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Fragmented Wars: Multi-Territorial Military Operations against Armed Groups

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CONTENTS

I. Introduction	216
II. Self-Defense	217
A. Self-Defense against Non-State Actors	217
B. Expanding Self-Defense into New States	222
III. Classification of Armed Conflicts.....	227
A. Classification of Hostilities between a State and Extraterritorial Non-State Actors	229
B. Classifying the Situation between the Two States.....	231
IV. The Scope of Conflict	238
A. Armed Groups and Associated Forces.....	238
B. The Geographical Scope.....	244
V. The Interplay with International Human Rights Law	247
VI. Conclusion	249

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

I. INTRODUCTION

The use of force against armed groups located in other States is not new, but began receiving heightened attention as a result of U.S. operations in Afghanistan following the September 11, 2001 attacks. The high profile of these events, the resoluteness with which the United States asserted its right to self-defense against an armed group and the international support that it received,¹ all led to increased attention to the surrounding legal matters. Much of the debate centered upon the basic question whether a State has a right to self-defense in response to attacks perpetrated by a non-State actor located in the territory of another State, absent attribution of the attack to the other State. Separate questions that arose were over the classification of hostilities between the State and such a group, and the rules governing the conduct of the parties.

Over a decade later, these fundamental questions are returning with a vengeance, while the unfolding of current events presents a myriad of new and far more complex challenges to our understanding of the law and how it should apply in these situations. In particular, the notion of a single armed group in a defined location has given way to concepts of a conflict simultaneously engaging multiple groups across numerous territories. As a result, debates have emerged over issues such as extending self-defense into multiple territories, defining the scope of the battlefield, and over terms such as “associated forces” in the context of armed groups. This article sets out to draw together the threads of these debates from the last fifteen years, to analyze new questions that have emerged, examine how they impact upon each other and suggest a way forward for overcoming the legal challenges.

1. *See* Permanent Representative of the United States of America to the United Nations, Letter dated Oct. 7, 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001); Press Release 124, NATO, Statement by the North Atlantic Council (Sept. 12, 2001); *see also* Organization of American States, Support for the Measures of Individual and Collective Self-Defense Established in Resolution Rc.24/Res. 1/01, Doc. Oea/Ser.F/Ii.24 Cs/Tiar/Res. 1/01 (Oct. 16, 2001).

II. SELF-DEFENSE

A. *Self-Defense against Non-State Actors*

Much of this early analysis used the starting point in which State A (Angosia) engages in forcible operations against a non-State armed group (the Veridians) located in State B (Betazed). This is a useful starting point for the current examination prior to opening up the Pandora's Box of multiple groups and territories. Many of the points that will arise later cannot be examined without first addressing the underlying point of contention: whether there exists a right to self-defense against non-State actors operating from the territory of another State. If attacks by the non-State actor are attributable to the State from whose territory it operates, then the issues would be of the more familiar variety of self-defense and use of force between States.

It is in situations when such attribution does not exist that the more vociferous debates emerge.² Although there is as yet no consensus on the matter, there is strong reason for the view that States can invoke the right to self-defense following an armed attack by an independent non-State actor operating from outside their borders. This view has support in a textual reading of Article 51 of the UN Charter, which does not mention the nature of the entity that commits the armed attack. Moreover, to deprive a State of the right to respond based on the identity of the attacker goes against the very notion that States have the inherent right to defend themselves.³ While there

2. For a range of views over the years, see Josef L. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AMERICAN JOURNAL OF INTERNATIONAL LAW 872, 878 (1947); Michael Bothe, *Terrorism and the Legality of Pre-emptive Force*, 14 EUROPEAN JOURNAL OF INTERNATIONAL LAW 227, 233 (2003); Oscar Schachter, *The Extraterritorial Use of Force against Terrorist Bases*, 11 HOUSTON JOURNAL OF INTERNATIONAL LAW 309, 311 (1988); Elizabeth Wilmshurst, *Principles of International Law on the Use of Force by States in Self-Defence* 55 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 963 (2006); Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ*, 99 AMERICAN JOURNAL OF INTERNATIONAL LAW 62, 64, 67–70 (2005); NOAM LUBELL, *EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS* chs.1–3 (2010); KENNETH WATKIN, *FIGHTING AT THE LEGAL BOUNDARIES: CONTROLLING THE USE OF FORCE IN CONTEMPORARY CONFLICT* 50–54 (2016); Nico Schrijver & Larissa van den Herik, *Leiden Policy Recommendations on Counter-terrorism and International Law*, 57 NETHERLANDS INTERNATIONAL LAW REVIEW 531, ¶ 38 (2010), <https://openaccess.leidenuniv.nl/handle/1887/42298>.

3. Christopher Greenwood, *International Law and the "War against Terrorism,"* 78 INTERNATIONAL AFFAIRS 301, 307 (2002)

remains disagreement over the relevance of self-defense absent attribution of the attack to a State (in particular due to the lack of clarity of the International Court of Justice (ICJ) position),⁴ the notion has growing support in State practice and in legal analysis.⁵ The most recent evidence of this support is found in the position of a significant number of States in their letters to the Security Council regarding action taken against the Islamic State in Syrian territory.⁶ While the precise wording differs and some letters offer claims of

Since the events of 11 September showed—if, indeed, the matter were ever in any doubt—that a terrorist organization operating outside the control of any State is capable of causing death and destruction on a scale comparable with that of regular military action by a State, it would be a strange formalism which regarded the right to take military action against those who caused or threatened such consequences as dependent upon whether their acts could somehow be imputed to a State.

4. In the *Wall* opinion, the ICJ appeared to have limited self-defense to attacks by States. However, the same paragraph can equally be read in the particular context of the Israeli-Palestinian conflict in which the Court was referring to attacks emanating from occupied territory, which is very different to attacks coming from another State's territory over which the attacked State has no control. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 139 (July 9); *id.* at 219, ¶ 35 (separate opinion by Kooijmans, J.); *id.* at 240, ¶ 6 (declaration of Buerghenthal, J.). Moreover, in the later *Armed Activities* case the Court appeared to leave open the question of the possibility of self-defense following attacks by independent non-State actors. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168, ¶¶ 146–47 (Dec. 19) [hereinafter *Armed Activities*].

5. Committee on The Use of Force, International Law Association, Draft Report on Aggression and the Use of Force (Feb. 2017) (on file with author); Schrijver & van den Herik, *supra* note 2.

6. See Chargé d'affaires a.i. of the Permanent Mission of Canada to the U.N., Letter dated Mar. 31, 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/221 (Mar. 31, 2015) [hereinafter Canada Letter]; Chargé d'affaires a.i. of the Permanent Mission of Turkey to the U.N., Letter dated July 24, 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/563 (July 24, 2015) [hereinafter Turkey Letter]; Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the U.N., Letter dated Sept. 7, 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/688 (Sept. 8, 2015); Permanent Representative of the United States of America to the U.N., Letter dated Sept. 23, 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014) [hereinafter United States Letter]; Permanent Representative of Australia to the U.N., Letter dated Sept. 9, 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/693 (Sept. 9, 2015) [hereinafter Australia Letter]; Permanent Representative of France to the U.N., Identical letters dated

collective self-defense, by supporting Iraq's right to self-defense against the Islamic State in Syrian territory they are providing recognition of self-defense action against an armed group in another State.

Once the right to invoke self-defense is accepted in principle, the conditions for the exercise of this right must come to the foreground, and it is here that much of the discussion in recent years has been centered. As with any instance of self-defense, the principles of military necessity and proportionality must be respected.⁷ During the past decade, there has been much talk of a supposed new condition for the exercise of self-defense against armed groups, termed the "unwilling or unable" test.⁸ This approach requires that the territorial State (Betazed in the above scenario) be either unwilling or unable to prevent the armed attacks conducted by the non-State actor in its territory. The use of the unwilling or unable standard has been criticized for being an unwarranted expansion of the long-standing recognized confines of self-defense.⁹

The debate over this issue risks creating a misguided perception that the notion of unwilling or unable might be presented as a new test under the *jus ad bellum* designed to replace existing law. This description is inaccurate; rather, if correctly applied, it should be seen as a component within the pre-

Sept. 8, 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/745 (Sept. 9, 2015); Permanent Representative of Denmark to the U.N., Letter dated Jan. 11, 2016 from the Permanent Representative of Denmark to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2016/34 (Jan. 13, 2016); Permanent Representative of Norway to the U.N., Letter dated June 3, 2016 from the Permanent Representative of Norway to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2016/513 (June 3, 2016); Permanent Representative of Belgium to the U.N., Letter dated June 7, 2016 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2016/523 (June 9, 2016).

7. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 41 (July 8); Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 176 (June 27) [hereinafter *Nicaragua*]; *Armed Activities*, *supra* note 4, ¶ 147.

8. See Australia Letter, *supra* note 6; Canada Letter, *supra* note 6, Turkey Letter, *supra* note 6, United States Letter, *supra* note 6. For a detailed examination of this issue, see Ashley Deeks, "Unwilling or Unable": Toward a Normative Framework for Extra-Territorial Self-Defense, 52 VIRGINIA JOURNAL OF INTERNATIONAL LAW 483 (2012); see also Kimberly N. Trapp, *Actor-pluralism, the "Turn to Responsibility" and the Jus ad Bellum: "Unwilling or Unable" in Context*, 2 JOURNAL ON THE USE OF FORCE AND INTERNATIONAL LAW 199 (2015).

