

# IRRECONCILABLE DIFFERENCES: THE THRESHOLDS FOR ARMED ATTACK AND INTERNATIONAL ARMED CONFLICT

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International law includes two legal regimes relating to war and the use of force: the *jus ad bellum*, or the law governing the resort to force, and the law of armed conflict (LOAC), the law governing the conduct of hostilities and the protection of persons during armed conflict. The former prohibits the use of force by one state against another, except by invitation, in self-defense, or with authorization by the United Nations Security Council, in pursuit of the UN's central goal of "sav[ing] succeeding generations from the scourge of war."<sup>1</sup> The latter seeks to minimize suffering in war by protecting persons not participating in hostilities and by restricting the means and methods of warfare. The separate application of these two bodies of law is foundational, ensuring that the lawfulness or unlawfulness of any resort to force does not affect the protections, obligations, and authorities inherent in the law of armed conflict, and that compliance or lack thereof with LOAC does not determine the lawfulness of the resort to force. In effect, the fact that a state is fighting in self-defense does not give it carte blanche to disregard the fundamental parameters of LOAC, whether in the targeting of persons or objects or the treatment of persons detained or interned. Similarly, the fact that a state launched an aggressive war does not result in a loss of LOAC protections for its soldiers and civilians, nor does the fact that a state complies with LOAC cover up for any violations of the *jus ad bellum*. As reinforced at Nuremberg and in countless courts and tribunals since then, this separation is essential to preserve the fundamental principles and goals of both bodies of law.<sup>2</sup>

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1 U.N. Charter pmbl.

2 See, e.g., *United States v. Altstötter*, reprinted in 6 UNITED NATIONS WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 26, 52 (1948) ("If we should adopt the view that by reason of the fact that the war was a criminal war of aggression every act which would have been legal in a defensive war was illegal in this one, we would be forced to the

Although the dangers of conflating *jus ad bellum* and LOAC are well known and thoroughly examined in jurisprudence and academic literature, the interplay between two foundational concepts in the two bodies of law remains unexplored: the meaning of armed attack and the trigger for international armed conflict. These two definitions or concepts are the building blocks on which much of the international law authority regarding the use of force resides. Armed attack is the threshold for the use of force in self-defense and therefore forms an essential component of the *jus ad bellum* and, in effect, serves as a gatekeeper for the acceptable use of force. The existence of an international armed conflict triggers the application of LOAC, with all of its attendant authorities, obligations, rights, and protections. Both terms are central to understanding the parameters for the use of force in various ways—and yet each has a different meaning, a different pedigree, and potentially consequential effects on the ability of the other term to serve its purpose. Although the broader debate regarding the simultaneous application of *jus ad bellum* and LOAC and the continuing application of *jus ad bellum* throughout conflict<sup>3</sup> is outside the scope of this Article, the interplay and different thresholds for armed attack and for international armed conflict raise challenging questions about the coexistence of the two bodies of law, namely the consequences of an international armed conflict triggered by acts or force that lie below the threshold for armed attack or other triggering of *jus ad bellum*. Can force be used and how should it be judged in such circumstances?

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conclusion that every soldier who marched under orders into occupied territory or who fought in the homeland was a criminal and a murderer.”); *United States v. List* (The Hostage Case), Case No. 7 (Feb. 19, 1948), 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, 1230 at 1247 (1950) [hereinafter *The Hostage Case*] (“Whatever may be the cause of a war that has broken out, and whether or no the cause be a so-called just cause, the same rules of international law are valid as to what must not be done, may be done, and must be done by the belligerents themselves in making war against each other . . . .” (quoting L. OPPENHEIM, 2 INTERNATIONAL LAW: A TREATISE 174 (H. Lauterpacht ed., 6th ed. 1944))); *Prosecutor v. Kordic*, Case No. IT-95-14/2-A, Judgement, ¶ 1082 (Int’l Trib. for the Prosecution of Persons Responsible for Serious Violations of Int’l Humanitarian L. Dec. 17, 2004), [https://www.icty.org/x/cases/kordic\\_cerkez/acjug/en/cer-aj041217e.pdf](https://www.icty.org/x/cases/kordic_cerkez/acjug/en/cer-aj041217e.pdf) (“The unfortunate legacy of wars shows that until today many perpetrators believe that violations of binding international norms can be lawfully committed, because they are fighting for a ‘just cause’. Those people have to understand that international law is applicable to everybody, in particular during times of war.”); *Prosecutor v. Fofana*, Case No. SCSL-04-14-A, Judgment, ¶¶ 530–31, 534 (May 28, 2008), <http://www.rscsl.org/Documents/Decisions/CDF/Appeal/829/SCSL-04-14-A-829.pdf> (noting that “[t]he basic distinction and historical separation between *jus ad bellum* and *jus in bello*” is a “bedrock principle” of LOAC. “Allowing mitigation for a convicted person’s political motives, even where they are considered . . . meritorious . . . provides implicit legitimacy to conduct that unequivocally violates the law—the precise conduct this Special Court was established to punish.”).

3 See generally, e.g., Christopher Greenwood, *The Relationship Between Ius ad Bellum and Ius in Bello*, 9 REV. INT’L STUD. 221 (1983).

This Article explores the gap between the definition of armed attack and the threshold for international armed conflict to identify such possible consequences of the different definitions for the application of either or both bodies of law and to consider whether efforts to reconcile the different meanings are feasible and, more importantly, desirable or problematic. The first Part briefly presents the definition of armed attack and the threshold for international armed conflict, with a focus on the purpose of the particular thresholds and definitions for the two terms in order to provide a foundation for the main comparisons and discussion in the rest of the Article. Part II examines the gap between the respective meanings of the two concepts and the potential legal consequences. In particular, this Part analyzes two primary, but opposing, interpretive effects of the gap between the meanings of armed attack and international armed conflict: first, the use of force in situations falling below the threshold of armed attack; and second, the possibility that an international armed conflict could exist without the states engaged in such conflict having the authority to use force against the adversary. Each of these possibilities raises a red flag within one body of law but at the same time hews closely to the basic concept or goals of the other, raising the question of whether this gap matters and, if so, whether some reconciliation is appropriate. The third Part addresses this final question, that of reconciliation between the two definitions and examines what such reconciliation might look like. More important, attempts at reconciliation could cause a severely damaging blow to one or the other body of law, such that preserving the gap—that is, agreeing to disagree, in effect—is the better course of action.

## I. ARMED ATTACK AND INTERNATIONAL ARMED CONFLICT: THE WHAT AND THE WHY

As in any other area of law, in both the *jus ad bellum* and LOAC, effective implementation of the law rests on definitions that create the framework for the application of the law, including rights, responsibilities, and protections. This Part therefore presents and examines the definitions of armed conflict and international armed conflict to set the stage for the analysis and comparisons to follow. Equally important, this Part explores the purpose behind these definitions so as to provide the requisite tools for exploring whether the gap between the definition of armed attack and the threshold trigger for international armed conflict can or should be reconciled or whether the continued dissonance between these two foundational concepts is the better result.

### A. *The Meaning and Purpose of Armed Attack*

Armed attack is a critical threshold for the use of force in the international system. The international legal framework governing the use of force, set forth in the United Nations Charter, is comprehensive. In particular, Article 2(4) of the UN Charter prohibits the “use of force against the territorial integrity or political independence of any state, or in any other manner

inconsistent with the Purposes of the United Nations.”<sup>4</sup> International law provides three exceptions to this prohibition against the use of force in or against another state: the consent of the territorial state;<sup>5</sup> UN Security Council authorization for the use of force,<sup>6</sup> usually through multinational operations; or individual or collective self-defense. The last exception, self-defense, is where the meaning of armed attack is relevant—indeed essential—and the focus of the instant discussion.

The international law of self-defense provides that states may use force as an act of individual or collective self-defense in response to an armed attack or to forestall an imminent armed attack. Article 51 of the UN Charter states: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”<sup>7</sup> This provision thus recognizes the preexisting right of states to use force, including in response to another state’s request for assistance, in self-defense against an armed attack. As a result, “armed attack” is the prerequisite—the trigger—that provides the victim state with the right to use force. Indeed, in the *Nicaragua* case, the International Court of Justice “proceeded from the assumption that the existence of an armed attack is a *conditio sine qua non* for the exercise of the right to individual and collective self-defence.”<sup>8</sup> Although the question of who can launch an armed attack remains the subject of extensive debate,<sup>9</sup>

4 U.N. Charter art. 2, ¶ 4.

5 Although consent is commonly viewed as a customary exception, some argue that it does not trigger the prohibition on the use of force at all, such that it is not actually an exception. See, e.g., INT’L L. ASS’N, FINAL REPORT ON AGGRESSION AND THE USE OF FORCE 18 (2018) [hereinafter ILA 2018 REPORT]; INT’L. & OPERATIONAL L. DEP’T, LAW OF ARMED CONFLICT DESKBOOK 31 (5th ed. 2015).

6 Article 42 of the UN Charter authorizes the Security Council to “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.” U.N. Charter art. 42.

7 U.N. Charter art. 51.

8 Georg Nolte & Albrecht Randelzhofer, *Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Article 51*, in 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1397, 1404 (Bruno Simma et al. eds., 3rd ed. 2012) (citations omitted).

9 The International Court of Justice has held that only states can be the source of an armed attack or imminent armed attack triggering the right of self-defense. See, e.g., *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, ¶¶ 143, 146 (Dec. 19); *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, ¶ 72 (Nov. 6); *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶¶ 195, 247 (June 27); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (July 9). However, state practice since 9/11 provides firm support for the existence of a right of self-defense against nonstate actors, even if their acts are not attributed to any state. See S.C. Res. 1368, ¶ 1 (Sept. 12, 2001); Press Release, N. Atl. Treaty Org., Statement by the North Atlantic Council (Sept. 12, 2001),

that question is outside the scope of this Article, which centers on the threshold of armed attack—the amount or intensity of the acts involved, in effect.

The Charter of the United Nations does not define “armed attack” and “[t]here is no explanation of the phrase ‘armed attack’ in the records of the San Francisco Conference, perhaps because the words were regarded as sufficiently clear.”<sup>10</sup> An armed attack is generally understood to be more severe and significant than a use of force, meaning that an act may constitute a use of force without rising to the level of an armed attack.<sup>11</sup> A key part of defining armed attack, as discussed in greater detail below, is therefore to distinguish the gravest forms of force, i.e., those that constitute an armed attack, from the category of “measures which do not constitute an armed attack but may nevertheless involve a use of force.”<sup>12</sup> However, international courts “have never provided sufficient guidance on the level or kind of violence that satisfies that threshold[, but r]ather . . . have preserved considerable ambiguity on the question of when the armed-attack threshold is met and, therefore, whether Article 51 is triggered.”<sup>13</sup>

As a starting point, the International Court of Justice’s (ICJ’s) jurisprudence focuses on the “scale and effects”<sup>14</sup> of any particular hostile action directed at a state in order to determine whether it rises to the level of an armed attack. Courts and scholars generally differentiate between low-level uses of force and those that are of sufficient gravity and severity to reach the level of an armed attack. The *Nicaragua* Court suggests that a “mere frontier incident” does not rise to the level of an armed attack.<sup>15</sup> Similarly, the Eri-

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ed. 1994); Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT’L L.J. 7, 17 (2003) (discussing the effects of attacks made by nonstate actors); Sean D. Murphy, *The International Legality of US Military Cross-Border Operations from Afghanistan into Pakistan*, 84 INT’L L. STUD. 109, 126 (2009) (“While this area of the law remains somewhat uncertain, the dominant trend in contemporary interstate relations seems to favor the view that States accept or at least tolerate acts of self-defense against a non-State actor.”); Raphaël van Steenberghe, *Self-Defence in Response to Attacks by Non-State Actors in the Light of Recent State Practice: A Step Forward?*, 23 LEIDEN J. INT’L L. 183, 184 (2010) (concluding that recent state practice suggests that attacks committed by nonstate actors alone constitute armed attacks under Article 51).

10 Ian Brownlie, *The Use of Force in Self-Defence*, 37 BRIT. Y.B. INT’L L. 183, 244 (1961).

11 Although the United States asserts that there is no difference between a use of force and an armed attack and that it can respond in self-defense to any use of force by another state, Ryan Goodman, *Cyber Operations and the U.S. Definition of “Armed Attack,”* JUST SEC. (Mar. 8, 2018), <https://www.justsecurity.org/53495/cyber-operations-u-s-definition-armed-attack/>, the distinction between the two concepts and the obligatory higher threshold of armed attack as the trigger for self-defense is widely accepted. See, e.g., *Iran v. U.S.*, 2003 I.C.J. at ¶ 51; *Nicar v. U.S.*, 1986 I.C.J. at ¶¶ 191, 195, 210; YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 193 (4th ed. 2005) (“[I]t is clear that one State may employ some illegal force against another without unleashing a full-fledged armed attack.”).

12 *Nicar v. U.S.*, 1986 I.C.J. at ¶ 210.

13 Monica Hakimi & Jacob Katz Cogan, *The Two Codes on the Use of Force*, 27 EUR. J. INT’L L. 257, 271–72 (2016).

14 *Nicar v. U.S.*, 1986 I.C.J. at ¶ 195.

