

REDEFINING LAW OF WAR IN THE WAKE OF GRAY-ZONE CONFLICT'S UBIQUITY

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INTRODUCTION

At 4:25 a.m., obscured in darkness, an Iranian drone breached Israeli airspace. The Israeli reaction was immediate and twofold: an Apache helicopter was dispatched, which shot down the drone over the small northern town of Beit She'an,¹ and eight F-16 fighter jets were dispatched that morning,² charged with striking the Iranian installation in Syria known as T-4. The installation, the purported base of the drone's control vehicle³ and Iran's Qods Force, was guarded by Iranian Revolutionary Corps operatives.⁴ One of the eight Israeli fighter jets was subsequently shot down—by Syrian fire this time—on its return flight over a field in Harduf, a village east of Haifa, Israel.⁵

Since 1982, Israel and Iran have engaged in rhetorical battles,⁶ intelligence battles,⁷ and proxy battles.⁸ They have accused each other of targeted assassinations and terror attacks. However, prior to February 10, 2018, when this episode transpired, there had been

¹ Seth J. Frantzman, *From the Euphrates to Beit She'an: The Islamic Republic's Dangerous Game*, JERUSALEM POST (Feb. 12, 2018), <https://www.jpost.com/Arab-Israeli-Conflict/From-the-Euphrates-to-Beit-Shean-The-Islamic-Republics-dangerous-game-542356> [<https://perma.cc/L6JQ-YD7U>].

² Jonathan Shepp, *Israel's Shadow War with Iran Comes Out of the Shadows*, N.Y. MAG. (Feb. 12, 2018), <http://nymag.com/daily/intelligencer/2018/02/israels-war-with-iran-comes-out-of-the-shadows.html> [<https://perma.cc/YKN9-5DMT>].

³ Tony Badran & Jonathan Schanzer, *The Iran-Israel War Flares Up*, WALL STREET J. (Feb. 11, 2018), <https://www.wsj.com/articles/the-iran-israel-war-flares-up-1518377530> [<https://perma.cc/H255-6W45>].

⁴ *Id.*

⁵ Josie Ensor, *Israel Strikes Iranian Targets in Syria After F-16 Fighter Jet Shot Down*, TELEGRAPH (Feb. 10, 2018), <https://www.telegraph.co.uk/news/2018/02/10/israeli-fighter-jet-shot-syrian-anti-aircraft-fire-military/> [<https://perma.cc/L85Y-MHCV>].

⁶ Ze'ev Maghen, *Eradicating the 'Little Satan'*, WALL STREET J. (Jan. 5, 2009), <https://www.wsj.com/articles/SB123093176783149767> [<https://perma.cc/DF9R-Z4XQ>] ("The congregation of worshippers, some 7,000 in number, expressed their unanimous support for the Supreme Leader's words by repeatedly chanting, *marg bar Omrika, marg bar Esra'il* "Death to America! Death to Israel!"); see also Josh Levs, *Iran Leader's Call to 'Annihilate' Israel Sparks Fury as Nuclear Deadline Looms*, CNN (Nov. 10, 2014), <https://www.cnn.com/2014/11/10/world/meast/iran-annihilate-israel/index.html> [<https://perma.cc/ULJ4-RLQC>] ("Khamenei posted a series of tweets slamming Israel. Among them was a document called "9 key questions about elimination of Israel.").

⁷ Bruce Riedel, *Israel-Iran Covert Spy Games Become More Dangerous*, BROOKINGS (Feb. 15, 2012), <https://www.brookings.edu/opinions/israel-iran-covert-spy-games-become-more-dangerous/> [<https://perma.cc/TM4X-TSRE>].

⁸ Shepp, *supra* note 2.

no public exchange of fire; in fact, their militaries had never engaged in any direct, open hostilities with one another.

Because of this, the Iranian-Israeli conflict has escaped the governing regime known as International Humanitarian Law (IHL). IHL is only applicable during an armed conflict, and it assumes that when a state is embroiled in an armed conflict, one state's army is either combatting a second state's army, or a state is defending itself against an armed resistance.⁹ These two types of clashes, identified as International Armed Conflict, or IAC, and Non-International Armed Conflict, or NIAC, are the only modes of armed conflict – the only accepted classes of war – governed by IHL.¹⁰

The Iran-Israel conflict, however, is neither an IAC nor a NIAC. Instead, it falls into a third regime known as gray-zone conflict, a mode of aggression that International Humanitarian Law, in its current form, is unprepared to handle. Gray-zone conflicts are competitive, often aggressive interactions between states, or state and non-state actors, that fall between the traditional war-and-peace dichotomy.¹¹ They are shadow wars, intentionally fought outside the boundaries of law and traditional military operations, and employ a combination of tactics, including proxy wars, cyber-attacks, and economic warfare.¹²

It has been stated, in reference to IHL, that “[a]ll armed conflicts are therefore either international or non-international, and the two categories have to be distinguished according to the parties involved rather than by the territorial scope of the conflict.”¹³ This paper will prove the fallacious reasoning of this statement and reveal how limiting warfare to this duality discounts a third derivative of war known as gray-zone conflict which has achieved ubiquity in the twenty-first century. Over the next few pages I will discuss Iranian-Israeli relations before transitioning into a discussion of the forms of IHL, its pillars, and the conflicts to which it is applicable. Following

⁹ INT’L COMMITTEE OF THE RED CROSS [ICRC], HOW IS THE TERM “ARMED CONFLICT” DEFINED IN INTERNATIONAL HUMANITARIAN LAW? (2008), <https://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm> [<https://perma.cc/5XR9-B4NK>].

¹⁰ Natasha Balendra, *Defining Armed Conflict*, 29 CARDOZO L. REV. 2461, 2464 (2008).

¹¹ INT’L SEC. ADVISORY BD., REPORT ON GRAY ZONE CONFLICT (2017), <https://2009-2017.state.gov/t/avc/isab/266650.htm> [<https://perma.cc/6LB5-JGCS>].

¹² *Id.*

¹³ INT’L COMMITTEE OF THE RED CROSS [ICRC], FUNDAMENTALS OF IHL (2014), <https://casebook.icrc.org/law/fundamentals-ihl> [<https://perma.cc/3E6S-AM49>].

this discussion, I will define gray-zone conflict—explain the distinctions between and similarities to the traditional modes of international war. Finally, I will make the ambitious argument for both redefining armed conflict and for expanding the body of IHL to appropriately regulate gray-zone conflict.

I. ISRAEL AND IRAN'S INEXORABLE MARCH INTO THE SHADOW CONFLICT

Cloaked in conduct reminiscent of the Cold War, pundits and practitioners today are warning of a looming explosion in the Middle East, triggered by a further deterioration in Iranian-Israeli affairs. Relations between Israel and Iran have not always been strained¹⁴—it wasn't until 1982 that Iranian-Israeli relations reached a formal point of tension. Transitioning out of a revolution¹⁵ and entrenched in a stalled war with Iraq,¹⁶ in 1982 Iran was looking for an opportunity to expand their regional influence. When the first

¹⁴ During Israel's embryonic years, their relationships were dictated by the proverb "the enemy of my enemy is my friend." In the 1950s, Iran served as a safe passage for Israel to help sneak persecuted Jews out of Iraq and into Israel. In the 1970s, Israel sold Iran \$500 million worth of weapons and Iranian and Israeli engineers worked together in manufacturing a surface-to-surface missile. This period was dictated by an Israeli foreign policy known as the policy of the periphery, where Israel courted relations with non-Arab nations in the Middle East, namely Morocco, Ethiopia, Turkey and Iran. See Uri Bialer, *The Iranian Connection in Israel's Foreign Policy: 1948-1951*, 39 MIDDLE EAST J. 292 (1985). It wasn't until the fall of the Shah in 1979 that relations fractured. Interestingly, it was Israel who masterminded the Iran-Contra deal. Still hoping that if Iran emerged victorious in the Iran-Iraq war, their government may be restored with a Western slant. See SAMUEL SEGEV, *THE IRANIAN TRIANGLE: THE UNTOLD STORY OF ISRAEL'S INVOLVEMENT IN THE IRAN-CONTRA AFFAIR* (Haim Watzman trans., 1988).

¹⁵ Pushed out by religious Islamists under Ayatollah Khomeini, the Iranian Shah was overthrown on January 16, 1979. The country became the Islamic Republic after an official referendum in April 1979, and Khomeini became the Supreme Leader that December. *Shah Flees Iran*, HISTORY, <https://www.history.com/this-day-in-history/shah-flees-iran> [<https://perma.cc/9ZDR-ZMWT>].

¹⁶ Iraq invaded Iran in September 1980, capitalizing on the country's post-revolution turmoil in an effort to assert their dominance over the Persian Gulf. Iran, however, moved the offensive in 1982, and for six years fought an offensive, though stalled campaign against Iraq, who had the support of most Western States. Mike Gallagher, *The "Beauty" and the Horror of the Iran-Iraq War*, BBC NEWS (Sept. 26, 2015), <https://www.bbc.co.uk/news/magazine-34353349> [<https://perma.cc/AQC8-Z2YG>].

Lebanon War broke out between Israel and the PLO in Lebanon,¹⁷ Iran saw their opportunity – they deployed 1,500 members of the Revolutionary Guard to Lebanon's Bekaa Valley in the east, laying the foundation for the organization that would ultimately become Hezbollah.¹⁸ Three years later, when Israel finally withdrew from Lebanon, the PLO was defeated but Hezbollah was only gaining momentum, evolving out of their nascent order into an Iranian proxy group.¹⁹

Hezbollah's existence is largely attributed to Iran's steadfast support for their mission. Committed to advancing the Iranian revolution and inculcating Shia Muslims across an arc of the Middle East that is largely Sunni,²⁰ by 1985 Iran had solidified their first base in what would become their "axis of resistance."²¹ Over the years, Hezbollah became an Iranian proxy prototype, responsible for the bombings of Israel's embassy in Argentina, a Jewish community center in Buenos Aires,²² and a bus of Israeli tourists in Bulgaria.²³

¹⁷ Israel invaded Lebanon in 1982 to expel the Palestinian Liberation Operation from their border with Lebanon, an attack precipitated by an assassination attempt against the Israeli ambassador to the UK. See Associated Press, *Shlomo Argov, 73, Ex-Israeli Envoy; His Shooting Prompted an Invasion*, N.Y. TIMES (Feb. 25, 2003), <https://www.nytimes.com/2003/02/25/world/shlomo-argov-73-ex-israeli-envoy-his-shooting-prompted-an-invasion.html> [https://perma.cc/KUV2-C58P].

¹⁸ Trained, armed and funded by Iran, this organization was responsible for the bombing of two American embassies and the US and French peacekeeping troops in Lebanon. They kidnapped some 90 hostages in retaliation for the disappearance of four Iranian diplomats in Lebanon. Finally, they engaged in countless suicide attacks against Israeli posts and headquarters during the Lebanon War. See Emile Hokayem, *Iran and Lebanon*, IRAN PRIMER (Aug. 2015), <http://iranprimer.usip.org/resource/iran-and-lebanon> [https://perma.cc/UL33-EPNX].

¹⁹ *Hezbollah*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Hezbollah> [https://perma.cc/3UTB-FDLA] (last visited May 28, 2018).

²⁰ BENADETTA BERTI, ARMED POLITICAL ORGANIZATIONS: FROM CONFLICT TO INTEGRATION (2013).

²¹ The Axis of Resistance is an Iranian led alliance between Iran, Iraq, Syria, Hezbollah and Hamas against Israel and what they consider to be US imperialism. See Payam Mohseni & Hussein Kalout, *Iran's Axis of Resistance Rises: How It's Forging a New Middle East*, FOREIGN AFF. MAG. (Jan. 24, 2017), <https://www.foreignaffairs.com/articles/iran/2017-01-24/irans-axis-resistance-rises> [https://perma.cc/GL7A-ENVN].

²² AUDREY KURTH CRONIN ET AL., RL32223, FOREIGN TERRORIST ORGANIZATIONS (2004), <https://fas.org/irp/crs/RL32223.pdf> [https://perma.cc/EW2Y-Z2V7].

²³ Isabel Kershner, *Iran Fires Rockets Into Golan Heights From Syria, Israelis Say*, N.Y. TIMES (May 9, 2018), <https://www.nytimes.com/2018/05/09/world/middleeast/israel-iran-attack.ht>

Iran and Hezbollah complement each other in a way states long for proxy groups to operate—since the revolution, Iran has been propelled by an expansionist foreign policy that Hezbollah is uniquely positioned to carry out,²⁴ and in response, Hezbollah receives arms, training, and funds for their operations.²⁵

A. *Second Lebanon War*

On June 12, 2006, Hezbollah solidified their identity as a movement that, first and foremost, is committed to resisting Israeli occupation in South Lebanon. Operation True Promise, an air and ground invasion into Israel's Northern Galilee, was accompanied by persistent rocket fire against Israeli civilians.²⁶ Israel responded swiftly with Operation Change Direction, initiating strikes against Hezbollah that culminated in a ground invasion into Southern Lebanon.²⁷ Though this 34 day war established Hezbollah as a resistance movement, it became evident that “ideologically,

ml?rref=collection%2Fbyline%2Fisabel-kershner&action=click&contentCollection=undefined®ion=stream&module=stream_unit&version=latest&contentPlacement=1&pgtype=collection [https://perma.cc/AP5R-W4TC].

²⁴ Entrenched in Lebanon, Hezbollah can seamlessly move across state borders to carry out Iran's religious and political agenda. Their agility and unique political position in Lebanon allow them to also infiltrate states outside the Middle East.

²⁵ Ben Hubbard, *Iran Out to Remake Mideast With Arab Enforcer: Hezbollah*, N.Y. TIMES (Aug. 27, 2017), <https://www.nytimes.com/2017/08/27/world/middleeast/hezbollah-iran-syria-israel-lebanon.html> [https://perma.cc/L9GU-QFXJ].

²⁶ On June 25th, 2008, Hamas, acting also as an Iranian proxy, launched a mortar, missile and rocket attack against Israel, kidnapping an Israeli soldier, Gilad Shalit, in the process. Two weeks later, on July 12, 2006 Hezbollah commenced Operation True Promise: acting in the capacity of an Iranian legion, they launched a mortar and rocket assault in the Northern Galilee region of Israel, and using the fire and grime as cover, a Hezbollah unit crossed the border into Israel and ambushed an IDF convoy. Three Israelis were killed, two more were captured, and four more perished in a tank explosion when the IDF launched a counterattack. Hezbollah rocket attacks against Israeli civilians persisted. See Isabel Kershner, *Rockets Hit Israel, Breaking Hamas Truce*, N.Y. TIMES (June 25, 2008), <https://www.nytimes.com/2008/06/25/world/middleeast/25mideast.html> [https://perma.cc/D8C6-7UWZ].