9. Olivier Corten, *The "Unwilling or Unable" Test: Has it Been, and Could it be, Accepted?*, 29 LEIDEN JOURNAL OF INTERNATIONAL LAW 777 (2016).

existing necessity principle. In other words, if Angosia wishes to exercise the right to self-defense against the Veridian group in Betazed, it can only do so in response to an armed attack and in a manner consistent with the principles of necessity and proportionality. The principle of necessity can be read as indicating that force in self-defense must be a last resort.¹⁰ If Betazed is willing and able to prevent the attacks by the Veridian group, then there is no necessity for Angosia to take forcible measures. The unwilling or unable test is not a new or alternative route for widening the required conditions for exercise of self-defense; if anything, it is an additional limitation within the test of necessity that must be observed when claiming the right of self-defense against armed groups in the territory of another State. Moreover, if the action taken by Angosia goes beyond what is necessary and proportionate in the prevention of attacks by the Veridian group, it would cease to be justified by self-defense.¹¹

Objections to the unwilling or unable test can rest on a number of grounds. First, there is a question of the subjective element in determining whether Betazed was indeed unwilling or unable. However, this type of question could equally be asked in any determination of necessity for self-defense, even in the “old-fashioned” self-defense directly between States. Ultimately, it will be for the State acting in self-defense to be able to make a convincing case—whether at an early stage or later on before the Security Council or the ICJ—that there was a necessity for it to act in self-defense. In cases of armed groups operating from other States, the case will invariably include the unwillingness or inability of the territorial State to prevent the attacks. Moreover, rather than requiring a lengthy analysis of whether Betazed was deliberately unwilling or whether it simply did not have the capacity to act against the armed group, the deciding factor will be whether Betazed, given the chance, was taking effective action to stop the attacks by the armed group. If the armed attacks by the Veridian group against Angosia continue despite attempts to resolve the matter through Betazed, then whether this was a result of unwillingness or the inability of Betazed would not alter the necessity of Angosia to take action in self-defense.

Another objection to the notion of unwilling or unable—in particular in cases of “unable”—rests upon the fact that it creates situations in which Betazed, through no fault of its own, might be subjected to armed force on

10. JAMES A. GREEN, *THE INTERNATIONAL COURT OF JUSTICE AND SELF-DEFENCE IN INTERNATIONAL LAW* 76–80 (2009).

11. Committee on The Use of Force, *supra* note 5.

its territory by another State. In other words, it decouples the breach of territorial sovereignty from the responsibility for the armed attack, and allows a State to be subjected to the former absent attribution to it of the latter. This is a valid concern, especially for States with limited military capacity and with less influence in the international system.¹² In such cases, the best solution would be for them to cooperate with international efforts—whether directly with other States affected by the armed group, or through the Security Council and regional organizations—to prevent the actions of the armed group from occurring within their territory. If they choose not to do so, or if these efforts fail to prevent the armed group from continuing to carry out armed attacks against other States, there will inevitably come a point at which one must choose between Angosia’s right to defend itself from armed attacks, and Betazed’s right to be free from force on its territory. As concluded earlier, States must be able to defend themselves from armed attacks, even if the attack emanates from a non-State actor and is not attributable to the territorial State. In such circumstances, rather than representing a widening of self-defense, “the unwilling or unable test is a critical element that narrows the situations in which it is lawful to use force in another State’s territory.”¹³

Simply put, the debate over the legitimacy of the unwilling or unable test is, in fact, a proxy for the real question as to whether self-defense can be invoked against an armed group in the territory of another State absent attribution to the territorial State. Arguments against the use of an unwilling or unable standard are coupled with a position rejecting self-defense in such circumstances. If one takes the position that Angosia cannot take action in self-defense to halt armed attacks by the Veridian group on Betazed’s territory, even if the latter will not or cannot prevent the attacks, this is for all intents and purposes the same as completely denying the right to self-defense against independent armed groups operating from other States. The position taken here is that the UN Charter recognizes that the inherent right of self-defense carves out a limited exception to the prohibition on the use of force, and that this right is not dependent on the identity of the attacker but on the existence of an armed attack, and that its exercise is limited by the test of necessity.¹⁴ Should the territorial State be willing and able to stop the armed

12. Dawood I. Ahmed, *Defending Weak States Against the “Unwilling or Unable” Doctrine of Self-Defense*, 9 JOURNAL OF INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 1 (2013).

13. Deeks, *supra* note 8, at 547–48.

14. In addition to necessity, the principle of proportionality must also be observed. *See supra* text accompanying note 7.

attacks, such necessity would not exist and the right of self-defense cannot be exercised.

B. Expanding Self-Defense into New States

Let us assume for now that Angosia has already engaged in forcible operations against the Veridian group in the territory of Betazed, and that the justification given was one of self-defense following attacks against Angosia launched by the Veridian group from the territory of Betazed. As noted above, the underlying question of a right to self-defense against an armed group is only the first step in a lengthy list of legal complexities when dealing with fragmented multi-territorial situations. The next question is whether Angosia can also use force against cells of the Veridian group located in the neighboring State of Cardassia (and Davlos and beyond). For the time being we shall set aside the matter of fractured and multiple armed groups, and assume that the Veridian group in Betazed and the Veridian group in Cardassia are part of a clear single whole operating under a unified command and control structure overseeing all the groups' operations in Betazed and Cardassia.

Angosia has already invoked self-defense and has begun operations against the Veridian group in the territory of Betazed. It might therefore argue that its right to resort to force has already been put to the test and operations against the Veridian group can proceed beyond Betazed and into Cardassia (or anywhere else) with no additional barriers.¹⁵ Such an argument, however, is misguided. The right of self-defense in international law has two

15. The U.S. position with regard to operations against al-Qaida is more nuanced and leaves room for interpretation in more than one way:

Once a State has lawfully resorted to force in self-defense against a particular actor in response to an actual or imminent armed attack by that group, it is not necessary as a matter of international law to reassess whether an armed attack is occurring or imminent prior to every subsequent action taken against that group, provided that hostilities have not ended. In addition, in armed conflicts with non-State actors that are prone to shifting operations from country to country, the United States does not view its ability to use military force against a non-State actor with which it is engaged in an ongoing armed conflict as limited to "hot" battlefields. This does not mean the United States can strike wherever it chooses: the use of force in self-defense in an ongoing armed conflict is limited by respect for States' sovereignty and the considerations discussed above, including the customary international law requirements of necessity and proportionality when force could implicate the rights of other States.

THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 11 (2016).

underpinning motives. First, it serves to establish that a State that suffers an armed attack must, within the limits of necessity and proportionality, be able to take forcible action to defend itself. As discussed previously, this is increasingly understood as including cases in which a non-State actor operating from abroad perpetrated the armed attack; otherwise, it would mean that States suffering such attacks are deprived of the ability to defend themselves in cases where force is the only way to do so.

Self-defense, however, plays an additional role in the international legal order; it is a form of exception to the prohibition on use of force between States. As such, it provides a guarantee to States that, subject to rare exceptions, they will be protected from the use of force by other States. Accordingly, even if a non-State actor perpetrated the armed attack, the inter-State aspect must also be considered.¹⁶ In other words, the invocation of self-defense does not occur in a single State vacuum, but is designed to govern a situation in which a State seeks justification for its use of force affecting another State. The fact that the armed attack that triggered the invocation was carried out by a non-State actor does not alter this aspect of the self-defense doctrine as one that regulates the use of force across State borders.

The earlier discussion of self-defense against armed groups demonstrated the tension between the competing objectives of self-defense, resolving it in favor of allowing self-defense.¹⁷ The new scenario involving Cardassia presents an altogether different picture. Angosia may have justifiably invoked self-defense in response to an armed attack by the Veridian group and passed the tests of necessity and proportionality allowing it to take action on the territory of Betazed. However, the initial invocation of self-defense will have governed the matter of whether Angosia can use force only inside Betazed, having considered Betazed's action or inaction to prevent these attacks. Even if the Veridian group has a presence in Cardassia, asserting that force can be used on Cardassia's territory with no regard to anything other than previous actions involving Angosia, Betazed and the Veridian group would blatantly disregard Cardassia's sovereign rights. Cardassia's right to be protected from a violation of its borders remains intact unless proven oth-

16. Claus Kreß, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts*, 15 JOURNAL OF CONFLICT & SECURITY LAW 245, 251 (2010).

17. For a discussion of unwilling or unable, see *supra* text accompanying notes 8–9. For an analysis of unwilling or unable in light of evolving approaches to the use of force under the UN Charter, see Trapp, *supra* note 8.

erwise. If Angosia wishes to use unilateral force in Cardassia's territory without Cardassia's consent, it must make a self-defense case in relation to Cardassia.¹⁸

This conclusion is not altered by the fact that there may already be an armed conflict between Angosia and the Veridian group in which certain members of the Veridian group are considered to have lost protection from attack under the *jus in bello*, even if this armed conflict already has an extra-territorial element through operations in Betazed. The rules of *jus ad bellum* must be adhered to when claiming a right to expand the force into the territory of a new State. Accordingly, there is a need to identify the criteria beyond the pre-existing situation with the Veridian group in Betazed to determine whether Angosia would be justified in using force on Cardassia's territory. As Angosia did with Betazed, if it is to assert the right to use force in the territory of Cardassia, it can only do so based on self-defense. Self-defense, in turn, can only be invoked in response to an armed attack.