15 *Id.*

trea-Ethiopia Claims Commission determined that “geographically limited clashes . . . along a remote, unmarked, and disputed border . . . were not of a magnitude to constitute an armed attack” and “[l]ocalized border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack for purposes of the [U.N.] Charter.”<sup>16</sup> In the same manner, by listing examples of grave uses of force falling within the definition of aggression, a term related to but not precisely the same as armed attack,<sup>17</sup> UN General Assembly Resolution 3314 on the Definition of Aggression “strongly suggests that an incursion must pass a certain threshold of violence to constitute an armed attack.”<sup>18</sup>

In essence, the act or acts in question must reach a certain level of gravity to constitute an armed attack. In the *Nicaragua* case, the ICJ offered some examples to illustrate the threshold, in the absence of a concrete definition or set of factors, explaining that deploying regular armed forces across a border, or sending irregular militias or other armed groups to accomplish the same purpose, will generally satisfy the threshold for an armed attack.<sup>19</sup> In contrast, providing assistance, such as weapons or other support, to rebels or armed groups across state borders will not reach the threshold of an armed attack.<sup>20</sup> The physical effects of an action or attack are often a primary consideration, because an “armed attack presupposes a use of force producing (or liable to produce) serious consequences, epitomized by territorial intrusions, human casualties or considerable destruction of property. When no such results are engendered by (or reasonably expected from) a recourse to force, Article 51 does not come into play.”<sup>21</sup> Even bombardment or other kinetic attacks, including invasion of territory, will only constitute an armed attack, according to this traditional approach, if “the military actions are on a

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16 *Jus Ad Bellum*—Ethiopia’s Claims 1–8 (Eth. v. Eri.), Partial Award, 26 R.I.A.A. 457, 465–66 (Eri.-Eth. Claims Comm’n 2005).

17 See *Nicar v. U.S.*, 1986 I.C.J. at ¶ 195; TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 339 (Michael N. Schmitt & Liis Vihul eds., 2017) [hereinafter TALLINN MANUAL 2.0].

18 Hakimi & Cogan, *supra* note 13, at 270; see also DINSTEIN, *supra* note 11, at 193 (“There is no doubt that, for an illegal use of force to acquire the dimensions of an armed attack, a minimal threshold has to be reached.”).

19 *Nicar v. U.S.*, 1986 I.C.J. at ¶ 195; see also DINSTEIN, *supra* note 11, at 189 (“When a country sends armed formations across an international frontier, without the consent of the local Government, it must be deemed to have triggered an armed attack.”).

20 *Nicar v. U.S.*, 1986 I.C.J. at ¶ 195 (“But the Court does not believe that the concept of ‘armed attack’ includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States.”).

21 DINSTEIN, *supra* note 11, at 193; see also Brownlie, *supra* note 10, at 219 (noting that armed attack may be defined by the destructive physical effects of an attack rather than the nature of the attack).

certain scale and have a major effect, and are thus not to be considered mere frontier incidents.”<sup>22</sup>

Identifying the particular threshold, however, proves challenging. The ICJ’s jurisprudence can appear somewhat inconsistent in pinpointing the notion of gravity, juxtaposing the “scale and effects” and gravity discussion in the *Nicaragua* case with the statement in the *Oil Platforms* case that the mining of a single military vessel could be sufficient to meet the definition of an armed attack.<sup>23</sup> Furthermore, states are often silent on the specific nature of acts that constitute or could constitute an armed attack, instead commonly “justify[ing] defensive force in response to low levels of violence without referring to any armed-attack threshold.”<sup>24</sup> At a minimum, although it appears “almost impossible to fix the threshold of force employed to define the notion of armed attack,”<sup>25</sup> one can conclude that some level of gravity is required to distinguish an armed attack from a use of force. Furthermore, that gravity determination rests on the effects of the action—in terms of deaths, injury, or destruction—rather than the nature of the act itself. Cyber or other nonkinetic means can therefore constitute an armed attack if sufficiently grave, such as one that “seriously injures or kills a number of persons or that causes significant damage to, or destruction of, property [so as to] satisfy the scale and effects requirement.”<sup>26</sup>

Notwithstanding any uncertainty regarding the specific threshold for the definition of armed attack, the purpose of the armed attack threshold is clear. Armed attack is a component of the law of self-defense that, in turn, is a component of the broader international law framework governing and regulating the use of force. That broader framework seeks, above all, to minimize the reliance on force as a tool of national power and, in the very first words of the United Nations Charter, “to save succeeding generations from the scourge of war . . . [and] to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the

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22 Nolte & Randelzhofer, *supra* note 8, at 1410 (explaining that the classification of an action as an armed attack “would usually seem to be the case when an invasion occurs, but ‘attacks’, ‘bombardments’, and the ‘use of weapons’ do not in every case reach an intensity that enables them to be classified as ‘armed attacks.’” (quoting *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, ¶ 51 (Nov. 6))).

23 Compare *Nicar v. U.S.*, 1986 I.C.J. at ¶ 195, with *Iran v. U.S.*, 2003 I.C.J. at ¶ 72; see also Christine Gray, *The International Court of Justice and the Use of Force*, in *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE* 237, 247 (Christian J. Tams & James Sloan eds., 2013).

24 Hakimi and Cogan, *supra* note 13, at 271; see also Constantine Antonopoulos, *Force by Armed Groups as Armed Attack and the Broadening of Self-Defence*, 55 NETH. INT’L L. REV. 159, 166 (2008); Christopher Greenwood, *The International Court of Justice and the Use of Force*, in *FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS* 373, 380–81 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996).

25 Natalino Ronzitti, *The Expanding Law of Self-Defence*, 11 J. CONFLICT & SEC. L. 343, 351 (2006).

26 TALLINN MANUAL 2.0, *supra* note 17, at 341.

common interest.”<sup>27</sup> As a result, a higher threshold for armed attack fits neatly within the purposes of the overall framework: the basic starting point of a prohibition on the use of force sets the ground rules that force should be a last resort for states rather than an ordinary tool of statecraft; limited exceptions to the prohibition help to reinforce that basic presumption; and a high threshold for any use of force in self-defense limits the circumstances in which states can lawfully resort to force as a self-help measure. For many, therefore, the ICJ affirmed a “distinction based on gravity . . . as part of a conscious attempt to increase the divergence between the two concepts [of use of force and armed attack], thereby limiting the possibility for the escalation in violence and an all-out war between states.”<sup>28</sup> A requirement of gravity or “scale and effects” for an armed attack thus promotes the basic goals of the international system and serves an essential purpose: “strengthen[ing] the stability of the international order by avoiding rapid escalation of conflicts into an unstoppable cycle of force and counterforce.”<sup>29</sup>

In addition, not only does the armed attack definition limit the circumstances for the use of force in self-defense to those in which force is the only option for repelling the threat the state faces, but the exclusion of lower-level or smaller-scale incidents from the definition of armed attack also serves to protect against escalation of smaller incidents into full-scale conflagrations. As the ICJ explained in the *Nicaragua* case, the drafters of the United Nations Charter deliberately extended the self-defense paradigm to what once were reprisals for less weighty incidents:

The logic behind [excluding low-level incidents] has been that if use of force was made permissible not as a lone restricted measure of self-defence, but also for other minor provocations demanding counter-measures, the day would soon dawn when the world would have to face the major catastrophe of a third World War – an event so dreaded in 1946 as to have justified concrete measures being taken forthwith to eliminate such a contingency arising in the future.<sup>30</sup>

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27 U.N. Charter pmbl.

28 CHRISTIAN HENDERSON, *THE USE OF FORCE AND INTERNATIONAL LAW* 217 (2018); see also Nolte & Randelzhofer, *supra* note 8, at 1403 (“The prevailing view considers Art. 51 to exclude any self-defence, other than that in response to an armed attack, referring, above all, to the purpose of the UN Charter, ie to restrict as far as possible the use of force by individual States.” (citations omitted)).

29 Tom Ruys, *The Meaning of “Force” and the Boundaries of the Jus ad Bellum: Are “Minimal” Uses of Force Excluded from UN Charter Article 2(4)?*, 108 AM. J. INT’L L. 159, 165, 178 (2014).

30 *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, 151 (June 27) (separate opinion by President Singh); see also Jared Zimmerman, *Assessing How Article 51 of the United Nations Charter Prevents Conflict Escalation*, REALCLEARDEFENSE (June 4, 2018), [https://www.realcleardefense.com/articles/2018/06/04/assessing\\_how\\_article\\_51\\_of\\_the\\_united\\_nations\\_charter\\_prevents\\_conflict\\_escalation\\_113507.html](https://www.realcleardefense.com/articles/2018/06/04/assessing_how_article_51_of_the_united_nations_charter_prevents_conflict_escalation_113507.html) (“Article 51 doesn’t eliminate conflict, but prevents it from escalating or at least escalating quickly.”).



By establishing armed attack as a subset of the use of force more broadly—what some term a “force-gap”<sup>31</sup>—the UN Charter prioritizes peace and the peaceful settlement of disputes over an individual state’s right to respond to absolutely any threat or danger. The right to use force in self-defense is therefore “limited to situations where the state is truly required to defend itself from serious attack.”<sup>32</sup> The tool for accomplishing this goal: a high threshold for armed attack.

### B. *The Threshold for International Armed Conflict and Its Purpose*

LOAC—otherwise known as the law of war or international humanitarian law—governs the conduct of both states and individuals during armed conflict and seeks to minimize suffering in war by protecting persons not participating in hostilities and by restricting the means and methods of warfare.<sup>33</sup> Although historically LOAC treaty and customary law applied to situations of declared war between states,<sup>34</sup> the drafters of the Geneva

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31 See, e.g., Gary P. Corn, *Cyber National Security: Navigating Gray-Zone Challenges in and Through Cyberspace*, in COMPLEX BATTLESPACES: THE LAW OF ARMED CONFLICT AND THE DYNAMICS OF MODERN WARFARE 345, 408 n.328 (Michael N. Schmitt et al. eds., 2019) (citing TALLINN MANUAL 2.0, *supra* note 17, at 332–33); Benjamin Zweifach, Note, *Plugging the Gap: A Reconsideration of the U.N. Charter’s Approach to Low-Gravity Warfare*, 8 INTERCULTURAL HUM. RTS. L. REV. 379 (2012).

32 Jonathan I. Charney, *The Use of Force Against Terrorism and International Law*, 95 AM. J. INT’L L. 835, 836 (2001). In addition, the Charter manifests a preference for “community responses (e.g., even to threats to peace) over individual ones.” Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT’L L. 885, 929 (1999).

33 See *What Is International Humanitarian Law?*, INT’L COMM. OF THE RED CROSS (July 31, 2004), <https://www.icrc.org/en/doc/resources/documents/legal-fact-sheet/humanitarian-law-factsheet.htm>. The law of armed conflict is codified primarily in the four Geneva Conventions of August 14, 1949, and their Additional Protocols. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention 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 [hereinafter GC IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *adopted* June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

34 See, e.g., Convention with Respect to the Laws and Customs of War on Land art. 2, July 29, 1899, 32 Stat. 1803 (stating that the annexed Regulations on the Laws and Customs of War on Land applied “in case of war”). The classical definition of war, set forth in Oppenheim’s treatise on international law, was “[w]ar is a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases.” 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 202 (H. Lauterpacht ed., 7th ed. 1952).

Conventions were concerned about opportunities for states to argue that LOAC—and its core protective obligations—were not applicable because there was no declared war. They therefore sought to identify more clearly when LOAC applied to govern conduct during wartime through a framework of law applicable based on an objective analysis of the relevant situation of violence, not the claims or objectives of one or both parties to the conflict.

The 1949 Geneva Conventions seek to address all instances of armed conflict and set forth two primary categories of armed conflict that trigger the application of LOAC: international armed conflict and non-international armed conflict. International armed conflict is conflict between or among two or more states, and non-international armed conflict refers to conflicts between a state and a nonstate armed group or between two or more non-state groups. The definition of armed conflict for each type of conflict is not the same, creating different triggers for the application of LOAC. Although the threshold for non-international armed conflict remains the source of extensive debate, this Article focuses on international armed conflict for purposes of understanding the relationship between its threshold and the definition of armed attack.

Common Article 2 to the four Geneva Conventions provides that “the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”<sup>35</sup> Although it does not specifically define the term “armed conflict,” Common Article 2 is understood to apply to any situation in which the armed forces of two states engage with each other—an international armed conflict.

An international armed conflict is therefore any conflict between two states involving their armed forces, no matter how minor or short lived, even if one or both states deny the existence of the conflict. As the Commentary to the Geneva Conventions explains, “[a]ny difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2.”<sup>36</sup> The threshold for a situation between two states to constitute an international armed conflict is deliberately low—even a seemingly minor confrontation with little or no overt violence can meet the threshold for international armed conflict. The Commentary elaborates as follows:

It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4 [of the Third Geneva Convention]. Even if there has been no fighting, the fact that persons covered by the Convention are detained is

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35 GC I, *supra* note 33, at art. 2; GC II, *supra* note 33, at art. 2; GC III, *supra* note 33, at art. 2; GC IV, *supra* note 33, at art. 2.

36 INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 23 (Jean S. Pictet ed., 1960) (footnote omitted) [hereinafter GC III COMMENTARY].

sufficient for its application. The number of persons captured in such circumstances is, of course, immaterial.<sup>37</sup>

Thus, for example, the Iranian detention of fifteen British sailors in the Persian Gulf in March 2007<sup>38</sup> triggered the law of international armed conflict and the Third Geneva Convention governed the treatment of the detained sailors. The fact that neither the United Kingdom nor Iran recognized a state of war or the existence of an armed conflict had no bearing on the application of LOAC.<sup>39</sup> Similarly, when Syrian forces shot down and captured U.S. Navy Lieutenant Bobby Goodman in 1983 when he was flying a bombing mission in support of U.S. peacekeeping forces in Lebanon, Syria treated him as a prisoner of war, as the United States demanded.<sup>40</sup> The engagement between Syria and the United States was extraordinarily brief, but nonetheless qualified as an international armed conflict so as to trigger the application of LOAC.