²⁷ See Michael N. Schmitt, “Change Direction” 2006: Israeli Operations in Lebanon and the International Law of Self-Defense, 29 MICH. J. INT’L L. 127, 127 (2008).

economically, and politically, its fortunes remain intimately tied to those of Iran."²⁸

In a letter to the United Nations Secretary-General and Security Council, Israel argued their operation in Lebanon is buttressed by Article 51 of the UN Charter.²⁹ According to Israel, the 34-day military campaign was an expression of their inherent "right of self-defence when an armed attack is launched against a Member of the United Nations. The State of Israel will take the appropriate actions to secure the release of the kidnapped soldiers and bring an end to the shelling that terrorizes our citizens."³⁰

This letter, though it expressly justifies Israel's actions as individual self-defense under Article 51, raises additional international legal questions: while *jus ad bellum*³¹ sets a normative standard for when the use of force is justified, one of which is an Article 51 basis, *jus in bello* (IHL) only applies when there is an IAC or an NIAC.³² When neither is applicable, International Human Rights Law (IHRL) is the exclusive governing regime.³³ In this case, if Israel was indeed exercising her right to self-defense against

²⁸ Hezbollah's Global Reach: Joint Hearing Before the Subcommittee on Int'l Terrorism and Nonproliferation & the Subcommittee on the Middle East and Cent. Asia of the H. Committee on Int'l Relations, 109th Cong. 69-70 (2006) (statement of Ilan Berman, Vice President for Policy, American Foreign Policy Council).

²⁹ U.N. Charter art. 51.

³⁰ Permanent Rep. of Israel to the U.N., Letter dated July 12, 2006, from the Permanent Rep. of Israel to the Secretary-General and the President of the Security Council, U.N. Doc. A/60/937-S/2006/515 (July 12, 2006).

³¹ *Jus ad bellum* refers to the conditions under which a state may resort to armed conflict. It encapsulates Article 51 of the UN Charter, which permits a state to retaliate against an aggressor when they are acting in self-defense, doctrines like Responsibility to Protect, or R2P, which authorizes states to join in collective action in defense of another state, and finally it permits enforcement action sanctioned by the Security Council, pursuant to Article VII of the Charter. This doctrine is further discussed in the subsequent Section. See William K. Lietzau, *Old Laws, New Wars: Jus ad Bellum in an Age of Terrorism*, 2004 MAX PLANCK U.N.Y.B. 383, 387-90.

³² *Jus in bello* regulates parties' behavior during periods of conflict. Also known as International Humanitarian Law, *jus in bello* seeks to minimize suffering during war by protecting the conflict's victims. While a party may have violated the conditions established in *jus ad bellum* when the conflict was initiated, IHL governs a conflict irrespective of the conflict's *raison d'etre*. This doctrine too is further discussed in the subsequent Section.

³³ Human Rights Law is non-waivable. It encapsulates the rights guaranteed to all citizens of the world, among them religious freedom, freedom of thought, and women's rights, as well as the prohibition on slavery, torture, and inhumane punishment. See *IHL and human rights law*, INT'L COMMITTEE RED CROSS (Oct. 29, 2010), <https://www.icrc.org/eng/war-and-law/ihl-other-legal-regimes/ihl-human-rights/overview-ihl-and-human-rights.htm> [https://perma.cc/G34Z-WB2P].

Lebanon, that would be an acceptable *just war*,³⁴ and would trigger the protective regulations of IHL – a legal regime that compromises between human rights and military necessity in their mission to protect civilians and non-combatants from war’s most capricious byproducts – while allowing states to achieve their military objectives.³⁵ However, if Hezbollah was taking directions from Iran, it begs the question of whether IHL would be legally administrable in this conflict, or if IHRL would be the solitary regulatory regime, protecting civilians from torture and cruel and unusual punishment,³⁶ but otherwise stripping victim nations of the protection IHL affords them in retaliating against aggressors.³⁷ Despite the overlap between these two regimes, both flexing their muscles to protect civilians from abuse, there are some areas where IHRL and IHL diverge: for example, the assumption IHL makes that killing, at points, is necessary to achieve a military objective.³⁸ In these situations, because IHL and IHRL are both technically

³⁴ See MICHAEL WALZER, *JUST AND UNJUST WARS* 74–85 (2006) (arguing that people and states can rightly defend themselves against threats of imminent violence).

³⁵ Carl von Clausewitz referred to the “fog of war” as the inherent confusion and uncertainty that manifests from the gun fire and attacks exchanged in the battlefield and inherent insufficient intelligence. The uncertainty regarding your military capability and your opponents during a campaign increases your vulnerability. See CARL VON CLAUSEWITZ, *ON WAR* 33 (Michael Howard & Peter Paret, trans., Princeton University Press 1976); see generally SUN ZU, *THE ART OF WAR* (Samuel B. Griffith trans., Oxford University Press 1963) (discussing generally the strategies a military can use to increase the likelihood of winning).

³⁶ The preeminent doctrine in IHRL is the Universal Declaration of Human Rights, a doctrine littered in aspiration, but with minimal enforcement mechanisms. Otherwise, doctrines such as the CEDAW, CAT, ICCPR and ICESCR, while they protect critical freedoms, do not protect citizens from the conflagration of foreign governments and non-state actors.

³⁷ IHL weighs the nuances of military necessity and human dignity during times of war. Their regulations provide states during war with the ability to respond against aggressors. IHL is not intended to nullify wars, but rather to humanize them. When that fails, it allows states to try violators for war crimes, further giving them protection against extreme violence and belligerence during war. See Waseem Ahmad Qureshi, *Untangling the Complicated Relationship between International Humanitarian Law and Human Rights Law in Armed Conflict*, 6 PENN STATE J.L. & INT’L AFF. 203, 208–09 (2018).

³⁸ Balendra, *supra* note 10, at 2464.

germane,³⁹ the doctrine of *lex specialis* would define which law governs.⁴⁰

To evaluate whether *lex specialis* is applicable, it is essential to unpack whether there is an ongoing armed conflict between Israel and Iran.⁴¹ Discussing the ongoing conflict in South Lebanon in a Security Council meeting on July 14, 2006, the UN “called for the respect of international humanitarian law, and the protection of civilians and civilian infrastructures.”⁴² Though summarily declaring IHL’s application answers the question of whether Israel and Lebanon were in fact engaged in a war according to international legal standards, by choosing to view the Second Lebanon War through the purview of an armed conflict between Lebanon and Israel, the UN bestowed more fuel and authority into

³⁹ The ICJ has held that it is possible to simultaneously violate both IHL and IHRL, elucidating that both legal frameworks can be concurrently applicable. See *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 81, ¶ 221 (Dec. 19); see also *United Kingdom, The Case of Serdar Mohammed (Court of Appeal and Supreme Court Judgments)*, INT’L COMMITTEE RED CROSS, <https://casebook.icrc.org/case-study/united-kingdom-case-serdar-mohammed-court-appeal-and-supreme-court-judgments> [https://perma.cc/H7WX-RG8V] (last visited Nov. 4, 2019) (“[T]he protection offered by human rights conventions and that offered by international humanitarian law co-existed in situations of armed conflict”).

⁴⁰ The doctrine of *lex specialis*, derived from the axiom “*lex specialis derogate lex generali*” which translates to “special laws override general laws” dictates that when two bodies of law are simultaneously applicable, but one contradicts the other, then the law specific law supersedes the more general law. See *Lex Specialis Law and Legal Definition*, USLEGAL.COM, <https://definitions.uslegal.com/1/lex-specialis/> [https://perma.cc/9KHW-GQRL] (last visited May 28, 2018). The debate over the application of IHL and IHRL under *lex specialis* is vibrant, and some hold that IHL is specific law, whereas IHRL is both specific and general, depending on the legal issue, however the ICRC currently holds that “IHL constitutes the *lex specialis* governing the assessment of the lawfulness of the use of force against lawful targets” during international armed conflicts, but concedes that this holding is less more opaque during non-international armed conflicts. See *Lex specialis*, INT’L COMMITTEE RED CROSS, <https://casebook.icrc.org/glossary/lex-specialis> [https://perma.cc/FSM5-NMFL] (last visited Nov. 4, 2019).

⁴¹ Common Article 2 of the 1949 Geneva Conventions, explains “the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” Conversely, IHRL is generally reserved for, and was constructed to apply during, times of peace. The exceptions to this rule are particular human rights concerns that have been labeled non-derogable, which include enslavement. See DANIEL MOECKLI, *HUMAN RIGHTS AND NON-DISCRIMINATION IN THE “WAR ON TERROR”* 92 (2008).

⁴² Press Release, Security Council, Security Council Debates Escalating Crisis Between Israel, Lebanon; UN Officials Urge Restraint, Diplomacy, Protection of Civilians, U.N. Press Release SC/8776 (July 14, 2006).

Iran's proxy arsenal, allowing Iran to evade the law's reach and to nefariously expand their influence. Furthermore, because Israel, according to the UN, was exclusively fighting Lebanon, Hezbollah's relationship with Iran was able to escape public scrutiny, and instead Hezbollah grew as a part of the Lebanese political infrastructure;⁴³ and Iran, therefore, excused from any involvement with Hezbollah, and through Hezbollah with Israel, bypassed legal accountability. Israel, in their own effort to dismantle Hezbollah's organization, assassinated several of their core leaders,⁴⁴ however like the mythical Greek creature Hydra, as one leader falters, Hezbollah continues to grow, stronger, from these supposed setbacks.⁴⁵

B. Syria

Both the First and Second Lebanon Wars prove that Iran is particularly adept at moving into the vacuum left behind by regime change and civil war, and Iran's efforts in Syria further prove this skill. Tehran deployed members of the Basij Militia, a voluntary mission, to Syria in 2012 as an advisory committee to Syrian President Bashar al Assad in his fight against the growing

⁴³ See Jeffrey Feltman, *Hezbollah: Revolutionary Iran's Most Successful Export*, BROOKINGS (Jan. 17, 2019), <https://www.brookings.edu/opinions/hezbollah-revolutionary-irans-most-successful-export/> [https://perma.cc/KPF2-H8JS] (explaining *Hezbollah* began participating in Lebanese elections in 1992, with "[h]opeful speculation that Hezbollah's growing role in politics and governing would diminish the importance of its arms and transform Hezbollah into a 'normal' party proved naive."); see also Michael Slackman, *Hezbollah Uses Influence to Jockey for Power in Beirut*, N.Y. TIMES (Nov. 6, 2006), <https://www.nytimes.com/2006/11/06/world/middleeast/06lebanon.html?mtrref=www.google.com&assetType=REGIWALL> [https://perma.cc/5D7B-EQ4L] ("Hezbollah is pressing its case for effective control of the government and a new election law, warning that otherwise it would move to bring down the government and force a new parliamentary election . . . so now, Hezbollah, an ally of Iran and Syria, has been emboldened.").

⁴⁴ Including Sheikh Ragheb Harb in 1984, Abbas Al-Musawi in 1992, and Imad Mughniyeh in 2008. Daniel Byman & Bilal Y. Saab, *Hezbollah In a Time of Transition*, CTR. FOR MIDDLE EAST POL'Y BROOKINGS & ATLANTIC COUNCIL BRENT SCOWCROFT CTR. INT'L SEC. (Nov. 2014), <https://www.brookings.edu/wp-content/uploads/2016/06/Hezbollah-in-a-Time-of-Transition.pdf> [https://perma.cc/K2XY-AECD].

⁴⁵ See generally *id.* (discussing the ways in which Hezbollah is in flux, and specifically its ability to adapt to changes in its environment).

insurgency in his country.⁴⁶ But as the war progressed, the mission changed. By 2015, as the Syrian civil war stretched into its fifth year, Quds Force Commander Major General Qassam Suleimi was forced to deploy volunteers from all six branches of the Islamic Revolutionary Guard Corps (IRGC) in the capacity of “tactical advisors.”⁴⁷ Their goal, like most states who employ gray-zone tactics, was to turn the Assad regime into a client state and to secure their “axis of resistance”⁴⁸ across the Middle East.⁴⁹

Although the threat against President Assad dissipated, the number of Iranian militants in Syria has not consequentially decreased. Instead, they have been instrumental in executing Iran’s new plan: to establish a strong infrastructure in Syria to threaten Israel’s security.⁵⁰ In a region where there is neither peace nor formal war against Israel,⁵¹ Iran has been preparing for the day the status quo will cease to be gray.⁵²

⁴⁶ See Kristin Daily, *Iran Has More Volunteers For the Syrian War Than It Knows What to Do With*, FOREIGN POL’Y (May 12, 2016), <http://foreignpolicy.com/2016/05/12/iran-suleimani-basij-irgc-assad-syria/> [<https://perma.cc/7P9P-9YZE>].

⁴⁷ See *id.*

⁴⁸ Iran has been centered on an “axis of resistance” but this term encompasses the goal of all states that employ gray-zone tactics. Russia’s strategic aim is the eradication of what they perceive to be US dominion. The axis of resistance is synonymous to this goal because it too is subsumed with establishing an arch of power that could strategically combat Western hegemony. See Dan G. Cox & Bruce Stanley, *US and Russia: The Gray Zone Spiral Toward Open War*, E-INT’L REL. (Mar. 7, 2018), <https://www.e-ir.info/2018/03/07/us-and-russia-the-gray-zone-spiral-toward-open-war/> [<https://perma.cc/1-WEHN>].

⁴⁹ Iran is also using their iron grip in Syria as an additional funnel for arms transfers to Hezbollah, see *Security Analyst: Hezbollah Continues Transferring Arms from Syria to Lebanon*, JR. POST (Jan. 3, 2014), <https://www.jpost.com/Middle-East/Despite-alleged-Israeli-strikes-Hezbollah-continues-moving-weapons-from-Syria-to-Lebanon-336998> [<https://perma.cc/K9VR-JKL2>].

⁵⁰ Ben Hubbard, Isabel Kershner, & Anne Bernard, *Iran, Deeply Embedded in Syria, Expands “Axis of Resistance,”* N.Y. TIMES (Feb. 19, 2018), <https://www.nytimes.com/2018/02/19/world/middleeast/iran-syria-israel.html> [<https://perma.cc/2XEY-WJKG>].