Clearly, if the Cardassia-based Veridian group is carrying out armed attacks directly from Cardassia's territory (e.g., launching rockets or sending large numbers of fighters), the analysis would proceed along the lines described earlier in relation to Betazed. However, it is also possible that a physical location from which an armed attack is launched might not be the same as the location in which the self-defense measures must take place. For example, while attacks between States could be launched from a submarine in a remote part of the seas, the victim-State may justifiably direct its self-defense at the military naval command inside the attacking State. Likewise, Angosia's claim to self-defense would not be limited to situations such as a new set of missiles being fired from the territory of Cardassia, and could involve a wider set of circumstances.

One possible scenario is that ongoing attacks, or imminent attacks if anticipatory self-defense is accepted,¹⁹ are coming from Betazed, but in which the Cardassia-based Veridian group is playing a crucial role. For example, if the commanders of the Veridian group were located in Cardassia but directly coordinating the attacks and movements of the Veridian group in Betazed, they would be effectively controlling the attack. If the attacks emanating

18. Kreß, *supra* note 16, at 251; Christof Heyns, Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, ¶ 89, U.N. Doc. A/68/382 (Sept. 13, 2013); Marko Milanovic & Vidan Hadzi-Vidanovic, *A Taxonomy of Armed Conflict*, in RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW 256, 311 (Nigel D. White & Christian Henderson eds., 2012); Schrijver & van den Herik, *supra* note 2, ¶ 40.

19. See *infra* notes 21–25 and accompanying text.

from Betazed's territory are set to continue until the Veridians in Cardassia are stopped, this may justify Angosia in claiming a right to self-defense in relation to the manifestation of the Veridian group in the territory of Cardassia.

Notwithstanding, it must be stressed again that invoking self-defense does not give automatic license to deploy military personnel. Before engaging in a use of force, Angosia would still need to traverse the barriers of necessity and proportionality. It would not be enough for Angosia simply to claim that there are elements of the Veridian group in Cardassia linked to the attacks from wherever they originate. It would need to establish that operations against the Cardassia-based Veridian group are necessary in order to halt the attacks, and that unilateral forcible measures are the only viable option. If Cardassia, for example, is ready and able to detain the commanders of the Veridian group and prevent their activity, then Angosia will have no cause to engage in forcible action.

As noted earlier, the requirement that must be fulfilled in order to take action on Cardassia's territory without its consent is one of the *jus ad bellum*, and is separate from the question of whether the members of the Veridian group are targetable under the *jus in bello*.²⁰ Being directly responsible for ongoing armed attacks would be the clearest indication for triggering the possibility of a self-defense claim. The other most likely claim by States is one of anticipatory self-defense. This is not the space to resolve the relentless debate over anticipatory self-defense.²¹ If one takes the position that it is never acceptable, then clearly, this would equally be the case with regard to armed groups, and not only States. However, if one were to accept that anticipatory self-defense can be supported in certain circumstances,²² then

20. See *infra* Part III for a discussion on classification and geographical scope.

21. This has been a controversial issue at the heart of self-defense discussions for many years. See, e.g., D. W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 191–92 (1958); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 275–78 (1963); see also 2 HUGO GROTIUS, ON THE LAW OF WAR AND PEACE DE JURE BELLI AC PACIS ch. 5, V (A. C. Campbell trans., Batoche 1901) (1625).

22. There is increasing support for this position in relation to imminent attacks. See Wilmshurst, *supra* note 2, at 965; Elizabeth Wilmshurst, *Principles of International Law on the Use of Force by States in Self-Defence* (Chatham House Int'l Law Program Working Paper 05/01, 2005), <https://www.chathamhouse.org/publications/papers/view/108106>; Attorney General Lord Goldsmith, 660 Parl Deb HL (2004) col. 370 (UK) (“It is therefore the Government's view that international law permits the use of force in self-defence against an imminent attack but does not authorise the use of force to mount a pre-emptive strike against a threat that is more remote.”); see also TOM RUYSS, ARMED ATTACK AND ARTICLE 51 OF THE UN CHARTER 324–42 (2010); HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND

there is a need to clarify how it might operate in the context of transnational armed groups. The mere presence of members of the Veridian group on Cardassia's territory will not suffice. The critical element for a claim to anticipatory self-defense is that an armed attack must be imminent.²³ The notion of imminence requires a high degree of certainty that a specific attack will occur in the foreseeable future, and that the attack cannot be averted by other means.²⁴ It does not cover general concerns over the capabilities of certain groups or preventive action to counter vague threats; such formulations stretch the notion of imminence well past the breaking point and leave it devoid of any meaningful content.²⁵

The analysis thus far has focused on a single armed group with manifestations in more than one State. The next, and seemingly more complex scenario to consider, is a situation in which it is unclear if the armed groups based in Betazed and Cardassia are simply cells of the same group, or separate entities. In other words, we still have the Veridian group in Betazed, but the group in Cardassia is now the Yonada group, whose relationship to the Veridian group is in question. Such a scenario does not have much bearing on the above analysis with regard to Angosia's right to use force in Cardassia. Even if it is determined that the Yonada group and the Veridian group were one and the same, Angosia would still need to make a separate self-defense case for use of force in Cardassia. Clearly, therefore, it would also need to

CHANGE, UNITED NATIONS, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY, REPORT OF THE HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE, ¶ 188 (2004); U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 124, UN Doc. A/59/2005 (Mar. 21, 2005) (“Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened.”). But see the reactions of a significant number of States who were opposed to a temporal widening of the right to self-defense, including Pakistan, Mexico and Turkey. RUYSS, *supra*, at 339–41.

23. Imminence has long been recognized as a key component—and form of restriction—for the use of anticipatory self-defense. GROTIUS, *supra* note 21, ch. 1, V; 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 206–09 (1947) (addressing the German invasion of Denmark and Norway); HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE, *supra* note 22, ¶ 188 (“[A] threatened State, according to long established international law, can take military action as long as the threatened attack is *imminent*, no other means would deflect it and the action is proportionate. The problem arises where the threat in question is not imminent but still claimed to be real.”).

24. Although a high-degree of certainty cannot be interpreted as absolute certainty. For an analysis, see Noam Lubell, *The Problem of Imminence in an Uncertain World*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 697 (Marc Weller ed., 2015).

25. *See id.*

do so if the Yonada group were not as obviously connected to the Veridian group. The legal test was—and remains—whether Angosia can establish that the armed group in the new State (Cardassia) is behind the armed attacks against it, and that the use of force in Cardassia is necessary to stop the attacks.

In summary, it is clear that the increasing fragmentation and multi-territorial dimension of operations against armed groups do not alter the basic tests of the *jus ad bellum*. Any time a State wishes to use force on the territory of another State (absent consent or Security Council authorization), it can only do so if it can make a valid claim of self-defense. While the invocation of self-defense may be the result of armed attacks by an armed group, its purpose is to justify the use of force that would otherwise be prohibited under the UN Charter on the territory of another State. As such, even if the same armed group has cells in different countries, extending operations to another State's territory will require returning to the basic test of self-defense in relation to that State.

III. CLASSIFICATION OF ARMED CONFLICTS

Resolving the above debates surrounding the *jus ad bellum* is but one step along the long road of legal conundrums requiring attention. Equally controversial are the questions that such multi-territorial fragmented conflicts pose in the realm of the *jus in bello*. Once self-defense has been exercised and hostilities between the State and the armed group ensue, concerns arise over the categorization of the situation and the ensuing body of rules that applies to the conduct of the parties. First among these is the need to identify whether an armed conflict exists and, if so, what type of armed conflict exists. The starting point for this analysis is based upon the following two relatively uncontroversial assumptions. First, hostilities between a State and an armed group will normally be considered as a non-international armed conflict (NIAC), provided the group has a certain organizational capacity, and

the violence crosses a certain threshold of intensity.²⁶ Second, hostilities between two States will usually be considered an international armed conflict (IAC), which does not require the same intensity threshold as a NIAC.²⁷

Much has been said and written about the merits and challenges of classification,²⁸ and elaborate repetition is not required. In brief, whether a situation is or is not an armed conflict, determines the applicability of international humanitarian law (IHL). Without the existence of an armed conflict, IHL simply does not apply and the actual use of force will be regulated solely in accordance with the law enforcement model found in international human rights law (IHRL).²⁹ If an armed conflict does exist, then the determination of whether it is an IAC or NIAC can affect a range of issues, including rules of detention and which acts might be prosecutable as war crimes before the International Criminal Court.³⁰

When dealing with multi-territorial fragmented conflicts the nature of the situation presents two major obstacles to reaching swift agreement on classification. First, there is the matter of extraterritorial hostilities between a State and an armed group. Hostilities between a State and an armed group are considered to be a NIAC, but is this classification affected if the fighting occurs outside the State's own borders? Second, if Angosia is engaging in hostilities against an armed group on the territory of Betazed without the latter's consent, is there an IAC between the two States?

26. Prosecutor v. Tadić, Case No. IT-94-1-AR-72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the former Yugoslavia Oct. 2, 1995); International Committee of the Red Cross, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?* (Int'l Comm. of the Red Cross Opinion Paper, 2008), <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

27. See Prosecutor v. Tadić, Case No. IT-94-1-AR-72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the former Yugoslavia Oct. 2, 1995); International Committee of the Red Cross, *supra* note 26.