More recently, Russia's 2014 incursion into Crimea highlighted the low threshold for international armed conflict and, more importantly, the reasons for this low threshold. On February 27–28, 2014, armed men in unmarked uniforms—understood to be and later identified as Russian troops—seized Crimea's parliament building and two airports in the process of securing control over Crimea over the next few days and weeks. During that time, beyond a few isolated incidents, Russian and Ukrainian military

37 *Id.*

38 See Sarah Lyall, *Iran Detains British Sailors in Waters off Iraq*, N.Y. TIMES (Mar. 23, 2007), <https://www.nytimes.com/2007/03/23/world/middleeast/23cnd-basra.html>.

39 See Paul Berman, *When Does Violence Cross the Armed Conflict Threshold: Current Dilemmas*, COLLEGIUM, Autumn 2013, at 33, 39 (“If a member of one armed force falls into the power of the other—sick, shipwrecked or taken prisoner—then IHL applies even without a shot being fired. In 2007 when British sailors were detained by Iran and paraded on television, the UK invoked the protection of Article 13 of the third Geneva Convention.”); see also GC III COMMENTARY, *supra* note 36, at 23 (“Even in that event it would not appear that they could, by tacit agreement, prevent the Conventions from applying.”); COMMENTARY OF 2016, CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD, INT’L COMM. OF THE RED CROSS para. 213 (2016) [hereinafter 2016 COMMENTARY], <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=OpenDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518> (“Even 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.”).

40 See Terry A. Anderson, ASSOCIATED PRESS, Dec. 31, 1983 (“Syria says it considers Goodman a prisoner of war and will release him only ‘after the war is over.’”); see also Geoffrey S. Corn & Michael L. Smidt, “*To Be or Not to Be, That Is the Question*”: *Contemporary Military Operations and the Status of Captured Personnel*, ARMY LAW., June 1999, at 1, 5; Steven Dornfeld, *Jackson Leaves for Syria to Seek Airman’s Freedom*, MIA. HERALD, Dec. 30, 1983, at 11A; *Excerpts from Interview with Syrian Defense Minister*, ASSOCIATED PRESS, Dec. 30, 1983; *Red Cross Visits Flier Being Held by Syrians*, N.Y. TIMES (Dec. 9, 1983), <https://www.nytimes.com/1983/12/09/world/red-cross-visits-flier-being-held-by-syrians.html>; Telegram 348126 from Dep’t of State to American Embassy at Damascus (Dec. 8 1983), in 3 MARIAN NASH (LEICH), DEP’T OF STATE, CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981–1988, at 3456–57 (1994).

forces did not engage directly in hostilities. News reports suggest that only a few shots were fired and one Ukrainian soldier was killed in the course of Russia's consolidation of control.<sup>41</sup> However, from the moment Russian forces entered into Ukrainian territory without Ukrainian consent, the situation constituted an international armed conflict, even in the absence of fighting and even if most Ukrainian soldiers were unarmed in most confrontations. To trigger an international armed conflict, it

is also of no concern whether or not the party attacked resists. . . . [A]s soon as the armed forces of one State find themselves with wounded or surrendering members of the armed forces or civilians of another State on their hands, as soon as they detain prisoners or have actual control over a part of the territory of the enemy State, then they much comply with the relevant [Geneva] convention.<sup>42</sup>

The threshold for international armed conflict is therefore "remarkably low"<sup>43</sup>—one airstrike,<sup>44</sup> detention of one soldier,<sup>45</sup> even an incursion onto the adversary's territory without consent is sufficient. Furthermore, the existence of international armed conflict and the application of LOAC does not depend on either the adversary's response or lack thereof,<sup>46</sup> or on the *jus ad*

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41 See Carol Morello & Anthony Faiola, *Ukrainian Soldier Fatally Shot at Base in Crimea*, WASH. POST (Mar. 18, 2014), <https://www.washingtonpost.com/news/world/wp/2014/03/18/ukrainian-serviceman-reportedly-shot-in-crimea/>.

42 Hans-Peter Gasser, *International Humanitarian Law: An Introduction*, in HUMANITY FOR ALL: THE INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT 22–23 (Hans Haug ed., 1993).

43 Marko Milanovic & Vidan Hadzi-Vidanovic, *A Taxonomy of Armed Conflict*, in RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW: *JUS AD BELLUM*, *JUS IN BELLO*, AND *JUS POST BELLUM* 256, 274 (Nigel D. White & Christian Henderson eds., 2013).

44 See Françoise J. Hampson, *The Relationship Between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body*, 90 INT'L REV. RED CROSS 549, 553 (2008) ("[N]o minimum threshold for the amount or quality of force used is specified. Clearly, this suggests that any use of armed force *against* a state triggers an armed conflict."); Christopher Greenwood, *Scope of Application of International Humanitarian Law*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 45, 48 (Dieter Fleck ed., 2d ed. 2008) ("An international armed conflict exists if one state uses armed force against another state."); DIETRICH SCHINDLER, THE DIFFERENT TYPES OF ARMED CONFLICTS ACCORDING TO THE GENEVA CONVENTIONS AND PROTOCOLS 131 (1979) ("Even a minor frontier incident is sufficient. Any kind of use of arms between two States brings the Conventions into effect.").

45 See 2016 COMMENTARY, *supra* note 39, para. 238; NASH (LEICH), *supra* note 40, at 3456.

46 See 2016 COMMENTARY, *supra* note 39, para. 243 ("Indeed, States might not publicly acknowledge [isolated or sporadic incidents] as armed conflicts and may describe them simply as 'incidents'. They may also choose not to respond with violence to an attack against their military personnel or populations, or on their soil. Nevertheless, given that humanitarian law applies based on the facts, the fact that a State publicly uses a term other than 'armed conflict' to describe a situation involving hostilities with another State is not in itself determinative of the classification of that situation as an armed conflict.").

*bellum* question of “whether the use of force against another State is permitted under the UN Charter.”<sup>47</sup>

Although some argue that international armed conflict requires some level of intensity to trigger LOAC,<sup>48</sup> nothing in the Geneva Conventions, the Commentary or international jurisprudence supports such an analysis. In fact, the immediate application of LOAC upon any dispute between states leading to the engagement of their armed forces is fundamental to LOAC’s core purposes and effectiveness. Thus, the threshold for the existence of an international armed conflict is deliberately set quite low in order to maximize LOAC’s protective purposes. First, when two states are in conflict, there may be no mechanisms for individuals in one state to seek redress or protection from the other in the absence of LOAC applying—consider, for example, how soldiers or civilians from one state could enforce their rights if detained or otherwise subject to the control of the adversary state. “In the absence of a classification of a situation as an armed conflict, detained military personnel would not enjoy equivalent legal protection under the domestic law of the detaining State, even when supplemented by international human rights law.”<sup>49</sup> In fact, in many situations of conflict, neither human rights law nor domestic law applies at all to ensure protection for those most vulnerable—the populations specially protected by the four Geneva Conventions of 1949: wounded, sick, shipwrecked, prisoners of war, and civilians. The low threshold for LOAC’s application in international armed conflict helps ensure there are no gaps in legal protection, guarding against situations in which “no law governs the conduct of military operations below that level of intensity,”<sup>50</sup> and upholding the core purposes of the Geneva Conventions.

Second, the low threshold for international armed conflict encompasses the opening phase of hostilities into the conflict and the application of LOAC. A system in which a conflict begins with an attack by one state against another and then develops from there, but LOAC does not apply to the initial attack, would simply not make sense and would not offer the necessary protection for the individuals and objects targeted or incidentally harmed in that first attack. Neither human rights law nor domestic law is designed to

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47 *Id.* para. 215 (“The mandate and the actual or perceived legitimacy of a State to resort to armed force are issues which fall within the province of *ius ad bellum*, and have no effect on the applicability of international humanitarian law to a specific situation involving two or more High Contracting Parties.”).

48 See INT’L L. ASS’N, THE HAGUE CONFERENCE: FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW 2 (2010) [hereinafter ILA REPORT 2010].

49 2016 COMMENTARY, *supra* note 39, para. 239; see also INT’L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 7 (2011); Louise Arimatsu, *Beginning of IHL Application: Overview and Challenges*, COLLEGIUM, Autumn 2013, at 71, 76 (2013) (“This low threshold of violence corresponds with the view that the overriding purpose of the Conventions is to ensure maximum protection for those groups the law seeks to protect.”); Noam Lubell, *What Does IHL Regulate and is the Current Armed Conflict Classification Adequate?*, COLLEGIUM, Autumn 2013, at 17, 20 (2013).

50 Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 32, 41 (Elizabeth Wilmshurst ed., 2012).

address or regulate violence between two states. Applying LOAC to the start of hostilities thus “avoid[s] the uncertainty surrounding the period during which one would try to observe whether a given threshold of intensity has been reached”<sup>51</sup> and maximizes the application of the law to the entire spectrum of a conflict situation.

Unlike the threshold for armed attack, which seeks to contain the use of force and prevent escalation and is therefore high, the threshold for the existence of an international armed conflict endeavors to provide maximum protection for all persons and is therefore low. Both thresholds focus on activities involving the use of force of some kind; both play an essential role in the international system. The following Part explores this gap in greater detail and then examines the possible consequences that result from two different thresholds.

## II. GAPS AND CONSEQUENCES

In many situations, an operation triggering an international armed conflict, such as an invasion, or artillery or rocket attacks, will obviously also constitute an armed attack, and the different standards and definitions in the two bodies of law will present no concerns. The very language used in the two thresholds, however—gravity, scale, and effects for armed attack; “no matter how minor” for international armed conflict—demonstrates the gulf between an act that may trigger the existence of an international armed conflict and an act that constitutes an armed attack triggering the right to use force in self-defense. Indeed, the type of act that could constitute a use of force, recognized as a lower threshold than armed attack, is more likely to be similar in nature and import to the threshold for international armed conflict. Regardless of the precise appropriate comparison, there can be little doubt that the existence of an international armed conflict occurs or is triggered below the threshold for an armed attack. As a result, without further analysis, a simple side-by-side comparison of the two thresholds and the two legal regimes leads to the conclusion that two states can be in a state of international armed conflict without any act or situation triggering or justifying the right to use force under the *jus ad bellum*. And yet the very first lesson in any discussion of the *jus ad bellum* is that it regulates the right of states to use force in the international system—that is, to go to war.

This Part explores three examples of this gap between the thresholds for armed attack and international armed conflict in order to highlight the potential inconsistencies and challenges that result. Although LOAC and the *jus ad bellum* are entirely separate legal regimes, with different goals, structures, and methodologies, both are integral in any situation that involves the use of force by or against a state. One consequence of the gap between the thresholds is that at times, the resulting rules in one body of law may seem to operate at cross-purposes to the goals and principles of the other. As Part III of this Article considers, these situations of cross-purposes may well be the

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51 2016 COMMENTARY, *supra* note 39, para. 240.

unavoidable consequence of the interaction of LOAC and *jus ad bellum* in certain specific circumstances and may be less problematic than other potential solutions or adaptations to address the gap between the thresholds. However, before examining and reaching that potential conclusion, understanding the nature of the gap and its consequences is essential. Section A of this Part therefore analyzes the interpretation of and application of the thresholds for international armed conflict and for armed attack in three situations—detention, a declaration of war, and anticipatory self-defense—to highlight seemingly problematic, confusing, or surprising results. Section B of this Part then examines the consequences of the gap for either or both bodies of law, with particular attention to whether and how the core purposes of the law or its logic may be undermined. In the end, this analysis narrows to a few key questions: Do *jus ad bellum* and LOAC always apply sequentially, with *jus ad bellum* applying first before any LOAC analysis can be undertaken? Does the application of LOAC include the permission or even authority to use force once a conflict exists or does that authority rest solely in the *jus ad bellum*? And when there appears to be a conflict between the two bodies of law with respect to the authority or permissibility of using force in a given situation, how should that conflict be resolved?

### A. *Explaining the Gaps*

#### 1. Detention

Imagine that State A detains several members of State B's military. According to the general understanding of the threshold for international armed conflict, this act of detaining members of another state's military would constitute an international armed conflict within the meaning of Common Article 2 of the 1949 Geneva Conventions and trigger the application of the law of armed conflict. Both the original Commentary to the 1949 Geneva Conventions and the 2016 updated Commentary affirm that the capture and detention of even one soldier can be sufficient to trigger the existence of an international armed conflict: "[I]t makes no difference 'how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4' of the Third Convention."<sup>52</sup> As explained above, the application of LOAC upon capture of members of an adversary state's military is an essential feature of the "entire package of protection"<sup>53</sup> the Geneva Conventions provide, ensuring legal

52 *Id.* para. 236 (quoting GC III COMMENTARY, *supra* note 36, at 23). For example, when Serbia captured four U.S. soldiers serving in a UN peacekeeping mission in Macedonia who allegedly crossed the border into Serbia without authority, the United States asserted that they were entitled to treatment as prisoners of war. See generally GEOFFREY S. CORN ET AL., *THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH* 75 (2012); Stephen Lee Myers, *Crisis in the Balkans: The Prisoners; Serb Officer, Captured by Rebels, Held by U.S.*, N.Y. TIMES, April 17, 1999, at A9.

