the territorial state. If there is a non-international armed conflict (NIAC) between the intervening state and the armed group, then the law of NIAC may apply in parallel.

The ICRC's position has attracted substantial criticism, to which I will respond in the final section. In this section, I will try to explain why I find the ICRC's view persuasive.

Before we begin, let's remember why the question is worth asking, and why the answer matters. Conflict classification can seem dry and technical, but it affects both protection and accountability in armed conflict.

First, the treaty law of IAC is far more detailed and robust than the treaty law of NIAC. Most importantly, the Geneva Conventions and Additional Protocol I are far more protective of both civilians and combatants than either Common Article 3 or (with respect to certain internal conflicts) Additional Protocol II. Second, the customary law of IAC remains distinct from the customary law of NIAC, though the gap has certainly narrowed since the 1990s. For its part, the ICRC identifies seventeen customary rules applicable in IAC but not in NIAC and five applicable in NIAC but not in IAC. "States that take a more conservative approach to customary international law may conclude that the gap between IAC and NIAC remains even wider than the ICRC maintains."³⁰ Third, grave breaches of IAC treaty law trigger obligatory universal jurisdiction, meaning that all states have a legal duty to either prosecute or extradite perpetrators for prosecution elsewhere.³¹ Finally, the Statute of the International Criminal Court recognizes thirty-four war crimes in IAC but only nineteen war crimes in NIAC.³² Notably, the Statute recognizes clear violation of the

²⁹ ICRC, *supra* note 1.

³⁰ J.-M. Henckaerts, *Study on Customary International Humanitarian Law*, 87 INT'L REV. RED CROSS 198, 198–212 (2005), <https://www.icrc.org/eng/assets/files/other/customary-law-rules.pdf>.

³¹ *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, art. 49, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

³² Rome Statute for the International Criminal Court, UN Doc. A/CONF. 183/9, art. 8, July 1, 1998, 2187 U.N.T.S. 90.

proportionality rule as a war crime when committed in IAC but not when committed in NIAC.³³ To fix ideas, consider the following scenario:

No Consent: State A launches an airstrike against armed *Group G* on the territory of *State T*, foreseeably killing several civilians. *State T* exercises no control over *Group G*, but also does not consent to *State A's* strike.

According to the Commentary, *State A's* strike triggers an IAC with *State T* to which the law of IAC applies.³⁴ If there is, in addition, a NIAC between *State A* and *Group G*, then these two conflicts occur in parallel.

Note that conflict classification does not depend on the lawfulness of *State A's* attack under the *jus ad bellum*.³⁵ For these purposes, it does not matter whether *State A* is lawfully defending itself against an armed attack by *Group G* or unlawfully using military force to eliminate a possible future threat.

The ICRC's position fully reflects the text, object, and purpose of the Geneva Conventions and their Additional Protocols. An international armed conflict is a dispute ("conflict") between states ("international") involving the use of military force ("armed").³⁶ It is hard to imagine a more serious dispute between states than a dispute regarding the use of military force by one on the territory of the other.

Indeed, states adopted the law of IAC in order to protect their civilian populations and armed forces from extraterritorial force by foreign states.³⁷ States using force beyond their borders may not recognize many legal, ethical, or political constraints on their conduct. Accordingly, when *State A* uses force on the territory of *State T*, we need the law of IAC to protect the civilian population of *State T* from the military operations of *State A* and to protect the armed forces of *State A* from criminal prosecution by *State T*.

In contrast, states adopted the law of NIAC primarily to regulate *internal* armed conflicts within their own territories.³⁸ States using force on their own

³³ *Id.*

³⁴ See generally ICRC, *supra* note 1.

³⁵ ICRC, IHL AND OTHER LEGAL REGIMES—JUS AD BELLUM AND JUS IN BELLO (Oct. 29, 2010), <https://www.icrc.org/eng/war-and-law/ihl-other-legal-regimes/jus-in-bello-jus-ad-bellum/overview-jus-ad-bellum-jus-in-bello.htm>.

³⁶ ICRC, *supra* note 4.