28. See INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS (Elizabeth Wilmshurst ed., 2012); Milanovic & Hadzi-Vidanovic, *supra* note 18. For an analysis of some of the challenges arising from the Syrian conflict in this context, see Laurie R. Blank & Geoffrey S. Corn, *Losing the Forest for the Trees: Syria, Law, and the Pragmatics of Conflict Recognition*, 46 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 693 (2013).

29. See *infra* Part V.

30. Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS, *supra* note 28, at 32; Jelena Pejic, *Conflict Classification and the Law Applicable to Detention and the Use of Force*, in *id* at 80.

A. Classification of Hostilities between a State and Extraterritorial Non-State Actors

As previously discussed, armed conflicts between a State and an armed group are generally considered non-international. The fundamental reasoning behind this separation rests above all on the identity of the parties. The IAC rules were designed to regulate hostilities between sovereign States,³¹ whereas the NIAC rules were created for conflicts involving non-State actors.³² The current analysis focuses upon situations that may involve multiple groups and territories, but nonetheless have States on one side and armed groups on the other. Accordingly, the starting point for this analysis should be the presumption of a NIAC rather than an IAC. Notwithstanding, a number of points require closer examination prior to this presumption being confirmed.

First, there is the matter of whether crossing a border would change the conflict from a NIAC to an IAC. Let us begin with a relatively simple scenario, sometimes referred to as a spillover conflict—an internal NIAC in which some of the hostilities “spill over” into a neighboring State (without that State’s involvement in the conflict).³³ The crossing of the border matters greatly to the *jus ad bellum* between the two States, but it is submitted here that it is largely irrelevant to the conflict between the State and the armed group. The fundamental rules of NIAC must remain applicable.³⁴ As for

31. INTERNATIONAL COMMITTEE FOR THE RED CROSS, COMMENTARY TO GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD ¶ 221 (2d ed. 2016), <https://ihl-databases.icrc.org/ihl/full/GCI-commentary> [hereinafter ICRC COMMENTARY] (“Under Article 2(1), the identity of the actors involved in the hostilities—States—will therefore define the international character of the armed conflict. In this regard, statehood remains the baseline against which the existence of an armed conflict under Article 2(1) will be measured.”).

32. The NIAC rules are especially important with regard to the status of individuals and combatant immunity from prosecution.

33. The question of the relationship with the other State will be examined in Part III.B.

34. The ICRC noted that

the relations between parties whose conflict has spilled over remain at a minimum governed by Common Article 3 and customary IHL. This position is based on the understanding that the spillover 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.

INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 9–10 (2011), <https://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf> [hereinafter IHL CHALLENGES].

shifting between NIAC and IAC, imagine a straightforward spillover conflict occurring in a desert area where there is not even a fence to mark the border. There is simply no sense in constantly switching the conflict between being international and non-international every time the armed group steps across the border. This is always the same conflict, a NIAC between the State and an armed group. In other words, the crossing of a border is not in and of itself enough to transform a NIAC into an IAC.³⁵

Let us now expand the scenario to additional territories. Angosia is engaged in a major NIAC and, as in the earlier example, most of the fighting is still within Angosia. However, it is now occasionally spilling over into three neighboring territories: Betazed in the north, Cardassia in the east, and the State of Davlos in the south. So long as the fighting is still between Angosia and the same single armed group there is no reason to see this as different from the previous example, meaning that we are still dealing with a NIAC between the State and the group. The involvement of multiple territories does not per se transform the conflict from a NIAC to an IAC.

Thus far, the examples have presented a conflict that had an internal NIAC at its core. Let us now shift the center of gravity so that the armed group is based primarily in Betazed and is carrying out attacks against Angosia by launching missiles and occasional raids across the border. Again, for now, we are setting aside the question of the relationship between Angosia and Betazed, but for the sake of clarity, we should assume that the armed group's actions cannot be attributed to the host State.³⁶ As in the first example, we would not shift the classification between an IAC and a NIAC when they fire a missile from the desert area a few meters across the border or whenever they venture to Angosia's side of the desert. This is still at its essence an armed conflict between a State and a non-State actor, and accordingly, is a NIAC.

Going one step further, let us relocate the armed group so that they are not across an immediate border, but are in the State of Ekos, two hundred miles away, firing missiles into Angosia (over Cardassia that sits between Angosia and Ekos). They also continue to conduct occasional attacks by clandestine cells operating inside Angosia, but the group is largely based in Ekos, which has no adjacent border. A question arises as to whether one

35. At this stage, it should be recalled that the current question is only about the conflict between the State and the armed group; the issue of the relationship between the two States will be examined in Part III.B.

36. See *supra* Part II and especially *infra* Part III.B.

should differentiate between conflicts that involve the armed group operating across an adjacent border, and conflicts in which the armed group is located further afield.³⁷ But, if a NIAC can be found when operating across an adjacent border, why would adding distance change the classification? It is accepted that one State assisting another State in its internal NIAC could also be party to a NIAC,³⁸ thus allowing conceptually for the idea of engaging the rules of NIAC for hostilities against an armed group primarily (or even completely) taking place in distant territory. The difference in our example is that the territorial State has not issued an invitation and might not be involved at all in the hostilities. The relationship and legal ramifications between the States is a separate question (which will be examined next), but has nothing to do with the precise distance between them and whether or not they share a border. Likewise, the question would equally arise in the case of adjacent States. Accordingly, here too it seems that the new factor—distance—should not in and of itself transform a NIAC into an IAC.

To summarize, hostilities between a non-State actor and a State are, in principle, meant to be viewed through the prism of NIAC.³⁹ They are not an international conflict as they are not between two (or more) States. Elements of cross-border operations, multiple territories or large distances do not themselves change this classification. Rather, the identity of the parties determines the classification of conflict. The remaining question is whether actions by Angosia against the armed group in the territory of Betazed without the latter's consent necessarily brings about an IAC between the two States.

B. *Classifying the Situation between the Two States*

As discussed above, there are contentious issues in relation to the *jus ad bellum* and the exercise of self-defense against armed groups in the territory of other States. Even once these are resolved, there remain other legal complexities with regard to the relationship between the States. Let us return to the initial scenario in which Angosia has claimed the right to self-defense and is using

37. This question is of particular relevance when it comes to the geographical scope of IHL in the context of drone strikes. For a reasoned approach differentiating between the situations, see Jelena Pejic, *Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications*, 96 INTERNATIONAL REVIEW OF THE RED CROSS 67, 80, 102–03 (2014).

38. Dieter Fleck, *The Law of Non-International Armed Conflicts*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 581, 605 (Dieter Fleck ed., 3d ed. 2013).

39. Provided that the NIAC threshold is met.

force against an armed group in the territory of Betazed without Betazed's consent, and the actions of the armed group are not attributable to Betazed. In accordance with the earlier analysis, we shall also assume that if the NIAC requirements of intensity and organization are met, the violence between Angosia and the armed group would be a NIAC, even if an extraterritorial one. The following analysis focuses on the remaining key question concerning the two States, namely whether the use of force by one State on the territory of another without its consent means that an IAC exists between them.

The contention requiring clarification is whether *any* force without consent by one State on the territory of another must *automatically* be classified as an IAC between the two States. There is no reason to dispute that in *some* circumstances there could be an IAC. For example, if the force employed includes the "deployment of military means in order to overcome the enemy or force it into submission, to eradicate the threat it represents or to force it to change its course of action"⁴⁰ (in which the "enemy" is the other State), there would be an IAC. The difficulty, however, is with the contention that "an international armed conflict arises between the territorial State and the intervening State when force is used on the former's territory without its consent."⁴¹ The debate, therefore, is not between those who say "yes" there is an IAC and those who say "never." Rather, it is between those who favor a position that non-consensual force against a non-State actor on the territory of another State is *always* an IAC, as opposed to those who say it is only *sometimes* an IAC, depending on the circumstances.⁴² The following analysis supports the latter view.

40. ICRC COMMENTARY, *supra* note 31, ¶ 225.

41. *Id.*, ¶ 262.

42. For the varying views, see Terry D. Gill, *Classifying the Conflict in Syria*, 92 INTERNATIONAL LAW STUDIES 353 (2016); Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS, *supra* note 28, at 32, 70–79. See also the debates on the *Just Security* website, especially Kenneth Watkin, *The ICRC Updated Commentaries: Reconciling Form and Substance, Part I*, JUST SECURITY (Aug. 24, 2016), <https://www.justsecurity.org/32538/icrc-updated-commentaries-reconciling-form-substance/> [hereinafter Watkin Part I]; Kenneth Watkin, *The ICRC Updated Commentaries: Reconciling Form and Substance, Part II*, JUST SECURITY (Aug. 30, 2016), <https://www.justsecurity.org/32608/icrc-updated-commentaries-reconciling-form-substance-part-ii/> [hereinafter Watkin Part II]; Sean Watts, *The Updated First Geneva Convention Commentary, DOD's Law of War Manual, and a More Perfect Law of War, Part I*, JUST SECURITY (July 5, 2016), <https://www.justsecurity.org/31749/updated-geneva-convention-commentary-dods-lowm-perfect-law-war/>; Adil Haque, *Whose Armed Conflict? Which Law of Armed*

That in some circumstances a use of force against a non-State actor on the territory of another State without its consent could create an IAC should be uncontroversial.⁴³ If, for example, an armed group is located in an urban area and the hostilities lead to massive destruction of civilian objects and the death of civilians, or if the operations against the group involved destruction of State facilities, such as major roads or airfields, there would be wide agreement that an IAC has come into existence (between the two States, possibly alongside the NIAC between the State and the armed group). Likewise, if in the course of its actions against the armed group Angosia wound up occupying any of Betazed's territory, this would undoubtedly trigger the Fourth Geneva Convention⁴⁴ and the ensuing rules of IAC. Israel's operations against Hezbollah in Lebanon in 2006 will—certainly at the later stages of the conflict—have triggered the rules of IAC for a number of the above reasons.⁴⁵ Tellingly, the cases that often come up are those of Ugandan operations in the Democratic Republic of the Congo and Israeli operations in Lebanon.⁴⁶ However, these cases are indicative of ones in which there would have been wider agreement of an IAC (for at least part of the operations) due to the nature of the activities and the amount of harm caused.⁴⁷ Consequently, by focusing on the higher end of hostilities not enough attention is paid to the repercussions of such an approach in situations involving more limited force.