53 Jelena Pejic, *Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications*, 96 INT'L REV. RED CROSS 67, 77 (2014).

protection when domestic law and international human rights law are not able to provide the necessary protections. Just as the use of deadly combat power is one central tool for achieving the defeat of the enemy forces, so another means to “undermine the potential of the enemy army . . . is to capture its soldiers,” such that the law of international armed conflict applies as soon as “someone falls into the hands of the enemy.”<sup>54</sup>

At the same time that the capture and detention of these members of State B’s military would trigger the existence of an international armed conflict, it would not rise to the level of an armed attack justifying the right to use force in self-defense in accordance with Article 51 of the United Nations Charter. In general, uses of force with sufficient gravity to constitute an armed attack are those resulting in death or destruction. Even seemingly “small-scale bombings, artillery, naval or aerial attacks qualify as ‘armed attacks’ activating Article 51 [of the] UN Charter, as long as they result in, or are capable of resulting in destruction of property or loss of lives.”<sup>55</sup> Detention is not of the same scale or gravity as acts that cause death and destruction and, although potentially a use of force under Article 2(4) of the UN Charter, would not be an armed attack. Indeed, detention would at most constitute a mere frontier incident, the type of low-level activity that was deliberately excluded from the self-defense paradigm in order to guard against escalation.

The capture and detention of soldiers, even just a few or perhaps one, could therefore trigger the existence of an international armed conflict and the application of the accompanying law, but at the same time would not be sufficient for the use of force in self-defense against an armed attack. State B therefore finds itself in an international armed conflict with State A but also does not have any legal justification under the *jus ad bellum* to use force in self-defense in response to State A’s action. A few potential outcomes may arise, each of which raises challenging questions for the application of LOAC, of *jus ad bellum*, and of the relationship and interplay between the two bodies of law.

First, if State B believes that the existence of an international armed conflict allows—or even authorizes—the use of force in accordance with the principle of military necessity and the rules governing the targeting of persons and objects during an armed conflict, then State B may begin to take action in accordance with the rules, authorities, and obligations of LOAC to prosecute the armed conflict with State A in order to end the dispute in a satisfactory manner. The result: a state is using force against another state without satisfying, or even considering, the parameters of the *jus ad bellum*.

Alternatively, if State B believes that it cannot use force without the Article 51 justification of self-defense in response to an armed attack, it will not use force and will have fewer feasible options, if any, to resolve the dispute

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54 Julia Grignon, *The Beginning of Application of International Humanitarian Law: A Discussion of a Few Challenges*, 96 INT’L REV. RED CROSS 139, 147 (2014).

55 TOM RUYTS, ‘ARMED ATTACK’ AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 155 (2010) (emphasis omitted).



with State A and secure the release and return of its military personnel. In addition, State A could detain additional members of State B's military, if it is in a position to capture them, and continue to detain them—in an international armed conflict (which has been triggered by State A's original capture and detention of State B's personnel), a state can detain members of the enemy forces for the duration of the conflict. Here, the conflict persists as long as State A is detaining State B's personnel because that detention is, in fact, the manifestation of the conflict. Although seemingly farfetched, this scenario presents the possibility that a state could simply manufacture the factual predicate to hold members of an adversary's military nearly indefinitely, while appearing to comply with the applicable law. State A could also engage in other acts below the threshold of armed attack, leaving State B perpetually handicapped from using force in self-defense because of the lack of an armed attack, but facing the equivalent of "death by a thousand cuts."

Third, consider that State A, having captured and detained State B's soldiers and thus triggered the existence of an international armed conflict, could act according to the same theory of LOAC authorizing or at least allowing the use of force to defeat the enemy presented in the first scenario. State A would therefore use deadly combat power against State B's military personnel and objects in accordance with the principle of military necessity and other rules of LOAC. In essence, State A would manufacture an international armed conflict through the minor act of detaining a would-be adversary's personnel and thus grant itself permission to use force against that adversary because of the existence of the conflict it created. Still more problematic, imagine State B sends one or more soldiers across the border into State A for the purpose of getting detained so as to trigger the international armed conflict it seeks as the acceptable paradigm for using force against State A. Like the first scenario, in either version of this third scenario, the *jus ad bellum* simply falls by the wayside as the gap between the thresholds for armed attack and international armed conflict enable an "end run" around the *jus ad bellum*.

## 2. Declarations of War

Historically, the law of war applied during wartime, but neither treaty nor customary law specifically defined the parameters of war, because the meaning of war was considered to be well understood. For example, Article 2 of the Hague Convention of 1899 stated that the annexed Regulations on the Laws and Customs of War on Land applied "in case of war."<sup>56</sup> The Hague Convention (III) of 1907 Relative to the Opening of Hostilities provided that "hostilities . . . must not commence without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an

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<sup>56</sup> Convention with Respect to the Laws and Customs of War on Land art. 2, July 29, 1899, 32 Stat. 1803.

ultimatum with conditional declaration of war.”<sup>57</sup> The primary purpose of a declaration of war is to identify with precision the moment when a state of war began. Traditional theories of declared war held that “the mere fact that States are engaged in armed violence is insufficient to displace the law of peace and trigger the applicability of humanitarian law[, such that] declared war in its legal meaning starts with a declaration of war.”<sup>58</sup> Although declarations of war are now rarely used—the last time the United States declared war was against Romania in June 1942 in the midst of World War II<sup>59</sup>—they nonetheless continue to have the same legal force.

A declaration of war thus marks the initiation and existence of an international armed conflict and the application of LOAC. Although the drafters of the 1949 Geneva Conventions introduced the objective analysis of armed conflict based on the driving goal of protecting against the dangers of states arguing that the law of war, and its concomitant obligations, did not apply because there was no declared war,<sup>60</sup> they did not eliminate declarations of war as a trigger for IAC. Thus, as Common Article 2 states, “the [Geneva] Convention[s] shall apply to all cases of declared war,”<sup>61</sup> reaffirming that a declaration of war marks the start of an international armed conflict. As the Eritrea-Ethiopia Claims Commission noted, “the essence of a declaration of war is an explicit affirmation of the existence of a state of war between belligerents.”<sup>62</sup> Furthermore, the declaration of war is sufficient, in and of itself and without any hostilities or other acts, to trigger the application of LOAC and the existence of an international armed conflict.<sup>63</sup> Like the low thresh-

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57 Hague Convention (III) Relative to the Opening of Hostilities art. 1, Oct. 18, 1907, 36 Stat. 2259.

58 2016 COMMENTARY, *supra* note 39, para. 204; *see also* Eliza Ann and Others (1813) 165 Eng. Rep. 1298, 1300; 1 Dodson 244, 247 (stating that a declaration of war “proves the existence of actual hostilities on one side at least, and puts the other party also into a state of war, though he may, perhaps, think proper to act on the defensive only”).

59 *See* H.R.J. Res. 319, 77th Cong. (1942).

60 For example, during World War II, the Japanese referred to their operations in China and Manchuria as an “Incident,” claiming that the hostilities therefore did not trigger the law of war, an argument that was rejected by the International Military Tribunal for the Far East, which applied the law of war and convicted numerous Japanese defendants of war crimes and other atrocities. *See* International Military Tribunal for the Far East, Judgment of 4 Nov. 1948, at 1003, 1008; *see also* WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY* 830 (1990) (explaining that Hitler argued that Germany did not have to apply the law of war in the conflict with the Soviet Union because the Soviets were not deserving of adherence to the law and therefore did not have a legitimate right to the reciprocity inherent in LOAC).

61 GC I, *supra* note 33, at art. 2; GC II, *supra* note 33, at art. 2; GC III, *supra* note 33, at art. 2; GC IV, *supra* note 33, at art. 2.

62 *Jus Ad Bellum—Ethiopia’s Claims 1–8 (Eth. v. Eri.)*, Partial Award, 26 R.I.A.A. 457, 467.

63 *See* 2016 COMMENTARY, *supra* note 39, para. 206 (“The Geneva Conventions become automatically applicable even when a declaration of war is not followed by armed confrontations between the declaring State and its designated opponent(s). Indeed, the declaration of war does not need to be underpinned by hostile actions against the enemy to make

old for international armed conflict—the “one shot” threshold—in general, the fact that a declaration of war alone suffices to constitute an international armed conflict helps to carry out the protective goals of LOAC. Individuals who find themselves in the territory of an adversary state will therefore “benefit from the protection conferred by humanitarian law should they be exposed to the adverse effects of a declaration of war and its correlative bellicose rhetoric and atmosphere.”<sup>64</sup>

In contrast, under the modern *jus ad bellum*, a declaration of war does not fall within the acceptable justifications for the use of force under the United Nations Charter. Although historically a declaration of war was considered *de rigueur* for a justifiable resort to arms and was “the constant practice among the powers of Europe,”<sup>65</sup> by the early twentieth century, the international community had begun to try to outlaw war as an instrument of national power, first through the League of Nations, then the interwar treaties, and finally the United Nations Charter. For the purposes of the instant analysis, the key question is whether a declaration of war against a state can constitute an armed attack against that state so as to trigger its right to use force in self-defense. Under any ordinary interpretation of armed attack, it does not—a declaration of war does not involve acts causing death, destruction or injury of any gravity or scale, or cause such effects. A declaration of war, “if it is evident to all that [it is] unaccompanied by deeds, [is] not enough”<sup>66</sup> to trigger the right of self-defense. One could certainly characterize a declaration of war in certain circumstances as a threat of force, prohibited under Article 2(4) of the United Nations Charter, “[b]ut such a threat *per se* does not constitute an armed attack.”<sup>67</sup>

This dichotomy could produce similar contradictory results as the detention example above in certain potential situations. If State A issues a declaration of war against State B, the two states will be in a situation of international armed conflict and LOAC will apply. However, neither state will have a legal justification to use force under the *jus ad bellum*. If, for example, the two states subscribe to the theory that the existence of an international armed conflict and the application of LOAC allows them to use force to defeat the enemy in the conflict, the result will be two states using force without either having authority under *jus ad bellum*. This scenario sets up a significant conflict between LOAC and the *jus ad bellum*, the nature and consequences of which will be addressed in greater detail in Section B of this Part below.

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humanitarian law applicable. Therefore, a State which confines itself to a declaration of war but does not participate in the fighting has to apply the Geneva Conventions.” (footnotes omitted)).

64 *Id.* para. 208.

65 EMER DE VATEL, *THE LAW OF NATIONS* 501 (Béla Kapossy & Richard Whatmore eds., 2008); see also OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* 36–37 (2017).

66 DINSTEIN, *supra* note 11, at 186.

67 *Id.* at 186 n.62.

Alternatively, where the states in question do not believe that LOAC includes the permission or authority to use force to defeat the enemy once in an armed conflict, the same situation of State A declaring war against State B would create a situation of international armed conflict, but one in which neither state believes it can use force because of the lack of a *jus ad bellum* justification. On first glance, this situation surely seems preferable because it avoids the use of force and escalation—the very goal of the *jus ad bellum*. However, the result may well be operationally illogical: consider that while neither state believes it has a justification to use force in self-defense, it nonetheless believes that it can take other actions in accordance with rights and privileges under LOAC, including detaining enemy nationals or even enemy military personnel if feasible to capture, and other rights accorded to belligerents that do not rise to the level of a use of force.<sup>68</sup> Although each state has a variety of responses available to it under classic international law, such as countermeasures, retorsions, or other tools, it would not be able to use force to resolve what, over time, would be a festering dispute with persons detained on both sides and other low-level acts taking place in the overall context of a conflict that persists without any hostilities. There is little doubt that this situation could well be seen as preferable to a shooting war because of the lack of hostilities and kinetic violence—the opportunity to avoid violence and escalation will always be a positive in some, if not all, ways—but operationally this result will likely be seen as illogical. The unfortunate consequence may be that parties involved begin to see the law as divorced from reality and as a hindrance rather than an effective complement to military and strategic doctrine.

### 3. Anticipatory Self-Defense

Unlike the previous two examples, anticipatory self-defense frames the gap between the threshold for armed attack and the threshold trigger for international armed conflict in a different manner. Anticipatory self-defense refers to the possibility of a state using force in self-defense in response to an imminent armed attack, rather than waiting for the attack to actually happen before having the right to respond to deter or repel the attack. Notwithstanding significant disagreement regarding what specifically constitutes an imminent attack and when the right of self-defense is triggered in such situations, there is general acceptance that a state may act in anticipatory self-defense to prevent an attack from occurring.<sup>69</sup>

In situations of anticipatory self-defense, the threshold for armed attack is, actually, an imminent armed attack—that is, the trigger for the use of

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68 See *id.* at 152 (explaining that once a declaration of war brings about a state of war, “[w]ithout resorting to hostilities, conceivably without even running any risk, the country issuing the declaration is allowed to take steps seriously impinging on the rights of individuals”).

69 See HENDERSON, *supra* note 28, at 277; NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 54–56 (2010).

force in self-defense is the existence of an imminent armed attack. Consider a state that faces an imminent armed attack. At the moment the armed attack is imminent, such that it triggers the right of self-defense, that state has the right to use force, but the situation does not constitute an international armed conflict because there is not yet a dispute between two states leading to the intervention of their armed forces. Once the victim state uses force in response, an international armed conflict exists. But in the time when the armed attack is imminent but not yet launched, and the intended victim state has the right to self-defense but has not actually used force, there is no international armed conflict. The question of anticipatory self-defense and

the existence of an imminent armed attack is relevant for the *jus ad bellum* only—i.e., for the exercise of the right of self-defense according to Article 51 of the UN Charter. For the determination of the existence of an international armed conflict, there must in fact be a resort to a use of military force; an imminent or allegedly imminent use of force or armed attack does not suffice.<sup>70</sup>

Thus, even the low threshold for international armed conflict is not triggered by an intended—but not launched—attack.