⁵¹ Amid their growing conflict with Iran on their border with Syria, the Israeli Mossad was suspected in the death of an Iranian nuclear scientist on a bleak Wednesday in January 2012, the third Iranian nuclear scientist assassinated during the Syrian civil war. See Dan Williams, *Analysis – Israel uses risky “hits” in deadly shadow War*, REUTERS (Jan. 11, 2012), <https://www.reuters.com/article/uk-iran-blast-israel-idUKTRE80A1KS20120111> [<https://perma.cc/345S-T66U>].

⁵² Hubbard, Kershner, & Bernard, *supra* note 50. See also Oren Lieberman, *Iran Vows to Retaliate Against Israel for Syria Strike*, CNN (April 11, 2018), <https://www.cnn.com/2018/04/11/middleeast/iran-israel-syria-strike->

When an Iranian drone trespassed on Israel's northern border with Syria on February 10, 2018, Israel responded by sending in eight F-16s to destroy the Iranian military command center.⁵³ Since that cold winter day, Israel has violated Syrian sovereignty on several more occasions;⁵⁴ in turn, Iran, not Syria, has exercised a use of force against Israeli sovereignty from Syrian territory.⁵⁵ Iran and Israel have been embroiled in a shadow war since 1982, and Iran has consistently employed proxies in their fight with Israel – Hezbollah, Hamas, the Palestinian Islamic Jihad.⁵⁶ This shadow war is creeping into the territory of open warfare, and the symptoms of this emerging cataclysm have been conspicuous for years. Had the international legal system been adept at constraining and regulating the shadow war, had it been able to hold actual players in this conflict accountable, and had they been able to apply the law of war in this theatre, Iranian ambitions could have been curtailed, and the inevitable, developing confrontation could have been avoided.

II. INTERNATIONAL HUMANITARIAN LAW, DEFINED AND EXPLAINED

International law has been adjudicating the Iranian-Israeli conflict not as an armed conflict between Israel and Iran, but – distinctly – as armed conflicts between Israel and Lebanon,⁵⁷ and

intl/index.html [<https://perma.cc/4W9E-G929>] (explaining Iran's intent to expand their operations in Syria to include military engagements with Israel).

⁵³ Shepp, *supra* note 2.

⁵⁴ On April 9th, missiles hit a compound at the Iranian T-4 airbase in Syria, targeting an advanced Tor anti-aircraft system that had just arrived in Syria from Iran. Syria and Russia blamed Israel for the attack. Israel neither confirmed nor denied the accusation. See Anshel Pfeffer, *Israel Braced for Attack by Iran as Shadow War Hits Boiling Point*, THE TIMES (April 22, 2018), <https://www.thetimes.co.uk/article/israel-braced-for-attack-by-iran-as-shadow-war-hits-boiling-point-w6rhvvsr> [<https://perma.cc/RA8X-XHR5>].

⁵⁵ Isabel Kershner, *Iran Fires Rockets Into Golan Heights, Israelis Says*, N.Y. TIMES (May 9, 2018), <https://www.nytimes.com/2018/05/09/world/middleeast/israel-iran-attack.html> [<https://perma.cc/2WZ8-ST22>].

⁵⁶ Khaled Abu Toameh, *The Iran-Hamas-Hezbollah Connection*, GATESTONE INSTITUTE INT'L POL'Y COUNCIL, (Nov. 8, 2017), <https://www.gatestoneinstitute.org/11330/iran-hamas-hezbollah> [<https://perma.cc/PT5T-8JQW>].

⁵⁷ See U.N. Press Release, *supra* note 42.

border skirmishes between Israel and Syria.⁵⁸ These confrontations, moreover, for the most part have been adjudicated either as isolated instances, or as fleeting, already resolved, conflicts. Thus, the overarching confrontation which has been defining Iranian-Israeli affairs has been examined through the lens of *jus ad bellum*, the law of self-defense, which defines the conditions under which the use of force is legal, but which does not regulate or govern belligerents in the field of war.⁵⁹

This Section will (A) introduce *jus in bello* and *jus ad bellum*, and (B) define international humanitarian law and its relationship with International Human Rights Law, address the legal application of International Humanitarian Law to state actions, and demonstrate that the international legal community has been doing a disservice to world affairs in barring the classification of gray-zone conflicts as a mode of legal armed conflict.⁶⁰

A. *Jus in bello, jus ad bellum*

Jus in bello, an alternative name for International Humanitarian Law or the law of war, regulates how a war is fought – how soldiers and aggressors must conduct themselves during an armed conflict. Preceding the *jus in bello* evaluation however is the necessary

⁵⁸ See generally NATIONAL FOREIGN ASSESSMENT CENTER, SYRIA-ISRAEL: THE GOLAN HEIGHTS IN PERSPECTIVE (2009), <https://www.cia.gov/library/readingroom/docs/CIA-RDP83B00851R000400150002-5.pdf> [<https://perma.cc/S79Z-ST7L>].

⁵⁹ See U.N. Charter Art. 51. (“the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations”); see also CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE (Oxford University Press, 4th ed. 2018) (explaining the application of *jus ad bellum* is limited to incidents where a party is the victim of an armed attack therefore permitting the use force in order to ensure the safety and security of their nation. Proving this point is the customary rules attributed to *jus ad bellum*, namely necessity, which explains that the use force can only be employed as a defensive technique to the extent that it can avert or end an attack, and no other non-forceful means are available to assuage the situation, and proportionality which limits the length and size of an attack to one commensurate to the threat posed by belligerents.).

⁶⁰ Gray-zone conflicts abound in Russia and China as well. With Russia, it is seen in how they have slowly been asserting their authority over neighboring states, with Ukraine, Georgia, and Moldova. With China, this tactic is seen in how they have been claiming the territory in the South China Sea. See Sophia Pugsley & Fredrik Wasslau, *Russia in the Grey Zone*, EUR. COUNCIL ON FOREIGN REL. (Jan. 9, 2016), https://www.ecfr.eu/wider/specials/russia_in_the_grey_zones [<https://perma.cc/KW8L-GFP3>].

analysis of whether States had the right to deploy force in the first place. *Jus ad bellum* is the framework that provides for situations in which there is a justifiable occasion for resorting to force.

Historically, war was a legitimate political tool used by states to defend their sovereign interests.⁶¹ St. Augustine took this for granted when he imbued this basic idea with a hybrid of Christian tenets and political pacifism, generating today's doctrine of just warfare. In his framework, war can be *just* only when fought on God's command: thus, constraints on the conditions for using force were merely morally compulsory before they evolved into the contemporary legal constriction of self-defense.⁶²

While St. Augustine ascertained the ethical elements of just war, Daniel Webster set out its legal structure in 1841 when, in a letter to British Minister Fox, he explained that a State asserting its right to anticipatory self-defense must demonstrate "a necessity of self-defense, instant, overwhelming, leaving no choice for means, and no moment for deliberation."⁶³ Based on the evolution of this single clause, the legal community derived four conditions permitting a State to act in self-defense which have become the bedrock of customary international law: "(1) the existence of a grave and pressing danger against the security of a State or its citizens necessitating such action; (2) the absence of means of protection other than the measures taken or to be taken; (3) the illegal nature of this danger; and (4) proportionality."⁶⁴ Today, Article 51 of the UN Charter permits a State to act in self-defense, but its conduct is still regulated by customary international law, informed by St. Augustine's moral framework and regulated by the principles of

⁶¹ Robert Kolb, *Origins of the Twin Terms Jus ad Bellum/Jus in Bello*, 320 INT'L R. RED CROSS, (Oct. 31, 1997), <https://www.icrc.org/eng/resources/documents/article/other/57jnuu.htm> [https://perma.cc/2ZVZ-3EDG].

⁶² Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT'L L. 47, 59 (2009).

⁶³ Letter from Secretary of State Daniel Webster to British Minister Fox, (Apr. 24, 1841), https://avalon.law.yale.edu/19th_century/br-1842d.asp [https://perma.cc/M6M9-K46K].

⁶⁴ See Bin Cheng, *Pre-emptive or Similar Type of Self-defense in the Territory of Foreign States*, 12 CHINESE J. INT'L L. 1, 4-5 (2003).

necessity⁶⁵ and proportionality⁶⁶ from the Webster doctrine. These principles in the aggregate comprise the *jus ad bellum* framework.

International humanitarian law, alternatively known as *jus in bello*, is one of the oldest branches of international law and comprises today's doctrine known as the law of war. Elements of an understanding that certain actions are impermissible in warfare are seen in ancient civilizations, among them the Chinese, Indians, and early Middle Eastern societies.⁶⁷ Hugo Grotius, *jus in bello*'s founding father, recognized that despite states' historic restraint, state practice had also sanctioned inhumane activities during the course of war; thus, Grotius began to codify these historic moral guidelines and wrote the first treaty on the principles and regulations of legal conduct in war in 1625. In his treatise, Grotius sought to "deprive those who wage war of nearly all the privileges" that current events had seemingly granted them, and evaluated critical assumptions about victims of war and humanitarian treatment.⁶⁸ During this process, he "drew a distinction between what was legally permissible and what was 'right,'" and compiled an extensive list of prohibitions, including the killing of women, children, prisoners of war, and noncombatants, as well as positive commandments for conduct in the battlefield, introducing what we know today as distinction and necessity in the use of force.⁶⁹ Aquinas similarly condemned states for what appeared to be a *de facto* license to slaughter civilians without repercussion, though his ethics did not amount to a formal *jus in bello* doctrine.⁷⁰

On this backdrop, the international community began to take affirmative steps towards protecting civilians and noncombatants in war: soldiers began wearing military uniforms so they could be

⁶⁵ Necessity is a limit on self-defense. Force can only be employed as a defensive technique to the extent that it can avert or end an attack, and no other non-forceful means are available to assuage the situation. See ELIZABETH WILMHURST, PRINCIPLES OF INTERNATIONAL LAW ON THE USE OF FORCE BY STATES IN SELF-DEFENCE, CHATHAM HOUSE 7 (Oct. 2005), <https://www.chathamhouse.org/publications/papers/view/108106> [<https://perma.cc/K62W-4ZU8>].

⁶⁶ Proportionality relates to the size, length, and objective of the attack. See GRAY, *supra* note 59, at 159.

⁶⁷ EMILY CRAWFORD & ALISON PERT, INTERNATIONAL HUMANITARIAN LAW (Cambridge University Press 2015).

⁶⁸ Steven Forde, *Hugo Grotius on Ethics and War*, 92 AM. POL. SCI. REV. 639, 645 (2014).

⁶⁹ CRAWFORD & PERT, *supra* 67, at 4.

⁷⁰ Sloane, *supra* note 62, at 58.

distinguished from non-soldiers; soldiers adapted the code of chivalry; strides were made in battlefield medical care; the Red Cross was founded.⁷¹ All of these developments led to the signing of the first Geneva Convention in 1864 to protect the wounded and sick in armed conflicts, and subsequent developments led to treaties regulating weapons in combat.⁷² World War II produced the acclaimed 1949 Geneva Conventions, a series of four treaties protecting the wounded and sick on land and at sea, prisoners of war, and civilians.⁷³

In an effort “to save succeeding generations from the scourge of war,”⁷⁴ in 1945 the international community also adopted Article 2(4) of the UN Charter, vowing to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”⁷⁵ Despite this prohibition, a state is still permitted to use force in two discreet incidents:⁷⁶ UN Security Council authorization⁷⁷ and individual or collective self-defense.⁷⁸ Article 51 of the UN Charter recognizes “the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations,”⁷⁹ a recognition which has been interpreted to support “the lawfulness

⁷¹ See generally 2 Encyclopedia of Human Rights, *History of Human Rights* (David P. Forsythe ed., 2009).

⁷² *Id.*

⁷³ Peter John Rowe, *Law of War*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/law-of-war#ref510811> [<https://perma.cc/9FAU-UZVU>] (last updated Sept. 26, 2018).

⁷⁴ U.N. Charter Preamble.

⁷⁵ U.N. Charter art. 2, ¶ 4.

⁷⁶ While R2P, or the responsibility to protect, is a doctrine utilized by international actors to warrant the use of force, this generally is for humanitarian purposes to prevent crimes against humanity, and is authorized by a General Council mandate and therefore distinct from UN Charter authorizations for the use of force. See *Use of Force and the Responsibility to Protect*, INT’L COALITION FOR RESP. TO PROTECT, <http://www.responsibilitytoprotect.org/index.php/component/content/article/42-learn-about-the-responsibility-to-protect/242-use-of-force-and-the-responsibility-to-protect> [<https://perma.cc/CDE7-37DU>].

⁷⁷ UN Charter art. 42–43.

⁷⁸ U.N. Charter art. 51.

⁷⁹ *Id.*

of unilateral action in self-defense"⁸⁰ so long as the limited engagements adhere to customary international law.⁸¹

Thus, though the law of armed conflict encompasses only the legal framework of *jus in bello*, it necessitates the preliminary *jus ad bellum* legal analysis. The distinctions between these two branches of law are critical. *Jus ad bellum* delineates whether the cause of war is just; *jus in bello* is a constraint on war's innate nature, regulating what military actions are permitted to transpire during an armed conflict.⁸² *Jus ad bellum* is preoccupied with the *cassus belli* of an armed conflict, a philosophy reflected in their principal of proportionality, which distinguishes whether the use of force is proportionate to the initial attack that permitted the responsive strike.⁸³ Conversely, proportionality in *jus in bello* evaluates whether the weapons chosen for the strike are permitted with regard to expected casualties from the attack.⁸⁴ Therefore, while *jus in bello* is exclusively concerned about human rights, *jus ad bellum* understands that when a state is attacked, they require the legal basis to act on its behalf. Additionally, *jus in bello's* determination that "*in bello* constraints apply equally to all parties to a conflict"⁸⁵ regardless of *how just* the war is, serves an added level of protection necessary for holding states and individuals accountable for their actions during war.

⁸⁰ W. Michael Reisman, *Assessing Claims to Revise the Law of War*, 97 AM. J. INT'L L. 82, 88 (2003).

⁸¹ The extent to which Article 51 sanctioned an "inherent right to self-defense" as protected by customary international law, as opposed to providing an *exception* to the Article 2(4) prohibition on the use of force is the subject of debate by different international players. However, for the most part, it is unanimously accepted that a right to self-defense does indeed exist, and that the customary international law rules of necessity, proportionality, and imminence govern the scope of the engagement of force for the purpose of self-defense. See GRAY, *supra* note 59, at 124.

