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Armed Conflict at the Threshold

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ESSAY

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Seventeen years into the United States' engagement in what America has controversially understood as a global, non-international armed conflict against a shifting set of terrorist groups, a growing array of scholars has called for a reassessment of the significance of the "armed conflict" classification under international humanitarian law (IHL). The existence of an "armed conflict" has long been understood as a proxy on/off switch of inescapable importance. When an "armed conflict" exists, lethal targeting—without regard to particular self-defensive need or immediacy of threat—is permitted as a first resort. When an "armed conflict" does not exist, it is not. Challenging the wisdom of this categorical switch, critics raise a range of concerns: the line dividing which circumstances count as "armed conflict" and which do not is no longer clear or stable enough to provide meaningful guidance; current definitions may compromise humanitarian interests, prospects for criminal justice or both; most important, the "armed conflict" classification no longer reflects current moral, political, or strategic sensibilities about the role of lethal force in an age in which global threats have changed. This Essay contends that while the criticisms are important, they fail on their own terms to justify the abandonment of "armed conflict" as a proxy determinant of first-resort killing. More fundamentally, while classification critics recognize acutely the many changes in the nature of conflict *since World War II, they attend far less to systemic changes in the development of international law during that time. Taking the "armed conflict" classification debate as a case study, this Essay highlights how critiques of international law's substance continue to embrace increasingly outmoded, World War-II era assumptions about the inadequacy of the international legal system to address problems inherent in all law: interpretive uncertainty, law violation, and social change.*

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I. INTRODUCTION

To judge by a good number of recent accounts, the modern law of war, often called the law of armed conflict or international humanitarian law (IHL), today faces a set of challenges that in very different ways test its continued salience as the primary source of legal protection for victims in wartime.[1] The post-Cold War period has seen wars involving non-state actors (non-international armed conflicts, or NIACs) eclipse wars between states as the primary source of armed conflict in the world,[2] a form of conflict IHL's Geneva Conventions regulate in only the bare terms of Common Article 3.[3] The advent and expansion of international human rights law (IHRL) in the years since the modern Geneva Conventions were drafted may fill the IHL vacuum in such conflicts in some respects,[4] but the post-Geneva development of IHRL equally undermines the long asserted argument for construing IHL to apply as broadly as possible. Namely, it challenges the assertion that the application of IHL will invariably and best advance the protection of humanitarian interests.[5] At the same time, the United States' now 17-year-old response to the attacks of September 11 – for the first time proposing the existence of a NIAC driven by a shifting set of terrorist groups that is not only trans-border but global in scope – seems counter to another core premise of IHL, that peace is the normal state of international affairs, and war (and the law that applies during it) is an exceptional, distinguishable condition.[6] Indeed, a growing set of security scholars maintain, the greatest threat to humanitarian interests in the world today is no longer necessarily war in any traditional sense, but rather the technological development and

1. This Essay understands the term international humanitarian law (IHL) as interchangeable with the term "law of armed conflict," both of which describe a body of rules contained principally in the Geneva Conventions of 1949 and their Additional Protocols, and in customary international law regulating conduct during hostilities. For a useful summary of this body of law, see LAURIE R. BLANK & GREGORY P. NOONE, INTERNATIONAL LAW AND ARMED CONFLICT (2013); Louise Doswald-Beck, *The right to life in armed conflict: does international humanitarian law provide all the answers?*, 88 INT'L REV. RED CROSS 881 (2006).

2. *See* OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD (2017) (arguing that the decreasing frequency in international armed conflicts and corresponding rise in non-international armed conflicts is in part a result of the dramatic success of the formal legal prohibition of aggressive war).

3. *See* Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III].

4. *See infra* Part IV.

5. *See, e.g.*, INT'L COMMITTEE OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD ¶¶ 492-95 (2d ed. 2016) [hereinafter 2016 ICRC COMMENTARY].

6. STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS: A GENERAL HISTORY 279-81(2005) (tracing this notion from its roots in just war theory to its codification in post-World War II UN Charter rules).

proliferation of remotely piloted armed drones, the weaponized use of cyberspace, and the rapidly developing fields of autonomous, bioengineered, and non-lethal weaponry – phenomena that transcend IHL's fundamental conception of war as happening between distinguishable combatants and civilians in a defined battlespace.[7]

Nowhere are the effects of these changes on the role of IHL more visible than in current debates over the salience of the "armed conflict" classification – the but-for test IHL establishes as the trigger for its application. As conventional IHL doctrine has it, the existence of an "armed conflict" is an on/off switch of inescapable importance. When an "armed conflict" exists (of international or non-international variety), lethal targeting, without regard to particular self-defensive need or immediacy of the threat, is permitted as a first resort. When "armed conflict" does not exist, it is not.[8] Yet, citing one or more of the changes described above, a growing array of critics today call into question the wisdom and utility of preserving the "armed conflict" threshold as a proxy test for the legality of first-resort killing.[9]

Scholarly critics express an importantly nuanced range of views, and several authors level more than one form of critique; this Essay suggests those critiques can be grouped broadly into three categories. The first set maintains that the "armed conflict" threshold is today irretrievably indeterminate, that the legal and factual line dividing which circumstances count as "armed conflict" and which do not is not – or is no longer – clear or stable enough to provide meaningful guidance on so important a question.[10] While authors have noted uncertainties surrounding the application of the NIAC classification over the years,[11] the subset of scholars addressed here now leverage that uncertainty to argue for the rejection of the "armed conflict" trigger altogether.[12]

The second group of critics worries, conversely, about the armed conflict threshold's undue rigidity – arguing that requiring (as IHL does) some exceptional level of violence before hostilities rise to the level of a NIAC risks creating law avoidance incentives that can undermine the achievement of both the basic humanitarian purposes of IHL, and the

7. *See, e.g.*, ROSA BROOKS, HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING: TALES FROM THE PENTAGON 129-41 (2016).

8. *See* BLANK AND NOONE, *supra* note 1.

9. *See infra* Part I.

10. *See, e.g.*, BROOKS, *supra* note 7; Monika Hakimi, *A Functional Approach to Targeting and Detention*, 110 MICH. L. REV. 1365 (2012).

11. *See* Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts, in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 27 (Wilmshurst ed., 2012) (noting that "[i]t is not always easy to determine when a situation of violence within a State is to be classified as a non-international armed conflict").

12. *See infra* Part II.

complimentary goals of IHRL.[13] Especially in places where rights may be inadequately protected under other bodies of law (where, for example, domestic or international human rights laws are underdeveloped or unobserved, or criminal justice systems dysfunctional), ensuring that IHL's basic constraining legal guidance is triggered sooner rather than later is essential to maximizing compliance with humanitarian protections.

The final group of critics questions the materiality of the "armed conflict" distinction at all, contending that the "armed conflict" proxy serves only to interfere with or prevent direct focus on the considerations that should really matter in the justification of lethal force. Indeed, some contend, the most important contemporary controversies over lethal targeting – involving a threat posed by a loosely organized group or individual, able to operate beyond the reach of other existing legal authorities – involve circumstances in which the application of either IHL or IHRL produces the same result. In the cases where legal questions most arise, this argument goes, both IHL and IHRL require context-dependent analyses turning on the degree of danger posed and the necessity of responding with lethal force.[14] States and scholars should be debating what those contexts are – including potentially shifting their substantive effect – rather than conducting a meta-analysis of whether the context is an "armed conflict" as such.

The developments these critics cite as motivating their concerns are manifestly real, and in an important sense, do put pressure on assumptions at the core of the humanitarian bargain on which IHL is based. That bargain flowed from the notion that both individuals and states were getting, for some limited period, a benefit they otherwise lacked. Where the law of war had for centuries been geared toward ensuring reciprocal fairness between contending states, the humanitarian revolution undergirding modern IHL traded legal acknowledgment of the privilege of belligerent parties to kill in the limited circumstance of war (even at a time when the law was moving away from war as a legitimate tool of state power) for the legal requirement that warring parties mitigate the suffering of individuals then otherwise wholly lacking legal protection.[15] But the proliferation in the 1980s and 1990s of generally applicable international human rights law today makes it impossible to argue that individuals are otherwise wholly lacking in legal protection. And while the phenomenon of transnational terrorism of course well predates 2001,[16] the more novel notion that sporadic acts of international terrorism might be part of a

13. *See infra* Part II.

14. *See* BROOKS, *supra* note 7; Hakimi, *supra* note 10.

15. *See* NEFF, *supra* note 6, at 340 (and sources cited).

16. *See* AUDREY KURTH CRONIN, HOW TERRORISM ENDS: UNDERSTANDING THE DECLINE AND DEMISE OF TERRORIST CAMPAIGNS 3-6 (2011).

transnational "armed conflict" makes it difficult to conceive of a time when belligerent states would ever lack the privilege to kill.

At the same time, each critique depends not only on accepting a particular – at best debatable – characterization of the law as it exists, but also, more implicitly, on embracing a set of longstanding assumptions about the deficits of international law writ large. As this Essay argues in successive parts below, each of the critiques is vulnerable to rebuttal on its own terms. The critiques may also be faulted for largely-unreconstructed reliance on expectations of international law's indeterminacy, the weak mechanisms for accountability under international law, and relative inadaptability to change – assessments that no longer accurately describe multiple areas of international law and are increasingly inapt for the bodies of law implicated here. For the changes driving the reassessment of the "armed conflict" classification do not occur in a vacuum of post-World War II developments. Where the lack of a singular international court of compulsory jurisdiction may once have been sufficient evidence to establish the international system's inability to deal with law's indeterminacy, the post-War era has shown how a distributed network of credible domestic and international judicial fora can perform the same function of interpretive settlement, helping to fill out the meaning of that long-contested idea. Informal interpretive mechanisms can likewise help shift understandings of legal meaning as more formal institutions gear up to address contemporary problems of social change. A similar phenomenon of distributed justice should likewise help mitigate concerns about particular gaps in international enforcement.