Force used against a non-State actor on the territory of another State is not confined to bombardments and incursions by large numbers of soldiers. Israel's abduction of Adolph Eichmann from Argentina was a forcible act carried out on the territory of another State without its consent,⁴⁸ yet it does

Conflict?, JUST SECURITY (Oct. 4, 2016), <https://www.justsecurity.org/33362/armed-conflict-law-armed-conflict/>.

43. Even those who do not take the automatic trigger approach will readily accept that certain factual circumstances would create an international armed conflict. See Gill, *supra* note 42.

44. Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

45. For a classification analysis of this conflict, see Iain Scobbie, *Lebanon 2006*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS, *supra* note 28, at 387.

46. ICRC COMMENTARY, *supra* note 31, ¶ 261 n.101; Milanovic & Hadzi-Vidanovic, *supra* 18, at 296.

47. Gill, *supra* note 42, at 372.

48. Argentina specifically noted that “he was removed to Israel by force” in a manner that violated Argentinian sovereignty. U.N. SCOR, 15th Sess., 865th mtg. at 5 (June 22, 1960). The Security Council declared that “acts such as that under consideration, which

not stand to reason that this created an IAC between Israel and Argentina. And, while some may object to this example as being too low a level of force and not a military action, such objections would—as will be seen below—contradict other aspects of the trigger for IAC.⁴⁹ Moreover, one can find alternative examples that slowly move up the scales of violence that would still seem incongruous with the notion of IAC. The sinking of the *Rainbow Warrior* is one such case. Here, French military agents carried out an operation in New Zealand's territory, which included the use of explosives and led to serious damage of property and death.⁵⁰ Here too, would one take the position that there was an IAC between France and New Zealand? Such claims would not receive serious consideration.

A major impetus for the “automatic IAC” approach is to ensure that the rules of IHL are there to provide protection and appropriate regulation of conduct. At the higher end of situations under discussion (such as Israel-Lebanon 2006), these are usually cases in which there is likely to be agreement that some form of armed conflict exists and the debate is focused upon distinguishing between NIAC, IAC, or a combination of NIAC and IAC. However, a critical weakness in the “automatic IAC” approach is that it risks creating an IAC in situations which manifestly should not be regarded as an armed conflict and in which no IHL rules (neither of IAC nor NIAC) should be applied. Introducing IHL in such situations does the exact opposite of the stated aim, by reducing protection and providing inappropriate rules of conduct. A law enforcement approach as found in IHRL and domestic criminal law would be far better suited for regulating incidents such as the Eichmann case or the *Rainbow Warrior* affair.

Accepting that there may be some circumstances in which non-consensual force by Angosia against a non-State actor in Betazed does not trigger an IAC negates the possibility of arguing for an automatic approach to determining an IAC. If the answer is “sometimes” an IAC rather than “always,” it requires us to examine the issue further to elucidate the criteria at the heart of any such determination. A number of possible criteria must be considered. These criteria can be grouped together in two primary categories: the nature of the force itself, including the level and type of force used, and the actual effects of the force on the ground. The second category centers upon

affect the sovereignty of a Member State and therefore cause international friction, may, if repeated, endanger international peace and security.” S.C. Res. 138, ¶ 1 (June 23, 1960).

49. See *infra* notes 53–54.

50. For a description and legal analysis, see Michael Pugh, *Legal Aspects of the Rainbow Warrior Affair*, 36 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 655 (1987).

the intention of Angosia, the targets of the operations, and the existence of *animus belligerandi* between the States as reflected in their own views.

The nature of the force used serves as a helpful starting point. Returning to the example of the Eichmann abduction, one might argue that this incident should be excluded from this analysis, as it was clearly not an act of hostilities, involved relatively little force, affected only a single individual and was not of a military nature. However, none of these issues on their own would be enough to exclude the possibility of an IAC. The detention of a single soldier could trigger the rules of IAC,⁵¹ in which case the fact that this situation revolved around the forcible abduction of just one individual could not be a definitive excluding criterion. Likewise, it is accepted that acts triggering an IAC do not necessarily have to be conducted by military forces,⁵² thus the fact that intelligence agents seized Eichmann does not alone exclude the possibility of classifying the action as an armed conflict. Neither can the *Rainbow Warrior* incident be excluded from the analysis on these grounds.

The second aspect that must be considered relates to the intentions of Angosia and the views of both Angosia and Betazed as to the situation between them. While it is widely accepted that the determination of the existence of armed conflict must not be dictated solely by the views of the parties to prevent self-interested denial of applicable rules,⁵³ this should not mean that their intentions or views are wholly irrelevant. It is also posited, for example, that mistakes in the use of force (e.g., an accidental release of a munition while overflying another country) are not acts of armed conflict⁵⁴ and that belligerent intent requires a factual assessment as to whether “a State is

51. “Even if there has been no fighting, the fact that persons covered by the Convention are detained is sufficient for its application. The number of persons captured in such circumstances is, of course, immaterial.” COMMENTARY TO GENEVA CONVENTION III RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 23 (Jean Pictet ed., 1960).

52. ICRC COMMENTARY, *supra* note 31, ¶ 226.

53. *Id.*, ¶ 213.

54. *Id.*, ¶ 241.

effectively involved in military operations or other hostile action against another State.”⁵⁵ In addition, there is a question as to the existence of *animus belligerandi* between the two States.⁵⁶

In the current context, it is submitted that if Angosia limits its operations solely against the non-State actor and has no intention of engaging in an IAC with Betazed, and if Betazed does not see Angosia’s actions as having created an armed conflict between them, then this must be taken into account when determining the legal classification of the situation.⁵⁷ The 1952 *Commentary on Geneva Convention I* spoke of a “difference arising between two States and leading to the intervention of armed forces.”⁵⁸ The new *Commentary* correctly asserts that this should not be interpreted to exclude one-sided hostilities, so that conflict between two States can occur even if Betazed has not responded to the attacks by Angosia.⁵⁹ However, it is submitted that the notion of “between” still carries weight, as it can be understood as pointing to the combination of the objective and subjective aspects of belligerent intent and *animus belligerandi*. It is stressed that this position does not claim that intention and State views would negate all other facts on the ground. As noted earlier, States must not be allowed to deny applicability of rules out of self-interest. Nonetheless, their intention and views should be one factor among several

55. “This involvement is aimed at neutralizing enemy military personnel and assets, hampering its military operations, or using/controlling its territory, be it to subdue or defeat the adversary, to induce it to change its behaviour, or to gain a military advantage. Belligerent intent must therefore be deduced from the facts.” INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 8 n.3 (2015), <https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts>.

56. “[A]*nimus belligerandi* is a pre-requisite for a State of war to exist—denoting the purely subjective dimension of the notion of war.” *Id.* at 8 n.3.

57. States do on occasion make their opinion public on such matters. For example, note Canada’s position that “Canada’s military actions against ISIL in Syria are aimed at further degrading ISIL’s ability to carry out attacks. These military actions are not aimed at Syria or the Syrian people, nor do they entail support for the Syrian regime.” Canada Letter, *supra* note 6; *see also* Australia Letter, *supra* note 6. Gill cites as examples some of the U.S. drone strikes, Turkish operations against the PKK in Iraq, Kenyan armed forces in Somalia, and Colombia’s incursions against the FARC in Ecuador, noting that “[i]n none of these did any of the States concerned ever consider themselves in a situation of armed conflict with each other.” Gill, *supra* note 42, at 371.

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

59. ICRC COMMENTARY, *supra* note 31, ¶¶ 222–23.

factors that can be taken into account, along with additional considerations and factual circumstances.

One of the difficulties in the debate stems from the conflation of issues from the *jus ad bellum* and the *jus in bello*. Attacks on the territory of another State comprised of limited operations that affect nothing but an armed group would certainly require further attention under the *jus ad bellum* as to possible violations of territorial sovereignty and Article 2(4) of the UN Charter. But not every operation on the territory should be considered a military operation against the territory in the *jus in bello* sense. Rather than speaking of attacks against the territory and without consent,⁶⁰ such limited operations are better described as operations on the territory without consent. This would more appropriately reflect that these are *jus ad bellum* concerns.⁶¹ There would then remain a separate question as to the nature of the operations and whether or not they trigger an IAC. Consent will usually be determinative for resolving *jus ad bellum* issues, but for IHL classification purposes, rather than being determinative, its relevance should be considered in light of a range of factors to be evaluated.