⁸² Sloane, *supra* note 62, at 52.

⁸³ WILMHURST, *supra* note 65, at 54–55 (discussing *Jus as bellum* Proportionality, and how it relates to the size, length, and objective of the attack).

⁸⁴ Enzo Cannizzaro, *Contextualizing Proportionality: Jus Ad Bellum and Jus In Bello in the Lebanese War*, 88 INT'L REV. RED CROSS 779, 785–91 (2006).

⁸⁵ Sloane, *supra* note 62, at 52.

B. International Human Rights Law and International Humanitarian Law

International Human Rights Law, compared to International Humanitarian Law, is a perpetual regulation of state behavior. Recognizing that there are certain rights and freedoms that every state owes to their citizens, IHRL is a commitment codified through treaty, custom, and general principles of international law. Unlike IHL, which has its roots in ancient history and crystalized over centuries of debate and progress, IHRL is a more modern phenomenon: this regulatory system matured on the coattails of the mass atrocities committed during World War II. While IHL dictates the treatment of soldiers during a conflict and protects civilians from war's savagery, IHRL does not distinguish between civilian and combatant, nor does it provide for "protected people." Further, because IHRL only governs either a state's relationship with a person on their territory or a person subject to their jurisdiction, it does not create norms or obligations for a state's relationship with a second state. IHL, conversely, is binding on any state that is party to an armed conflict. Where IHL therefore is inextricably linked to international relations, IHRL is an internal state affair.⁸⁶

Though there is clear overlap in human rights and humanitarian law, these overlays are not redundant. For example, both bodies of law contain provisions providing for a prisoner's humane detention, treatment in prison, and fair trial, but these similarities diverge in critical respects. In IHL, captivity is not prohibited based on reasonable suspicion of a threat, and judicial review of internment is not required; however the International Covenant on Civil and Political Rights, a bedrock treaty of international human rights law, guarantees every person the right to their liberty, and holds "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."⁸⁷ IHRL therefore ensures that a state can only infringe on a person's freedom when a crime has been committed, and avows to every person that even

⁸⁶ Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 *ISR. L. REV.* 310, 313 (2007).

⁸⁷ International Covenant on Civil and Political Rights art. 9.4, Mar. 23, 1976, 999 U.N.T.S. 171.

during these transgressions they are still guaranteed access to a court of law. On the contrary, IHL allows states to trade on liberty for the sake of security.

Though the Security Council definitively held “essential and inalienable human rights should be respected even during the vicissitudes of war,”⁸⁸ IHL not only governs interstate behaviors where IHRL is not applicable, it also legally gives states the necessary latitude to protect their state interests through distinguishing between civilians and combatants, and sanctioning proportionate attacks against military targets, among other necessary military actions. Because an overlap in law is clarified under the principle of *lex specialis*,⁸⁹ IHL reigns supreme during times of armed conflict—human rights law, after all, “was meant for peace, since peace was what the United Nations sought to achieve.”⁹⁰ However, before we ascertain what qualifies as an armed conflict under international law, we must first distinguish the elements of IHL that make it such a critical component of international law.

i. Rules of IHL

International Humanitarian Law seeks to regulate state behavior during periods of armed conflict—international armed conflict and often in non-international armed conflict, which will be defined and analyzed in the subsequent Section—and to reduce armed conflict’s humanitarian effects. Through the doctrines of military necessity, military distinction, and the principle of proportionality, IHL protects those individuals who are not formally involved in hostilities from violence and restricts violence to acts that are necessary to achieve the military objective.

Since the 19th century, the international community has presumed the deployment of armed forces during war.⁹¹ Though

⁸⁸ G.A. Res. 237, preamble (June 14, 1967); see also G.A. Res. 2252 (ES-V) (July 4, 1967), which refers to this resolution.

⁸⁹ The more specific legal rule applies.

⁹⁰ Berman, *supra* note 28, at 314.

⁹¹ The deployment of armed forces during war was enshrined in 1868 in the preamble to the St. Petersburg Declaration, which stated how the only legitimate target of war is to weaken the enemy’s military. See *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, INT’L COMMITTEE

this assumption has been tested with increasing regularity since 1991,⁹² it is the basis for the doctrine of military necessity. Article 54(5) of Additional Protocol I to the Geneva Conventions defines the modern construct of military necessity, explaining:

In recognition of the vital requirements of any Party to the conflict in the defense of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 [to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population] may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.⁹³

This pillar of IHL has since been codified by countless state military manuals, including Israel,⁹⁴ and has thus been accepted as customary international law.⁹⁵ It is therefore legally applicable during any armed conflict, even for states that are not signatories of Additional Protocol I.

The principle of military distinction is recorded in Additional Protocol I, Article 48 of the Geneva Convention, and it requires states to differentiate between combatants and civilians when carrying out military operations during an armed conflict. It protects civilians and non-military property from being the subject of a foreign military invasion by informing states that military personnel and property are the only legitimate targets during an

RED CROSS (Nov. 29 - Dec. 12, 1868), <https://ihl-databases.icrc.org/ihl/full/declaration1868> [<https://perma.cc/FZR7-QP8Q>].

⁹² The First Persian Gulf War in 1991 was the last traditional war. Short and decisive, it was fought between the armies of different states, on battle grounds – not by special operatives in cities. See Richard N. Haass, *Desert Storm, the Last Classic War*, WALL STREET J. (updated July 31, 2015), <https://www.wsj.com/articles/desert-storm-the-last-classic-war-1438354990> [<https://perma.cc/VV3S-L3YB>].

⁹³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) art. 54(5), June 8, 1977, 1125 U.N.T.S. 3.

⁹⁴ IDF SCH. OF MILITARY LAW, ISR., RULES OF WARFARE ON THE BATTLEFIELD 25 (2d. Ed. 2006).

⁹⁵ See Statute of the International Court of Justice, art. 38(1)(b), Apr. 18, 1946 (proving that customary international law is defined as “a general practice accepted as law”, and it is discerned out of widespread state practice as it evolves over time, and opinion juris, which demonstrates that state behavior is derived from a sense of obligation to act in that manner.).

armed conflict.⁹⁶ Like necessity, distinction too has been accepted as customary international law. And though Israel is not a signatory to Additional Protocol I and II, in the 1969 *Kassem case* Israel's Military Court at Ramallah underscored how a civilian's imperviousness from direct military attacks is one of IHL's most fundamental rules.⁹⁷

Proportionality, like distinction, was codified to protect non-combatants during military engagements. It is recorded in multiple treaties,⁹⁸ but it was Additional Protocol I, Article 51(5)(b) of the 1977 Additional Protocols that set the standard for the legal basis of proportionality, holding that a state must abstain from an attack against a lawful military objective if the expected civilian harm is excessive in comparison to the anticipated military benefit of the operation.⁹⁹

When the ICRC appealed to the parties to the 1973 Yom Kippur War in the Middle East to respect the principle of proportionality in attack, the states involved in the hostilities (Egypt, Iraq, Israel and Syrian Arab Republic) acquiesced.¹⁰⁰ Furthermore, as with necessity

⁹⁶ Protocols Additional to the Geneva Convention I art. 48, Jun. 8, 1977, 1125 U.N.T.S. 3.

⁹⁷ See *International Law Reports* 470-83 (Lauterpacht, E. ed., Grotius Publications Limited, vol. 42, 1971); see also IDF Sch. Of Military Law, *supra* note 94, at 25.

⁹⁸ See, e.g., Protocols Additional to the Geneva Convention I, Jun. 8, 1977, 1125 U.N.T.S. 3; see also Draft of Additional Protocol II; Protocol II to the Convention on Certain Conventional Weapons, Oct. 10, 1980, 1342 U.N.T.S. 137; Amended Protocol II to the Convention on Certain Conventional Weapons, May 3, 1996, 2048 U.N.T.S. 93; Rome Statute of the Int'l Criminal Court, Jul. 17, 1998, 2187 U.N.T.S. No. 38544; *General Orders No. 100 : The Lieber Code*, YALE L. SCH. LILLIAN GOLDMAN L. LIBR. (2008), https://avalon.law.yale.edu/19th_century/lieber.asp [<https://perma.cc/9MFT-7SFY>]; see also *Yugoslavia/Croatia, Memorandum of Understanding of November 27, 1991*, INT'L COMMITTEE RED CROSS, <https://casebook.icrc.org/case-study/former-yugoslavia-special-agreements-between-parties-conflicts> [<https://perma.cc/DW6J-J2P8>]; *Bosnia and Herzegovina, Agreement No. 1 of May 22, 1992*, INT'L COMMITTEE RED CROSS, <https://casebook.icrc.org/case-study/former-yugoslavia-special-agreements-between-parties-conflicts> [<https://perma.cc/DW6J-J2P8>]; SAN REMO MANUAL ONE INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Louise Doswald Beck ed., 1995); see also *Draft Code of Crimes against the Peace and Security of Mankind*, 2 Y.B. INT'L L. COMMISSION, U.N. Doc. A/CN.4/L.532 (1996); United Nations Transitional Administration in East Timor Reg. 2000/15 (June 6, 2000), <https://www.legal-tools.org/doc/c082f8/pdf/> [<https://perma.cc/FN8R-G7P4>].

⁹⁹ Protocols Additional to the Geneva Convention I art. 51(5)(b), Jun. 8, 1977, 1125 U.N.T.S. 3.

¹⁰⁰ See *Rule 14. Proportionality in Attack*, INT'L COMMITTEE RED CROSS, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14 [<https://perma.cc/LAW7-MFMV>] ("When the ICRC appealed to the parties to the

and distinction, Israel codified the principle of proportionality in their military manual, despite the fact that they are not party to Additional Protocol I or II.¹⁰¹

The rules of necessity, distinction, and proportionality form the foundation for International Humanitarian Law. IHL was constructed with the understanding that wars form exceptional circumstances that necessitate the existence of a body of laws to govern situations where morality has traditionally been suspended. By governing who and what can be targeted in a military operation, and what the justification for an operation can be, these laws give states the latitude to achieve their legitimate military objective and to respond to threats and attacks with the appropriate force, while simultaneously giving the international legal community the pretense to monitor a war, the grounds to interfere when the law is violated during a war, the responsibility and authority to bring justice to those who were wronged in a war, and to hold abusers accountable for their actions at the completion of a war. For these reasons, international law must be permitted to govern armed conflicts that do not cross the threshold of the traditional definitions of either international or non-international armed conflict.

ii. *Defining International Armed Conflicts and Non-International Armed Conflicts*

Jus in bello is applicable to two specific modes of conflict: “international armed conflict” and “non-international armed conflict”.¹⁰² However, despite official legal recognition that these are the two types of conflicts qualifying as war, the documents that comprise IHL neglect to provide a formal definition for either IACs or NIACs.

conflict in the Middle East in October 1973, i.e., before the adoption of Additional Protocol I, to respect the principle of proportionality in attack, the States concerned (Egypt, Iraq, Israel and Syrian Arab Republic) replied favourably.”)

¹⁰¹ See *Treaties, States Parties and Commentaries: Israel*, INT’L COMMITTEE RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=IL [https://perma.cc/4WRU-FRE6] (last visited May 28, 2018).

¹⁰² *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, INT’L COMMITTEE RED CROSS (Mar. 17, 2008), <https://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm> [https://perma.cc/5XR9-B4NK].

a. International armed conflict

Seeking to limit war's perverse effect, IHL, through the incorporation of the Geneva Conventions and its Additional Protocols, protects an expansive scope of people and objects. Two Common Articles to the four 1949 Geneva Conventions make these principles legally relevant to armed conflicts. Common Article 2 (Art. 2), which will be discussed below, applies the Geneva Conventions to all armed conflicts between two or more contracting parties, whether the conflict is formally recognized as war or not. Common Article 3 (Art. 3), which will be discussed in greater detail later, applies some of these norms to non-international armed conflicts.

The stories animating ancient and modern history prove how International Armed Conflicts, known colloquially as IACs, are the most traditional form of war in international affairs. Defined by Geneva Convention (IV) Common Article 2, an IAC is a "declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."¹⁰³ Commentary to the Geneva Convention of 1949 further affirms that:

Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.¹⁰⁴

Therefore, according to the most traditional framework, though duration, casualties, or state acceptance do not impact a conflict's legal categorization, for hostility to meet the underlining qualifications of an international armed conflict it must minimally be between two states. This definition is problematic for a multitude of reasons. Chief among them is that today's security problems do

¹⁰³ Treaties, States Parties, and Commentaries: Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Art. 2, Aug. 12 1949, <https://ihl-databases.icrc.org/ihl/385ec082b509e76c41256739003e636d/6756482d86146898c125641e004aa3c5> [<https://perma.cc/57TR-3KJ3>].

¹⁰⁴ Treaties, States Parties, and Commentaries: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, Commentary 1952, Para. 1, <https://ihl-databases.icrc.org/ihl/COM/365-570005?OpenDocument> [<https://perma.cc/YV45-CXH4>].

not necessarily transpire between two states – international events are plagued by the proliferation of gray-zone conflicts, which most frequently employ non-state actors as belligerents. As discussed, Iran, for example, routinely uses Hezbollah as an agent against Israel.

Commentary to the Geneva Convention also employs particular diction: it presupposes the “intervention of armed forces” in an armed conflict, distinctly using this term instead of ‘armies’ or ‘state militaries’.¹⁰⁵ The 2016 ICRC Art. 2 commentary resolves this ambiguity, confirming that “armed conflict presumes 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,” and further explains how deploying coast guards or security forces to a border region can constitute intervention by armed forces.¹⁰⁶ Thus, armed forces are implicitly a state organ and, understood in conjunction with Art. 2, their deployment is limited to the enemy state or border regions on the conflict’s margins.

Yet conflicts today often arise between two parties with battles transpiring in a third state, thus negating this definition’s utility. Consider our case study: though Israel may deploy security forces to the Golan Heights—the Israeli-Syrian border region—as a defense against Iran’s growing presence in Syria, this situation would evade Art. 2’s authority; because the rule qualifies an armed conflict as one state against a second with troop deployment to one of the borders of these two states, this definition contemplates these armed forces’ station in a framework where Syria, not Iran, would be Israel’s enemy state. Furthermore, cyber-battles or economic warfare, where the enemy forces are deployed to labs and armed with computer code, circumvent this legal definition as well because they are not even classified as combatants. Moreover, this commentary still bypasses the question of proxy wars: when Israel is fighting Hezbollah on behalf of Iran, who is Israel in an armed conflict against?