In the end, while current critiques of the "armed conflict" classification have been framed as emergent problems unique to IHL, this Essay suggests that they are better understood as categorical problems endemic in, even characteristic of, the evolutionary nature of all law in times of change. Far from illustrating IHL's inadequacy in the face of current threats, the "armed conflict" critiques noted above may be better understood as indicators of IHL's maturation, both as a substantive body of law, and as part of an increasingly developed international legal system.

II. THE INDETERMINACY CRITIQUE

While domestic legal theory has long recognized among fundamental jurisprudential truisms the reality that all law proves ambiguous in certain applications – including, famously, a simple law banning vehicles in the park[17] – the management of legal indeterminacy has proven much more

17. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607–08 (1958) ("A legal rule forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles? What about airplanes? . . . There

vexing to scholars of international law. Overwhelming conventional wisdom among post-World War II scholars compared international law unfavorably with its domestic law cousins for its relative lack of secondary rules and processes by which international legal rules can be identified, and legal meaning authoritatively settled.[18] As H.L.A. Hart famously explained in his canonical 1961 work, "The Concept of Law," legal systems generally cure "uncertainty" through institutions and agreed-upon processes to say what the law is, "either by reference to an authoritative text or to an official [or institution, like the legislature or courts] whose declarations on this point are authoritative."[19] The absence of such institutions in international law – post-War-era scholars typically contemplated a central, authoritative international court of compulsory jurisdiction – has long been the source of "pessimism about whether the international system can ever hope to achieve the level of consensus and certainty that is thought to characterize well-developed systems of domestic law."[20]

Yet while substantive international law, and the legal institutions through which it is interpreted and applied, have changed dramatically since the emergence of the international law indeterminacy critique, that decades-old assessment remains visible in a wide swath of international law literature, not least in contemporary debates about the utility of the category "armed conflict." This part describes the way in which the indeterminacy critique arises in contemporary "armed conflict" debates, then argues that, to the extent it may be applicable earlier or elsewhere in international law, it is no longer compelling here. For even assuming the absence of a central, authoritative international court of compulsory jurisdiction governing all matters IHL, part of the post-war lessons learned in this realm has been to demonstrate how a distributed system of judicial decision-makers can achieve a comparable settlement effect.

A. Understanding the Debate

The complexity of determining when violence involving non-state actors crosses the threshold from ordinary crime or protest to something on the scale of war has been apparent to the IHL of NIACs from the beginning. The text of Common Article 3 (setting forth the core IHL protections in NIACs) is famously silent on what counts as an "armed

must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out.").

18. H.L.A. HART, THE CONCEPT OF LAW 209 (1961).

19. *Id.* at 90. "Disputes as to whether an admitted rule has or has not been violated will always occur…if there is no agency specially empowered to ascertain finally, and authoritatively, the fact of violation." *Id.* at 91.

20. Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1802 (2009).

conflict not of an international character,"[21] a silence borne of negotiators' failure (either in connection with that article or later in Additional Protocol II elaborating on the law of NIAC) to agree on how to distinguish an "armed conflict" from any lesser "act committed by force of arms."[22] From the outset of treaty negotiations, it was clear that Common Article 3 NIACs were meant to encompass internal armed conflicts or civil wars, which had not been plainly covered by the Geneva regime until the modern Conventions of 1949. Beyond this, however, states were concerned. While accepting the need to ensure basic humanitarian protections in the bloody civil wars that had ravaged multiple states in the decades before the modern Conventions were ratified, states continued to view the management of lesser forms of violence as at the core of sovereign discretion. Among the risks states perceived: "ordinary criminals" would be "encouraged to give themselves a semblance of organization as a pretext for claiming the benefit of the Convention, representing their crimes as 'acts of war' in order to escape [criminal] punishment for them."[23]

Notwithstanding such concerns, negotiators in the end rejected limiting language that would have rendered Common Article 3 expressly applicable only to "cases of civil war, colonial conflicts, or wars of religion."[24] They likewise rejected the notion of codifying formal criteria for determining whether violence had reached the level of armed conflict – criteria, for example, including whether the non-state actor had an "organized military force," with "an authority responsible for its acts;" and whether the legal government "recognized the insurgents as belligerents," and was "obliged to have recourse to the regular military forces" in response.[25] While acknowledging the proposed criteria as "convenient" but not "obligatory," the influential International Committee of the Red Cross (ICRC) Commentaries ultimately urged that "the scope of the Article must be as wide as possible" for the purpose of maximizing humanitarian protection.[26]

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21. Geneva III, *supra* note 3.

22. INT'L COMMITTEE OF THE RED CROSS, COMMENTARY IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 35-36 (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958); *see also* Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment ¶ 562 (Int'l Crim. Trib. For the Former Yugoslavia May 7, 1997) (describing the need for factors to distinguish a NIAC from "banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law").

23. INT'L COMMITTEE OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION OF 12 AUGUST 1949, VOLUME III: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 32 (Jean S. Pictet ed., A.P. de Heney trans., 1960).

24. *Id.* at 31.

25. *Id.* at 35-36.

26. *Id.* at 35-36, 43.

The essentially tautological definition of NIACs ultimately embraced by the Commentaries – "armed conflicts, with *armed forces* on either side engaged in *hostilities*"[27] – much later gained clarification during the proceedings of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the international court created by UN Security Council Resolution in 1993 to conduct trials for war crimes arising out of the conflicts in Bosnia and Kosovo.[28] Drawing on the Commentaries for guidance, *Prosecutor v. Tadić* held that a NIAC exists when two factors are present: (1) "protracted armed violence between governmental authorities" and (2) "organized armed groups or between such groups within a State."[29] In a brief analysis applying this standard, the *Tadić* court concluded that the level of violence in Bosnia and Herzegovina in early 1992 had been sufficient. While noting the relevance of official intergovernmental conduct acknowledging the hostilities—in that case, the UN Security Council had acted during this period to maintain peace and security in the region—the court's opinion emphasized the dual findings of sufficiently organized parties (rather than scattered, loosely allied individuals) and hostilities of sufficient intensity and duration to distinguish "armed conflict" from more ordinary forms of violence.[30]

While the *Tadić* standard today enjoys broad international acceptance (a point to which the Essay returns below), *Tadić* hardly settled all uncertainty about the moment at which terrorism or "sporadic acts of violence" crosses the threshold to "protracted armed violence."[31] States and scholars have continued to raise questions about the effect of *Tadić's* application in a variety of settings,[32] not least of which has been whether it might be understood to include NIACs that reach "beyond the territory of one State."[33] The long-simmering uncertainty surrounding this question came to a boil around U.S. claims that the definition of NIAC might include global military operations against a shifting set of terrorist organizations found in dozens of countries – operations that now inform arguments by several scholars who advocate a wholesale abandonment of

27. *Id.* at 37 (emphasis in original).

28. S.C. Res. 827, pmbl. (May 25, 1993).

29. Prosecutor v. Duško Tadić, Case No. IT 94-1-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995).

30. *See* Tadić, *supra* note 22 (and accompanying text).

31. *Id.*

32. *See, e.g.*, Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts, in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 32, at 50 (Wilmshurst ed., 2012) (noting that "[i]t is not always easy to determine when a situation of violence within a State is to be classified as a non-international armed conflict"); Carina Bergal, *The Mexican Drug War: The Case for a Non-International Armed Conflict Classification*, 34 FORDHAM INT'L L.J. 1042 (2011) (debating how to classify the drug-related violence in Mexico).

33. *See* 2016 ICRC COMMENTARY, *supra* note 5, at ¶¶ 467-70 (noting that "the text and drafting history are somewhat ambiguous" on the applicability of Common Article 3 to cross-border conflicts but that "[t]he object and purpose of common Article 3 supports its applicability" in such settings).

the effort to attach legal significance to the difference between "armed conflict" and any lesser form of sub-state violence.[34]

Perhaps most sweeping among recent statements of this view is Rosa Brooks', who contends that global technological, political, and legal changes in the past 50 years have increasingly blurred the distinction between "war" and "peace."[35] Unlike classic civil wars or even cross-border guerilla movements in which the identities of non-state parties were manifest, Brooks argues that it is today difficult even to "define our enemy" amidst "numerous other networks and movements, loosely knit, nonhierarchical, geographically dispersed, and diverse in size, structure, methods and aims."[36] While the violence such groups are able to effect may not be sustained, technological developments have empowered such groups and individuals with extraordinary potential destructive capacity. For these reasons, "we can't tell whether a particular situation counts" as an armed conflict, and it is thus impossible meaningfully to assess when killing is legal and when it is murder.[37] Under the circumstances, continued insistence on the application of international law based on the vitality of such a distinction only undermines "our ability to place meaningful constraints on violence and power."[38]

B. Indeterminacy in Perspective

The indeterminacy critics may be faulted for a variety of reasons, some not especially complex. While lamenting the lack of elaborated meaning of non-international armed conflict, indeterminacy scholars commonly ignore the increasingly substantial body of case law (well beyond *Tadić*) elaborating on and applying the definition (and therefore giving it growing content) in a range of settings.[39] Neither do critics attempt any systematic (or non-systematic) account of the growing body of state practice that might add customary meaning to the "armed conflict" threshold over time.

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34. Hakimi, *supra* note 10, at 1369 (criticizing the NIAC standard as "notoriously deficient"); *accord* BROOKS, *supra* note 7, at 350-51 (arguing for decoupling the determination about whether killing is justified from the legal classification of a state of affairs as an "armed conflict" or not).

35. BROOKS, *supra* note 7, at 24.

36. *Id.* at 278; *See also, e.g.*, Hakimi, *supra* note 10; Samuel Isacharoff & Richard H. Pildes, *Targeted Warfare: Individuating Enemy Responsibility*, 88 N.Y.U. L. REV. 1521, 1534 (2013).

37. BROOKS, *supra* note 7, at 22.

38. *Id.* at 24.