³⁷ Adil Ahmad Haque, *Whose Armed Conflict? Which Law of Armed Conflict*, JUST SECURITY (Oct. 4, 2016, 1:37 PM), <https://www.justsecurity.org/33362/armed-conflict-law-of-armed-conflict/>. As we shall see, states also adopted the law of IAC in part to protect their armed forces from criminal prosecution for carrying or extraterritorial force on their behalf.

³⁸ *Id.*

territory may feel constrained by domestic law, human rights law, concern for their own citizens, and internal politics. Accordingly, the need for robust protection by the law of armed conflict may have seemed less urgent. The alternative view—that no IAC exists and that the law of IAC does not apply—seems deeply implausible.

First, the law of NIAC may not apply either. On the prevailing view, including that of the ICRC, the law of NIAC applies only to protracted armed confrontations between state armed forces and organized armed groups or between such groups.³⁹ If *Group G* is not organized in the right way, or if fighting between *State A* and *Group G* is not sufficiently intense, then a gap in protection would exist that no state would accept. I partially reject the prevailing view and partially disagree with the ICRC on this point.

Second, it is hard to believe that states would want legal protection for their civilians from foreign forces to depend on which targets those foreign forces choose. If an intervening state targets the armed forces of the territorial state, then civilians may receive robust protection under Additional Protocol I.⁴⁰ In contrast, if an intervening state targets an organized armed group, then civilians may receive only the minimal protections of Common Article 3—which, arguably, does not regulate the conduct of hostilities at all.⁴¹ Defenders of the alternative view must explain why states would accept such limited protection for their civilians from foreign forces in such cases.

Third, in *internal* NIACs, states may be constrained in their treatment of their citizens by human rights law and by domestic law. In contrast, in cross-border cases, IHL is the primary—though not exclusive—constraint on the intervening state's conduct. Accordingly, in cross-border cases, we should not rely on the law of NIAC to provide civilians with the level of protection envisioned by the parties to the Geneva Conventions and Protocols.

The *customary* law of NIAC now offers civilians protection comparable to that offered by the customary law of IAC. However, we should interpret Common Articles 2 and 3 of the Geneva Conventions in light of the customary law of NIAC as it existed when those treaties were adopted and entered into force. At that time, no state would have relied on the customary law of NIAC to protect their civilians from foreign states operating on their territory without their consent.

Fourth, the alternative view exposes the forces of the intervening state to criminal prosecution by the territorial state. There is no combatant immunity

³⁹ ICRC, *supra* note 4.

⁴⁰ *Id.*

⁴¹ *Id.*

in NIAC and, on the alternative view, there is no IAC. It follows that, if *State T* captures *State A*'s pilot, then *State T* may prosecute the pilot for killing its civilians under *State T*'s domestic criminal law even if the strike did not violate the targeting rules of the customary law of NIAC.

State T's capture of the pilot may itself trigger an IAC between the two states, such that the law of IAC would regulate his detention. However, the strike occurred prior to capture and therefore, on the alternative view, before an IAC began. Hence, the pilot would not be entitled to combatant immunity with respect to the strike. Since combatant immunity exists to protect combatants from prosecution by foreign states for acts that do not violate the law of armed conflict, it is hard to see why states would deny their own forces such protection in such cases.

Finally, the alternative view seems *ad hoc*. If one state uses military force against anything else in another state—citizens, state armed forces, or foreign visitors, private property, state institutions, or refugee camps—then it seems clear that an IAC exists and that the law of IAC applies. Defenders of the alternative view must justify carving out an exception to this general rule for strikes directed at armed groups. Given the evident need to protect civilians from the intervening state and to protect captured combatants from the territorial state, such a justification seems hard to imagine.

For these reasons, the ICRC's position prevails over the alternative view. The use of force by one state on the territory of another should be constrained by the law of IAC, even if that force targets an organized armed group on that territory, unless the territorial state consents to that use of force.

IV. CRITICISMS AND RESPONSES

In this final section, I will respond to some criticisms of the ICRC's position. Along the way, I will make some more general comments on the relationship between the law of force (*jus ad bellum*) and the law of armed conflict (*jus in bello*).