¹⁰⁵ *Id.*

¹⁰⁶ Treaties, States Parties, and Commentaries: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Art. 2, Aug. 12, 1949, Commentary of 2016, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518> [https://perma.cc/69L9-N6RE].

In *The Prosecutor v. Tadic*, a case arising out of the conflict in the former Yugoslavia and heard before the International Criminal Tribunal on the Former Yugoslavia, the Court concluded that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.¹⁰⁷

While an armed conflict involves two states engaged in military activity, *Tadic* also augments the definition by setting a precedent to include protracted armed conflict between a government and an organized group, or between two organized groups¹⁰⁸. Though this final piece of jurisprudence expands the definition of armed group, including groups that are not states, it still leaves enough ambiguity to question whether certain conflicts qualify as an armed conflict. Gray-zone conflicts encompass a multitude of strategies. Though they include armed resistance, they also employ targeted killings, maneuvers that undermine foreign states’ governments such as misinformation campaigns, and economic extortion as military techniques¹⁰⁹. Though *Tadic* recognizes that an armed conflict can transpire between groups other than two states, under *Tadic* war is still legally defined exclusively in terms of kinetic warfare¹¹⁰ and therefore is not broad enough to qualify gray-zone conflict as an internationally recognized war.

b. Non-international armed conflict

Common Article 3 to the 1949 Geneva Conventions was adopted at the behest of the Red Cross.¹¹¹ It applied the Conventions’

¹⁰⁷ *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Tr. for the Former Yugoslavia, (Oct. 2, 1995), https://www.mpil.de/files/pdf1/vrstraf0910_090911.pdf [https://perma.cc/Z3WE-WV9X].

¹⁰⁸ *Id.*

¹⁰⁹ *Competing in the Gray Zone: Countering Competition in the Space between War and Peace*, CTR. FOR STRATEGIC & INT’L STUD. <https://www.csis.org/features/competing-gray-zone> [https://perma.cc/DVP2-5VW2].

¹¹⁰ See generally *Tadić*, IT-94-1-AR72.

¹¹¹ Parties had a number of concerns about applying a convention of this nature to internal disputes, principally because of its implication on a state’s sovereignty. See Crawford, *supra* at 67.

underlining principles to internal armed conflicts, establishing a minimum threshold of care for wounded warriors and civilians, and protects noncombatants from the wrath of armed conflicts¹¹² “in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties”.¹¹³ Art. 3 set the precedent for applying IHL to conflicts where there are at least two parties to the conflict but where minimally one party is not a State.¹¹⁴ Art. 3 does not formally define what constitutes an internal armed conflict, though the International Committee of the Red Cross explains that “traditional civil wars, internal armed conflicts that spill over into other States, or internal conflicts which third States or multinational force intervenes” are qualifying situations.¹¹⁵ Art. 3 further establishes a belligerence threshold for internal unrest to qualify as a NIAC, which requires hostility to exceed “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature.”¹¹⁶ From this, it has been determined that the threshold of hostility for the identification of armed conflict is a civil war.¹¹⁷ The regulation was motivated by the notion that a state’s domestic law would govern internal conflicts that don’t meet this margin.¹¹⁸

The mid-twentieth century saw an exponential surge in the number of domestic armed conflicts. Outraged at the development of the “new norm”, states, though with a level of trepidation, agreed to a new set of principles to govern internal armed conflicts. Amid debate and a plethora of diverging opinions, state parties reached a

¹¹² See Crawford, *supra* note 67.

¹¹³ Article 3, *Geneva Convention Relative to the Treatment of Prisoners of War* (“Geneva III”), Aug. 12, 1949, 6 U.S.T. 3316, <https://ihl-databases.icrc.org/ihl/WebART/375-590006> [<https://perma.cc/CU5E-YBNA>].

¹¹⁴ ICRC, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, INT’L COMMITTEE RED CROSS, Opinion Paper, 3 (Mar. 2008), <https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf> [<https://perma.cc/93QQ-7YPY>].

¹¹⁵ *The Geneva Conventions of 1949 and their Additional Protocols*, INT’L COMMITTEE RED CROSS (Oct. 29, 2010), <https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm> [<https://perma.cc/ZG4L-S7X6>].

¹¹⁶ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, INT’L COMMITTEE RED CROSS (June 8, 1977).

¹¹⁷ ANTHONY CULLEN, *THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW* 14 (2010).

¹¹⁸ Ian Whitelaw, *Internationalization of Non-International Armed Conflict*, 1 PERTH INT’L L.J. 30, 32 (2016).

compromise and adopted Additional Protocol II with its twenty-eight provisions in 1977,¹¹⁹ setting out new rules and regulations for the emerging legal vacuum of non-international armed conflicts. Additional Protocol II (APII) to the Geneva Convention, supplementing Common Article 3, was drafted to:

Apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.¹²⁰

APII imposes an even more restrictive definition for an NIAC than Art.3. While Art. 3 applies to all situations of armed conflict, both when APII is applicable and when it is not, the inverse is not true: APII has a decidedly narrow margin of application. It is only germane when there is a conflict between a government and internal belligerent forces,¹²¹ thus while a civil war between a government and a rogue actor qualifies, a domestic war between two rogue actors would be excluded from APII's jurisdiction. Furthermore, like Art.3, the conflict must reach a minimum threshold of intensity for the Protocol to apply,¹²² which precludes more isolated acts of

¹¹⁹ United States: Message From the President Transmitting Protocol II Additional to the 1949 Geneva Conventions, Relating to the Protection of Victims of Noninternational Armed Conflicts (1987), https://www.loc.gov/rr/frd/Military_Law/pdf/protocol-II-100-2.pdf [https://perma.cc/UWU4-68RN].

¹²⁰ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, INT'L COMMITTEE RED CROSS (June 8, 1977), <https://ihl-databases.icrc.org/ihl/WebART/475-760004?OpenDocument> [https://perma.cc/E5UQ-J3J7].

¹²¹ See ICRC, *supra* note 115, at 3.

¹²² The issue of a threshold of intensity was also crystalized in the *Nicaragua* case. Using the 1974 General Assembly Definition of Aggression, the ICJ explained that "the sending by a State of armed bands to the territory of another State" can only amount to an Article 51 armed attack if "such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces." See *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14 ¶ 195 (June 27, 1986).

aggression from benefitting from these added safeguards. Moreover, the clause “exercise such control over a part of its territory” prevents the protocol’s application to contemporary armed conflicts between state and nonstate actors despite the fact that they may still meet the aforementioned standards.¹²³

Non-International Armed Conflicts, as a consequence of its more ambiguous legal regime and heavy restrictions, offers a lower level of protection to both the victims and participants of armed conflict. It dictates that “the application of the rules of humanity which are recognised as essential by civilized nations”¹²⁴ must be upheld, but deprives combatants and prisoners of war of the protections afforded to military participants under International Humanitarian Law.¹²⁵

c. Armed conflicts, in general

The *Tadic* case before the ICTY emphasized the two criteria necessary for a clash to qualify as an armed conflict, both for an NIAC and an IAC: 1) the conflict must be protracted, and 2) the armed group must be “organized and hierarchically structured”.¹²⁶ This is particularly important to NIACs, because, by design, an NIAC does not involve two militaries in combat with each other, both of which would inherently be “organized and hierarchically structured.” The court in *Delalic*, a second case emerging out of the ICTY, further elaborated that “in order to distinguish from cases of civil unrest or terrorist activities, the emphasis is on the protracted extent of the armed violence and the extent of organization of the parties involved.”¹²⁷

¹²³ Crawford, *supra* note 67.

¹²⁴ *Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, ICRC Commentary of 1958 to Article 3, Conflicts Not of an International Character*, INT’L COMMITTEE RED CROSS, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE12C9954AC2AEC2C12563CD0042A25C> [https://perma.cc/G9HN-SHJ7].

¹²⁵ See Ruth Lapidot, Yuval Shany, & Ido Rosenzweig, *Israel and the Two Protocols Additional to the Geneva Convention*, 92 ISR. DEM. INSTITUTE (2011).

¹²⁶ *Tadić*, IT-94-1-AR72 at ¶ 120.

¹²⁷ *Prosecutor v Delalic*, IT-96-21-T, Judgment, ¶ 184 (Int’l Crim. Trib. for the former Yugoslavia Nov. 16, 1998), https://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf [https://perma.cc/8EPN-KMAZ].

In discerning what meets the requisite organizational and hierarchical criteria, international jurisprudence generally evaluates whether an armed group has a command structure, operational capacity, the ability to procure and transfer arms, whether there is an internal disciplinary system, level of logistics, and the group's ability to speak with a single voice.¹²⁸ In this respect, IHL works to "assimilate non-state actors to states",¹²⁹ instead of recognizing that often non-state actors are proxy groups, acting as an agent at a state's behest.¹³⁰

And yet, attributing a proxy group's actions to a state in an effort to establish the existence of an armed conflict waged by a non-state actor is similarly problematic because of the high bar international law expects to prove attribution. In *Nicaragua v. US*, while evaluating the question of what constitutes an illegal use of force,¹³¹ the ICJ established the threshold principle for attributing the actions of a nonstate organization to a state's government. In concluding "there is no clear evidence of the United States having actually exercised . . . control . . . as to justify treating the *contras* as acting on its behalf,"¹³² the ICJ established that a country providing monetary aid and arms to a nonstate actor is not enough assistance to attribute the non-state actor's actions to the state. Further the ICJ held that to qualify for attribution, the non-state actor's attack must have transpired "because of the scale and effect"¹³³ of the state's assistance. With these holdings the ICJ set a high bar for attribution, creating an acute challenge in the legal quest to

¹²⁸ Prosecutor v Boskowski, IT-04-82-T, Judgment, ¶ 194-204 (Int'l Crim. Trib. for the former Yugoslavia July 10, 2008), https://www.icty.org/x/cases/boskoski_tarculovski/tjug/en/080710.pdf [https://perma.cc/T4PS-TK3D].

¹²⁹ Nicolas Lamp, *Conceptions of War and Paradigms of Compliance: The 'New War' Challenge to International Humanitarian Law*, 16 J. CONFLICT & SECURITY L. 225, 231 (2011).

¹³⁰ *Id.*

¹³¹ The *Contras* were a paramilitary group opposing the Sandinista government. In 1981, based in a variety of neighboring states and funded by the US, they launched a guerrilla campaign against the government in Nicaragua. In this case, Nicaragua argued that by aiding and abetting the *Contras*, the U.S. illegally used force against their government and illegally intervened in internal government affairs. See *Nicar. v. U.S.*, 1986 I.C.J. 14.

¹³² *Id.* at ¶ 109.

¹³³ *Id.* at ¶ 195.

attribute the actions of a non-state actor or proxy group to a state government.¹³⁴

The *Tadic* case similarly tackled the question of government control over a non-state actor. To establish this relationship, the Court in *Tadic* embraced the definition of “overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations.”¹³⁵ In this case, the Court was dissecting whether the actions of Tadic could be attributed to the state – if they were, this conflict would constitute an international armed conflict, thereby qualifying the application of IHL’s more expansive legal framework. The principle enumerated in this case, however, is not applicable in the evaluation of state responsibility: the ICTY, as delineated in the ICTY case regarding the question of genocide and the Srebrenica, ruled that the *Tadic* “overall control” test is applicable in the determination of whether there is an international armed conflict, not whether a government is responsible for the group’s behavior.¹³⁶

In an effort to amalgamate these tests and define the legal code for state responsibility and attribution, specifically with regards to when rogue and nonstate actors, or other states, act on a state’s territory, the International Law Commission (ILC) adopted the *Draft Articles for the Responsibility of States for Internationally Wrongful Acts* in 2001. The articles reflect a movement towards holding states responsible for ancillary actions that constitute legal transgressions, creating liability for states when non-state actors act under the direction or instruction of the state;¹³⁷ when non-state actors

¹³⁴ *Jus ad bellum* under this framework could only be violated by nonstate actors if the host state exercised effective control over the nonstate actor; the state exercising self-defense therefore must engage in fact-intensive investigation to prove substantial, tangible involvement of the host state in the attack launched by the terrorist organization. This reading limits self-defense against a terrorist group to intra-state conflict, which encouraged the developing framework of classifying terror attacks as domestic criminal actions instead of international security concerns. This skeleton, Tams argues, “made self-defence effectively unavailable as a justification for forcible anti-terrorist measures.” See Christian Tams, *The Use of force Against Terrorists*, 20 EUR. J. INT’L L. 359, 368 (2009).

¹³⁵ *Tadić*, IT-94-1-AR72 at ¶ 145.

¹³⁶ Prosecutor v. Tadić, No. IT-94-1-A, Judgment, ¶ 120 (Int’l Crim. Trib. For the Former Yugoslavia Jul. 15, 1999), <https://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf> [<https://perma.cc/3Z7H-2YL2>].

¹³⁷ *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, [2001] 2 Y.B. INT’L L. COMMISSION 31, art. 8.

demonstrate “elements of governmental authority” in their transgression;¹³⁸ for actions by non-state actors when their “conduct [is] acknowledged and adopted by a state”;¹³⁹ and for acts of omission.¹⁴⁰

While these new draft articles account for state responsibility on their territory, they did not develop language for expanding or clarifying armed conflicts. As discussed, the treaties and protocols defining armed conflicts intentionally use vague terms, and in elaborating on what constitutes an IAC and NIAC, organizations and judges have relied heavily on former jurisprudence, *travaux préparatoires*,¹⁴¹ and customary international law. What is discernable in this legal “no-mans-land” is that an IAC transpires between the governments of two or more states; an NIAC is fought between a government and a dissident group or two or more dissident groups within the borders of a single state; and more generally, for an armed-conflict to transpire, the armed groups must be organized with a hierarchical structure and the conflict must be protracted.

The international community’s strict adherence to a legal construct informed by European military history has been handicapping the regime of peace, security, and justice. The issue of the 2014 Gaza War has been lingering in the Office of the Prosecutor at the ICC as she weighs whether this war should be governed as an IAC or NIAC.¹⁴² This determination, though instrumental because certain humanitarian crimes are only illegal during IACs,¹⁴³ is misconceived. Iran has been providing Hamas’ with economic and military support for years,¹⁴⁴ and should thereby

¹³⁸ *Id.* at art. 6.

¹³⁹ *Id.* at art. 11.

¹⁴⁰ *Id.* at art. 2.