39. *See* TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Michael Schmitt ed., 2013). Brooks' book, for instance, devotes a single paragraph summarizing the current IHL understanding of the definition of armed conflict, engaging neither the negotiating history of the Geneva Conventions, nor the Convention Commentaries, nor any post-*Tadić* case law. *See* BROOKS, *supra* note 7, at 172. Likewise, apart from noting the absence of definition in the text of the relevant treaties, and the dilemma of United States' post-9/11 war, Isacharoff and Pildes rely solely on Hakimi for the proposition the definition is indeterminate. *See* Isacharoff & Pildes, *supra* note 36, at 1534.

At the same time, critics neglect to note the deep consensus that may be found with respect to the existence of dozens of (definitionally undisputed) NIACs in recent decades.[40] For while there are certainly circumstances in which the application of the "armed conflict" classification is uncertain, there are also a vast number of cases in which it is not. And while there can be little doubt that the nature of conflict has changed over time as a matter of fact, one might still question the extent to which these changes actually render questions of party organization or degree of violence less answerable as a matter of law. For instance, while Brooks describes the American post-9/11 conflict as one against "an ill-defined, amorphous, protean enemy, with no leaders authorized to speak on its behalf, no set membership, and only the vaguest of goals,"[41] in fact, the U.S. government has over time identified a highly specific list of enemy groups,[42] groups that do have named leaders,[43] and troublingly specific goals.[44]

In this respect, contemporary indeterminacy claims suffer especially from the near-exclusive focus on the legal uncertainty generated by U.S. practice, and its novel conception of its hostilities against Al Qaeda and associates as a NIAC of global scope. In formal terms alone, the practice of the United States is indisputably important to the development of customary international law. But drawing conclusions about the utility of a legal standard from its application in one particularly hard case seems to risk just the kind of mistake Justice Holmes warned of a century ago – letting hard cases make bad law.[45] The degree of legal uncertainty generated by this particular practical understanding might well be different if any other state or international legal authority had embraced the U.S. notion of a fully borderless NIAC as an accurate application of law. But

40. *See, e.g.*, Sylvain Vité, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INT'L REV. RED CROSS 69 (2009); Hans-Peter Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 AM. U. L. REV 145 (1983).

41. BROOKS, *supra* note 7, at 279.

42. Office of the U.S. President, Report on the Legal and Policy Frameworks Guiding the United States Use of Military Force and Related National Security Operations (Dec. 2016), https://fas.org/man/eprint/frameworks.pdf.

43. *See, e.g.*, CHRISTOPHER M. BLANCHARD & CARLA E. HUMUD, CONG. RESEARCH SERV., R43612, THE ISLAMIC STATE AND U.S. POLICY (2017) (summarizing background on the Islamic State organization, including goals, operations, and affiliates) [hereinafter CRS ISLAMIC STATE REPORT]; CLAYTON THOMAS, CONG. RESEARCH SERV., R43756, AL QAEDA AND U.S. POLICY: MIDDLE EAST AND AFRICA (2016) (discussing Al Qaeda leadership and affiliates) [hereinafter CRS AL QAEDA REPORT].

44. *See, e.g.*, CRS ISLAMIC STATE REPORT, *supra* note 43 (discussing goals of re-establishing a Caliphate and protecting 'true Muslim believers' from threats posed by idolaters, apostates, and other non-believers); CRS AL QAEDA REPORT, *supra* note 43 (describing the group's focus on targeting America and on avoiding conflict with local governments).

45. *See* Northern Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) ("Great cases like hard cases make bad law.").

despite 17 years of U.S. attempts to convince others that the definition of NIAC might be understood to include a conflict of global scope against terrorist groups, this construct has thus far proven unpersuasive to the ICRC or to any other state in the world, including America's closest allies (several of whom are also globally engaged against terrorist groups).[46]

It is important to note that the position that NIACs might sometimes spill over international borders is hardly unique to the United States. IHL has repeatedly grappled with the question whether a NIAC could be defined to exist across territorial borders, as conflicts among non-state actors in the past have too often crossed into the territory of one or more neighboring states (among many, for example, Rwanda).[47] Indeed, states, scholars, and the ICRC have embraced the view that IHL continues to apply in NIACs spilling over into the *adjacent* state, if not into "non-adjacent, non-belligerent" states.[48] As the ICRC explains:

> [S]pill over of a NIAC into adjacent territory cannot have the effect of absolving the parties of their IHL obligations simply because an international border has been crossed. The ensuing legal vacuum would deprive of protection both civilians possibly affected by the fighting, as well as persons who fall into enemy hands.[49]

Indeed, there is no dispositive authority establishing that a NIAC could *not* extend beyond adjacent states, and reasonable arguments that no such distinction between geographically proximate states and geographically

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46. The United States characterized its conflict with ISIL in Syria and Iraq as part of the same NIAC with Al Qaeda for purposes of ensuring the applicability of domestic legal authority to use force. *See* Stephen W. Preston, U.S. Dep't of Defense, Remarks by the General Counsel of the Department of Defense on the Legal Framework for the United States' Use of Military Force Since 9/11 (Apr. 10, 2015), https://www.justsecurity.org/wp-content/uploads/2015/04/DOD-GC-ASIL-Speech.Legal-Framework.10Apr15.pdf). *But see* Letter from Michael Grant, the Chargé D'affaires a.i. of the Permanent Mission of Canada, to the United Nations, Addressed to the President of the Security Council (Mar. 31, 2015), https://www.documentcloud.org/documents/1700700-canadas-letter-to-the-un-about-syria.html (noting that America's allies have relied on an independent invocation of collective self-defense (of Iraq) under Article 51 of the UN Charter to explain the international legal justification for their intervention against ISIL in Iraq and Syria).

47. *See* S.C. Res. 955 Annex, art. 1 (Nov. 8, 1994) (extending the court's jurisdiction to violations of IHL committed in Rwanda and against Rwandan citizens "in the territory of neighboring States").

48. *See* Jelena Pejic, *Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications*, INT'L REV. RED CROSS 14 (2015) (citing Michael N. Schmitt, *Charting the Legal Geography of Non-International Armed Conflict*, 90 INT'L L. STUD. 1, 11 (2014) (noting that "there is growing acceptance of the proposition that IHL applies to 'spillover' conflicts in which government armed forces penetrate the territory of a neighboring State in order to engage organized armed groups operating in border areas…")); NILS MELZER, TARGETED KILLINGS IN INTERNATIONAL LAW 59-60 (2008) (discussing state practice to this effect).

49. INT'L COMMITTEE OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY CONFLICTS 9-10 (2011).

distant states could be logically sustained in light of the humanitarian purpose of Common Article 3.[50]

Yet even these arguments fail to demonstrate as much indeterminacy as critics imagine – for several reasons. For one, the interpretive move at the core of purposive arguments for accepting a geographically-unlimited application of the NIAC classification – that IHL should be construed to apply as broadly as possible so that individuals do not fall into a "legal vacuum" without protection[51] – has been substantially weakened by the existence of IHRL. If the application of NIAC would, in some particular factual circumstance, have the effect of weakening the humanitarian protections to which individuals are otherwise entitled under IHRL, then surely the purpose of Common Article 3 would be better served by a narrower construction of what counts as a NIAC. More important, the argument that the definition of NIAC *should* be read as without geographic limitation is far different from an argument that the law *must* be read this way – a claim belied by the reality that the U.S. position on the existence of a global NIAC has remained a singular minority view. Above all, it is a far cry from the notion that one state believes the law should be extended to apply to one indisputably novel situation, to the notion that modern conflicts have created such uncertainty in the law as to render the standard it establishes fundamentally unworkable as a whole.

This last point in particular helps to illuminate the nature of the indeterminacy critique at its core – a critique that in key respects recalls classic domestic jurisprudential debates over the relative merits of rules and standards. Brooks and other indeterminacy critics (understandably) long for a brighter line distinguishing those circumstances in which first-order killing is lawful, and those in which it is not – that is, a clear and specific rule that instructs "a decision-maker to respond in a determinate way to the presence of delimited triggering facts."[52] While the "armed conflict" threshold sounds like such a rule (and indeed, in conventional terms draws a very bright line between kinds of killing allowed), the *Tadić* test functions far more like a standard – a legal directive requiring application of a "background principle or policy" of humanitarian protection "to a fact situation."[53] *Tadić*'s totality-of-the-circumstances-type test, turning on factors indicating the relative organization of the parties and the intensity of the violence between them, offers the same advantage

50. *See* Noam Lubell, *The War(?) Against Al-Qaeda, in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 421, 434–37 (2012).

51. *See* OSCAR UHLER AND HENRI COURSIER, COMMENTARY IV: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS 51 (Jean S. Pictet ed., 1958) ("[N]obody in enemy hands can be outside the law.").

52. Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992); *cf.* BROOKS, *supra* note 7; Hakimi, *supra* note 10.

53. Sullivan, *supra* note 52, at 58.

as a standard: flexibility in the face of an infinite variety of competing equities and factual possibilities. The test equally carries the main disadvantage of a standard: difficulty in predicting how to conform one's conduct to the law in varied situations.

It is here the indeterminacy critic relies most directly on the classic view of international law – maintaining that the standard-esque effect of the "armed conflict" classification poses problems far more existential in this setting than do standards elsewhere in law, both because the stakes of the outcome are so very high,[54] and because, "[i]n the international context . . ., there is no [judicial or legislative] referee able to make such vital calls" about how to apply core principles to a particular factual setting.[55]

Yet far from supporting this classic international law critique, the "armed conflict" example proves useful in illustrating its contemporary weakness. For one thing, neither of these factors (neither high stakes nor the absence of conclusive adjudication) renders this context categorically different from the domestic law settings in which these familiar jurisprudential debates regularly arise. Domestic law has of course long grappled with how to design standards applicable to situations with equal consequences for life or death.[56] And while it may seem ideal that a determination as weighty as the legality of killing turn on a far brighter rule than the "armed conflict" classification allows, it has been precisely because these determinations are so weighty that domestic law has preferred the standard-esque approach to promote humanitarian goals – drawing on interpretive clues beyond the words of the standard themselves to give meaning to what process is due,[57] or what treatment is "humiliating and degrading."[58] Indeterminacy critics themselves appear to recognize the virtues of standards in this respect; to the extent they propose a substitute test for determining when first-order killing is permitted, proposed alternatives tend to look to the relative "proportionality" of the killing to the perceived threat, or the "feasibility" of alternatives to killing.[59] Yet it goes unexplained why these similarly broad (or even broader) standards will not also, like "armed conflict," suffer the same indeterminate fate.