Although this scenario seems to present a gap between the threshold for armed attack and the threshold for international armed conflict, this presumed gap is actually the ordinarily accepted progression of how international law views and analyzes uses of force and situations of violence. It is almost axiomatic that any analysis of the use of force starts with the *jus ad bellum*—whether the state could use force—and then proceeds to LOAC—how the state uses force in the context of the ensuing armed conflict. The common view, therefore, is that “[c]ertainly, the rules governing the exercise of State self-defense precede the application of humanitarian law and therefore are, at least initially, sequential in application.”<sup>71</sup> As a result, the difference in the thresholds is seen as appropriate, even necessary to ensure the proper application of international law: first assess whether a state has a right to use force under international law, then examine the application of LOAC to the international armed conflict that exists as a result of that use of force. In contrast to the gaps presented in the detention and declaration of war subsections above, here the gap between the armed attack threshold triggering the right of self-defense and the threshold marking the existence of an international armed conflict seems uncontroversial and, in fact, sensible.

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70 Wolff Heintschel von Heinegg, *The Difficulties of Conflict Classification at Sea: Distinguishing Incidents at Sea from Hostilities*, 98 INT’L REV. RED CROSS 449, 457 (2016).

71 KENNETH WATKIN, *FIGHTING AT THE LEGAL BOUNDARIES: CONTROLLING THE USE OF FORCE IN CONTEMPORARY CONFLICT* 57 (2016); see also Greenwood, *supra* note 3, at 222 (explaining that the *jus ad bellum* “will always operate before the [LOAC] comes into play”).

### B. *Exploring the Consequences*

Any examination of the gaps between the armed attack and international armed conflict thresholds and the consequences of those gaps must inevitably encounter the timeless question of the interaction between the *jus ad bellum* and LOAC. In effect, when a situation creates a gap between the trigger for the use of force in self-defense and the existence of an armed conflict, such as the examples above, one way to frame the resulting question is to ask whether LOAC or the *jus ad bellum* governs whether the action in question was lawful. Like the debates about the interplay between LOAC and international human rights law, where the once starkly presented question of *lex specialis* has morphed into a complex discourse about the complementary application of the two legal regimes, the relationship between LOAC and *jus ad bellum* also is susceptible to differing interpretations. Although the relationship is rarely framed through the lens of *lex specialis*, questions about how the *jus ad bellum* and LOAC relate do offer some similarities to the LOAC versus human rights law debates.

Over time, three primary approaches to this relationship are evident. First, what some consider to be “the mainstream view is that the two bodies of law apply at different stages of a conflict (*jus ad bellum* affects the legality of the initial recourse to force, whereas [LOAC] logically applies after hostilities have begun).”<sup>72</sup> This approach focuses on the core function of each body of law in assessing when it applies and when that application begins and, perhaps, ends. Based on that methodology, the two legal regimes must “necessarily apply at different times, at different stages in the deterioration of relations between states [such that once] hostilities commence, *ius ad bellum* ceases to be relevant and *ius in bello* takes control.”<sup>73</sup> Under this approach, the application of international law happens in two separate and sequential steps: first, was the initial use of force lawful under the *jus ad bellum*; and second, assuming the use of force triggered an international armed conflict, are the parties to the conflict complying with LOAC in the conduct of hostilities. For some, this view predominates in situations where the initial armed attack not only triggers the right to use force in self-defense, but leads the victim state to launch a “war of self-defence” in response.<sup>74</sup> Overall, just as LOAC does not apply to the first determination regarding the lawfulness of the use of force, so—under this view—the *jus ad bellum* offers no contribution to legal analysis of the conduct of hostilities in the ensuing armed conflict.

A second and related view is that *jus ad bellum* and LOAC apply simultaneously but one does not affect the application or analysis of the other. Although the precise contours and consequence of this approach are not

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<sup>72</sup> Jasmine Moussa, *Can Jus ad Bellum Override Jus in Bello? Reaffirming the Separation of the Two Bodies of Law*, 90 INT’L REV. RED CROSS 963, 968 (2008).

<sup>73</sup> Greenwood, *supra* note 3, at 221 (presenting a traditional view but not supporting that argument).

<sup>74</sup> DINSTEIN, *supra* note 11, at 237.

entirely clear, the basic premise is that any limits imposed by the *jus ad bellum* simply have no effect on any LOAC analysis, whether to affirm the legality of an act or declare it illegal. Therefore, the “[s]imultaneous application of *jus ad bellum* and *jus in bello* should not imply that the two concepts are linked or interdependent. Acts that are in complete conformity with *jus in bello* may nonetheless be prohibited under *jus ad bellum*.”<sup>75</sup>

Finally, the third approach sees the relationship between the two bodies of law as one of continuous and concurrent application. The starting premise of this approach is that the fact that an armed conflict has begun does not end the application of either Article 2(4) or Article 51 of the United Nations Charter. “To hold otherwise would be to allow a state to avoid the application of some of the most fundamental rules contained in the Charter by the unilateral act of characterizing its relations with another state as war.”<sup>76</sup> Adherents of this approach therefore apply the *jus ad bellum* to assess the lawfulness of the initial use of force and then apply both the *jus ad bellum* and LOAC to all subsequent uses of force and hostilities throughout the conflict. Most commonly, scholars argue that the criteria for self-defense—the principles of necessity, proportionality, and immediacy—continue to apply throughout the conflict, in conjunction with LOAC’s rules. Through this “‘overarching’ application,” the self-defense principles therefore affect “the temporal and geographic scope of any resulting conflict, the choice of legitimate military targets, the choice of weapons, belligerent reprisals, the conduct of an occupation, and dealings with neutrals.”<sup>77</sup> Others demand a still more comprehensive concurrent application of *jus ad bellum* and LOAC. Under this interpretation, because the *jus ad bellum* applies to the first use of force and to each subsequent use of force during the hostilities, “[a]ny use of force, even after the outbreak of fighting, is prohibited if it cannot be justified by reference to the right of self-defence recognized in Article 51 of the Charter.”<sup>78</sup>

With these general formulations of the relationship between *jus ad bellum* and LOAC as background, this Section explores the consequences of the gap between the threshold for armed attack and the threshold for the existence of international armed conflict. If an international armed conflict exists but the armed attack threshold has not been met, such as in the examples presented above, this gap between the thresholds and the concomitant application of the relevant international law regimes introduces challenging questions in both the operational and legal spheres.

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75 Moussa, *supra* note 72, at 968.

76 Greenwood, *supra* note 3, at 224.

77 WATKIN, *supra* note 71, at 58.

78 Greenwood, *supra* note 3, at 223.

## 1. Using Force in International Armed Conflict Below the Armed Attack Trigger

A first question arises in the scenarios above, or similar situations, where the facts trigger the existence of an international armed conflict but neither state has engaged in acts constituting an armed attack. Perhaps one state has detained members of the military of another state, or one state has engaged in low-level uses of force that exceed the low threshold for international armed conflict but do not meet the higher threshold of armed attack so as to trigger the right to use force in self-defense. The existence of an international armed conflict, even if there is no kinetic action, triggers the application of LOAC, particularly the full panoply of the four Geneva Conventions of 1949. Can the states involved in this international armed conflict therefore use force against each other—in compliance with LOAC—even if there is no event triggering the *jus ad bellum* authority to use force?

Within the international legal discourse, no consensus exists on this question. For some, only the *jus ad bellum* provides the authority to use force, regardless of any characterization of a situation under LOAC; for others, the existence of an armed conflict is the necessary authority to use force in the context of that armed conflict, irrespective of any *jus ad bellum* analysis. This subsection focuses primarily on the latter argument and its consequences and the following subsection addresses the former considerations. Upon first glance, any consideration of using force that does not first involve the classic *jus ad bellum* analysis of Article 2(4)'s prohibition and then the three possible exceptions of consent, United Nations Security Council authorization or self-defense is simply inconceivable. But does the existence of an international armed conflict permit, or even authorize parties to the conflict to engage in forceful combat action against each other? In essence, is the existence of an armed conflict another, albeit implicit, exception to the prohibition on the use of force, or simply a separate but parallel framework for understanding the employment of force in disputes between states?<sup>79</sup>

During armed conflict, LOAC provides for the identification of persons and objects and lawful objects of attack. As a factual matter, apart from debates regarding legal authority, permission or regulation, states in an armed conflict use force to accomplish the subjugation of the adversary's forces in order to achieve their core strategic objectives through defeat or capitulation of the adversary. In a situation where one state launches an armed attack triggering the other state's right to use force in self-defense, the question of whether the states (or, at a minimum, the victim state) can use force to prosecute the armed conflict—at least to the extent allowed according to necessity, proportionality, and immediacy, depending on one's view of

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79 See François Bugnion, *Just Wars, Wars of Aggression and International Humanitarian Law*, INT'L REV. RED CROSS 3, 8 (2002) (English version) (raising the question of whether "the rules governing relations between belligerents (*jus in bello*) [are] autonomous, or is their application conditioned by the rules prohibiting the recourse to force (*jus ad bellum*)?").



the *jus ad bellum*–LOAC interplay—is answered easily by the fact that the *jus ad bellum* was triggered by the armed attack. From there, analysis of the use of force proceeds along the regular trajectory of LOAC and, possibly, *jus ad bellum* analysis. If the international armed conflict comes into existence without actions meeting the threshold for armed attack, however, it remains unclear how international law does or should view the use of force, the regulation of that use of force, and, most importantly, the authority or entitlement to use force.

Notwithstanding an extensive debate over the past decade regarding whether LOAC includes the authority to detain persons during armed conflict<sup>80</sup>—or only regulates such detention with the authority coming from another source—the debate over whether LOAC authorizes, permits, or merely regulates the use of deadly force has not necessarily been seized in the same explicit manner in the international discourse. Rather, there appear to be two, or perhaps three, views on the question that the proponents of each accept as axiomatic. Given that most situations of international armed conflict arise after the *jus ad bellum* trigger of armed attack has occurred, this issue does not necessarily come to the fore, but in the unusual situation of an international armed conflict without an armed attack, it becomes an existential question for both LOAC and the *jus ad bellum*.

LOAC does not pronounce on the legality of the resort to force and the application of LOAC does not depend on the rightness or lawfulness of either state’s resort to force. This separation is fundamental and has been repeatedly affirmed.<sup>81</sup> LOAC does, however, rest on the presumption of both sides in a conflict “deploy[ing] military means in order to overcome the enemy or force it into submission, to eradicate the threat it represents or to force it to change its course of action.”<sup>82</sup> The law provides detailed rules for identifying legitimate targets of attack—whether combatants, members of an organized armed group, civilians directly participating in hostilities, or military objectives<sup>83</sup>—and principles and rules setting forth the necessary steps

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80 See, e.g., Mohammed v. Ministry of Defence [2014] EWHC (QB) 1369 (Eng.); Lawrence Hill-Cawthorne & Dapo Akande, *Does IHL Provide a Legal Basis for Detention in Non-International Armed Conflicts?*, EJIL:TALK! (May 7, 2014), <https://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts/>; Derek Jinks, *Does IHL Authorize Detention in NIACs?*, JUST SEC. (May 5, 2014), [https://www.justsecurity.org/10144/ihl-authorize-detention-niacs/#:~:text=one%20important%20question%20confronting%20the,international%20armed%20conflicts%20\(NIACs\).](https://www.justsecurity.org/10144/ihl-authorize-detention-niacs/#:~:text=one%20important%20question%20confronting%20the,international%20armed%20conflicts%20(NIACs).)

81 See *supra* note 2.

82 2016 COMMENTARY, *supra* note 39, para. 82; see also YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 6 (2nd ed. 2010) (“A Belligerent Party is entitled to do whatever is dictated by military necessity in order to win the war, provided that the act does exceed the bounds of lawfulness set by LOIAC.”).

83 See, e.g., AP I, *supra* note 33, art. 48 (mandating that parties to a conflict distinguish between combatants and civilians and only direct attacks at the former, as well as similar obligations with regard to military objectives and civilian objects); *id.* art. 51 (prohibiting deliberate attacks on civilians except when directly participating in hostilities and prohibiting indiscriminate attacks); *id.* art. 52 (prohibiting deliberate attacks on civilian objects

required in targeting so as to minimize harm to civilians and civilian objects during hostilities.<sup>84</sup> As the International Committee of the Red Cross explains, these rules “are based on the assumption that the use of force is inherent to waging war because the ultimate aim of military operations is to prevail over the enemy’s armed forces.”<sup>85</sup> If the use of force is inherent to waging war, is the existence of an armed conflict sufficient to allow the states involved to employ force? More specifically, the legal question is whether the fact that LOAC applies (i.e., because there is an armed conflict) means that states can use force—without any other considerations.