For example, consider a scenario in which a group of criminals robbed an Angosian bank near the border area, took hostages with them to avoid being shot by the police and ended up in an old shack a hundred yards over the border in an unpopulated desert area of Betazed. Although Betazed has no control over these criminals and displays no desire to act themselves to free the hostages, it refuses to allow Angosia to mount a rescue operation. Angosia nonetheless sends a small Special Forces unit across the border into the desert and rescues the hostages while engaging in gunfire with the criminal gang, with no harm or damage to anyone else.⁶² In these circumstances, Betazed may well complain about a violation of its sovereignty,⁶³ but if neither of the States consider themselves in the midst of an IAC, it is unlikely to be considered as such.

60. *Id.*, ¶¶ 224, 260.

61. For a discussion on sovereignty and consent in this context, see Watkin Part II, *supra* note 42.

62. On the separate issue of the related *jus ad bellum* rules, such scenarios are addressed in the debates over rescue of nationals abroad. Tom Ruys, *The "Protection of Nationals" Doctrine Revisited*, 13 JOURNAL OF CONFLICT & SECURITY LAW 233 (2008); Committee on The Use of Force, *supra* note 5.

63. Watkin notes the case of the French attempt to rescue an individual held by al-Shabaab in Somalia following which Somalia complained about the violation of its sovereignty. Watkin Part II, *supra* note 42.

A primary concern for those who take the approach that it is virtually always an IAC is to ensure that appropriate rules are applicable to the situation at hand.⁶⁴ Indeed, it is accepted here that under many circumstances in which the population or State are affected it would be appropriate to apply the rules of IAC. However, as outlined above, *automatically* applying the IAC framework when the force is strictly limited in both intention and effects to a non-State actor can equally result in inappropriate rules and in less protection. This is especially the case in situations that should not be considered as an armed conflict at all (neither NIAC nor IAC), but instead, should be regulated by human rights law and domestic criminal law. In these situations, an IHL framework is not appropriate, as it allows for greater collateral harm and other unwanted repercussions. Accordingly, it is submitted that a nuanced approach that does not generate an automatic IAC would result in legal frameworks that are more appropriate for the different situations that could arise.

IV. THE SCOPE OF CONFLICT

The analysis thus far of the classification under the *jus in bello* has focused on the question of a single group operating from the territory of one other State. As with the *jus ad bellum*, here too this analysis must expand to encompass situations involving the territories of multiple States and more than one armed group. As will be seen, two matters are of critical importance. First, whether the armed groups in the different States are all, in fact, different branches of a single entity (or partners to the same conflict), and second, the separate but related question as to what type of situations in the different locations would lead to the applicability of IHL (the debate over the “geographical scope”).

A. *Armed Groups and Associated Forces*

The current analysis returns to the starting point in which it has already been determined that an armed conflict exists between Angosia and the Veridian group in Betazed. Furthermore, the underlying assumption as asserted earlier is that this is an extraterritorial NIAC. The question now expands to include the Yonada group in Cardassia, against whom Angosia is also intending to take forcible action. As in the earlier case, here too there is a separate matter

64. ICRC COMMENTARY, *supra* note 31, ¶ 262.

of the relationship between Angosia and Cardassia. There will be a need for a *jus ad bellum* analysis with regard to Angosia's claim to be able to use force on Cardassia's territory if the latter does not consent. Equally, there will be a need to assess whether the specific action taken could trigger a separate IAC between the two States.⁶⁵ Indeed, it is entirely possible that there would be separate IACs between Angosia and Betazed, and Angosia and Cardassia, just one IAC or no IAC. These inter-State issues aside, the framework governing the force used by Angosia against the Yonada group requires elucidation, and the connection between the Veridian group and the Yonada group may have significant bearing on the final determination.

If it is clear that the Veridians and Yonadas are one and the same and they are operating within a single command and control structure in jointly carrying out the group's military operations, then Angosia will likely claim that military action occurring between it and the Yonada group would effectively be part of the pre-existing NIAC against the Veridians.⁶⁶ In principle, a single group may operate across borders, as has been the case with Hezbollah, the Lord's Resistance Army, Boko Haram and others. However, the experience of recent years with regard to Al-Qaida and the Islamic State demonstrates that it is often far from straightforward to claim that groups in different locations are part of a single entity, even if they might use the same name.⁶⁷

In the absence of evidence that these groups are related parts operating together under a single command and control structure, there is a need to examine whether other situations could lead to a determination that they are to be viewed together in the context of classifying parties to an armed conflict. One other possibility might be if, although separate groups, one group was in control of the other. Control of a group by a State has been presented as key to conflict classification.⁶⁸ While there is not—as of now—the same

65. See *supra* Part III.B.

66. There remains the issue of the geographical scope of IHL, which will be examined in Part IV.B.

67. Noam Lubell, *The War (?) against Al-Qaeda*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS, *supra* note 28, at 421.

68. The correct test for determining the required nature of control (and whether there should be separate tests for the specific contexts of classification and attribution) has been the subject of debate. See Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries arts. 4–11, in International Law Commission, Report on the Work of its Fifty-Third Session, U.N. Doc. A/56/10, at 43 (2001), reprinted in [2001] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 32, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2); *id.* ¶¶ 80–122; *Nicaragua*, *supra* note 7, ¶¶ 93–116;

level of detailed analysis and rules regarding the notion of international responsibility for armed groups, it would not seem farfetched to propose that for the purpose of conflict classification, control by one armed group of another armed group would operate in an analogous manner. In other words, in our scenario, if it emerges that the Yonada group is operating under the control of the Veridian group (or vice versa), then the two groups could be viewed as both being party to the same armed conflict.

Matters become further complicated if the two groups are not operating within a unified command and control structure, or with one group controlling the other. In such cases, there can be no swift determination that the operations against them would be part of the same conflict. It then becomes necessary to determine the precise nature of the connection between the Veridians and Yonadas and whether there is a particular type of link that would entail a conclusion that they are party to the same conflict. Recent writings and government positions have referred to notions such as “associated forces” and “co-belligerents” when discussing such situations. In the latest of attempts to set the parameters for these terms, the United States has stated the following:

To be considered an “associated force” of al-Qa’ida or the Taliban for purposes of the authority conferred by the 2001 AUMF, an entity must satisfy two conditions. First, the entity must be an organized, armed group that has entered the fight alongside al-Qa’ida or the Taliban. Second, the group must be a co-belligerent with al-Qa’ida or the Taliban in hostilities against the United States or its coalition partners. Thus, a group is not an associated force simply because it aligns with al-Qa’ida or the Taliban or embraces their ideology. Merely engaging in acts of terror or merely sympathizing with al-Qa’ida or the Taliban is not enough to bring a group within the scope of the 2001 AUMF. Rather, a group must also have entered al-Qa’ida or the Taliban’s fight against the United States or its coalition partners”⁶⁹

Neither “associated forces” nor “co-belligerents” provide an obvious ready-made solution, as they do not rest on clearly defined and agreed upon terms of international law. The reliance on these terms has been criticized

Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶¶ 146–62 (Int’l Crim. Trib. for the former Yugoslavia July 15, 1999); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶¶ 379–415 (Feb. 26).

69. THE WHITE HOUSE, *supra* note 15, at 4–5.

for a range of reasons.⁷⁰ Whether using the phrase associated forces or the term co-belligerents, the key question is what are the underlying criteria for making such a determination and whether these criteria are appropriate to the context at hand. Absent clarity on how these determinations are reached, there is a real risk of using a subjective and loose definition that can too easily be manipulated.⁷¹ Use of the term co-belligerents raises a particular concern as it involves using a concept that presents itself as a legal term of art and an acceptable categorization, while ignoring the fact that it is taken out of its inter-State context and potentially misapplied to relationships between armed groups. This is particularly true when viewed in the historical context of neutrality laws.⁷²

Even beyond the specifics of neutrality, there is a fundamental difference between IACs and NIACs, which presents a problem for transposition of co-belligerency notions from the former to the latter. For the purposes of an IAC, a declaration of war may suffice to trigger an armed conflict.⁷³ Accordingly, if there is an IAC between the State of Kronos and the State of Ledos, and the State of Pentarus declares that it is joining Ledos in the fight against Kronos, one might say that this leads to Pentarus and Ledos as co-belligerents and to view them as both being party to the same IAC against Kronos. Caution must however be exercised before drawing the analogy to the case of armed groups. For an armed conflict with a non-State actor, a certain threshold of intensity is required.⁷⁴ Declarations are not a sufficient trigger. Accordingly, if the Yonada group declares that it is joining the Veridian group in its war against Angosia, one cannot deduce that this alone is enough to consider them as co-belligerents and that the Yonada group is now automatically in an armed conflict against Angosia. Such a determination will require more than words.⁷⁵ Moreover, even if it is action that we are measuring, it will not be enough simply to show that the Yonada group has also engaged in violent activities against Angosia. Both groups might be

70. For a recent in-depth analysis, see Rebecca Ingber, *Co-Belligerency*, 42 YALE JOURNAL OF INTERNATIONAL LAW 67 (2017) (forthcoming).

71. *Id.*

72. *Id.* at 88–93; see also Nathan Derejko, *Understanding the Contours of Non-International Armed Conflict* 118–23 (Dec. 2016) (unpublished Ph.D. dissertation, University of Essex) (on file with author).

73. See GC IV, *supra* note 44, art. 2. Common Article 2 appears in all four 1949 Geneva Conventions.

74. See *infra* note 78 and accompanying text.

75. THE WHITE HOUSE, *supra* note 15, at 4–5.

fighting the same State without being associated with each other (the multitude of armed groups operating against the Syrian regime provides ample evidence that sharing an enemy does not make one friends).⁷⁶ It is submitted that there is a need for a particular type of cooperation to enable a determination that the armed groups are, in fact, co-belligerents. The clearest case would be in a situation in which each group, independently, is engaged in action against the State which satisfies the NIAC criteria, but despite being separate groups, they are coordinating their operations against the State (e.g., by dividing up zones of activity or by coordinating the time and place of attacks in order to maximize their effect).