¹⁴¹ “The Travaux Préparatoires are official documents recording the negotiations, drafting, and discussions during the process of creating a treaty. These documents may be consulted and taken into consideration when interpreting treaties”, *Collected Travaux Préparatoires*, YALE L. SCH. LILLIAN GOLDMAN L. LIBR., <https://library.law.yale.edu/collected-travaux-preparatoire> [https://perma.cc/27ZK-M94Y] (last visited May 02, 2019).

¹⁴² THE OFFICE OF THE PROSECUTOR, *Report on Preliminary Examination Activities 2017*, INT’L CRIM. CT. (Dec. 4, 2017), https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf [https://perma.cc/E99S-NXQK].

¹⁴³ *Id.*

¹⁴⁴ Toi Staff, *In Jerusalem, Trump Envoy on Iran Says US to Target Funding for Hezbollah, Hamas*, TIMES ISRAEL (Nov. 15, 2018), <https://www.timesofisrael.com/trump-envoy-for-iran-says-us-to-target-funding-for-hezbollah-hamas/> [https://perma.cc/S5TJ-8UK]; Yonah Jeremy Bob, *Hamas*

legally qualify as the aggressor in conflict. However, state actions that transpire in the gray-zone such as Iran's relations with Hamas still elude this framework.

IACs and NIACs do not abound today. Rarely does one state's army engage in formal hostilities with a second. And outside the scope of civil wars and domestic unrest, today's headlines do not broadcast stories of NIACs either. For these reasons, the scope and reach of the definition of an armed conflict must be expanded, as must the accompanying pillars of IHL.

III. TODAY'S WARS

In 1928, brandishing a pen adorned with the inscription "*If you want peace, prepare for peace*"—a *jeu de mots* to the Roman adage "*if you want peace, prepare for war*"¹⁴⁵—fifteen States signed the Kellogg-Briand Pact¹⁴⁶ and declared war illegal.¹⁴⁷ It is ironic to outlaw something that inherently is a legal aberration, yet in 1928 the Kellogg-Briand Pact was acclaimed as a monumental achievement in the realm of international peace keeping. But then World War II broke out and the Kellogg-Briand Pact—only nine years after its conception—proved to be a hollow, historic relic of more sanguine times.

In the wake of WWII's atrocities, States, facilitated by the International Committee of the Red Cross, or ICRC, modernized the law of war, imbuing *jus in bello* with the power of the aforementioned Geneva Conventions and their accompanying

and Iran are Closest They've Been Since Syrian War, Senior Officials Say, JERUSALEM POST (Mar. 28, 2018), <https://www.jpost.com/Middle-East/Hamas-and-Iran-closest-theyve-been-since-Syrian-war-senior-official-says-547353> [<https://perma.cc/j8GG-M32V>].

¹⁴⁵ OFFICE OF THE HISTORIAN, *The Kellogg-Briand Pact, 1928*, U.S. DEP'T ST., <https://history.state.gov/milestones/1921-1936/kellogg> [<https://perma.cc/QMV6-T3QP>] (last visited Nov. 17, 2018).

¹⁴⁶ Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy, July 24, 1929, http://avalon.law.yale.edu/20th_century/kbpact.asp#art1 [<https://perma.cc/L5X4-4PUS>] ("The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.").

¹⁴⁷ David A. Kaplow, *A Nuclear Kellogg-Briand Pact: Proposing a Treaty for the Renunciation of Nuclear War as an Instrument of National Policy*, 42 SYRACUSE J. INT'L L. & COM. 123, 131 (2014).

Additional Protocols. That same year, the world's nations attended the San Francisco Conference. "Designed to end war and promote peace," fifty-one original signatures adorned the United Nations Charter. As the sun set on this final ceremony, President Truman made the celebrated proclamation:

The Charter of the United Nations which you have just signed . . . is a solid structure upon which we can build a better world. History will honor you for it. Between the victory in Europe and the final victory, in this most destructive of all wars, you have won a victory against war itself . . .¹⁴⁸

The UN Charter was designed with a clear political objective: to relegate war to the annals of history, and to guarantee the world a more peaceful future. Article 2(4)'s prohibition on the use of force was sealed as the backbone of international order,¹⁴⁹ and the *jus ad bellum* framework, which, as discussed, permits the use of force for individual or collective self-defense¹⁵⁰ or with security-council authorization,¹⁵¹ was generated. Since 1945, the argument has even been made that the prohibition of the use of force has evolved into a *jus cogens* principle, a norm that no state can derogate from, with the exception of Art. 51 and Art. 42–43.¹⁵²

Law may have judged war morally reprehensible in 1928, but in the aftermath of World War II law has also normalized these acts of violence through the UN Charter, tentatively sanctioning armed conflicts with a regulatory system that hovers between protecting human rights and endorsing military engagements. International armed conflicts were governed by this paradoxical system throughout the Cold War years and the *End of History*,¹⁵³ and under

¹⁴⁸ 1945: *The San Francisco Conference*, U.N., <https://www.un.org/en/sections/history-united-nations-charter/1945-san-francisco-conference/> [<https://perma.cc/RDZ3-98QZ>].

¹⁴⁹ Kofi Anan is reported to have said in the aftermath of the 9/11 terror attacks, "No principle of the Charter is more important than the principle of the non-use of force as embodied in Article 2, paragraph 4." Michael Wood, *International Law and the Use of Force: What Happens in Practice?* 53 INDIAN J. INT'L L. 345, 345 (2013), http://legal.un.org/avl/pdf/ls/Wood_article.pdf [<https://perma.cc/9BZJ-PHZE>].

¹⁵⁰ U.N. Charter, *supra* note 69, art. 51.

¹⁵¹ U.N. Charter, *supra* note 68, art. 42–43.

¹⁵² Sondre Torp Helmersen, *The Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations*, 61 NETHERLANDS INT'L L. REV. 167 (2014).

¹⁵³ Francis Fukuyama gave a talk in Chicago in February 1989 that was published as a piece entitled "The End of History?". It was a reference to the end

its watchful eyes the Vietnam War broke out, Algeria battled France for independence, the Rwandan genocide transpired, and the Albanians in Kosovo struggled against the yoke of Serbian oppression.¹⁵⁴

As discussed, it was through Kosovo and its accompanying Baltic wars during the dissolution of Yugoslavia that international law recognized that international armed conflicts are no longer the norm. The twenty-first century however has diverged even more from the former traditional framework that encouraged the UN to forbid one nation from invading a second. Today's headlines are dominated by events such as Russia annexing the Crimea, China slowly swallowing the South China Sea, or the will-they/won't-they dance between Iran and Israel.

What we've seen today is the supersession of gray-zone conflict as the conventional mode of war, with a world order governed by new regimes of combat where hostilities may transpire, but not between the armed forces of two enemy states. Today's wars use a fusion of military tactics, only one of which is conventional arms. In the following pages, through a discussion of the available literature from scholars, military personnel, and US and European defense documents on this conflict, I present a definition of gray-zone conflict, explain how and why it has emerged as the new conventional form of war, and prove how the current definition of war has aided in gray-zone conflicts emerging ubiquity.

of the Cold War, and an emergence of a period of time where foreign policy experts and international relations theorists believed liberal ideology triumphed over its antithetical alternatives. Francis Fukuyama, *The End of History?*, THE NATIONAL INTEREST, No. 16 (Summer 1989), at 3.

¹⁵⁴ Some of these wars were International Armed Conflicts; others were Non-International Armed Conflicts and included nonstate actors struggling against governments. However, though these were all departures from more traditional wars, they still included typical, protracted battles with more conventional strategies. These wars were a bridge in the evolution of warfare, proving that NIACs must be incorporated into the IHL framework, and also proving that the paradox – use of force is illegal, but once fire is exchanged there are new rules states must follow to continue to exchange fire legally – still has gaping holes.

A. *What is a Gray Zone Conflict?*

Gray-zone conflict is an enigma. “Alternately termed non-linear war, or . . . hybrid war,”¹⁵⁵ gray-zone conflicts are conceptualized as multi-faceted clashes taking place “within the war and peace duality.”¹⁵⁶ They are not yet at the level of a hot war, but they represent greater conflict than normal interstate competition.

US Special Operations Command explains how “Gray Zone challenges . . . are characterized by ambiguity about the nature of the conflict, opacity of the parties involved, or uncertainty about the relevant policy and legal frameworks.”¹⁵⁷ It is a mode of conflict used by foreign powers because the activities are intentionally deniable as forms of aggression.¹⁵⁸ If the scale of conflict is visualized as a map with diplomatic interstate competition on the far left and a fire-and-fury doomsday on the far right, gray-zone conflicts reside left of center.¹⁵⁹

Gray-zone conflict is able to remain below the threshold of traditional war because it is a patchwork of different tactics, consisting of cyber-attacks, terrorism and insurgency campaigns, disinformation campaigns, economic coercion, covert targeted killings, creeping military expansionism, and other military maneuvers performed in the shadows. Utilizing these tactics as a vehicle to achieve a political end is not a new phenomenon. Economic warfare dates back to Antiquity. Every spring, the

¹⁵⁵ Douglass Cantwell, *Hybrid Warfare: Aggression and Coercion in the Gray Zone*, 21 AM. SOC'Y INT'L L. (Nov. 29, 2017), <https://www.asil.org/insights/volume/21/issue/14/hybrid-warfare-aggression-and-coercion-gray-zone> [https://perma.cc/2JJZ-WGN9].

¹⁵⁶ *Gray Zone Challenges: Between the War and Peace Duality*, MIL. LEGITIMACY REV. (Oct. 18, 2016), <http://militarylegitimacyreview.com/?p=1715> [https://perma.cc/EC4D-NBMN].

¹⁵⁷ U.S. SPECIAL OPERATIONS COMMAND, *The Gray Zone 1* (Sept. 9, 2015), <https://info.publicintelligence.net/USSOCOM-GrayZones.pdf> [https://perma.cc/B92C-553M].

¹⁵⁸ See, e.g., Amy Chang, Ben FitzGerald & Van Jackson, *Shades of Gray: Technology, Strategic Competition, and Stability in Maritime Asia*, CTR. FOR NEW AM. SEC. (Maritime Strategy Series), Mar. 2015, <https://s3.amazonaws.com/files.cnas.org/documents/CNAS-Maritime-7-Report-FINAL.pdf> [https://perma.cc/8UEF-7HE9] (discussing the geopolitical instability and risks associated with gray-zone conflicts and increasing appearance of such conflicts in maritime competition in Asia).

¹⁵⁹ David Barno & Nora Bensahel, *Fighting and Winning in the “Gray Zone”*, WAR ON THE ROCKS (May 19, 2015), <https://warontherocks.com/2015/05/fighting-and-winning-in-the-gray-zone/> [https://perma.cc/Q5RD-5VF4].

Spartans would march into Attica to burn the crops that fed Athens.¹⁶⁰ Abimelech in Kings too sowed the city with salt, devoting it to bareness to ensure his enemies can never again benefit from the land.¹⁶¹

Twenty-first century warfare however is even more devious than these ancient tactics, despite their obvious relation to one another. First, today's economic battles are not necessarily kinetic. As Michael Stecher explains, "[i]n Ukraine, for example, Russia does not need to destroy the economic infrastructure and logistics hubs present near the Ukrainian port of Mariupol; instead, by announcing that the Russian Coast Guard will search vessels as they pass through the Kerch Straits, Russia can ensure that no goods get in or out of the port."¹⁶²

Furthermore, states and militants are employing a hybrid of these different tactics, coupling economic warfare with proxy battles and propaganda campaigns. In a world order defined by globalization, "the phenomenon by which national economies became entwined with and progressively subsumed within the international economy,"¹⁶³ the weaknesses this construct generates, and the ramifications of these hybrid tactics, are devastating. For example, an attack on the NY Stock Exchange would debilitate not only the US economy, and a suicide bomber in Piccadilly would handicap not only British civil infrastructure, but both instances would hijack global GDP. Evidently, an attack on an economic complex can be carried out through more traditional weapons – a bomb or a machine gun for example – though these are not requisite tools: a computer virus would be an equally damaging attack on the global economy. The complexity inherent to economic warfare includes the varied weapons at a group's disposal, and the damage's boundless ripple-effect.

Propaganda and fake news have similarly been used as weapons for centuries. Trading hyperbole and lies for political triumphs are old tactics: the Spanish-American War at the turn-of-the-century was dubbed "The Journal's War" because of William Randolph

¹⁶⁰ James A. Thorne, *Warfare and Agriculture: The Economic Impact of Devastation in Classical Greece*, 42 GREEK, ROMAN, & BYZANTINE STUDIES 225, 230–31 (2001).

¹⁶¹ Judges 9:45.

¹⁶² Interview with Michael Stecher, Senior Research Fellow, Center for the Study of the Presidency & Congress (Apr. 12, 2019).

¹⁶³ Nicholas A. Lambert, *Brits-Krieg: The Strategy of Economic Warfare*, in UNDERSTANDING CYBER CONFLICT: FOURTEEN ANALOGIES 123, 123 (George Perkovich & Ariel E. Levite ed., 2017).

Hearst's role in inciting anti-Spanish sentiment in the US.¹⁶⁴ During World War I, new technology and developments in chemistry and engineering relegated soldiers to the trenches, scourging their lives. Dovetailing these scientific advancements however, verbal conflicts emerged as a powerful, infamous tool on the home front. Flyers, banners, and radio commercials drew on people's sense of patriotism and their morale, encouraging them to enlist and purchase war bonds.¹⁶⁵ In the years leading up to World War II Hitler similarly wielded power over his citizens' opinions with Nazi propaganda; during the war, Joseph Goebbels held the official government position Minister of Government Enlightenment and Propaganda.¹⁶⁶

Yet, despite this historic role, there are key differences between the propaganda and fake news of yesterday and the twenty-first century phenomenon. First, while history's pages are filled with these stories, the players were not transnational or international: governments peddled in lies and fabrications against their own public. Today though, foreign states are trafficking in these words, steering them across borders, using them against foreign populations. Second, the issue of fake news is compounded by technology and social media. Hitler's *Mein Kampf* sold millions of copies, and Americans in big cities were all consumers of yellow journalism, but today these myths and subterfuge spread across social media in nanoseconds, disseminating information that would undermine the entire democratic institution.