The three different perspectives on this question produce vastly different results in this gap between the thresholds. One view is that only the *jus ad bellum* can provide justification or authority to use force, so even if an international armed conflict exists due to the low threshold for application of LOAC in a dispute between states, the states involved do not have legal authority to use force. The ramifications of this view are examined in the following subsection. A second view is that LOAC provides the authority to use force once an international armed conflict exists. A third, and perhaps middle, view is that LOAC permits the use of force once an international armed conflict exists but does not necessarily authorize it, meaning that the authority must be found elsewhere, even if not only in the *jus ad bellum*. This subsection addresses these latter two views and their ramifications in the gap between the thresholds.

Although no treaty provision in LOAC specifically states something akin to “once an international armed conflict exists, states involved in the conflict can use deadly force against the adversary,” several principles and treaty rules in LOAC imply exactly this result. First, the principle of military necessity provides that parties to an armed conflict can use all force necessary to achieve the submission of the enemy as quickly as possible, as long as not forbidden by the law.<sup>86</sup> Often understood as a principle of authority allowing for, or justifying, the employment of deadly combat power to defeat

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and providing a definition of military objectives to describe objects that can be attacked during armed conflict).

84 *Id.* art. 57 (setting forth precautions an attacking party must take before launching an attack, including the obligation to verify the target is a lawful target, to choose the means and methods of attack so as to minimize harm to civilians, to refrain from attacks where the expected civilian harm will be excessive in relation to the anticipated military advantage gained, and to provide effective advance warning where feasible of attacks that may endanger the civilian population).

85 GLORIA GAGGIOLI, INT’L COMM. OF THE RED CROSS, *THE USE OF FORCE IN ARMED CONFLICTS: INTERPLAY BETWEEN THE CONDUCT OF HOSTILITIES AND LAW ENFORCEMENT PARADIGMS* 6 (2013).

86 DEP’T OF THE ARMY, *DEPARTMENT OF THE ARMY FIELD MANUAL 27-10: THE LAW OF LAND WARFARE* 4 (1956); FRANCIS LIEBER, *INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD* 7 (Washington D.C., Gov’t Printing Off. 1898) (1863); UNITED KINGDOM MINISTRY OF DEFENCE, *THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT: JOINT SERVICE PUBLICATION 383* para. 2.2 (2004).

an enemy, military necessity forms an essential underpinning of LOAC.<sup>87</sup> As a starting point, therefore, once an armed conflict exists, military necessity allows for the use of force against the adversary.<sup>88</sup> Most important for the instant discussion, the inherent constraint built in through the principle of military necessity refers to the law of war in particular, ensuring that states and other parties to armed conflict cannot turn to military necessity as the justification to jettison critical protections for persons and objects during armed conflict.<sup>89</sup>

Beyond military necessity, other key rules of LOAC support the idea that LOAC either permits or authorizes the use of force in armed conflict. Article 22 of the 1907 Hague Convention and Article 35(1) of Additional Protocol I provide that “the right of the Parties to the conflict to choose methods or means of warfare is not unlimited,”<sup>90</sup> suggesting that parties to an armed conflict have a *right* to employ combat power in an armed conflict and that right is then subject to constraints on how it is employed. To that end, the Commentary explains that “when the law of armed conflict does not provide for any prohibition, the Parties to the conflict are in principle free within the constraints of customary law and general principles.”<sup>91</sup> Such statements can be interpreted to suggest authority or, at a minimum, permissiveness with regard to combat force against an adversary in armed conflict. In addition, the language of Common Article 3, the definition of military objective, and the rules regarding targeting of persons all implicitly support the idea of LOAC as authorizing, or at least permitting, the use of force once an armed conflict exists. Common Article 3 protects persons who are not actively participating in hostilities from “violence to life,”<sup>92</sup> leading to the reasonable conclusion that persons who are actively participating in hostilities can be attacked—that is, that a state or other party to a conflict can attack those who are participating in hostilities. Once an armed conflict exists, LOAC pro-

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87 See Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT’L L. 795, 796 (2010).

88 See, e.g., *The Hostage Case*, *supra* note 2, at 1230; CORN ET AL., *supra* note 52, at 116 (“[M]ilitary necessity supplies the authority to employ the means necessary to bring an enemy to submission, including the application of deadly combat power, and to detain captured enemy personnel until the end of hostilities.”).

89 See, e.g., *The Hostage Case*, *supra* note 2, at 1253 (“Military necessity permits a belligerent, *subject to the laws of war*, to apply any amount and kind of force to compel the complete submission of the enemy . . . .” (emphasis added)).

90 AP I, *supra* note 33, art. 35, para. 1. Article 22 of the 1907 Hague Convention states that “[t]he right of belligerents to adopt means of injuring the enemy is not unlimited.” Convention IV Respecting the Laws and Customs of War on Land and Its Annex, Regulations Respecting the Laws and Customs of War on Land art. 22, Oct. 18, 1907, 36 Stat. 2277.

91 CLAUDE PILLOUD ET AL., INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 393 (Yves Sandoz, Christophe Swinarski & Bruno Zimmerman eds., 1987) [hereinafter AP I COMMENTARY].

92 GC I, *supra* note 33, art. 3; GC II, *supra* note 33, art. 3; GC III, *supra* note 33, art. 3; GC IV, *supra* note 33, art. 3.

vides that all members of the enemy armed forces are presumptively liable to attack and “can participate directly in hostilities, i.e., [can] attack and be attacked.”<sup>93</sup> The definition of military objective in Article 52(2) of Additional Protocol I provides further support, affirming that objects qualifying as military objectives can be attacked,<sup>94</sup> again implying a permission or authority to use force when in armed conflict.<sup>95</sup>

As a result, under this view, once an armed conflict exists, the *jus ad bellum* is no longer the determining factor in assessing the right to use force. Rather, “[t]he individual military action undertaken within the framework of the conflict can only be judged in the light of the *ius in bello*” and “the only question to be asked under the rules of the *ius ad bellum*, the prohibition of the use of force, is: who started the whole conflict?”<sup>96</sup> Similarly, an ongoing armed conflict, even if marked by long periods of quiet, provides the necessary justification for uses of force by one state in that conflict against the other, without the need for reference to the *jus ad bellum*.<sup>97</sup>

The related view, that LOAC permits the use of force during armed conflict, produces a similar result. For proponents of this view, the authority to use force during armed conflict does not necessarily derive only from the *jus ad bellum* but rests in the sovereignty of states or other related sources. Historically, states enjoyed the right to go to war as a fundamental incident of sovereignty. In essence, “prior to 1919 there were no restrictions upon the freedom of states to go to war” and “every state had the unfettered right to go to war.”<sup>98</sup> To the extent that sovereignty or other inherent rights of states

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93 AP I COMMENTARY, *supra* note 91, at 515.

94 AP I, *supra* note 33, art. 52, para. 2.

95 See Geoffrey S. Corn, *Self-Defense Targeting: Blurring the Line Between the Jus ad Bellum and the Jus in Bello*, 88 INT’L L. STUD. 57, 68 (2012).

96 Michael Bothe, *Terrorism and the Legality of Pre-emptive Force*, 14 EUR. J. INT’L L. 227, 234–35 (2003) (“In principle, an individual military action undertaken within the framework of an armed conflict cannot be singled out to be judged according to the yardstick of the *ius ad bellum*.”).

97 See DINSTEIN, *supra* note 11, at 186 (explaining that “[w]hen Israeli aircraft raided an Iraqi nuclear reactor (under construction) in 1981, the legal justification of the act should have rested on the state of war which characterized the relations between the two countries” and that if no such conflict existed, the act “would have been prohibited, since (when examined in itself and out of the context of an on-going war) it did not qualify as a legitimate act of self-defence consonant with Article 51”); Pnina Sharvit Baruch, *Operation Protective Edge: Legality and Legitimacy*, INSS (July 22, 2014), <https://www.inss.org.il/publication/operation-protective-edge-legality-and-legitimacy/> (noting that because Operation Protective Edge was “part of an existing protracted armed conflict . . . Israel [did] not need to rely on the right to self-defense, which is relevant only at the outset of an armed conflict”); Amichai Cohen & Elena Chachko, *The Israel-Iran-Syria Clash and the Law on Use of Force*, LAWFARE (Feb. 14, 2018), <https://www.lawfareblog.com/israel-iran-syria-clash-and-law-use-force/> (noting that, if there is an ongoing armed conflict between Israel and Syria, “then the legality of Israel’s use of force in Syria would be assessed under the law of armed conflict, not the law governing the resort to force in the U.N. Charter”).

98 Elihu Lauterpacht, *The Legal Irrelevance of the “State of War,”* 62 PROC. AM. SOC’Y INT’L L. 58, 61 (1968).

provide the authority to use force in the context of armed conflict, LOAC permits the exercise of that authority once an armed conflict exists. “Thus, each side in a conflict might lawfully kill the other’s soldiers in open combat, not because international law gave it a right to kill but because international law left it alone to kill or not according to its ability and inclination.”<sup>99</sup> If valid, this view also results in the use of force during armed conflict apart from and without regulation by the *jus ad bellum*.

This first consequence of the gap between the armed attack threshold and the international armed conflict threshold therefore is stark and dramatic: if the existence of an international armed conflict and the concomitant application of LOAC is sufficient authority for the use of force during that conflict, then the states that are party to that armed conflict can use force without satisfying the *jus ad bellum* trigger of an armed attack or imminent armed attack. Given that the *jus ad bellum* and the United Nations Charter framework seek to constrain and regulate the resort to force—for the fundamental purpose of ending “the scourge of war”<sup>100</sup>—a situation in which states can lawfully use force without needing to satisfy the *jus ad bellum* is a significant chink in the armor of the international system against the escalation of violence and conflict. If the purpose of the United Nations Charter framework is to create the only legal infrastructure for considering, authorizing, or justifying the use of force by one state against or in the territory of another state—in essence, a closed universe of law on the use of force—then this gap creates a parallel universe in which the *jus ad bellum* criteria and requirements would not dominate or control the analysis because the existence of an international armed conflict would create an off-ramp out of the *jus ad bellum*.

Consider, for example, a situation in which one state sends a few of its soldiers across the border unarmed into the neighboring state, knowing that they will be captured and detained by that neighboring state’s military. In accordance with the low threshold for the application of the law of international armed conflict, that capture and detention of a few soldiers (indeed, even one soldier) creates a situation of international armed conflict to which the law of armed conflict applies.<sup>101</sup> The capture and detention of one or a few soldiers does not meet the threshold for armed attack and thus would not justify the use of force in self-defense under the *jus ad bellum*.<sup>102</sup> However, if the existence of an international armed conflict and the application of LOAC therefore authorizes, or even permits, the use of force to achieve strategic objectives in armed conflict, then either state would then be allowed

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99 Greenwood, *supra* note 3, at 229. For many, although this sovereign authority exists, it is regulated solely and entirely by the *jus ad bellum*, thus removing the possibility of this middle view of permissiveness.

100 U.N. Charter pmbl.

101 2016 COMMENTARY, *supra* note 39, para. 236.

102 The capture and detention could constitute a use of force, as could the sending of one or a few soldiers across the border, even unarmed, but a use of force alone does not trigger the right to use force in self-defense.

to use force in the course of the international armed conflict. In the commonly referenced examples of capture and detention as the sole manifestation of an international armed conflict and the application of LOAC—such as the detention of fifteen British sailors by Iran in 2007—the states involved either do not reference LOAC or reference it solely for the purpose of ensuring prisoner-of-war treatment in accordance with the Third Geneva Convention.<sup>103</sup> However, this gap raises the possibility of a state making, in effect, an “end run” around the *jus ad bellum* by creating an international armed conflict with another state in order to thus trigger the authority to use force under LOAC without the risk of violating the *jus ad bellum* or any other similar concerns. Sending one’s soldiers to “mistakenly” cross the border, knowing they will be captured and detained and therefore trigger the existence of an international armed conflict, would be a potential means for a state to effectively create the authority to use force—a result that would dramatically endanger the *jus ad bellum* and its core purpose of preventing the resort to force and the escalation of violence.

## 2. An International Armed Conflict Without Authority to Use Force

The existence of an international armed conflict in the absence of an armed attack or other justification to use force under the *jus ad bellum* presents a diametrically opposite challenge as well. As above, consider the earlier examples where a low-level engagement between the armed forces of two states triggers the existence of an international armed conflict and the application of LOAC but does not rise to the level of an armed attack. However, this subsection flips the analysis and considers the argument that LOAC in and of itself does not provide any authority for the use of force and what that means for the gap between the armed attack threshold and the threshold for international armed conflict. According to this view, only the *jus ad bellum* can provide justification, and therefore the authority, to use force, regardless of the existence of an armed conflict.

The starting point for this view is that although states traditionally enjoyed the sovereign right to resort to war, that right is now overtaken by the rules and framework of the *jus ad bellum*. Thus, while

the *ius in bello* . . . leaves states free to fight as they please within the limits which it sets . . . [t]he legal vacuum which once existed within the limits set by the *ius in bello* is now filled by the *ius ad bellum* which determines whether any action involving the use of force is lawful or not in the eyes of international law.<sup>104</sup>

With the entry into force of the United Nations Charter, the starting point for any discussion of the use of force must therefore be Article 2(4) and the prohibition of the use of force. Article 2(4) does not include any reference to armed conflict or to LOAC, and therefore does not exempt conflict but covers all situations in which a state might use force against the sovereignty,

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103 See *supra* notes 38–40 and accompanying text.