It is generally accepted that the determination of a NIAC rests on two key components: the organizational structure of the armed group, and the intensity of hostilities.⁷⁷ Nonetheless, there is sound reason for accepting that it may not be appropriate to use this same test for determining the entry of a new party into a pre-existing NIAC, since the overall level of prevailing violence has already surpassed the required threshold.⁷⁸ The underlying test of organization and intensity will remain valid, but its assessment will need to take into account the pre-existing conflict. The organizational requirement should remain in place and the new group cannot be considered a party to the conflict without it. As for the intensity threshold, rather than measuring the intensity from the time of its entry, it would need to be shown that the new group is now collectively engaging in the prevailing hostilities alongside an existing party. The threshold for joining could, therefore, be lower than in the test for determining the start of a new conflict, as it would presumably not require an element of being protracted, and may even be satisfied with relatively fewer acts than would have been required had there not been a pre-existing conflict.

The precise actions that would satisfy the threshold in this context require further elaboration. Direct engagement in battlefield hostilities (such

76. For the complexities of classifying the Syrian conflict, see Gill, *supra* note 42.

77. There is some debate on how to interpret the notion of “protracted,” as discussed initially in *Tadić* and revisited in *Haradinaj*, including whether “protracted” would always require a lengthy time period (which could be problematic if extremely high levels of violence break out early on), or whether it should be read as indicative of intensity, with the latter being the key criterion. Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 49 (Int’l Crim. Trib. for the former Yugoslavia Apr. 3, 2008); see also Marco Sassóli, *Transnational Armed Groups and International Humanitarian Law* 6–7 (HPCR Occasional Paper Series, 2006), <http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper6.pdf>.

78. Ingber, *supra* note 70, at 97; Derejko, *supra* note 72, at 125.

as use of weapons during attacks) would be relatively straightforward in this regard, but one might also advance the proposition that the provision of material support for the commission of hostilities could lead to a determination that the new group has become a party to the conflict, as has been proposed in the context of a State joining other State(s) in a pre-existing NIAC.⁷⁹ Such a support test for armed groups cannot be satisfied by declarations of a common cause or pledges of allegiance.⁸⁰ The support-based approach, if adopted, must be carefully advanced in a manner that avoids unwarranted expansion of the web of conflict and should be limited to support that directly affects the conduct of hostilities, rather than indirect support such as the provision of supplies or financial backing.⁸¹ It may be, however, wiser to avoid advancing this approach in the context of armed groups unless they are actually participating in the hostilities.⁸²

Lastly, in situations in which the new group has not become a party to the conflict, there is a separate matter of whether individuals might take a direct part in hostilities. In our example, the Yonada group might not become a party to the conflict, but individual Yonadas might engage in hostilities within the Angosia-Veridian conflict.⁸³

In summary, the notions of associated forces and co-belligerents have penetrated the legal discourse surrounding military operations against armed groups, although both lack definitional clarity. Further, both terms at times rely on an erroneous analogy between IAC and NIAC. While there may be a case for using a lower threshold when determining whether a second organized armed group has become party to a prevailing conflict, such approaches must be interpreted narrowly to avoid widening the scope of the conflict in an inappropriate fashion.

79. In the determination of when multinational forces might become a party to a pre-existing NIAC, Ferraro proposes the following criteria: (1) there is a pre-existing NIAC in the territory where multinational forces intervene; (2) actions related to the conduct of hostilities are undertaken by multinational forces in the context of that pre-existing conflict; (3) the multinational forces' military operations are carried out in support of a party to that pre-existing conflict; (4) the action in question is undertaken pursuant to an official decision by the troop-contributing countries or international organization in question to support a party involved in that pre-existing conflict. Tristan Ferraro, *The Applicability and Application of International Humanitarian Law to Multinational Forces*, 95 INTERNATIONAL REVIEW OF THE RED CROSS 561, 584 (2013).

80. THE WHITE HOUSE, *supra* note 15.

81. Ferraro, *supra* note 79, at 585.

82. Albeit with a lower threshold for joining, as presented in the preceding paragraph.

83. Subject to debates over the interpretation of direct participation in hostilities. *See infra* note 93.

B. The Geographical Scope

Even in situations in which the non-State actor in Cardassia is recognized as being part of the Veridians from Betazed, there remains the controversial issue of the geographical scope of the battlefield. There exists no clear legal delineation of the battlefield, and there is significant inconsistency in the writings and case law on the matter.⁸⁴ The crucial issue for the purposes of governing military operations and uses of force should not be artificial attempts to draw a neat line around a specific area, but rather to determine when and where specific rules of IHL might apply. Indeed, it is impossible to have one predetermined area for all IHL rules, since some of them are context dependent and apply only to particular situations regardless of territory. One such example is the rules relating to the handling of prisoners during an armed conflict, whether in the territory of the parties or even in neutral territory.⁸⁵ IHL was not designed to and does not attempt to determine the geographical boundaries of conflict.⁸⁶ Quite the opposite, IHL was designed to apply to actions taken as part of an armed conflict, wherever they may occur.

In the situation currently under examination, the question is whether the dislocation between the manifestation of the non-State actor in Betazed and the non-State actor in Cardassia (assuming they are elements of the same party), affects the applicability of IHL to the operations Angosia is taking in Cardassia. If Angosia and the armed group manifestation in Cardassia are engaged in two-way, high-intensity hostilities, for example heavy weapons and missile fire from both sides, there should be little objection to viewing this as simply one more location in which the pre-existing NIAC is occurring. The rules of IHL would clearly be applicable to this situation. Where matters become more debatable is in situations in which there is a relatively limited use of force against a small group or even an individual in the territory of Cardassia. U.S. drone strikes in Yemen, Pakistan and Somalia are the

84. For an examination of these cases, see Noam Lubell & Nathan Derejko, *The Global Battlefield: Drones and the Geographical Extension of Armed Conflict*, 11 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 65 (2013).

85. GC IV, *supra* note 44, art. 4(B)(2).

86. Lubell & Derejko, *supra* note 84; *see also* Michael N. Schmitt, *Charting the Legal Geography of Non-International Armed Conflict*, 90 INTERNATIONAL LAW STUDIES 1 (2014).

obvious examples of such situations and have been at the heart of the relevant debates.⁸⁷

It has been argued that some operations of this type risk extending the battlefield beyond acceptable parameters, and in certain circumstances should not be governed by IHL.⁸⁸ The repercussions of such an approach are of huge importance since without the laws of armed conflict it would be more difficult (although not entirely impossible) to legitimize direct recourse to lethal force against individuals.⁸⁹ Three primary legal frameworks are of particular relevance: the *jus ad bellum*, the *jus in bello*, and IHRL. As presented earlier, the *jus ad bellum* will determine the legality of the resort to force by Angosia on the territory of Cardassia, and whether or not Angosia has violated international law in this inter-State relationship. It is not intended to regulate the manner in which force is used and contains no rules on matters such as status of individuals or weapon use. The classification of the situation under IHL is explicitly meant to exclude reliance on the determination of *jus ad bellum* legality. Whether or not a particular situation should be categorized as an armed conflict and, if so, of what type, does not depend on whether prior actions were in violation or in accordance with the *jus ad bellum*. While it will determine the inter-State legal aspects of resorting to force on the territory of Cardassia, it is not part of the assessment as to whether and which rules of IHL apply to the actual way in which the force is used. Nonetheless, the *jus ad bellum* does play a critical role in preventing the spread of conflict. As noted earlier, Angosia cannot expand its operations against the Veridian group into Cardassia without meeting the stringent requirements of self-defense, including the need to thwart a specific armed attack and the absence of alternative options presenting a necessity to do so by force.

The applicability of IHL in these circumstances will rest upon the nature of the operations and the identity of the parties concerned, rather than their location. Geography alone cannot be the primary criterion for the applicability of IHL. Crossing borders is a matter for the *jus ad bellum*, not for the applicability of IHL. As presented earlier, if a party to a conflict has a military camp straddling two sides of the border, or an armed group operates from

87. Precise information on the number of strikes and their effects remains contested, but not the fact that such strikes do take place. See, e.g., Jack Serle & Jessica Purkiss, *Drone Wars: The Full Data*, THE BUREAU OF INVESTIGATIVE JOURNALISM (JAN. 1, 2017), <https://www.thebureauinvestigates.com/stories/2017-01-01/drone-wars-the-full-data>.

88. IHL CHALLENGES, *supra* note 34, at 22.

89. See *infra* Part V.

a desert area in which it is not clear when the border has been crossed, moving a hundred yards to one side or the other of the border will not change the applicability of IHL. Similarly, it cannot be purely a question of distance from the more central fighting zone. It is quite possible that a small group of commanders camped far from the central battlefield remain part of the conflict, just as the generals conducting the war fall within the rules of IHL even if their military base is across the ocean.

Whether or not individuals are legitimate targets of attack under the rules of IHL will depend on the belligerent nexus, measured through a combination of factors that can include their connection to a party to the conflict, their individual status, and the activities in which they are engaged.⁹⁰ Their actions, not only their status, must be part of the analysis in order to avoid creating a situation in which individuals can never disassociate themselves from the conflict. For NIACs, in which there is no clearly agreed upon equivalent to combatant status and where the controversies over notions of direct participation in hostilities are particularly apt,⁹¹ the activities in which they are engaged will be doubly crucial to this determination.