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54. BROOKS, *supra* note 7, at 274-75.

55. *Id.* at 289 (highlighting in particular U.S. veto power over decisions of the UN Security Council).

56. *See, e.g.*, Baze v. Rees, 553 U.S. 35, 50 (2008) (holding that a method of execution violates constitutional prohibition against "cruel and unusual punishment" only if it presents a "substantial risk of serious harm" or an "objectively intolerable risk of harm") (internal citations omitted); County of Sacramento v. Lewis, 523 U.S. 833, 849, 854, n.13 (1998) (suggesting that state conduct deliberately intended to injure in a way unjustifiable by any government interest "shocks the conscience" and violates the Due Process Clause, but holding that negligently causing death does not meet this standard) (internal citations omitted).

57. U.S. CONST. amend. V.

58. Geneva III, *supra* note 3.

59. Hakimi, *supra* note 10, at 1391-94; BROOKS, *supra* note 7, at 354 (advocating unspecified better mechanisms to prevent "arbitrariness, mistake, and abuse in targeted killings").

What, then, of the absence of a judicial "referee," the singular court of compulsory jurisdiction necessary to provide authoritative settlement of disputed meaning? While it is certainly possible that various aspects of international law still suffer from the absence of settlement, the particular question of what counts as a NIAC in IHL has been the subject of extensive international judicial attention – and remarkable interjurisdictional penetration. The ICTY's *Tadić* test defining what counts as a NIAC has been embraced by, among others, the International Criminal Court, the European Court of Justice, and the U.S. federal courts;[60] *Tadić* is likewise recognized by the ICRC as the controlling test, and *Tadić* is cited by multiple states in official defense department law of war manuals (including the United States') as the relevant principle of law.[61] One might see some greater issue if different jurisdictions had come to different conclusions applying the *Tadić* test to the particular facts of the U.S. conflict here, but there is as yet no jurisdiction that has embraced the U.S. executive branch interpretation of the nature of its conflict with Al Qaeda; further, the one jurisdiction indisputably controlling U.S. state behavior – the U.S. Supreme Court – stopped notably short of embracing the executive branch view that the U.S. NIAC extended beyond the conflict in Afghanistan.[62] Even if one embraced the classic critique that international law lacks the systemic features required to promote legal certainty, one would be hard pressed to deny the remarkable degree of settlement here.

Indeed, even acknowledging the absence, at least in the most general terms, of a singular, authoritative global executive or judicial decision-maker for all IHL purposes, the interjurisdictional acceptance of *Tadić* demonstrates how a distributed network of legal decision-makers, each

60. *See, e.g.*, Prosecutor v. Haradinaj et al., Case No. T-04-84-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 19, 2010) (offering a detailed list of criteria to determine intensity, including metrics of death, damage, and social upheaval); Rome Statute of the International Criminal Court, art 8(2)(d)-(f), July 17, 1998, 2187 U.N.T.S. 90, 97-98 (following Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, U.N. Doc A/32/144, Appendix II (1977) 16 International Legal Materials 144); Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, judgment, (Mar. 14, 2012); Case C-285/12, Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides, 2014 E.C.R. I-921; United States v. Hamdan, 801 F. Supp. 2d 1247, 1278, n.54 (Ct. Mil. Comm'n Rev. 2011) (en banc), *rev'd*, *Hamdan II*, 696 F.3d 1238 (D.C. Cir. 2012), *overruled on other grounds*, Al Bahlul v. United States, 767 F.3d 1 (D.C. Cir. July 14, 2014); 2016 ICRC COMMENTARY, *supra* note 5.

61. *See* DANIEL HESSEL ET AL., BELOW THE THRESHOLD: THE LAW GOVERNING THE USE OF FORCE AGAINST NON-STATE ACTORS IN THE ABSENCE OF A NON-INTERNATIONAL ARMED CONFLICT, 3-5 (2015) (citing military manuals of the United States, United Kingdom, France and Germany).

62. While Hamdan v. Rumsfeld, 548 U.S. 557 (2006), is often cited for the proposition that the U.S. Supreme Court recognizes a transnational NIAC between the United States and Al Qaeda, the *Hamdan* Court was careful to limit its holding to the conflict between those parties then occurring "in the territory" of Afghanistan. *Id.* at 556.

authoritative in its own jurisdiction, may have the same effect. This is exactly as in U.S. domestic law, where countless constitutional decisions reached in lower federal and state courts, and in the work of legislatures and executives at the federal and state levels, as legal decision-makers must draft, apply, and enforce legal rules every day under circumstances no singular court will ever review.[63] It may not be an ideal legal system in some abstract sense, but it equally cannot distinguish the NIAC standard of IHL, or indeed many parts of international law, from an ordinary domestic legal system in this respect.

A final point. None of the foregoing is intended as an argument against the prospect that some *substantive* value or values might be better advanced by identifying factors other than party organization and ambient violence on which to ground the determination whether first-order killing is lawful – that is, that a "feasibility" test or some other analytical approach might better reflect current moral, political, or strategic sensibilities about the nature and propriety of the use of lethal force. The Essay returns to this possibility below. Here, the suggestion is only that imperfect clarity alone does not distinguish the "armed conflict" classification from any other legal standard. Abandoning it thus seems unlikely to justify the transition costs associated with shifting from one legal standard to another.

III. THE ACCOUNTABILITY CRITIQUE

If the primary import of the "armed conflict" indeterminacy critique is to surface long-festering debates about the adequacy of the international legal system to resolve the common problem of legal uncertainty, a second group of critiques turns, ironically, on a contrary complaint: that the NIAC standard is both too rigid and counterproductively set in the wrong place. Scholars here, whom I call "accountability critics," contend that requiring some exceptional degree of violence before hostilities rise to the level of a NIAC creates law avoidance incentives that may compromise opportunities for criminal justice for violators, or otherwise compromise compliance with the humanitarian goals both IHL and IHRL were designed to achieve. As this Part explains, the accountability critique suffers from a variety of deficits on its own terms. Further, reflecting longstanding concerns that the international legal system lacks sufficient mechanisms for constraining the behavior of non-compliant states, the accountability critique here discounts the prospects for formal enforcement in the contemporary international system's distributed mechanisms for criminal justice and fails to take account of what

63. *See* Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791 (2009).

international law theorists over the post-War era gradually came to realize: formal enforcement remains, in international law as in domestic, of only partial significance in securing compliance with law.

A. Understanding the Debate

Far from focusing narrowly on the unique circumstances of the conflict between the United States and various terrorist groups, accountability critics are more concerned about those parts of the world where vulnerable populations still grapple with underdeveloped or undeveloped domestic or international law protecting ordinary peacetime human rights. For while the development of domestic constitutions protecting rights, and of IHRL writ large, might change the way large parts of the world think about the importance of IHL as a safeguard against humanitarian transgressions in war, the argument goes, gaps in legal protection that remain in other parts of the world may make it far more important to the protection of individual rights that IHL's baseline humanitarian safeguards be triggered sooner rather than later.[64] Indeed, now that an International Criminal Court finally holds out at least the prospect of formal accountability for war crimes, hesitation or refusal to recognize the existence of an armed conflict in its early days may effectively immunize acts of violence that during any other period of the conflict would be manifestly prosecutable.[65] War crimes only exist, after all, when an "armed conflict" exists.[66] Overly-demanding standards for the level of violence required to trigger war – especially where states are not otherwise inclined to comply with basic human rights – risks leaving individuals without either front-end legal protection, or back-end justice. Maximizing the prospect that law will secure state compliance with humanitarian protections thus depends on broadening the set of circumstances in which law recognizes the existence of war.

One version of this argument is offered by Laurie Blank and Geoff Corn, who focus on the incentives the current "armed conflict" threshold gives states disinclined to attend to individual rights in the ordinary course. Writing in the wake of the apparent reluctance of various international experts to acknowledge that the violence in Syria had risen to the level of armed conflict, Blank and Corn urge that the *Tadić* test be construed more flexibly, such that a relatively lower degree of violence might still suffice to

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64. *See, e.g.*, Laurie R. Blank & Geoffrey S. Corn, *Losing the Forest for the Trees: Syria, Law and the Pragmatics of Conflict Recognition*, 46 VAND. J. TRANSNAT'L L. 693, 740-43 (2013).

65. *See* Adil Ahmad Haque, *Triggers and Thresholds of Non-International Armed Conflict*, JUST SECURITY.ORG (Sep. 29, 2016), https://www.justsecurity.org/33222/triggers-thresholds-non-international-armed-conflict/.

66. *See, e.g.*, Rome Statute of the International Criminal Court, *supra* note 60.

establish an armed conflict if one could point to a relatively higher degree of party organization – and vice versa.[67] As they contend, demanding that both elements of the *Tadić* test invariably be met before recognizing that the protections of Common Article 3 attach risks creating incentives for state armed forces that undermine IHL's goal of protecting all sides "from unnecessary suffering and gratuitous violence":[68]

> "[W]hat history seems to demonstrate repeatedly is that states almost always tend to err on the side of aggressiveness when they feel threatened by dissident movements. This is unsurprising. A state seeking to preserve its warrant will almost always perceive even a nascent and poorly organized armed opposition movement as a critical national security challenge.…[I]t is often precisely at this point in the threat evolution that a massive and heavy-handed combat response will be perceived as decisive…Government forces will seek to exploit the nascent organization of opposition or dissident movements with the application of overwhelming force, creating a situation wholly unsuited for normal peacetime legal regulation. In this context, issues such as lawful objects of attack, precautions in the attack, minimization of collateral damage, clear standards of protection for those rendered hors de combat, protection for the wounded and sick, establishment of neutral zones, and access to humanitarian relief become essential. …[R]efusing to recognize the existence of armed conflict eviscerates the efficacy of these norms by rendering them inapplicable."[69]

On this view, most apparently in places where rights may be inadequately protected under other bodies of law (where, for example, domestic or international human rights laws are underdeveloped or unobserved), having available such basic constraining legal guidance would seem critical to the achievement of any humanitarian goals.