Perhaps the most sustained critique of the ICRC's position comes from Terry Gill, in a recent article for *International Law Studies*.⁴² There is much

⁴² Terry D. Gill, *Classifying the Conflict in Syria*, 92 INT'L STUD. 353 (2016). See also Sean Watts, *The Updated First Geneva Convention Commentary, DOD's Law of War Manual, and a More Perfect Law of War, Part I*, JUST SECURITY (July 5, 2016, 11:05 AM), <https://www.justsecurity.org/31749/updated-geneva-convention-commentary-dods-lowm-perfect-law-war/>; Kenneth Watkin, *The ICRC Updated Commentaries: Reconciling Form and Substance, Part I*, JUST SECURITY (Aug. 24, 2016, 2:17 PM), <https://www.justsecurity.org/32538/icrc-updated-commentaries-reconciling-form-substance/>; Kenneth Watkin, *The ICRC Updated Commentaries: Reconciling Form and Substance, Part II*, JUST SECURITY (Aug. 30,

to admire in Gill's article (indeed, I recently assigned it to my students). However, I found his criticisms of the ICRC's position unpersuasive.

First, Gill rejects "the argument that non-consensual military intervention automatically constitutes a violation of sovereignty and is therefore directed against the territorial State," on the grounds that the intervention may be a lawful exercise of self-defense or may be authorized by the UN Security Council.⁴³

This objection seems misdirected. The ICRC does not refer to a *violation* of sovereignty but instead to an "interference"⁴⁴ or "intrusion"⁴⁵ into the territorial state's sphere of sovereignty. By definition, a *violation* of sovereignty is unlawful. In contrast, an interference or intrusion into a state's sphere of sovereignty may be lawful or unlawful. According to the ICRC, an armed interference with or intrusion into a state's sphere of sovereignty—whether unlawful aggression or lawful self-defense—will trigger an armed conflict with that state.⁴⁶

Second, and relatedly, Gill writes that "there is no reason to assume that the classification of an armed conflict is dependent upon—or even influenced by—the question of whether a violation of the *jus ad bellum* has occurred."⁴⁷

This objection also seems misplaced. On the ICRC's view, the classification of an armed conflict does not depend upon the lawfulness or unlawfulness of the use of force, but instead upon the *fact* that force is used by one state on the territory of another without its consent.⁴⁸

Of course, if the territorial state consents to the use of force, then (i) the use of force is lawful under the *jus ad bellum*, and (ii) there is no armed conflict between the two states. However, the *reason* that there is no armed

2016, 10:36 AM), <https://www.justsecurity.org/32608/icrc-updated-commentaries-reconciling-form-substance/>.

⁴³ Gill, *supra* note 42, at 368.

⁴⁴ ICRC, *supra* note 1, ¶ 237 ("Any unconsented-to military operations by one State in the territory of another State should be interpreted as an armed interference in the latter's sphere of sovereignty and thus may be an international armed conflict under Article 2(1).").

⁴⁵ *Id.* ¶ 261 ("In some cases, the intervening State may claim that the violence is not directed against the government or the State's infrastructure but, for instance, only at another Party it is fighting within the framework of a transnational, cross-border or spillover non-international armed conflict. Even in such cases, however, that intervention constitutes an unconsented-to armed intrusion into the territorial State's sphere of sovereignty, amounting to an international armed conflict within the meaning of common Article 2(1).").

⁴⁶ *Id.* ¶¶ 236–237.

⁴⁷ Gill, *supra* note 42, at 369.

⁴⁸ ICRC, *supra* note 1, ¶ 236 ("For international armed conflict, there is no requirement that the use of armed force between the Parties reach a certain level of intensity before it can be said that an armed conflict exists. Article 2(1) itself contains no mention of any threshold for the intensity or duration of hostilities.").

conflict between the states is not that the use of force is lawful, but rather that there is no conflict at all between the states, armed or otherwise. There is no dispute, difference, opposition, or hostile relationship between the two states. Put another way, the fact that consent has been given or withheld is independently relevant to both the *jus ad bellum* and the *jus in bello*.