104 Greenwood, *supra* note 3, at 229.

territorial integrity, or political independence of another state. Furthermore, the United Nations Charter then provides the only exceptions to this prohibition: authorization by the United Nations Security Council under Article 42 or self-defense in accordance with Article 51.<sup>105</sup> Given that the goal of the *jus ad bellum*, as enshrined in the United Nations Charter, is to end the resort to war as a tool of international relations, any other interpretation of the scope of the prohibition on the use of force or toleration of other exceptions or justifications to use force would be difficult to reconcile.<sup>106</sup> As a result, the existence of an international armed conflict alone cannot, in and of itself, provide the justification for the use of force by one state against another.

Beyond this basic presentation of the structure of the *jus ad bellum*, this approach to the interplay between and the authorities triggered by the two bodies of law further rests on two primary arguments: first, a foundational understanding of LOAC as limited to regulating the use of force during armed conflict, and second, the purpose of the *jus ad bellum* as the constraint on the resort to force and a brake on the escalation of violence. In contrast to the arguments above that LOAC authorizes the use of force once an armed conflict exists, many argue that LOAC is solely a regulatory body of law, designed to set rules for warfare—for how parties can fight and how they must treat individuals, groups, and objects during an armed conflict. Through such rules, LOAC thus fulfills its core purpose of minimizing harm to and protecting civilians during war. As a result, under this approach it “cannot be seen as providing rights to States, but rather as setting forth objective rules of behaviour binding them for the benefit of individuals affected by war.”<sup>107</sup> In effect, international law wholly separates the question of “can force be used” from the question of “how force must be used.” LOAC does not pronounce on the decision to use force, including when, if, and by whom, but rather merely regulates how any party to an armed conflict uses force, from targeting of persons and objects to protection of persons during military operations and when detained. On this view, issues of the permissibility of using force or the authority to use force do not arise at all under LOAC; such questions are reserved solely for the *jus ad bellum*.<sup>108</sup>

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105 U.N. Charter, arts. 42, 51. Consent is regularly understood to be a third exception to the prohibition on the use of force; however, it would not be relevant in considering an armed conflict between two states. ILA 2018 REPORT, *supra* note 5, at 18; INT’L. & OPERATIONAL L. DEP’T, *supra* note 5, at 31.

106 Bugnion, *supra* note 79, at 8 (noting that the parties to the Kellogg-Briand Pact declared that “they condemned ‘recourse to war for the solution of international controversies’ and renounced it ‘as an instrument of national policy’”) (citing Renunciation of War as an Instrument of National Policy art. 1, Aug. 27, 1928, 46 Stat. 2343).

107 Marco Sassòli, *Ius ad Bellum and Ius in Bello—The Separation Between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare: Crucial or Outdated?*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 241, 245 (Michael N. Schmitt & Jelena Pejic eds., 2007).

108 Eliav Liebllich, *On the Continuous and Concurrent Application of ad Bellum and in Bello Proportionality*, in NECESSITY AND PROPORTIONALITY IN INTERNATIONAL PEACE AND SECURITY

Most proponents of this view assume, indeed insist, that *jus ad bellum* always comes before LOAC—that is, any analysis of a state’s conduct that involves force goes through a two-part process: Was the resort to force lawful under the *jus ad bellum*, and then, assuming that an armed conflict exists, did the states in question use force in accordance with the rules of LOAC? Indeed, the idea that the *jus ad bellum* “will always operate before the [LOAC] comes into play”<sup>109</sup> is foundational to the ordinary way in which lawyers analyze and advise, students are instructed, and courts adjudicate on questions relating to the use of force. The idea that LOAC could be triggered in the absence of any *jus ad bellum* trigger or assessment is rarely, if ever, discussed.<sup>110</sup> For some, this omission stems from the simple fact that any action taken under LOAC must “nonetheless comply with the *jus ad bellum* necessity and proportionality criteria,”<sup>111</sup> so consideration of the use of force in a LOAC-only vacuum simply does not occur. In effect, because the first question asked whenever a state uses force is the *jus ad bellum* question, the issue raised here—what happens when an international armed conflict is triggered by acts not rising to the level of an armed attack—simply does not arise.

The belief that LOAC is purely regulatory further rests on an understanding of *jus ad bellum* having a broader reach or role than the question of legality at the moment of the initial decision to use force. Thus, the more robust presentation of this view mandates that *jus ad bellum* “applies not only to the act of commencing hostilities [i.e., the use of force in self-defense to repel or deter an armed attack] but also to each act involving the use of force which occurs during the course of hostilities.”<sup>112</sup> The nature and extent to which the *jus ad bellum* rules and principles of self-defense apply to acts and operations once an armed conflict is underway vary depending on the particular presentation of this approach. At a minimum, most argue that each act

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Law (Claus Krefß & Robert Lawless eds., forthcoming Oct. 2020) (manuscript at 15), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3284411](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3284411) (noting that LOAC “does not grant justification to resort to force, which can only be found in *jus ad bellum*—rather, it only identifies situations of armed conflict”).

109 Greenwood, *supra* note 3, at 222.

110 For one example, see James A. Green & Christopher P.M. Waters, *Military Targeting in the Context of Self-Defence Actions*, 84 NORDIC J. INT’L L. 3, 6 (2015), addressing questions of targeting in self-defense but assuming that “[e]ven if one accepts that the *jus in bello* can be triggered where the *jus ad bellum* is not, such a scenario would be unproblematic in relation to the military targeting requirement because the absolute IHL prohibition on civilian targeting would apply.”

111 *Id.* at 25 (citing Christopher Greenwood, *International Humanitarian Law (Laws of War)*, in THE CENTENNIAL OF THE FIRST INTERNATIONAL PEACE CONFERENCE: REPORTS & CONCLUSIONS 161, 184 (Frits Kalshoven ed., 2000)) (“[T]he fact that a particular use of force does not contravene the laws of war no longer suffices to make it lawful if it fails to meet the criteria of being necessary and proportionate for the achievement of the goals of self-defence, the discharge of a Security Council mandate, the exercise of an authority granted by the Security Council or, perhaps, some other goal for which the use of force may be permitted by international law.”).

112 Greenwood, *supra* note 3, at 223.



during the conflict must meet the criteria of necessity and proportionality that are essential to any exercise of self-defense.<sup>113</sup> Others go a step farther, suggesting that the armed attack trigger itself continues to apply throughout the conflict, such that all force used must satisfy the self-defense rules in Article 51 of the United Nations Charter.<sup>114</sup> Regardless of the extent of this approach to the concurrent application of the *jus ad bellum* once an armed conflict is underway, the effect is that LOAC itself cannot be the source of any authority to use force even during armed conflict, because the *jus ad bellum* continues to play that role even after a conflict is triggered.

Second, the very purpose of the *jus ad bellum* reinforces that it can be the only source of authority for the use of force and that LOAC cannot be an independent source of authority for the use of force. As detailed above, the goal of pre-United Nations efforts, including the League of Nations, the Locarno Treaty, and the Kellogg-Briand Pact, was to outlaw recourse to war, and the drafters of the United Nations Charter formalized and solidified that purpose, carrying out their “clear interest in making it more difficult for countries to go to war.”<sup>115</sup> More specifically, it is through the high threshold for armed attack that the *jus ad bellum* seeks to prevent escalation of conflict. The purpose of the high threshold for armed attack is to encourage and require states to rely on peaceful tools for resolving lower level or less urgent disputes. Thus,

the prevailing view [is] that the danger of escalation which is inherent in most forms of transboundary uses of force justifies the rule that States deal with small-scale uses of force against them by using force on their own territory or by using non-violent means, and thus in a way which does not involve the use of cross-border force.<sup>116</sup>

With this core purpose, accepting that LOAC independently authorizes the use of force once an international armed conflict exists would fundamentally undermine the *jus ad bellum* and destabilize the international legal architecture designed to reduce and promote stability and order.

However, consider the same example of an international armed conflict that exists as a result of one state detaining a small number of military forces of another state. According to this view of LOAC as purely regulatory, LOAC applies because of the existence of the international armed conflict, but in the absence of an armed attack or other *jus ad bellum* justification, neither state has a right to use force against the other. The detaining state is obligated under LOAC to provide prisoner-of-war protections and treatment to the soldiers it has detained, in accordance with the Third Geneva Convention, but the soldiers’ state is limited to nonforceful means to secure their release, notwithstanding the existence of an armed conflict between the two states. At an operational level, this result is troubling and, when taken to a

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113 WATKIN, *supra* note 71, at 56–63.

114 Greenwood, *supra* note 3, at 223.

115 Zweifach, *supra* note 31, at 393.

116 Nolte & Randelzhofer, *supra* note 8, at 1402.

more extreme level, appears absurd—the detaining state can hold those soldiers until the end of the conflict, but because the detention is the only manifestation of the conflict, the result is a self-fulfilling prophecy that the detaining state can simply hold those soldiers as long as it chooses. Perhaps the soldiers' state manages to take a few of the detaining state's military personnel into custody, treating them as prisoners of war as well, and now the result is an international armed conflict in which each state holds soldiers from the other state and neither has the authority to use any measure of force to bring the conflict to an end and secure the release of its soldiers. Although this hypothetical is unusual, it is certainly impossible to envision that states would consider this an acceptable legal conclusion.

This result also runs counter to the logic of LOAC, namely the principle of military necessity, which allows the use of all force necessary to achieve the complete submission of the enemy as quickly as possible, as long as that force is not prohibited by the law. An international armed conflict exists when there is a dispute between states leading to the intervention of their armed forces. In this example, the capture and detention of the soldiers *is* the dispute between the two states—and yet the soldiers' state is left with no means to resolve that dispute beyond the tools it would have in the absence of the armed conflict. Even if this is the correct legal result based on a view that LOAC is purely regulatory and *jus ad bellum* is the entire universe of use of force options, the resulting operational disconnect would lead states to simply disregard the law as operationally illogical if the alternative was to leave soldiers detained indefinitely by another state. Disregard for the law undermines the legal framework overall and poses substantial risks of a slippery slope regarding other legal rules and principles.

### III. WHERE TO GO FROM HERE: SHOULD THE GAP BE RECONCILED?

Law is an essential tool for understanding, regulating, and adjudicating relationships between and among individuals, groups, states, and more. A common—and perhaps the natural—instinct when law does not seem to address a given situation, relationship, or activity in a sufficient manner is to identify that gap in coverage and seek to fill it, or at least minimize the vacuum or its effects. On first glance, *jus ad bellum* and LOAC, the two legal regimes at issue in the instant discussion, would seem to present this urge on an almost existential level because both bodies of law apply to and provide the fundamental rules for the most consequential behavior for humankind and the international community: war and the use of force in a collective manner. Indeed, the Fourth Geneva Convention itself was a direct response to gaps in the law with regard to protection of civilians, to ensure that the shortcomings in legal protection exposed during World War II would be corrected to the extent possible in an effort to define “the essential rules for that protection to which every human being is entitled.”<sup>117</sup> The provisions

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117 INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 9 (Jean S. Pictet ed.,

prohibiting and regulating the resort to force in the United Nations Charter were a direct response to, and attempt to eliminate, the weaknesses in the international system regarding the resort to war.

Gaps in the international framework applicable to the use of force therefore may seem untenable; after all, these legal regimes govern activity that has the starkest consequences for humankind—life and death. Given the disconnect between the threshold for international armed conflict and the threshold for armed attack highlighted in this discussion, as well as the potential ramifications of that disconnect for both the application and the integrity of the relevant legal regimes, a likely response would be to identify some ways to close or even eliminate the gap. However, as problematic as a gap between the armed attack threshold and the international armed conflict threshold may be, any call to close or minimize that gap must first explore whether that possible cure is worse than the disease—that is, whether the risks or negative outcomes from aligning the two thresholds are more damaging than leaving the gap as it stands.

#### A. *Aligning the Thresholds*

Consider what is required to align or match the thresholds for international armed conflict and armed attack: (1) raise the threshold for international armed conflict to meet the high threshold for armed attack, or (2) lower the threshold for armed attack to meet the low threshold for international armed conflict. One could also possibly envision adjusting both thresholds to find some sort of middle ground. In any of these possible options, the alteration in the threshold would not only be for the particular circumstances raised in the instant discussion where the thresholds collide but would then apply in all circumstances. As a result, it is critical to examine what such a change in the thresholds would mean for the law more generally.

The first option requires a significantly higher threshold for international armed conflict in order to trigger the existence of a conflict and the application of LOAC. Such a higher threshold could include a greater degree of violence, a more protracted engagement between the armed forces of the two states involved, or other indicia pointing to the existence of a conflict, such as pronouncements by one or both states to that effect or statements of concern by the United Nations Security Council, for example. Raising the threshold for international armed conflict to match the armed attack threshold means that an international armed conflict would only exist when one state launches an armed attack against another state. Acts or activities

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1958) [hereinafter GC IV COMMENTARY] (quoting *Draft Resolution on the Revision of the Convention Relative to the Treatment of Prisoners of War*, in SEVENTEENTH INTERNATIONAL RED CROSS CONFERENCE 74 (1948)). As another example, in discussing the status of persons under LOAC, the Commentary later affirms that “[t]here is no intermediate status; nobody in enemy hands can be outside the law;” i.e., there can be no gap in status categorizations because a gap would leave individuals without protection. *Id.* at 51.

that do not constitute the “most grave forms of the use of force”<sup>118</sup> would therefore, under this altered threshold, be insufficient to trigger an international armed conflict.