Indeed, concerns that states regularly maneuver to avoid or deny the application of IHL in certain settings – formally rejecting the existence of an otherwise manifest international or non-international armed conflict to avoid the application of IHL rules – was central in motivating the shift from subjective to objective measures for establishing the existence of an armed conflict in modern IHL.[70] One of the great innovations of the

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67. Blank & Corn, *supra* note 64, at 742-43 (noting that "[s]ome hostilities must be necessary for a situation to qualify as an armed conflict—inherent in the term armed—although it does seem logical to reduce the intensity threshold when the evidence of organization is overwhelming").

68. *Id.* at 731.

69. *Id.* at 738-40.

70. *Id.* at 711 ("Just as Common Article 2's paradigm for international armed conflict eliminates the opportunity for states to engage in law avoidance by creating an objective trigger untethered to

modern Geneva Conventions was thus to ensure that the failure of a state to declare war could no longer absolve the state of the obligation to comply with IHL in the midst of hostilities that were, declaration or not, apparent for all the world to see. Concerns of law avoidance have been equally central to the ICRC's more recent position advocating a relatively high threshold for establishing the *end* of a NIAC; according to the ICRC, parties should be bound to comply with IHL standards as long as possible lest the end of conflict produce a situation in which it may be possible to argue that no law applies.[71] Particularly for conflicts involving states with poor peacetime human rights records, one can understand the case that humanitarian interests may be better served by the imposition of at least the modest constraints of Common Article 3 than by no law recognized as effectively binding at all.

Citing both humanitarian concerns and criminal accountability interests especially, Adil Haque argues more broadly in favor of a "nominal threshold for both IAC and NIAC."[72] Also troubled by the Syrian example, Haque offers the scenario in which a non-state group like ISIL invades Iraq, killing only a handful of Iraqi civilians and taking over Iraqi government institutions, while local forces flee, offering no resistance. Suggesting that current *Tadić* rules might not require the recognition of an armed conflict at the outset of such an operation (given the non-opposition and a relatively low level of actual violence), Haque worries that *Tadić* risks leaving ISIL's early acts of violence untouchable by international criminal law (whose jurisdiction is triggered only in circumstances of "armed conflict"). He worries equally that any hesitation in conflict classification frees third party states from otherwise putatively applicable obligations to try or extradite those who have committed crimes of war.[73]

B. Accountability in Perspective

Setting aside for the moment whether these authors are right in assuming that a proper application of *Tadić* would fail to recognize the existence of a NIAC in these settings,[74] it should be apparent how a call to

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declarations of war or other public pronouncements, so Common Article 3 also introduced the same objective approach to internal armed conflict…").

71. *See* 2016 ICRC COMMENTARY, *supra* note 5.

72. *See* Haque, *supra* note 65.

73. *Id.*

74. The *Tadić* decision and its progeny all insist on looking to an array of factors to help assess both intensity and organization, and have expressly resisted claims that the presence or absence of any one criterion is dispositive. *See, e.g.*, Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶¶ 49, 60 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008) ("Trial Chambers have relied on indicative factors relevant for assessing the 'intensity' criterion, none of which are, in themselves, essential to establish that the criterion is satisfied. These indicative factors include the number,

lower the level of violence required before an armed conflict may be said to exist – requiring, for instance, only "nominal" levels of violence – would be tantamount in practical terms to abandoning "armed conflict" as a meaningful trigger altogether. All societies have some nominal level of violence all the time; the law of exception – the killing rules of exception – would become the rule. The argument that humanitarian and related interests would be better served by lowering the armed conflict threshold in this sense seems a difficult case.

The strength of the argument thus turns on what might be gained by lowering the NIAC threshold – gains critics list as (1) improving the prospect of criminal accountability, and (2) increasing the likelihood that states will comply with basic humanitarian protections like avoiding collateral harm to civilians and ensuring humane treatment for detainees.[75] But those gains seem, even on their face, unlikely to be quite as significant as accountability critics suggest. Consider, for instance, the promise of greater criminal accountability for the crimes committed beginning early in the course of conflict settings like that of ISIL's emergence in Syria and Iraq – in important part because the existence of an armed conflict will make third party states more likely to feel legally obligated to prosecute-or-extradite ISIL fighters.[76] Doctrinally, there is at best a *hope* that states will feel so compelled, for where, as in the invasion by ISIL of Iraq, the conflict is non-international, the legal *obligation* to do is far less clear.[77]

Likewise, it is far from evident that earlier application of IHL protections might, overall, produce better humanitarian outcomes than allowing ambient, non-conflict law to prevail. For assessing any benefits here can only be fairly done in full view of the humanitarian cost IHL's application also brings. And as the ICRC has recognized, because IHL "rules on what constitutes the lawful taking of life or on detention in

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duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict."). Even where armed violence is entirely one-sided – for instance, where a state launches a sustained bombardment over a period of weeks against an organized armed group in which the state destroys entire tracts of property and drives thousands of civilians from their homes, but in which the non-state group is too overmatched to fight back – it seems hard to imagine the *Tadić* court would dispute characterizing these events as a NIAC.

75. *See, e.g.*, Haque, *supra* note 65.

76. *See* U.N. High Commissioner for Human Rights, *UN Commission of Inquiry on Syria: ISIS Is Committing Genocide Against the Yazidis* (June 16, 2016) http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20113#sthash.WwvsevZM.dpuf.

77. While the ICRC maintains that customary international law obligates states at a minimum to investigate and prosecute war crimes allegedly committed in NIACs, even it notes that a number of states have issued amnesties for war crimes). *See* Int'l Committee of the Red Cross, Customary IHL Database, Rule 158. Prosecution of War Crimes, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158#Fn_65_13.

international armed conflict … allow for more flexibility than the rules applicable in non-armed conflicts governed by other bodies of law," it is "dangerous and unnecessary … to apply" IHL to circumstances not amounting to armed conflict.[78] To be clear, this is not an argument that IHL is in any sense an affirmative grant of power. Rather, it is merely to acknowledge that it is not possible in many circumstances to reconcile the basic IHRL prohibition on arbitrary killing with the basic IHL permission to kill on the basis of status as a first resort.[79] It may well be that a given military in a given conflict concludes that it is categorically inconsistent with military necessity to kill when capture is possible.[80] But this judgment is not compelled by the law of armed conflict. It is only compelled by the law of human rights. The lower the threshold for recognizing a NIAC, the fewer the circumstances in which that compulsion applies. State arguments that a NIAC exists in the presence of only a nominal degree of violence (or indeed, in the presence of an ongoing *threat* of violence) thus risk becoming the latest state form of law avoidance – a means of avoiding the application of greater rather than lesser humanitarian protections, a means that has only become generally available since the emergence of international human rights. Pressure to expand the definition of armed conflict in this respect risks collapsing the distinction between the human rights law rule and the law of war exception altogether, effectively shrinking the time and space in which ordinary IHRL right-to-life rules – even if only in customary form – may be said to govern state behavior.

Here it is necessary to pause to address a key response to this concern, namely, the United States' longstanding refusal to recognize the extraterritorial application either of its own Constitution or the ICCPR.[81] That is, even if IHRL is more protective than IHL in the abstract, it would make no practical difference (or worse, a counterproductive difference) in the concrete, most pressing application of those rules – the United States' use of lethal targeting in global counterterrorism operations.[82] Insisting that the United States' engagement with Al Qaeda and its associates is not

78. INT'L COMMITTEE OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICT 8 (2007).

79. *See* McCann v. United Kingdom, 21 Eur. Ct. H.R. 97, ¶¶ 146-54 (1995).

80. *See* Presidential Policy Guidance, Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities (May 22, 2013), https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download.

81. The U.S. Supreme Court has not generally recognized the application of, for instance, Fourth Amendment rights under the U.S. Constitution to foreign nationals outside the territorial United States. *See* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990). The United States likewise maintains that the ICCPR does not limit its actions outside territory under its jurisdiction. *See, e.g.*, Charlie Savage, *U.S., Rebuffing U.N., Maintains Stance That Rights Treaty Does Not Apply Abroad*, N.Y. TIMES, Mar. 14, 2014, at A12.

82. *See generally* Yahli Shereshevsky, *Politics by Other Means: The Battle over the Classification of Asymmetrical Conflicts*, 49 VAND. J. TRANSNAT'L L. 455 (2016).

an "armed conflict" will only diminish rather than strengthen the humanitarian protections that apply as a matter of law to U.S. operations. As long as the United States thinks it is fighting a NIAC, at least it will recognize the application of Common Article 3. If the United States thinks that its current conflict with Al Qaeda is not a NIAC, however, it will not recognize the applicability of other human rights rules outside the United States – effectively diminishing available rights protection.

This argument is problematic in several respects. First, as with efforts to draw conclusions about the general clarity of the "armed conflict" standard from the peculiar example of the U.S. application, the argument here risks allowing the hard case to make bad law. Because a majority of countries *do* recognize the extraterritorial application of IHRL,[83] it seems perverse to use the singular U.S. example to justify a worldwide expansion of the scope of IHL application. Second, this argument misunderstands the way in which the United States has come to use a lowered threshold for NIAC as its own form of law avoidance. The universal rejection of the view that the United States is engaged in a transnational NIAC with Al Qaeda and associated forces has done nothing to diminish the United States' stated intent to comply in its conflict with at least Common Article 3, rules the United States today considers itself bound to as a matter of customary international law under any circumstances.[84] On the other hand, the United States' insistence that its hostilities are part of a NIAC has been essential in persuading U.S. courts that domestic sources of legal authority should be read to permit the use of wartime measures.[85] In other words, the United States uses its unique definition of NIAC not so much to avoid the application of IHRL (which it denies anyway), or Common Article 3 (which it applies anyway), but rather to lend legal legitimacy to its claim that first-resort lethal targeting is authorized under its domestic law.