In his second post, Watkin writes that the ICRC's "reliance on State consent, as the basis for conflict categorization, makes it difficult, if not impossible, to separate it from the law governing the recourse to war."⁴⁹ I respectfully disagree.

The *jus ad bellum* and the *jus in bello* are independent in the sense that a use of force may be lawful under one body of law but unlawful under the other. A war of aggression may strictly conform to the law of armed conflict, while a war of self-defense may flagrantly violate the law of armed conflict. At the same time, we do not conflate *jus ad bellum* and *jus in bello* simply by recognizing that certain factual circumstances (such as consent or non-consent) may be relevant to both bodies of law. For example, if one state exercises effective control over part of the territory of another state then this will ordinarily give rise to a belligerent occupation.⁵⁰ Of course, if the territorial state consents, then there is no belligerent occupation—not because the occupation is lawful but because there is no belligerency. The same logic applies to the use of armed force and the existence of armed conflict.

Third, Gill notes that "neither the text of the relevant provisions in the Geneva Conventions (Common Articles 2 and 3) nor the original ICRC commentaries thereto contain any reference to violation of sovereignty as a criterion for determining the character of the armed conflict."⁵¹ Nor does the ICTY's *Tadić* judgment, which Gill rightly describes as "the leading judicial decision on the classification of armed conflicts."⁵²

Since the Geneva Conventions do not tell us when an armed conflict between states exists, we must interpret their terms in light of their context, object, and purpose. The original ICRC commentaries state that "[a]ny difference arising between two States and leading to the intervention of members of the armed forces" gives rise to an armed conflict between those

⁴⁹ Kenneth Watkin, *The ICRC Updated Commentaries: Reconciling Form and Substance, Part II*, JUST SECURITY (Aug. 30, 2016, 10:36 AM), <https://www.justsecurity.org/32608/icrc-updated-commentaries-reconciling-form-substance-part-ii/>.

⁵⁰ See generally ICRC, *supra* note 1, ¶ 304 (describing conditions necessary for occupation).

⁵¹ Gill, *supra* note 42, at 370.

⁵² *Id.* at 371.

states.⁵³ It is hard to imagine a more serious difference arising between two States than a difference regarding whether one may use armed force on the territory of the other. If such a difference leads to intervention by the armed forces of either state, then an armed conflict automatically arises.

In *Tadić*, the ICTY stated that “an armed conflict exists whenever there is a resort to armed force between States.”⁵⁴ Importantly, “armed force between States” does not require that two states use armed force against one another but instead requires that one state uses armed force against another.⁵⁵

Now we approach the heart of the matter. What does it mean for one state to use force “against” another? On the ICRC’s view, an armed interference in a state’s sphere of sovereignty is a use of force against that state.⁵⁶

Why invoke the concept of sovereignty in this context? States are legal persons, not physical persons or objects.⁵⁷ Strictly speaking, one cannot use physical force against a legal person, such as a state or corporation. One can, however, use physical force against a physical entity—a person, place, or object—over which a legal person has legal rights. There is nothing else that physical force against a legal person could sensibly mean. On this approach, physical force is used against a state when physical force is used against a physical entity within that state’s sphere of sovereignty. There is nothing else that physical force against a state could sensibly mean.

Gill claims that “a State uses force against another State when it engages in hostilities against its armed forces, attacks national assets under the territorial State’s control, or occupies its territory.”⁵⁸ On this view, a state that launches terror attacks on the civilian population of another State or bombs refugee camps owned and operated by the UN or an INGO in the territory of another State does not use force against that State. This view seems hard to accept.

⁵³ ICRC, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD ¶ 1 (1st ed. 1952), <https://ihl-databases.icrc.org/ihl/full/GCI-commentary>.

⁵⁴ ICRC, *supra* note 1, ¶ 218 (referencing Prosecutor v. Tadić, Case No. IT-94-1-A, *Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction* (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995)).

⁵⁵ See, e.g., ICRC, *supra* note 4.

⁵⁶ ICRC, *supra* note 1 (“Any unconsented-to military operations by one State in the territory of another State should be interpreted as an armed interference in the latter’s sphere of sovereignty and thus may be an international armed conflict under Article 2(1).”).