Proxy wars have also been raging for centuries: a major power encouraging and steering a party into a conflict while only playing a minor role in the affair is commonplace. Lenin used his own proxy group to "conduct political terror with plausible deniability" in neighboring states and no-mans-land during the period of the Russian Civil War.¹⁶⁷ The US armed the Contras in Nicaragua after the Sandinistas led a violent campaign to overthrow the Somoza regime, hoping to quash communism but not interested enough to

¹⁶⁴ *Yellow Journalism: The "Fake News" of the 19th Century*, PUB. DOMAIN REV., <https://publicdomainreview.org/collections/yellow-journalism-the-fake-news-of-the-19th-century/> [<https://perma.cc/2HP7-X58L>].

¹⁶⁵ See Alice Goldfarb Marquis, *Words as Weapons: Propaganda in Britain and Germany During the First World War*, 13 J. CONTEMP. HIST. 467 (1978).

¹⁶⁶ Joseph Goebbels, HISTORY (updated Jun. 7, 2019), <https://www.history.com/topics/world-war-ii/joseph-goebbels> [<https://perma.cc/X2VJ-Z6NH>].

¹⁶⁷ Alex Marshall, *From Civil War to Proxy War: Past History and Current Dilemmas*, 27 SMALL WARS & INSURGENCIES 183, 187 (2016).

put their own boots on the ground.¹⁶⁸ Proxy wars are similarly pervasive in gray-zone conflicts, however, as is vogue, these too are complicated by technology. Proxies have increasingly become nonstate actors, as seen with Iran utilizing not just Hezbollah, but Hamas and the Palestinian Islamic Jihad as well on their quest for regional hegemony.¹⁶⁹ Military codes, drone surveillance, and weapon cyphers are digitized, creating further vulnerabilities in defense strategies.¹⁷⁰ And because of the internet and globalization, nonstate actors have the potential to violate the security of other nations without resorting to conventional weapons, though globalization has also made it easier for nonstate actors to access conventional force.¹⁷¹ Proxy wars and domestic conflict engenders a distinctive criminal economy, exploiting humanitarian efforts and taxing immigration, cigarettes, and alcohol, providing funds for necessary arms.¹⁷²

Because gray-zone is a hodgepodge of military and non-military maneuvers, it would be difficult to apply IHL, whose pillars include military necessity, to gray-zone conflicts in its current form.¹⁷³ This presupposition, that war is exclusively a military battle, keeps IHL ensconced in an era where war was fought in the trenches, and cyber-crimes, fake-news, and economic arm-twisting as joint tactics to achieve an end were beyond the realms of imagination.

These schisms in both policy and law are exploited by nations particularly adept at navigating the gray-zone. Chinese government-sponsored hackers deftly consume US military information.¹⁷⁴ Chinese civilian fishing boats have caused near-

¹⁶⁸ See *Iran-Contra Affair*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/reagan-iran/> [https://perma.cc/9SQ7-SZE7] (last visited May 2, 2019).

¹⁶⁹ See Hubbard et al., *supra* note 50.

¹⁷⁰ See, e.g., Rosa Brooks, *Rule of Law in the Gray Zone*, MOD. WAR INSTITUTE (July 2, 2018), <https://mwi.usma.edu/rule-law-gray-zone/> [https://perma.cc/X94R-4SSC].

¹⁷¹ *The Illicit Arms Trade*, FED'N AM. SCIENTISTS, <https://fas.org/asmp/campaigns/smallarms/IssueBrief3ArmsTrafficking.html> [https://perma.cc/QLY9-BYFQ].

¹⁷² See Mary Kaldor, *Beyond militarism, arms races and arms control*, in *WAR AND PEACE IN THE 20TH CENTURY AND BEYOND* 145-76 (Geir Lundestad & Olav Njølstad, eds. 2003).

¹⁷³ Lamp, *supra* note 129 at 237.

¹⁷⁴ See, e.g., Ellen Nakashima & Paul Sonne, *China hacked a Navy contractor and secured a trove of highly sensitive data on submarine warfare*, WASH. POST (June 8, 2018), <https://www.washingtonpost.com/world/national-security/china-hacked-a->

collisions with US military vessels in the South China Sea, off the coast of Chinese man-made islands.¹⁷⁵ The nexus between these agents and the Chinese government is difficult to prove, eluding the traditional law of state responsibility. International law cannot hold China accountable.

Further, gray-zone operations allow a state to exercise aggression, engage in conflict, and leverage coercion without subjecting themselves to the risk of escalation and retribution that customarily accompany traditional wars. “[O]ften conducted in ways that are meant to make proper attribution of the responsible party difficult to nail down,”¹⁷⁶ reacting to a gray-zone attack runs the risk of flaunting international law with an outstretched military response, breaching internationally permitted countermeasures,¹⁷⁷ or thinking too small, thereby permitting the aggressor to succeed in their gambit and move one step closer to checkmate. Russian recognition of South Ossetia and the Crimea are a case-in-point: the deployment of “little green men” into Ukraine,¹⁷⁸ the effective manipulation of videos and photographs¹⁷⁹ to create enough ambiguity to avoid a direct, military reaction from NATO. Russia was condemned for these actions, but the map of Europe has not been restored to the status-quo ante.¹⁸⁰ The fact that Russia successfully instated a new status-quo bolsters gray-zone tactics as

navy-contractor-and-secured-a-trove-of-highly-sensitive-data-on-submarine-warfare/2018/06/08/6cc396fa-68e6-11e8-bea7-c8eb28bc52b1_story.html [https://perma.cc/XPZ8-USZJ].

¹⁷⁵ Brooks, *supra* note 170.

¹⁷⁶ *Neither War Nor Peace: The Uses of Constructive Ambiguity*, THE ECONOMIST (Jan. 25, 2018), <https://www.economist.com/news/special-report/21735474-uses-constructive-ambiguity-neither-war-nor-peace> [https://perma.cc/G2VE-9VKE].

¹⁷⁷ A form of self-help to convince another country to come back in compliance with international law, countermeasures should be commensurate to the injury suffered, proportionate, and intended to enforce compliance with international law. Force cannot be employed. *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, *supra* note 137, Arts. 49-51.

¹⁷⁸ Steven Pfifer, *Watch Out for Little Green Men*, BROOKINGS, (July 7, 2014), <https://www.brookings.edu/opinions/watch-out-for-little-green-men/> [https://perma.cc/BAC3-XLSU].

¹⁷⁹ See, e.g., Arwa Damon, Michael Pearson, & Ed Payne, *Ukraine: Photos Show Undercover Russian Troops*, CNN (Apr. 22, 2014), <https://edition.cnn.com/2014/04/21/world/europe/ukraine-crisis/index.html> [https://perma.cc/Q2ZS-VSHH].

¹⁸⁰ Steven Pfifer, *Five Years After Crimea's Illegal Annexation, the Issue is no Closer to Resolution*, BROOKINGS (Mar. 18, 2019), <https://www.brookings.edu/blog/order-from-chaos/2019/03/18/five-years-after-crimeas-illegal-annexation-the-issue-is-no-closer-to-resolution/> [https://perma.cc/P2EK-JGHS].

a legitimate means for achieving new political ends and provoked NATO and the EU to launch a new center in Finland devoted to combatting gray-zone threats.¹⁸¹

The most successful gray-zone maneuvers are ones performed incrementally. Iran has slowly been planting their proxies across the Middle East: in addition to assigning the Islamic Revolutionary Guard's Corps (IRGC) and their expeditionary Quds Force across the Levant, Iran has been assembling a transnational network of Shia militias "including Salafi-Jihadi and Sunni extremist organizations (EOs) such as al Qaeda and the Islamic State of Iraq and Syria (ISIS), as well as Lebanese Hezbollah"¹⁸² to exploit the transitional, chaotic climate afflicting the Middle East and to establish a new social, cultural and security status-quo. Their sophisticated achievements in electronic warfare are worrisome as well – the shocking report from Reuters on how an Iranian company had successfully fed fake news and propaganda across 70 websites in 15 countries with the aid of American web service stunned personnel across the US and its allied nations who believed Iranian cyber capabilities were third-tier.¹⁸³ Among the damage caused by this campaign, "[a] news site called Another Western Dawn which says its focus is on 'unspoken truth' . . . fooled the Pakistani defence minister into issuing a nuclear threat against Israel."¹⁸⁴

Iran's piecemeal construction of military bases in Syria is alarming, but the provocation is less shocking because of the slow-and-steady pace used to build them. The threat from ISIS in Syria is slowly weakening, and as it begins to falter even more, and by the time "world leaders can organize a peace deal for Syria," Iran will have become the bedrock of Syrian security, with their proxies and

¹⁸¹ See The European Centre of Excellence for Countering Hybrid Threats, <https://www.hybridcoe.fi/> [<https://perma.cc/D6RB-4EGS>] (last visited Nov. 13, 2019) (the Centre will offer this collective experience and expertise for the benefit of all participating countries, as well as the EU and NATO).

¹⁸² Nicholas Heras, *Gray Zones in the Middle East*, CTR. FOR NEW AM. SECURITY (Sept. 18, 2017), <https://www.cnas.org/publications/reports/gray-zones-in-the-middle-east> [<https://perma.cc/8HV6-CLGG>].

¹⁸³ See, e.g., Jack Stubbs & Christopher Bing, *Special Report: How Iran Spreads Disinformation Around the World*, REUTERS (Nov. 30, 2018), <https://www.reuters.com/article/us-cyber-iran-specialreport-idUSKCN1NZ1FT> [<https://perma.cc/95ZA-YNLQ>].

¹⁸⁴ *Id.*

personnel embedded in the Syrian infrastructure.¹⁸⁵ Yet, not only is their tactic geopolitically transformative, the accumulation doctrine, where States can hold others accountable for small acts of violence in accretion has been rejected by international law:

[N]otably Israel took the view that ‘continuous pin-prick assaults’, if part of a general strategy, could be ‘apprais[ed] . . . in their totality as an armed attack’. But, by and large, the accumulation doctrine was received unfavourably and Israel’s reliance on it was not accepted in discussions in the Security Council.¹⁸⁶

This vacuity is a further example of how gray-zone tactics elude international law.

Hostility, no matter its form, cannot remain unchecked by law. While gray-zone conflict is a hybrid—comprised of tactics and attacks in a wide array of fields—in its culmination, it surmounts to warfare. It is a strategy, like any military strategy, with an end goal. Carl von Clausewitz said, “war is the continuation of policy by other means,”¹⁸⁷ an apt, timeless summation. Gray-zone conflict is a protracted conflict, categorized by a hodgepodge of tactics, fought between the war and peace duality, fought with the purpose of achieving an international political end.

And in the case of Iran, looking at the combined threat of targeted killings, proxy wars, propaganda, and creeping military expansionism, as Iran infringes on the broader Middle East their political objective is an “axis of resistance” across the region and the ultimate destruction of the State of Israel.¹⁸⁸ As is typical in gray-zone conflicts, they’ve been strategizing this point since 1982 when they implanted Iranian proxies in Lebanon and established the group today known as Hezbollah.¹⁸⁹

Iran has not been held accountable for Hezbollah’s actions against Israel because basic international law does not have the teeth: as discussed, the principles of attribution do not apply to Iran’s relationship with Hezbollah, and the *Nicaragua* case requires

¹⁸⁵ Collin P. Clarke, *Countering Iran’s Gray Zone Strategy in Syria*, LAWFARE (Jan. 24, 2018), <https://www.lawfareblog.com/counteracting-irans-gray-zone-strategy-syria> [<https://perma.cc/Q6TR-A453>].

¹⁸⁶ Christian Tams, *The Use of Force Against Terrorists*, 20 EUR. J. INT’L L. 359, 370 (2009).

¹⁸⁷ CLAUSEWITZ, *supra* note 35, at 87.

¹⁸⁸ Hubbard et al., *supra* note 50.

¹⁸⁹ Hokayem, *supra* note 18.

proof that Iran not only funds and trains Hezbollah, but effectively controls the organization too, a legal standard that is almost impossible to reach.¹⁹⁰

In some ways, we can try to hold actors accountable for their actions in the gray-zone through standard international law such as the UN Charter Article 2 ban on use of force,¹⁹¹ or the legal standard of appropriate counter-measures.¹⁹² But this is inefficient.¹⁹³ Even making a case for preventive self-defense—for Iran to argue their drone infringement on Israeli borders was self-defense, for Russia to argue that their jets probed Finnish and Swedish airspace in self-defense¹⁹⁴—is imprudent, and considers this altercation between Iran and Israel, or between Russia and the West, or between China and other regional players, as isolated incidents. Like Russia's actions in the Crimea, Iran's drone is only one minor act in a larger sequence of actions, it is merely a battle in a loftier, four-decade war. Which is why gray-zone conflict must be regulated by IHL.

IV. RE-DEFINING THE LAW OF WAR

International law is a peculiar regulatory system. Its skeleton is constructed by treaty law, but it is suffused and shaped by state behavior.¹⁹⁵ Under international law, state behavior can create or

¹⁹⁰ See *Nicar. v. U.S.*, 1986 I.C.J. 14.

¹⁹¹ U.N. Charter art. 2.

¹⁹² *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, *supra* note 137, Arts. 49–51.

¹⁹³ Countermeasures prohibit the use of force (ILC art 50.1(a)) as a retaliatory measure. Binding gray-zone tactics, a tool used by states avoiding legal regimes, would be myopic, especially considering the limited scope the ILC permits states to operate in when responding against a state that took unlawful action against them. Furthermore, these actions are not isolated incidents, and because there would be constant reprisal, countermeasures would become mainstream actions, not used as a tool to keep states bound by the law, as they were intended, (ILC art 49.1) but instead used as a means of perpetual pay-back.

¹⁹⁴ Thomas Forsell & Jussi Rosendahl, *Estonia, Finland Say Russia Entered Airspace Before U.S. Defense Pact*, REUTERS (Oct. 7, 2016), <https://www.reuters.com/article/us-finland-russia/estonia-finland-say-russia-entered-airspace-before-u-s-defense-pact-idUSKCN1270ID> [<https://perma.cc/7NE3-2C4W>].

¹⁹⁵ The ICCPR was ratified by 167 nations and is a legally binding obligation for its signatories, however it likely binds the remaining 25 nations as customary international law as well: state behavior has thereby extended treaty application to states that refrained from adorning their signature to said document. See *Abdullahi v. Pfizer*, 562 F.3d 163 (2d Cir. 2009), (explaining that even treaties such as the ICCPR

transfigure law, which generates a global order constantly in flux, metamorphizing as states adapt to changing landscapes.¹⁹⁶ For these reasons, the global political system is a decisive public international legal tool.