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83. *See generally* Oona Hathaway et al., *Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?*, 43 ARIZ. ST. L.J. 389 (2011) (reviewing jurisprudence of the supreme courts of Canada and Britain, as well as the European Court of Human Rights ("ECHR"), Inter-American Court of Human Rights ("IACHR"), and International Court of Justice ("ICJ"), and finding that all but one has embraced the view that human rights obligations apply extraterritorially when the acting government exercises "effective control" over the territory, person, or situation in question).

84. *See* U.S. Dep't of Def., Law of War Manual § 3.1.1.2 (June 2015), www.defense.gov/Portals/1/Documents/DoD_Law_of_War_Manual-June_2015_Updated_May_2016.pdf ("DoD practice also has been to adhere to certain standards in the law of war, even in situations that do not constitute 'war' or 'armed conflict,' because these law of war rules reflect standards that must be adhered to in all circumstances."); *see also* § 2.5 (Distinction); § 5.5 (Discrimination in Conducting Attacks).

85. *See* Hamdi, 542 U.S. at 521 (2004) (O'Connor, J., concurring) ("[W]e understand Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.").

If one sets aside the special case of the United States, it becomes apparent that the accountability critique is most occupied by a species of the same problem that has animated international law realists since World War II: the concern that international law, especially lacking in formal enforcement mechanisms, cannot function effectively to constrain the behavior of sovereign states not otherwise inclined to behavioral constraint.[86] This accountability concern is certainly evident in calls to expand the definition of "armed conflict" in the hope of maximizing chances for justice before an international criminal court, an interest that has long driven development in the field.[87] Yet modern practice has increasingly demonstrated that international war crimes prosecution is hardly the only criminal alternative. In the case of ISIL in particular, there already exist a fair number of states that may plausibly assert ordinary prescriptive jurisdiction over one or more ISIL members, arrested domestically or outside a domestic jurisdiction, for violating a range of domestic criminal laws.[88] More, even if no functional domestic government can properly assert conventional prescriptive jurisdiction over particular NIAC-related offenses, it is today apparent that universal jurisdiction practice has also been "quietly but persistently expanding" across a range of offenses since the early 1990s.[89] Indeed, according to a new study by Maximo Langer and Mackenzie Eason, the past decade has seen "more completed universal jurisdiction trials than in the previous twenty years combined; and there have been substantially more completed universal jurisdiction trials than completed trials at the International Criminal Court."[90] Given this existing state of affairs, if and when criminal prosecution becomes possible (overcoming a host of practical hurdles), it is far from apparent how adding a handful of additional potential offenses

86. *See* generally HANS MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE (1948) (noting that in the decentralized international system, in the relatively rare instances when law is violated, the availability of sanctions could depend solely on the "vicissitudes of the distribution of power between the violator of the law and the victim of the violation").

87. As one of the judgments of the International Military Tribunal at Nuremberg famously opined, violations of "international law are committed by men, not by abstract entities, and only by punishing individuals who [violate such laws] can the provisions of international law be enforced." *Judicial Decisions: International Tribunal (Nuremberg), Judgment and Sentences*, Oct. 1, 1946, 41 AM. J. INT'L L. 172, 221 (1947).

88. *See* THE AMERICAN EXCEPTION: TERRORISM PROSECUTIONS IN THE UNITED STATES: THE ISIS CASES MARCH 2014–AUGUST 2017 (Karen J. Greenberg ed., 2017) (reporting criminal charges against 135 ISIS defendants in U.S. federal courts); Steven Morris, *British Woman who Joined ISIS in Syria Guilty of Encouraging Terror Acts*, THE GUARDIAN (Jan. 29, 2016), https://www.theguardian.com/uk-news/2016/jan/29/british-woman-tareena-shakil-joined-isis-syria-guilty-encouraging-terror (describing the UK criminal prosecution of an ISIL member).

89. *See generally* Máximo Langer and Mackenzie Eason, The Quiet Expansion of Universal Jurisdiction (UCLA Sch. of Law Working Paper, 2017) (on file with author).

90. *Id.* at 3.

to the list of manifest criminal wrongs ISIL has already committed serves much of a practical accountability benefit.

As important, just as post-War practice has helped demonstrate that individual criminal accountability for international offenses may be achieved through distributed mechanisms beyond a single, central court of compulsory criminal jurisdiction, so too has the vast scholarly response to the post-War realists demonstrated that formal enforcement is only part of a set of reasons why states – or individuals – might comply with law or not. As theorists today recognize, states have a range of interests that motivate behavior toward or away from compliance with a legal rule, including, for example, interests in reciprocal treatment and reputation.[91]

Here, accountability critics' intuition seems to be that the earlier, formal applicability of IHL in this setting would make it more difficult for putatively repressive states to avoid the application of any rights-protective law in a domestic conflict.[92] Thus, the argument might go, states are more likely to attend to, for example, the IHL rule to minimize civilian casualties (proportionality) than to parallel strictures in the ICCPR, customary international law, or domestic constitutional regimes (all roughly prohibiting arbitrariness or deliberate indifference in taking life). To flesh out a rationale for this view, one might hypothesize that otherwise-non-human-rights-protective states (presumptively lacking effective domestic law rights protections) are more apt to comply with the IHL treaty regime (to which all states are party) than to the IHRL treaty regime (which boasts broad, but not universal, adherence), or to customary law. While one might naively imagine that a state with an established record of disinterest in the legal protection of human rights in times of relative calm seems unlikely to develop such an interest on the threshold of internal armed conflict, it is true that 19 states (including Myanmar, Singapore, and Saudi Arabia) have obligated themselves by treaty not to engage in disproportionate targeting in "armed conflict,"[93] but have undertaken no such formal treaty obligation to protect the right to life under the ICCPR otherwise – suggesting that states themselves may perceive some difference in the value or relevance of the obligations.[94] Even if one sets aside the reality that the states most commonly the subject of discussion in the "armed conflict" debate today all have ratified the ICCPR (including

91. For a useful summary of key post-war insights, see BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INT'L LAW IN DOMESTIC POLITICS 116-18, 121-25 (2009).

92. *See* Blank & Corn, *supra* note 64, at 695-96.

93. INT'L COMMITTEE OF THE RED CROSS, States Parties to the Convention (III) relative to the Treatment of Prisoners of War. Geneva, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=375.

94. None of these states is a party to the International Covenant on Civil and Political Rights (ICCPR). *See* U.N. U.N. Human Rights Office of the High Commissioner, Status of Ratification Interactive Dashboard (2014), http://indicators.ohchr.org/ (last visited Nov. 18, 2018).

Afghanistan, Iraq, and Syria),[95] it is still possible to hypothesize that behavioral incentives of one kind or another make those states more likely to adhere to their IHL obligations than to any apparent under the ICCPR.

But while post-War international law scholars have certainly recognized the importance of behavioral incentives – all apart from formal enforcement – in motivating state compliance with law, neither the theoretical literature nor the increasingly rich empirical literature that has blossomed since World War II offers much cause to expect that states will comply with Rule A contained in one treaty regime to which they are party, but not comply with substantively the same Rule A contained in a different treaty regime to which they are also party. Thus, for example, scholars have recognized that states engaged in *interstate* armed conflict are likely concerned with reciprocity, reputation, and the like in their own conduct of hostilities in that conflict.[96] But it is less clear why reciprocity concerns would motivate any state engaged in a purely internal armed conflict, for there are no other treaty-obligated warring states on the other side. Likewise, to the extent a NIAC-involved state is worried about the reputational or strategic effects of non-compliance with a particular rule, the impact on reputation seems likely to be the same whether the state is complying (or failing to comply) with IHL proportionality obligations, or IHRL proportionality-equivalent obligations. If a state is killing large numbers of civilians, in violation of *any* law, the effect on its reputation among states is unlikely to be good.

Scholars are entirely right to be concerned about how to maximize the likelihood that states engaged in NIACs will behave humanely toward rights-bearing populations. But while insights into why states behave as they do have grown tremendously in the past half-century, there is nothing thus far to suggest that shifting the moment at which humanitarian legal protections are governed by one regime or another is likely to make a difference.

IV. THE POLICY CRITIQUE

In explaining why international law could not yet be considered part of a mature legal system, Hart highlighted its lack of what he called secondary rules – "power-conferring" laws and processes by which primary rules of conduct (no targeting of civilians, for instance) could be authoritatively

95. U.N. Human Rights Office of the High Commissioner, Status of Ratification Interactive Dashboard (2014), http://indicators.ohchr.org/.

96. *See* James D. Morrow, *When Do States Follow the Laws of War?*, 101 AM. POL. SCI. REV. 559 (2007).

identified, applied, and changed.[97] Hart understood that because all primary rules in law by their nature carry certain defects – not only uncertainty in meaning and "the fact of violation," but also the eventuality of obsolescence – mature legal systems necessarily had methods by which they could regularly and predictably engage in the process of legal change. Especially given the international legal system's lack of a singular legislature,[98] and the Cold War dysfunction of what formal institutions it had (like those established by the UN Charter), international law in this view remained frustratingly unable to address inevitable changes in global conditions.[99]

International legal instruments, institutions and other mechanisms for advancing legal change have developed significantly since 1961, but as this part explores, frustration surrounding international law's perceived failure to keep pace with change echoes in contemporary debates about the utility of the category "armed conflict."[100] This part begins by introducing the policy arguments driving recent calls for abandoning the "armed conflict" classification, and first engages their claims on their own terms. Among other problems, many of the policy failings perceived in current law are either irrelevant to or confound the question whether it is necessary to abandon the "armed conflict" threshold as a trigger of legal significance. It then suggests that, to the extent IHL has failed to keep pace with perceived needs, it is not a sign of inadequately-developed mechanisms for legal change, but rather a phenomenon familiar in the most mature legal systems: reflection of a substantive judgment that the case for particular changes has not yet been made.