At present, some argue that the threshold for international armed conflict is higher and demands some level of intensity. Most well known, for example, is the International Law Association’s 2010 report, which asserts that all armed conflicts necessarily involve “fighting of some intensity.”<sup>119</sup> As a result, “border incidents” or “skirmishes” between the armed forces of two states would not constitute an international armed conflict because such events would not reach the requisite level of intensity demanded under this argument. Proponents of this approach also look to the reluctance of states to affirm the existence of an international armed conflict, arguing that “state practice suggests that the threshold at which a violent exchange between states is regarded as amounting to an armed conflict rather than merely a series of armed ‘incidents’ may be relatively high.”<sup>120</sup> In theory, although this asserted standard for international armed conflict remains unclear, it would seem to narrow (or potentially even eliminate) the gap between the threshold for international armed conflict and that for armed attack.

However, this “some intensity” approach is decidedly a minority view. Indeed, it remains an outlier perspective precisely for reasons that highlight the significant risks of raising the threshold of international armed conflict to match the meaning of armed conflict. The law of international armed conflict exists to protect persons and regulate the conduct of hostilities during armed conflict. At the time of the drafting of the Geneva Conventions in 1949, the goal was to maximize humanitarian protections and the drafters did not evince any concerns about overly extensive application of the law. Rather, any “potential for such over-broad application was simply perceived as a benefit, because it could only result in enhanced humanitarian protections for war victims.”<sup>121</sup>

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118 Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 191 (June 27).

119 ILA REPORT 2010, *supra* note 48, at 2.

120 LOUISE ARIMATSU & MOHBUBA CHOUDHURY, THE LEGAL CLASSIFICATION OF THE ARMED CONFLICTS IN SYRIA, YEMEN AND LIBYA 3 (Chatham House ed., 2014); *see also* ILA Report 2010, *supra* note 48, at 13–14; Agnes Callamard, *The Targeted Killing of General Soleimani: Its Lawfulness and Why It Matters*, JUST SEC. (Jan. 8, 2020), <https://www.justsecurity.org/67949/the-targeted-killing-of-general-soleimani-its-lawfulness-and-why-it-matters/> (“[N]o State, expert commentator or expert body, such as the International Committee of the Red Cross, had identified the escalation of the conflict between the U.S. and Iran as amounting to an international armed conflict.”). *But see* GEOFFREY S. CORN ET AL., THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH 106 (2nd ed. 2019) (“[W]hatever motivated the inclusion of the intensity element, the practice of states seems to contradict this effort to qualify the meaning of armed conflict. Where inter-state hostilities are concerned, this practice suggests that an intensity threshold is not a legitimate or widely accepted requisite element for assessing the existence of armed conflict.”).

121 CORN ET AL., *supra* note 52, at 76.

Altering the threshold inherently removes situations, and therefore the individuals and populations caught up in those situations, from the essential protective framework LOAC imposes on such situations. One reason the definition of non-international armed conflict—conflict between a state and an organized armed group or between two or more such groups—rests fundamentally on a certain level of intensity of violence is that the state’s sovereign right and obligation to maintain public order and security both demands and provides opportunity for the state to quell unrest and address low-level violence through its existing and legally regulated law enforcement apparatus and tools.<sup>122</sup> In contrast, in international armed conflicts, whether low level or marked by more violence, domestic law is not a viable mechanism to ensure the protection of individuals or other essential legal needs. Thus, “[i]f minor clashes between States are not considered to be an international armed conflict or if the very beginning of hostilities is not regulated by humanitarian law, one would have to identify an alternative in terms of the applicable law.”<sup>123</sup> In the simplest example, an international armed conflict that begins with an exchange of fire would have one legal framework—as of now, unidentified—applicable to the first volley and a second—LOAC—applicable to the return volley of fire.

Beyond that disconnect, the lack of any law that appropriately governs the first action is enormously consequential and damaging. Neither the domestic law of one state nor international human rights law effectively mandates the conduct, obligations, privileges, or protections of the opposing state in such an initial clash.<sup>124</sup> Raising the trigger for international armed conflict to match the high threshold for armed attack would only exacerbate this legal vacuum, leaving still more actions and interactions in a space without law appropriately designed to ensure the necessary protections and “undermining the original purpose of the Geneva Conventions.”<sup>125</sup> In effect, attempts to narrow the gap between armed attack and international armed conflict only serve to create a much greater and more problematic gap—a gap in which individuals have no law to grasp in seeking protection from the actions of a state adverse to their own, a gap in which states have no authority to take necessary action to defend their own population and sovereign interests, and a gap in which states engage in armed and even violent interactions and the international community has no legal framework to assess, advocate, critique, and impose political or legal accountability. Raising the threshold for international armed conflict therefore poses too great a risk to the very fabric of LOAC.

The second, and opposite, possible means to reconcile the gap between the international armed conflict threshold and the armed attack definition

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122 Laurie R. Blank & Benjamin R. Farley, *Identifying the Start of Conflict: Conflict Recognition, Operational Realities and Accountability in the Post-9/11 World*, 36 MICH. J. INT’L L. 467, 484 (2015).

123 2016 *Commentary*, *supra* note 39, para. 243.

124 Akande, *supra* note 50, at 41; Lubell, *supra* note 49, at 20.

125 CORN ET AL., *supra* note 52, at 77.

would be to lower the threshold for armed attack. In considering this option, a reminder of what the armed attack threshold means is essential: the existence of an armed attack provides legal justification for the victim state to use force, an action otherwise prohibited under international law. Adjusting the armed attack threshold therefore means fundamentally reconsidering the seventy-five-year-plus consensus regarding the acceptable exceptions to one of the most foundational ordering principles of the international system. “[A]ware that an expansive right of self-defense—permitting states to launch a ‘defensive’ war in response to an arms buildup by a rival state, for instance—could undo the charter’s prohibition on the use of force,” the drafters of the United Nations Charter “deliberately wrote it narrowly.”<sup>126</sup> Lowering the threshold for an armed attack would expand the aperture for the use of force in self-defense by broadening the circumstances in which a state could justify such resort to force. Justifications such as Turkey’s claim of responding to “the threat of terrorism”<sup>127</sup> as the basis for its January 2018 operation against Kurdish forces in the Afrin region of Syria, according to its Article 51 letter to the United Nations, raise concerns about a “huge potential for escalation of violence”<sup>128</sup> if such a low threshold for self-defense were adopted or accepted.

A lower threshold for armed attack also fundamentally alters the manner in which the existing international legal and collective security apparatus encourages and requires the peaceful settlement of disputes. Article 33 of the United Nations Charter requires that states in a dispute that “is likely to endanger the maintenance of international peace and security . . . shall, first of all, seek a solution by . . . peaceful means.”<sup>129</sup> The rules regarding the use of force and self-defense further reinforce this structural preference for peaceful settlement of disputes: the use of force is prohibited as the main ordering principle and the one unilateral exception to that prohibition—i.e., self-defense—is limited in scope. In this manner, the “armed-attack threshold effectively narrows the right to use defensive force” and “requires states to respond to low-level violence either with non-forcible measures or by going through the Security Council.”<sup>130</sup> Without a high threshold for armed attack, “inter-state conflict could arise out of minor cross-border incidents or other minor uses of force.”<sup>131</sup> Similarly, the requirement that an armed

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126 Oona Hathaway, *Turkey Is Violating International Law. It Took Lessons from the U.S.*, WASH. POST (Oct. 22, 2019), <https://www.washingtonpost.com/outlook/2019/10/22/turkey-is-violating-international-law-it-took-lessons-us/>.

127 Chargé d’affaires a.i. of the Permanent Mission of Turkey, Identical Letters dated 20 January 2018 from the Chargé d’affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2018/53 (Jan. 22, 2018).

128 Anne Peters, *The Turkish Operation in Afrin (Syria) and the Silence of the Lambs*, EJIL:TALK! (Jan. 30, 2018), <https://www.ejiltalk.org/the-turkish-operation-in-afrin-syria-and-the-silence-of-the-lambs/>.

129 U.N. Charter art. 33, ¶ 1.

130 Hakimi & Cogan, *supra* note 13, at 270.

131 CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 157 (4th ed. 2018).

attack encompass only the most grave uses of force helps to limit the involvement of third states in disputes or minor incidents by ensuring that only a sufficiently grave use of force can constitute an armed attack justifying collective self-defense.<sup>132</sup>

One, if not the, central goal of the United Nations is to end the “scourge of war” by reducing the resort to force and the escalation of disputes between states into situations of violence and conflict. The concept of and threshold for armed attack is an important pillar in the infrastructure created and maintained to pursue and achieve this goal—indeed, it forms an essential bulwark against the unfettered resort to force and to the use of war as a first tool for the settlement of disputes. Weakening this critical support beam in the core structure of the international legal architecture would irrevocably undermine the ability of the United Nations and its legal framework to achieve this fundamental goal. As a result, lowering the threshold for armed attack in an effort to align it with the threshold for international armed conflict is enormously problematic and, by nearly any measure, a nonstarter.

### B. *Living with the Gap*

The severe downsides of altering either threshold—raising the threshold for international armed conflict or lowering the threshold for armed attack—suggest that perhaps the differences between the two thresholds are simply irreconcilable. A change to either threshold presents an existential risk to the ability of that legal regime to fulfill its core purpose, whether to ensure protection for persons during armed conflict or to minimize the resort to war and the escalation of disputes between states into violence. In comparison, the desire for and benefits of uniformity and complete legal coverage are important, but the failure to fulfill those goals does not present the same threat to the foundational purposes of the law. Living with the gap can therefore be considered the more reasonable, in fact only, solution to the chasm between the meaning of armed attack and the notion of international armed conflict.

States make international law and, as a result, existing treaty and customary law reflects where and how states have aligned their interests and agreed upon the applicable law. Although LOAC and the *jus ad bellum* both apply to situations involving the use of force and have developed in parallel and even sometimes in tandem, they exist and have developed for different reasons and to accomplish different goals. Within each body of law, states have negotiated and agreed upon certain rules based on their view of how to achieve those goals. The existence of a gap may, like other “[u]nclear rules[,] . . . reflect States’ judgment that more precise or logically consistent rules would

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132 *Id.* at 156 (“If there was no armed attack, there could be no collective self-defence.”); see also *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, 543 (June 27) (Jennings, J., dissenting) (“It is of course a fact that collective self-defence is a concept that lends itself to abuse. One must therefore sympathize with the anxiety of the Court to define it in terms of some strictness.”).

prove legally unmanageable.”<sup>133</sup> Seeking to fill that gap through interpretation may offer the chance to reduce uncertainty and ambiguity, but in the process can unravel the very law states made and consented to through carefully constructed consensus and negotiation.

The ordinary practice of states also suggests that accepting and navigating the gap is more desirable than attempting to reconcile the difference between the thresholds. In most situations where an international armed conflict is triggered at the low end of the threshold, perhaps because of detention of military personnel or other low-level acts, states are highly reluctant to outwardly identify the situation as an armed conflict and instead seek to deescalate the situation. Even where military or civilian leaders demand compliance with the basic protections set forth in the Geneva Conventions, such demands reference LOAC as the applicable law or the status of detained persons as prisoners of war but stay far short of any statement regarding an armed conflict. Thus, for example, Prime Minister Tony Blair alluded to the Third Geneva Convention’s prohibition against subjecting prisoners of war to public curiosity after Iranian authorities broadcast videos of the detained British sailors on television in 2007,<sup>134</sup> and President Ronald Reagan demanded that Syria treat Lieutenant Bobby Goodman as a prisoner of war after Syrian forces shot down his plane and captured him,<sup>135</sup> but in neither of those cases did the countries involved declare war, escalate the situation with forceful measures, or otherwise act as if they were in fact in an active armed conflict.

The pragmatic effect of the gap between the trigger for international armed conflict and the threshold for armed attack may therefore be minimized because it represents the space in which the international legal framework pushes states to settle disputes through nonforceful means. In effect, both LOAC and the *jus ad bellum* are performing in accordance with their respective purposes: LOAC provides protection for the individuals left vulnerable by the dispute and the *jus ad bellum* helps to restrain the states involved from escalating the situation. Even if one takes the view that LOAC authorizes the use of force once an armed conflict exists regardless of the lack of an armed attack, the general emphasis on peaceful settlement of disputes strongly encourages resort to nonforceful measures in exactly this space formed by the gap between the two thresholds. Furthermore, and perhaps most important, apart from the contributions the legal norms and principles offer in such situations, the general reluctance of most states to get involved in an actual conflict with another state—that is, one with active violence—helps to mitigate the situation in this gap rather than exacerbate it.

In the final analysis, a focus on and adherence to the object and purpose of the law leads to a nearly unavoidable conclusion that not only are the two

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133 Sean Watts, *Humanitarian Logic and the Law of Siege: A Study of the Oxford Guidance on Relief Actions*, 95 INT’L L. STUD. 1, 45 (2019).

134 *Iran Calls on Britain to Admit ‘Mistake,’* IRISH EXAM’R (Mar. 29, 2007), <https://www.irishexaminer.com/world/arid-30304140.html>.

135 See CORN ET AL., *supra* note 52, at 74–75.



thresholds irreconcilable, but that the gap between them may be a part of the individual strength of each threshold. Examination of the gap also reinforces the importance of not merely knowing the law but of understanding why it exists, what it seeks to achieve and how, and the risks of eroding its foundations even for what appears to be a productive reason elsewhere. The difference between these two central triggering definitions offers explicit confirmation of the different goals of the two legal regimes overall. If altering the thresholds means revising the fundamental object and purpose of one or both bodies of law, then surely retaining the gap in order to affirm and sustain the core purposes of both legal frameworks is the wiser choice.