Just as globalization created new vacuums for states to exploit through gray-zone tactics, globalization too has modified the global stage, causing new forms of public actors to materialize. This political milieu, where war and peace are both made, is an elliptical of different players and institutions, some with disproportionate authority but all with the capability to levy socio-political as well as legal impact.¹⁹⁷

This break down in the Westphalian system¹⁹⁸ engendered a fragmented world order. Today, “states have lost the monopoly on metaphoric, as well as actual, warfare. War is now the continuation of a far more chaotic politics, in a far more chaotic political environment.”¹⁹⁹ To fight it requires more than conventional military forces—it requires economic prowess, cultural manipulation, and a specific technological and cyber aptitude.²⁰⁰ Yet, having the capacity to fight this war is irrelevant if you are legally unable to defend yourself to the extent necessary.

The joint declaration signed by the EU and NATO on December 6th, 2016 and their new center in Finland devoted to gray-zone conflict is proof that the international community recognizes that gray-zone conflict is no longer a creeping threat posed by obscure

that are not self-executing in US domestic law are still recognized as evidence of customary international).

¹⁹⁶ Balendra, *supra* note 10.

¹⁹⁷ Globalization has given human rights NGOs unprecedented real-time access to on-the-ground violations making them a critical global player, and has helped them bolster global institutions such as the International Criminal Court and the UN Human Rights Commissioner by giving them additional information-gathering resources, and ensuring human rights violations receive proper attention. See generally Cecilia Tortajada, *Nongovernmental Organizations and Influence on Global Public Policy*, 3 ASIA & PAC. POL'Y STUD. 266, 266-74 (2016).

¹⁹⁸ Created from the Treaty of Westphalia of 1648 that ended the Thirty-Years War, the Westphalian system refers to the “a system of states or international society comprising sovereign state entities possessing the monopoly of force within their mutually recognized territories. Relations between states are conducted by means of formal diplomatic ties between heads of state and governments, and international law consists of treaties made (and broken) by those sovereign entities”. See *Overview the Westphalian System*, OXFORD REFERENCE, <http://www.oxfordreference.com/view/10.1093/oi/authority.20110803121924198> [<https://perma.cc/G37L-2AGG>].

¹⁹⁹ DAVID KENNEDY, *OF LAW AND WAR*, 19 (Princeton University Press, 2006).

²⁰⁰ *Id.* at 27

powers, but rather a real danger.²⁰¹ However, though regional organizations recognize the threat of gray-zone conflict, their declarations are not strategically effective: the EU-NATO cooperation framework “endorsed a common set of proposals focused on better coordination, situational awareness, strategic communication, crisis response, and bolstering resilience”²⁰² for gray-zone conflict—a declaration signed with an eye towards progress, though whose language is strictly aspirational. This development is politically reassuring, but it does not amend the legal paradigm that gray-zone conflict currently eludes.

A report on EU strategy similarly concluded “[i]n order to respond effectively, the EU not only has to develop a cyber-security strategy, a maritime strategy or a broader ‘global’ strategy; it must also learn how to synchronize all these aspects—and in a tailor-made fashion.”²⁰³ NATO’s military strategy,²⁰⁴ the EU documents, and the briefings coming before the US Secretary of State²⁰⁵ and Department of Defense are declarations that the Western military and international policy communities are grappling in their responses to foreign gray-zone tactics, and underscore the necessity of implementing an additional legal regime to govern these conflicts.

The Council of Europe adopted a draft resolution, recognizing that though gray-zone conflict has no universally agreed upon definition and no law it “does not operate in a legal vacuum”.²⁰⁶ The committee emphasized the pre-eminent threat gray-zone conflict poses: the legal asymmetry that allows users of gray-zone tactic to

²⁰¹ Briefing, *Countering Hybrid Threats: EU-NATO Cooperation*, March 2017, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599315/EPRS_BR I\(2017\)599315_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599315/EPRS_BR I(2017)599315_EN.pdf) [<https://perma.cc/5ZXR-L38Y>].

²⁰² *Id.* at 8

²⁰³ Jan Joel Andersson & Thierry Tardy, *Hybrid: What’s in a Name?*, 32 BRIEF ISSUE 2015, https://www.iss.europa.eu/sites/default/files/EUISSFiles/Brief_32_Hybrid_warfare.pdf [<https://perma.cc/QEG3-EGRD>].

²⁰⁴ Dr Federico Yaniz, *Projecting Stability: Hybrid Warfare and Cooperation With the EU, ATLANTIC TREATY ASS’N.* (Feb. 2, 2018), <http://www.atahq.org/2018/02/projecting-stability-hybrid-warfare-cooperation-eu/> [<https://perma.cc/C2VZ-HHKR>].

²⁰⁵ *Report on Gray Zone Conflict*, INT’L SECURITY ADVISORY BOARD, (Jan. 3, 2017), <https://2009-2017.state.gov/t/avc/isab/266650.htm> [<https://perma.cc/UD72-T3BX>].

²⁰⁶ Eur. Consult. Ass. ‘Hybrid war’ may be complex, but it does not operate in a legal vacuum, March 14, 2018, <http://www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=6986&lang=2&cat=> [<https://perma.cc/Y6XD-LCCB>].

avoid the legal repercussions of their actions, and to therefore brazenly defy international order.²⁰⁷ The assembly stressed that standard domestic and international human rights laws apply during gray-zone conflict, that the principle of self-defense allows victims to retaliate against a gray-zone adversary. As discussed though, this declaration is only rhetoric. Human rights law is invariably applicable—it applies in perpetuum. What is lacking in the as it applies to these conflicts is the victim's ability to respond as if war was waged against them, and as the assembly concluded "in practice, hybrid adversaries avoid manifest use of force that would reach the required threshold for triggering application of the above norm, therefore creating a legal grey area."²⁰⁸

Their answer to this question is to request that the signatory parties refrain from using gray-zone tactics themselves.²⁰⁹ One-step forward, two-steps back. When adversaries are utilizing gray-zone techniques to combat another state, it is illogical and dangerous to ask a state to refrain from reacting in kind. By requesting their states to desist from using gray-zone tactics, the Council of Europe is handicapping its members, forbidding them from defending their borders, sovereignty, and citizens.

As mentioned in the previous Section, The European Center for Excellence for Countering Hybrid Threats opened in October 2017. The think tank is comprised of eleven European countries and the United States. All self-proclaimed victims of Russian gray-zone tactics, "the new center is dedicated to finding effective ways to push back."²¹⁰ Pushing back against the new normal is expected and necessary.

Their first order of business should be agreeing to a unilateral, singular definition for this mode of war. Without knowing what you are combatting, or what you are governing, it is impossible to emerge victorious from a fight. In this regard, I recommend the council adopt the following definition of gray-zone conflict:

²⁰⁷ Eur. Consult. Ass. *Legal Challenges Related to Hybrid War and Human Rights Violations*, Doc. 14523 (2018), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24547&lang=en> [<https://perma.cc/YVM7-TKTP>].

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Reid Standish, *Finland Opens a New Center to Fight 'Hybrid Threats' from Russia and Beyond*, PRI (Oct. 3, 2017), <https://www.pri.org/stories/2017-10-03/finland-opens-new-center-fight-hybrid-threats-russia-and-beyond> [<https://perma.cc/3MSK-MN65>].

Gray Zone conflict is a mode of war that embraces tools including, but not limited to: cybercrime, cyber-espionage, the proliferation of fake news, disinformation campaigns, proxy wars, economic-extortion, targeted killings, establishing client states. It does not necessarily employ military tactics, and is a hybrid of these, as well as other, tactics.

Gray-zone conflict is malleable, and adapts to incorporate new combative techniques as they become available.

Gray-zone tactics encompass long-term goals. They can be employed by a single state over decades.

Gray-zone tactics are not singular, isolated incidents: they are coordinated by a central command and may be used over decades to achieve a political end-goal.

Gray-zone conflicts often are categorized by attacks that are most devastating by their cumulative effect on the victim. Gray-zone attacks, in accumulation, have the capacity to debilitate their victims in a comparative way to war.

This definition should then be used in subsequent negotiations with additional European states and allies. A formalized treaty on countering gray-zone conflict is unlikely to develop in the immediate future, but if this definition is accepted in domestic law, and capitalized on in diplomatic and military practice, it could emerge as customary law over time, just as cyber-espionage has become a norm and other new forms of information gathering and combat have become expected.²¹¹ This definition's emergence as a custom would have a transformative impact on how states participate in gray-zone conflict. A formal definition in the international law lexicon would normalize these conflicts, bankrupting their utility and depriving nations like Russia, China, and Iran of this gambit, whose strength lies in the tactic's ability to

²¹¹ COLIN ANDERSON & KARIM SADJADPOUR, *IRAN'S CYBER THREAT* (2018) (noting that with the growing number of nations with offensive cyber capabilities, espionage and information gathering through cyber operations has increasingly become accepted as an international norm). *See also* *Nicar. v U.S.*, 1986 I.C.J. 14 at para. 207 ("For a new customary rule to be formed, not only must the acts concerned 'amount to a settled practice', but they must be accompanied by the *opinio juris sive necessitatis*." . . . States "in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'").

escape any characterization. A common definition allows the community to know what they are tackling. Furthermore, a common definition allows the international community to regulate these conflicts—rather than open the floodgates to a perpetual state of war, this will allow the victims to respond to attacks, the community to govern these conflicts, and the world-order to negotiate an end to these conflicts. Ends do not emerge from undefined battles, but from battles that the international community to respond to.

Second, in addition to the team of policy makers and military strategists, this committee should erect a legal team to work through the legal barriers barring gray-zone conflict's entry to international humanitarian law. For law to be effective, it must be dexterous and flexible enough to adapt to modern transgressions, but strong enough to regulate state behavior and hold violators accountable. This dual purpose is where IHL fails gray-zone conflict and is why IHL must be amended. Despite rounds of debate over terminology, IHL still claims that two definitions of armed conflict account for all derivatives of the historic term 'war'; that states will achieve their end-goals through military action; and that states, or the armed groups that essentially embody the organization and behavior of states, will adjust their actions to account for the sanctity of civilian lives. In truth, IHL has failed to account for the fact that war is an agile term, waxing and waning over time to adapt to the modern, international playground. IHL, in its effort to create a utopian society, has lent itself to the construction of a dystopian reality.

This team must redraft the content of international humanitarian law. First, the committee must redefine aggression²¹² to include the accumulation doctrine. The threshold of force cannot be measured by a triggering event: it must consider individual incidents that, in the aggregate, surmount to a level of force equal to an armed conflict. War should be defined by its caliber, the amount of force—both kinetic and non-kinetic—applied, even if it is over time, and by the degree of intensity employed to achieve their targeted end.

Second, IHL must account for the fact that military ends can be achieved without one state's army ever firing a shot at an enemy. The law of attribution must be changed to create new legal norms that will hold states responsible for proxy activity. The doctrine of

²¹² The General Assembly, in Resolution 3314, defined certain international acts as acts of aggression, including blockades, armed invasions, and armed violations of territory—notably, all of the qualifying examples require some form of the use of force G.A. Res. 3314 (XXIX), annex, Definition of Aggression.

military necessity too is only useful when armed forces are engaged in battle – when the end-goal is not weakening the enemy forces, but expanding influence across a region, or wiping a country off the map, military necessity, as a regulating force, becomes obsolete. Necessity, after all, does not play a role in law when the enemy's ultimate goal is unquestionably illegal.

Further, IHL, through proportionality and distinction, was drafted to prevent civilian casualties from the scourge of kinetic warfare. Gray-zone conflict, through circumventing kinetic warfare, infused civilian casualty with a new meaning. First, proxy wars capitalize on civilians sympathetic to their cause, or susceptible to coercive tactics making them mules in transferring arms or funds.²¹³ These innocents become victims of psychological torture, emerging from these battles in many ways more broken than those exposed to explosives and shrapnel. Additionally, cyber-attacks target the private and public sector in equal proportions, exposing civilians to vulnerabilities unimagined when the Geneva Conventions were drafted.²¹⁴ How do you define a victim when the attack is happening thousands of miles away, yet hundreds of thousands are affected by the proliferation of fake news? What is proportionality when the objective is unrelated to armed forces? The new definition of war, to remain relevant in the twenty-first century, will have to confront the looming issue of civilian casualties in a new framework that accounts for the changing game.

All of this must be accomplished with an eye towards the long-term goal of adopting an accompanying treaty to the Geneva Conventions or an additional set of Additional Protocols re-defining war. If the definition of gray-zone conflict does get implemented into domestic policy and emerges as custom, then future treaty negotiations would be more likely to take place.

When an Iranian drone intercepted Israeli airspace on February 10, 2018, Israel's response was swift. This midnight duel stoked the fears of military personal across the globe, but it was not anomalous. Since Ayatollah Khomeini's ascent, Iran and Israel have been locked in battle against one another, but under the umbrage of the midnight sun, away from public view. These assaults have transpired in Lebanon and Syria, Latin America, and Europe. The tools:

²¹³ Kaldor, *supra* 172, at 158–59.

²¹⁴ Cameron Stevens, *Casualties of Cyber Warfare*, THE DIPLOMAT (Aug. 25, 2014), <https://thediplomat.com/2014/08/casualties-of-cyber-warfare/> [https://perma.cc/K5V8-EVZG].

espionage, political warfare, propaganda, electronic and cyber-attacks, proxy battles. Everything short of kinetic action, until 2018. This cyclical hostility is made possible by a number of converging factors. Globalization has relegated borders to a mere façade; technology has allowed foreign actors to permeate all corners of the earth, making code and locks a farce; these mediums have made proxies easier to control. And law, the system intended to regulate the changing world and to ensure peace and security is maintained, has fallen behind, entrenched in an era where kinetic, as opposed to hybrid, tactics are the norm.

Had IHL adapted to new forms of state responsibility, Iran would have been held accountable for using proxy groups in Lebanon, for manipulating the battles in Syria, for funding and coordinating Hamas' agenda, and for steering Pakistan into issuing a nuclear threat alert against Israel. Had IHL adapted the accumulation doctrine, Iran's actions would have amounted to a declaration of war decades ago.

Gray-zone conflict, through cloak-and-dagger operations, has shattered the status quo, reminding the international legal community that current events can indeed render law ineffective and obsolete. However, international law is endowed with the ability to change—through treaties, through state behavior, through having enough leaders decide that it should. War is no longer equated to one belligerent bombing, or invading, a second. Today, there is a new world order, and the world needs a new law of armed conflict to govern it.