A. Understanding the Debate

The policy case against the armed conflict threshold is on its face the most challenging of the categorical critiques, a concern championed by law and security thinkers who argue that the cloak of "armed conflict" ill-suits the contemporary body of violent hostilities in the world writ large. On this view, the requirement that there be a certain intensity of violence between organized parties before lethal targeting under NIAC rules is permitted fails to account for the serious, chronic, and increasingly typical threat posed by loosely organized or shifting groups or individuals, able to

97. HART, *supra* note 18, at 81, 92-94 (describing the need for rules of recognition, change, and adjudication that determine what the primary legal rules are and when they have been violated).

98. HART, *supra* note 18, at 209.

99. *Id.* at 226-28.

100. *See* Hakimi, *supra* note 10, at 1367 (lamenting that "[i]nstead of embracing" agreement about justifiable outcomes, "and trying to develop shared parameters for counterterrorism operations," debates among state and non-state advocates remain hamstrung by secondary disputes over legal conflict classification).

act beyond the reach of other existing legal authorities.[101] Current conflict conditions, or conditions that will soon prevail, are substantially characterized not only by sustained violent campaigns by organized groups, but also by far more loosely-affiliated groups and individuals who are able to capitalize on technologies that put more and more intensely destructive power in the hands of smaller and smaller numbers of individuals.[102] What Michael Adams calls "jus extra bellum,"[103] David Barno and Nora Bensahel call "gray zone conflicts,"[104] and Rosa Brooks calls the "space between" war and peace,[105] is increasingly occupied by proliferating drone and cyber technology, biotechnology, and more – all of which can be readily weaponized by state and non-state actors alike to inflict profound harm without any of the trappings of group organization, geography, or even duration that have been thought central to our understanding of the category of "armed conflict."[106] It would be a complex set of challenges in the best of circumstances, but in the absence of more "robust, responsible, and accountable forms of international governance,"[107] we have only the diffuse interpretive competition of one state's view against another on the question of what the rules permit, leaving uncertain decision-makers and outmoded norms, rather than effectively governing law.

Given such changes, policy critics maintain that requiring a state to ask whether a particular threat can be thought of as part of an "armed conflict" or not only obscures more meaningful debate about the "substantive" reasons whether and when action against these kinds of threats should be lawful.[108] Might it not make more sense or at least clarify matters, the policy critics ask, to have the legal availability of killing depend on some other test? Brooks and Hakimi diverge on the significance of the "armed conflict" classification under current law: Brooks views it as legally pivotal and Hakimi notes contexts in which the legality analysis comes out

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101. *See, e.g.,* BROOKS, *supra* note 7; Michael J. Adams, *Jus Extra Bellum: Reconstructing the Ordinary, Realistic Conditions of Peace*, 5 HARV. NAT'L SEC. J. 377 (2014).

102. *See* BROOKS, *supra* note 7, at 141; Adams, *supra* note 100; Hakimi, *supra* note 10, at 1374-75 (highlighting the chronic violence committed by groups like Al Qaeda and drug cartels, whose "organizational structures, intentions, and levels of violence vary widely" and whose actions "fall somewhere in between" those that rise to the level of armed conflict and not). In fairness, concerns about weapons technologies and the (resulting) rising power of small groups of non-state actors have been detailed in the security literature for years. *See* Christopher F. Chyba & Alex L. Greninger, *Biotechnology and Bioterrorism: An Unprecedented World* 46 SURVIVAL 143 (2004).

103. Adams, *supra* note 101.

104. David Barno and Nora Bensahel, *Fighting and Winning in the "Gray Zone,"* WAR ON THE ROCKS (May 19, 2015), https://warontherocks.com/2015/05/fighting-and-winning-in-the-gray-zone/.

105. BROOKS, *supra* note 7, at 353.

106. *See* BROOKS, *supra* note 7, at 129-41; Adams, *supra* note 100, at 425.

107. BROOKS, *supra* note 7, at 253.

108. Hakimi, *supra* note 10, at 1385 ("[F]ocusing on the domain question undermines substantive resolution.").

the same whether an "armed conflict" exists or not. But they separately arrive at recommendations that are identically categorical in nature: decouple the determination about whether killing is justified, from the legal classification of a situation as an "armed conflict."[109]

B. Policy in Perspective

While there can be little doubt of the existence of the increasingly complex array of threats the policy critics describe, it is far from evident that legal change – in particular, abandoning the armed conflict classification as a legal rule of relevance – would address the policy concerns critics perceive. Indeed, several scholars today contend that the existence of an armed conflict or not is already practically irrelevant in an IHRL world. Far from simply permitting first-resort killing, this view holds, IHL's combined principles of distinction, proportionality, necessity, and humanity effectively require the very same kind of judgment IHRL imposes to render the use of lethal force permissible: a context-specific, fact-dependent determination of how much force is reasonable given the totality of the circumstances.[110] Such analyses have been bolstered by recent ICRC guidance embracing a notably restrictive view of military necessity,[111] and by sometime U.S. policy guidance imposing limits beyond those otherwise required by IHL on the use of lethal force against terrorist targets outside of areas of active hostilities.[112] The overlap in IHL/IHRL outcomes is especially apparent in those contemporary circumstances in which the use of lethal force has been most contested – in a setting where the existence of a threat is apparent but the existence of an "armed conflict" as such is unclear. Consider for example, a state's discovery of a lone, religious cult member on the way to depositing a biological pathogen into a city water supply. Different states and different bodies of law might

109. *See* Hakimi, *supra* note 10.

110. *See* Adil Ahmad Haque, *Triggers and Thresholds of Non-International Armed Conflict*, JUST SECURITY (Sep. 29, 2016), https://www.justsecurity.org/33222/triggers-thresholds-non-international-armed-conflict/; *see also* Monika Hakimi, *Taking Stock of the Law on Targeting*, EJIL: TALK! (Dec. 12, 2016), https://www.ejiltalk.org/taking-stock-of-the-law-on-targeting-part-i/.

111. *See* INT'L COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 79 (2015) (finding that the principles of military necessity and humanity "reduce the sum total of permissible military action from that which IHL does not expressly prohibit to that which is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances"); INT'L COMMITTEE OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS (2015) (offering a three-part test for when to apply targeting norms and when to apply other rules in IACs and NIACs: firm control, no hostilities in area, no foreseeable risk of reinforcements).

112. EXEC. OFFICE OF THE PRESIDENT, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 24-25 (2016).

dress the legal inquiry in different doctrinal clothing – involving tests about the imminence of the threat, the availability of alternatives, the amount of force reasonably necessary under the circumstances – but in the end neither domestic nor international law would deny a state recourse in such a situation to take some action, up to and potentially including lethal force, to prevent such an attack. To the extent conclusions about the legality of killing differ in this in sort of setting, the argument goes, it is a result of the difference in what is assessed to be reasonable under different circumstances, not a result of a difference in the nature of the legal analysis required.

Yet while it is evident that certain rights protections in IHL and IHRL overlap,[113] and that there are some circumstances in which outcomes under IHL and IHRL are the same, it is far more difficult – indeed, impossible – to make the claim that there are comparably similar requirements in both regimes for considering all reasonable alternatives in primary targeting. Notwithstanding scholarly suggestions that IHL *should be* read to include some duty to capture rather than kill otherwise lawful targets in armed conflict wherever possible,[114] neither the United States nor any state party to the Geneva Conventions recognizes that position as law.[115] Rather, it is the reality that IHL permits first-resort targeting of lawful targets without reference to alternative options (even in circumstances in which those targets pose no active or meaningful threat), that has led some to call for reconsidering the rules of IHL to bring them more in line with modern moral intuitions.[116]

The most that can then be said is that while IHL and IHRL may, on some occasions, produce the same outcome on the question of legality, there are other occasions in which they will not. And traditional battlefield circumstances are not the only occasion on which this will be the case. Imagine a modified version of the bioterrorist scenario above. Rather than involving an individual actor en route to delivering a pathogen into a water supply, suppose the actor is a former state biological weapons scientist en route to a meeting with a newly emerging terrorist organization to which he has pledged his allegiance. If the terrorist organization is part of an

113. *See supra* note 102 and accompanying text.

114. *See* Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUR. J. INT'L L. 816 (2013) (arguing that the modern law of armed conflict should be understood to require that, in certain circumstances, "if enemy combatants can be put out of action by capturing them, they should not be injured; if they can be put out of action by injury, they should not be killed").

115. *See* INT'L COMMITTEE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 80 (2009) (concluding that "[i]n classic large-scale confrontations between well-equipped and organized armed forces or groups, the principles of military necessity and of humanity are unlikely to restrict the use of force against legitimate military targets beyond what is already required by the specific provisions of IHL").

116. *See* Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEGAL ANALYSIS 115 (2010).

existing armed conflict, IHL *may* permit lethal targeting of such an actor. But in the absence of an existing armed conflict, human rights law will not justify his killing, and certainly not on the basis of group status alone.

Policy critics are thus right to recognize the ongoing significance of the "armed conflict" trigger in some swath of circumstances. Yet the policy critics' initial line of attack – that the armed conflict standard obscures a more meaningful inquiry into the "substantive" reasons whether particular action should be justified – does not follow.[117] For it is hardly the case that the armed conflict classification lacks substantive content. Quite the contrary. The armed conflict inquiry reflects the deeply substantive judgment that there is a specific and unique set of conditions, the existence of which suffices to justify first-resort killing that is otherwise unjustifiable. In NIACs, these are conditions in which the groups fighting one another are organized enough to be capable of observing certain baseline rules governing the way they fight,[118] but in which the intensity of fighting is great enough that more detailed inquiries into individual culpability and absolute necessity are either impossible or unreasonable.[119] Asking whether a set of circumstances amounts in legal terms to a NIAC is, in this sense, no different from asking whether this particular set of substantive justifications for killing exists. If the terrorist organization in our biological weapons example is not currently party to an armed conflict, we could call this example an absence of conditions justifying first-resort killing. For now, the law happens to call it, more simply, not war.