⁵⁷ See, e.g., Hans Aufricht, *Personality in International Law*, 37 AM. POL. SCI. REV. 217, 223 (1943) (describing the personality of a state as similar to that of a corporate personality).

⁵⁸ Terry Gill, *Letter to the Editor from Professor Terry Gill on Classification of International Armed Conflict*, JUST SECURITY (Oct. 14, 2016, 9:51 AM), <https://www.justsecurity.org/33569/letter-editor-prof-terry-gill-classification-international-armed-conflict/>.

Gill also claims that “an intrusion or violation of sovereignty in itself does not determine whether conflict between them exists. If that were the case, any unlawful aerial incursion would seemingly trigger an armed conflict. That would be hard to defend considering the frequency at which such incursions occur.”⁵⁹

This objection seems misplaced for two reasons. First, the Commentary is quite clear that the intrusions to which it refers are armed interventions,⁶⁰ and armed intrusions⁶¹ involving violence,⁶² that is, to attacks⁶³ on the state’s territory. Second, the Commentary clearly

rule[s] out the possibility of including in the scope of application of humanitarian law situations that are the result of a mistake or of individual *ultra vires* acts, which — even if they might entail the international responsibility of the *State T* to which the individual who committed the acts belongs — are not endorsed by the State concerned. Such acts would not amount to armed conflict.⁶⁴

Accordingly, an unlawful but harmless aerial incursion, resulting from a pilot’s mistake or contrary to a pilot’s instructions, would not trigger an armed conflict between the two states.

Fourth, and most importantly, Gill identifies several examples involving extraterritorial force targeting armed groups in which “the States concerned [n]either verbally [n]or factually conduct themselves as if they were involved in an armed conflict, even though they may not have consented to the interventions and may have considered them a violation of their sovereignty (irrespective of whether they did constitute such violations).”⁶⁵ These examples include military operations by the United States inside Pakistan and Yemen; by Turkey inside Iraq; by Kenya inside Somalia; and by Colombia inside Ecuador.⁶⁶

Admirably, Gill allows that “the lack of hostilities between the intervening and territorial States in these examples may be in whole or in part due to other factors.”⁶⁷ For its part, the Commentary states that

⁵⁹ *Id.*

⁶⁰ ICRC, *supra* note 1, ¶ 260.

⁶¹ *Id.* ¶ 261.

⁶² *Id.*

⁶³ *Id.* ¶ 262.

⁶⁴ *Id.* ¶ 241.

⁶⁵ Gill, *supra* note 42, at 371.

⁶⁶ *Id.*

⁶⁷ *Id.*

[e]ven if none of the Parties recognize the existence of a state of war or of an armed conflict, humanitarian law would still apply provided that an armed conflict is in fact in existence. . . . The fact that a State does not, for political or other reasons, explicitly refer to the existence of an armed conflict within the meaning of Article 2(1) in a particular situation does not prevent it from being legally classified as such.⁶⁸

Nevertheless, could the absence of such claims, or the denial of such claims, constitute “subsequent practice in the application of the treaty [in this case, the Geneva Conventions] which establishes the agreement of the parties regarding its interpretation?”⁶⁹

State silence is inherently ambiguous. We cannot know if a state’s silence is attributable to its legal positions, or what those legal positions might be. Accordingly, we should consider only the explicit legal positions of states that the law of IAC applies or does not apply. For example, Syria might announce that it is not in an IAC with the UK and that, accordingly, UK forces captured in Syria are not entitled to combatant immunity for acts preceding their capture. The UK would no doubt respond with its own legal opinion, based on its own classification of the conflict and identification of applicable legal rules.

Until subsequent practice establishes the agreement of the parties to the Geneva Conventions regarding their interpretation in such cases, we should interpret the terms of the Conventions in light of their object and purpose. As discussed in the previous section, the object and purpose of the law of IAC is the protection of civilians, civilian objects, and combatants from hostile foreign states. As the ICRC puts it:

[I]t is useful to recall that the population and public property of the territorial State may also be present in areas where the armed group is present and some group members may also be residents or citizens of the territorial State, such that attacks against the armed group will concomitantly affect the local population and the State’s infrastructure. For these reasons and others, it better corresponds to the factual reality to conclude that an international armed conflict arises between the

⁶⁸ ICRC, *supra* note 1, ¶ 213.