When U.S. military personnel seated in Nevada operate a drone on a combat mission in Afghanistan, they are legitimate targets for attack despite being far from the battlefield, as would still be the case if they were operating the drones from a third State or a ship on the high seas. If Taliban fighters infiltrate the United States to attack these drone operators, they would equally be subject to the targeting rules of IHL while on U.S. soil. However, and the applicability of IHL notwithstanding, in situations geographically far removed from the central zones of fighting, IHRL may play a vital role.

90. Lubell & Derejko, *supra* note 84, at 84–86.

91. See INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009) [hereinafter INTERPRETIVE GUIDANCE]; Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 641(2010); Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, *id.* at 697; Bill Boothby, “*And for Such Time As*”: *The Time Dimension to Direct Participation in Hostilities*, *id.* at 741; W. Hayes Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, *id.* at 769; Nils Melzer, *Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *id.* at 831.

V. THE INTERPLAY WITH INTERNATIONAL HUMAN RIGHTS LAW

International human rights law remains applicable at all times, including during armed conflict. Nonetheless, it does not itself contain rules on categorizing situations as armed conflict or not. The classification is solely a matter of IHL. The relevance of human rights law is not in determining the applicability of IHL, but in the interplay between the two bodies of law in situations to which they both apply. Forcible operations by Angosia against members of an armed group will not be exempt from IHRL. The extraterritorial applicability of human rights obligations is another debated and divisive topic. In that regard, it is submitted that there is ample evidence through extensive legal analysis and the case law of human rights bodies pointing to the inevitability of accepting that when a State, through its agents, uses lethal force against an individual, it thereby exercises control over the individual's life and is accordingly bound by IHRL's right to life provisions.⁹²

If this is occurring in the context of an armed conflict, the precise contours of the obligation and any subsequent determination of whether they have been adhered to will likely be affected by two factors. First, the factual circumstances of an armed conflict will affect the measures that can be undertaken by a State in light of the prevailing circumstances. For example, the European Court of Human Rights has accepted that a State cannot be expected to conduct the same type of investigation into alleged violations in an area of armed conflict as it might in the peaceful confines of its own territory.⁹³ Second, the armed conflict will have triggered the applicability of IHL and the interplay between IHL and IHRL will need to be taken into account.⁹⁴

92. For a detailed analysis of cases, see LUBELL, *supra* note 2, ch. 8; *see also* DARAGH MURRAY ET AL., *PRACTITIONER'S GUIDE TO HUMAN RIGHTS LAW IN ARMED CONFLICT* ch. 3 (2017).

93. *Al-Skeini and Others v. United Kingdom*, App. No. 55721/07, ¶ 168 (2011) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-105606>.

The Court takes as its starting point the practical problems caused to the investigatory authorities by the fact that the United Kingdom was an Occupying Power in a foreign and hostile region in the immediate aftermath of invasion and war. These practical problems included the breakdown in the civil infrastructure, leading inter alia to shortages of local pathologists and facilities for autopsies; the scope for linguistic and cultural misunderstandings between the occupiers and the local population; and the danger inherent in any activity in Iraq at that time. As Stated above, the Court considers that in circumstances such as these the procedural duty under Article 2 must be applied realistically, to take account of specific problems faced by investigators.

94. Amicus Curiae Brief Submitted by Professor Françoise Hampson & Professor Noam Lubell of The Human Rights Centre, University of Essex, *Georgia v. Russia (II)*,

While many situations will place IHL at the foreground, most notably in battlefield operations between opposing soldiers, there may also be cases whereby the nature of the operation and the situational circumstances require that the starting point for use of force is the IHRL framework.⁹⁵ For example, a routine military patrol in an occupied territory with no ongoing hostilities might be expected to operate within a law enforcement approach concerning the use of force insofar as the civilian population is concerned.⁹⁶ It is submitted here that distance from the battlefield and the lack of active hostilities at a given moment will be important factors in the interplay between IHL and IHRL, and in certain situations may require that the latter take predominance. Rather than predicate the dominant legal framework for governing the manner of force upon arbitrary State borders, the proximity to active hostilities and control over the area would serve as more appropriate yardsticks.⁹⁷ This should be equally true for operations occurring within a State's territory or extraterritorially. In the earlier example of the Taliban fighter who has come to the United States to attack drone operators, it was noted that IHL is applicable as this involves a member of a party to a conflict planning to engage in an act of hostilities. However, it is also the case that IHRL will apply. Consequently, if the United States has the ability to peacefully detain the individual while walking down a street in Las Vegas, then, despite the fact that IHL may permit targeting, the interplay with IHRL may

App. No. 38263/08 (ECtHR), <http://repository.essex.ac.uk/9689/1/hampson-lubell-georgia-russia-amicus-01062014.pdf> (last visited May 23, 2017).

95. MURRAY ET AL., *supra* note 92, ch. 4.

96. "The experts agreed that law enforcement's stricter standards were better suited to regulating all use of force in relation to the policing activities conducted by the occupying power." TRISTAN FERRARO, OCCUPATION AND OTHER FORMS OF ADMINISTRATION OF FOREIGN TERRITORY 113 (2012).

97. For further development of this approach, see Noam Lubell & Daragh Murray, *Operationalizing the Interplay between LOAC and IHL: A Way Forward* (forthcoming) (on file with author). Although stated as policy rather than law, as evidence of the practicability of such an approach it is notable that the U.S. Presidential Policy Guidance for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities

lays out procedures to determine whether the overseas target is lawful and then whether, as a matter of policy, the lawful target should be attacked. It lays out a policy preference to capture if feasible, rather than use lethal force, as well as prescribed procedures for high-level approval of such operations.

Jennifer M. O'Connor, Gen. Counsel, U.S. Dep't of Def., Address at New York University School of Law: Applying the Law of Targeting to the Modern Battlefield (Nov. 28, 2016), <https://www.defense.gov/Portals/1/Documents/pubs/Applying-the-Law-of-Targeting-to-the-Modern-Battlefield.pdf>.

require that force be used under a law enforcement approach (i.e., detain if possible and no direct recourse to lethal force).⁹⁸

Returning to the starting point of Angosia engaging in the use of force against the Veridian group in Betazed, Cardassia and beyond, IHRL will also play a role in regulating the operations. If there were ongoing two-way hostilities between Angosia and the group in a new location, for example, a major camp of the group in Cardassia from which they are launching missiles, then the co-applicability of IHRL would not prevent the use of force in accordance with the IHL framework for hostilities. The outcome may differ if, however, Angosia intends to conduct a forcible operation against an individual or small group of individuals located in another State in which there are no ongoing active hostilities. In such circumstances, while it may be possible to find that IHL is applicable in principle,⁹⁹ IHRL can gain predominance and will need to be given greater weight in the planning and conduct of the operation. IHRL does not rule out the possibility of lethal force, but it does require a higher standard before it is employed, both with regard to a graduated approach to use of force, and by limiting it to situations of imperative necessity to save lives.¹⁰⁰ For example, if Cardassia is capable and ready to detain the individuals, then not only would there be no *jus ad bellum* justification for the use of force, but there would also be a requirement through IHRL to effect the detention rather than use a military operation designed to kill.

VI. CONCLUSION

This article examined multi-territorial conflicts with armed groups through the lens of several legal frameworks. In the realm of the *jus ad bellum*, the existing body of law proves to contain the required guidelines and constraints to allow for defensive force where necessary, while preventing the unwanted spread of conflict. This balance can be achieved once it is accepted that self-defense can be invoked in response to armed attacks by non-State

98. This approach differs from one that may produce a similar result based on IHL alone. See INTERPRETIVE GUIDANCE, *supra* note 91, sec. IX.

99. See *supra* Part IV.

100. Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, U.N. Doc. A/CONF.144/28/Rev.1, at 112 (1991); NIGEL S. RADLEY & MATT POLLARD, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 253–60 (3d ed. 2009).

actors, but that the self-defense test must be applied each time a new border is crossed.

As for IHL, complexities included identifying the existence of armed conflict and classifying it correctly, as well as the scope of the conflict regarding the parties and geographical location. In principle, operations in which one side of the conflict is a non-State actor will usually be non-international armed conflicts, even if conducted outside the State's territory. If these operations are taking place on the territory of another State without its consent, there will be a need to determine whether the operations have also triggered an international armed conflict. Automatically assuming the existence of such a conflict based solely on a non-consensual forcible operation having taken place could result in an inappropriate classification. Such determinations must be based on both the factual nature and the effects of the operation, as well as the intent and positions of the States involved. The scope of the conflict may widen to include new parties and the test for this could require a different intensity threshold than the one for determining the start of the new conflict. Nonetheless, great care should be taken in advancing support-based approaches that do not require active participation in the hostilities themselves. The IHL framework itself does not serve to define the geographical boundaries of the conflict. Indeed, this is a task better suited to the *jus ad bellum*. However, the interplay with human rights law may mean that in some situations in which IHL is applicable, a more restrictive paradigm for forcible operations may be required.

Multi-territorial conflicts against armed groups present a series of challenges across all relevant areas of international law. This article demonstrates that while emerging complexities require careful analysis, none of these obstacles is insurmountable and can all be addressed within existing legal frameworks.