Indeed, policy critics themselves seem to contemplate a universe in which ambient violence and group organization are likely to remain part of a renamed substantive standard for killing. Hakimi, for instance, suggests that a focus on principles rather than (armed conflict or not) frameworks could lead to a standard requiring the decision-maker to inquire (in our scenario) whether the biologist poses an "[a]ctive, serious threat of deadly force."[120] In our biological weapons scientist example, there seems little question that the threat could be deadly if realized. Is the threat "active"? Is it "serious"? To answer these questions, one might want to know whether the threat was temporally "imminent" in a traditional self-defense

117. Hakimi, *supra* note 10, at 1385 ("[F]ocusing on the domain question undermines substantive resolution.").

118. *See* 2016 ICRC COMMENTARY, *supra* note 5, at ¶ 429 ("In order for a non-State armed group to be sufficiently organized to become a Party to a non-international armed conflict, it must possess organized armed forces. Such forces…must possess a certain level of hierarchy and discipline and the ability to implement the basic obligations of IHL.").

119. *See* Seth Lazar, *Necessity in Self-Defense and War*, 40 PHIL. & PUB. AFF. 27 (2012) ("The epistemic situation of combatants in war is quite different from that of individual self-defenders in domestic society…what information they have is generally either unreliable or ambiguous…[and] it is near-impossible for their adversaries to discriminate among them according to their individual contributions and responsibility.").

120. Hakimi, *supra* note 10, at 1391.

sort of way. But one would almost certainly also want to know whether the terrorist group is organized enough to pull off a biological attack, and indeed whether the group has ever successfully attacked any other target in the past. Indeed, one would surely want to know as much as possible about the nature of the threat before deciding on a course of action – up to and including exactly those things about the threat that would establish whether it was part of an armed conflict or not.

It is at this point tempting to ask why the threats that most concern the policy critics – threats posed by loosely affiliated groups or individuals operating carrying out geographically and temporally isolated attacks, perhaps using particularly powerful or novel weapons – should be viewed as mostly a problem for armed conflict law at all. Many human rights scholars and advocates have, after all, long maintained that general application of the law of armed conflict to the problem of international terrorism is a significant category error itself.[121] Terrorism (and drug trafficking and weapons proliferation and more) have long been dealt with through a host of other available legal authorities, from domestic and transnational criminal law, to trade and export control regimes, to international monitoring systems, to national rights of self-defense. Of course armed conflict law is an ill-fitting cloak for the contemporary threats about which the policy critics worry because those threats, however threatening, are not meant to be covered by armed conflict law by definition. It is only the United States' uniquely broad application of IHL to address the threat of international terrorism that has made what should be mostly a *policy* discussion about how these threats should be managed, a discussion about inadequacies in armed conflict *law*. Perhaps it is the case as a policy matter that existing state authorities are inadequate to combat contemporary threats, but if so, then one might sensibly wonder why such a problem would not be solved at least as well by developing a whole new category of legal authorities and regulation, rather than by adapting an existing legal framework to suit a problem for which it was not designed. In this respect, the argument that the armed conflict framework is not useful in evaluating the justness of killing in situations not amounting to an armed conflict reads uncomfortably much like an argument that a hammer is not useful in evaluating whether a soup needs more salt.

But it is precisely the critics' attention to the ill-fittingness of the "armed conflict" framework to new kinds of threats that makes it seem likely that a key part of what is animating the policy critique is, indeed, policy: that is, an intuition that many contemporary threats are *close enough* to circumstances of armed conflict, or so otherwise dangerous, that the

121. *See* David Luban, *The War on Terrorism and the End of Human Rights*, 22 PHIL. & PUB. POL'Y 9 (2002).

law *should* permit some regulated form of killing in those situations, provided that certain later-to-be-determined substantive and procedural conditions are met. While there is no evidence of an armed conflict given in our example of the former state bioweapons scientist aligned with a terrorist organization, a reasonable person might well view this situation as one in which moral or policy concerns should make killing permissible if no other option is, say, "feasible," to prevent the threat from advancing.[122] On this reading, the "armed conflict" threshold is the subject of criticism on the grounds that it does not just obscure where the lawful-killing line should be drawn, it draws the line in the wrong place.

Yet rather than engaging such a normative discussion directly, the policy critics for the most part ascribe the failing to systemic deficiencies: the "armed conflict" regime and the international legal system as it stands is incapable of timely bringing contemporary policy insights into effect.[123] Given the clarity of the policy need for change, the critique implies, we should not be surprised that states are finding ways to circumvent legal standards that are in fact entirely outmoded or irrelevant. Given the failings of the international system, sketched in terms strikingly similar to those levied in the decades immediately following World War II, the real explanation for why the "armed conflict" threshold has remained as it is must be that the system has made it structurally too hard to change it.

Yet if the post-World War II era in international legal development has demonstrated anything, it is IHL's relatively robust capacity, through formal and informal mechanisms, to account for change. State parties to the Geneva Conventions have twice negotiated Additional Protocols to the 1949 treaties, Protocols which were subsequently adopted by the substantial majority of states.[124] Decisional law from international and domestic courts has further refined treaty rules in ways that have won broad interjurisdictional acceptance, notwithstanding the courts' lack of universal jurisdiction in a formal sense.[125] When states have perceived a

122. The policy critics certainly highlight analogous examples in illustrating the problem they perceive. *See, e.g.*, BROOKS, *supra* note 7; Hakimi, *supra* note 10, at 1404-05 (suggesting that Osama bin Laden probably should have been lawfully targetable but that existing IHL did not clearly permit it).

123. *See, e.g.*, BROOKS, *supra* note 7, at 253 (faulting the current standard in the absence of more "robust, responsible, and accountable forms of international governance"); Hakimi, *supra* note 10, at 1373 ("No overarching framework exists for developing the law within domains…. [the international legal system] lacks effective tools for determining the correct answers. Inevitably, it leads to disputes about which domain governs – disputes that, because the system is decentralized, no actor has unilateral authority to resolve.").

124. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S 609 [hereinafter Additional Protocol II].

125. *See supra* note 74; *see also* HCJ 769/02 Pub. Comm. Against Torture v. Gov't 62(2) PD 459, 489 (2006) (Isr.); Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

lack of clarity or substantive inequity in particular IHL rules – the definition of "direct participants in hostilities," or the applicability of IHL rules to emerging weapons technologies, for example – the ICRC, NATO, and other actors have developed informal but rigorous and influential international processes to help clarify and document emerging principles of consensus.[126] And states collectively of course remain entirely capable of shifting the rules the old fashioned way – through the development of contrary state practice over time, as may happen with relative lightning speed,[127] or over a longer period.[128]

Such mechanisms for change are far from perfect, and while demonstrably capable of moving reasonably quickly on occasion, at other times move far more slowly than one might wish. Yet such frustrations fail categorically to distinguish these international mechanisms for legal change from domestic lawmaking institutions likewise regularly subject to criticism on grounds of failing to keep pace with, for example, technological change.[129] Perhaps more important, the mere lack of rule change in this (or any) legal system gives us no insight, without more, into the reasons for that lack – whether the rule has not changed because structural hurdles prevent it, or because, as seems a particularly compelling hypothesis here, the policy case for change has not proved persuasive to enough actors to make change happen in a non-unilateral legal system.

V. CONCLUSION

The post-September 11 years have been challenging for IHL in a host of respects, challenges that have in the past few years manifested themselves in calls by a series of scholars to revisit the utility of the "armed conflict" classification as a threshold of legal significance. Yet while the

126. *See* INT'L COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009); TALLINN MANUAL, *supra* note 39.

127. *See* Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sep. 18, 1997, 2056 U.N.T.S. 211.

128. *See, e.g.*, THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 135-71 (2002) (canvassing state practice relevant to the emergence of a norm supporting the legality of the use of force for humanitarian purposes); Elena Chachko and Ashley Deeks, *Who is on Board with "Unwilling or Unable"?*, LAWFARE BLOG (Oct. 10, 2016) https://www.lawfareblog.com/who-board-unwilling-or-unable (arguing that several states have embraced an 'unwilling or unable' norm for the use of force without state consent).

129. *See, e.g.*, Deborah Pearlstein, *Before Privacy, Power: The Structural Constitution and the Challenge of Mass Surveillance*, 9 J. NAT'L SECURITY L. & POL'Y 159, 201 (2017) (noting that, as of 2013, the Executive Branch had issued no comprehensive revision to E.O. 12333, which sets forth guidelines to protect electronically collected information "concerning U.S. persons," for nearly thirty years) (internal citations omitted); Erin Murphy, *The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment and Statutory Law Enforcement Exemptions*, 111 MICH. L. REV. 485, 533-34 (2013) (providing examples of obsolete provisions from the Electronic Communications Privacy Act of 1986).

changes to which these scholars respond are without question real and important – changes that in key respects well pre-date the U.S. response to the attacks of September 11 – they cannot on their own justify the abandonment of "armed conflict" as a relevant determinant of the legality of first-resort killing. More, while critics focus here on challenges of "armed conflict" law in particular, their substantive critiques depend in more and less subtle ways on increasingly outmoded, World War II-era assumptions about the inadequacy of the international legal system writ large to address them. The problems to which "armed conflict" classification critics rightly attend – problems of interpretive uncertainty, law compliance, and social change – are familiar dilemmas in all legal systems. And while the international legal system remains far from perfect, it, too, has developed and diversified in ways that make it far more capable than it was in 1949 to address the common problems of law's making.

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