⁶⁹ Vienna Convention on the Law of treaties, art. 31(3)(b), May 23, 1969, 1155, U.N.T.S. 331.

territorial State and the intervening State when force is used on the former's territory without its consent.⁷⁰

Strangely, in his first post on *Just Security*, Watkin objects that, by adverting to this factual reality, the ICRC “prioritizes form over substance” because the harm to civilians “may be a mere possibility.”⁷¹ Instead, Watkin suggests that conflict categorization should be based on “an assessment of what actually happens.”⁷² On this view, it seems that we will not know what law applies to a use of force until after the use of force is carried out. Among other things, we will not know which legal protections civilians enjoy until it is too late. This seems like an unattractive view.

For his part, Gill acknowledges that “an intervention may impact portions of a State’s population or its national resources,” but he writes that

when a population and public property are under the control of an [organized armed group] and not under the effective control of the territorial State, they can no longer be identified with that State for purposes of determining the legal constraints on the conduct of hostilities. In the event the intervening State’s action resulted in occupation of territory, this would change the situation and trigger the regime pertaining to IACs.⁷³

Watkin seems to make a similar claim in his first post on *Just Security*.

Strikingly, Gill provides no support for the first sentence, which is hardly self-evident. Indeed, the first sentence seems to implicitly concede that persons and public property under the effective control of the territorial State *can* be identified with that State for purposes of conflict classification. Accordingly, if a member of an armed group travels through an area under the effective control of the territorial state then an attack in that area, potentially impacting nearby persons and property, would seem to constitute an attack on the state itself.

Moreover, the second sentence seems to undermine the first. According to Gill, territory under the control of an armed group remains sufficiently identified with the territorial state such that, if the intervening state *occupies* that territory, then an IAC arises between the two states. However,

⁷⁰ ICRC, *supra* note 1, ¶ 262.

⁷¹ Kenneth Watkin, *The ICRC Updated Commentaries: Reconciling Form and Substance, Part I*, JUST SECURITY (Aug. 30, 2016, 10:36 AM), <https://www.justsecurity.org/32538/icrc-updated-commentaries-reconciling-form-substance/>.

⁷² *Id.*

⁷³ Gill, *supra* note 42, at 369.

according to Gill, territory under the control of an armed group is not sufficiently identified with the territorial state such that, if the intervening state *uses force* on that territory, then an IAC arises between the two states. I can see no legal or logical basis for this incongruous result.

In an earlier exchange, Gill clarified his position as follows:

If the territorial State no longer controls the territory or public property in a particular part of that State because it is under the control of the armed group, an attack against the armed group controlling it is in my view not tantamount to an attack on the territorial State *because the attack is not directed against the territorial State*.⁷⁴

Gill takes the view that an attack is directed against a state only if it is directed at that state's armed forces or national assets. Accordingly, on his view, an attack against an armed group is not directed against the territorial state even if the armed group *does not* control the area in which it is attacked. Put the other way around, an armed group's control over territory is irrelevant to whether an attack against that group is tantamount to an attack on the territorial State. Gill offers no support for his proffered control criterion because, in fact, the issue of control is superfluous to his account. This view is implausibly narrow.

Finally, Gill observes that "most [academic] authorities take the position that the classification of armed conflicts primarily (but not exclusively) turns on the nature of the parties . . ." ⁷⁵ This begs the question to say that, in the cases under discussion, the two states are not parties to an armed conflict. After all, if the ICRC is correct, then the two states *are* parties to an armed conflict.

In this section, I have tried to address the most substantial criticisms of the ICRC's position. No doubt, other objections have been and will be raised—we should expect no less. The controversy that the ICRC's position has elicited is, perhaps, the best evidence that conflict classification remains highly relevant to the legal regulation of armed conflict.

⁷⁴ Gill, *supra* note 58 (emphasis added).

⁷⁵ *Id.* at 372.