

The Notion of Armed Attack under the UN Charter and the Notion of International Armed Conflict – Interrelated or Distinct?

ÖyküIrmakkesen

LL.M. Paper written under the supervision of Professor Marco Sassòli

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Introduction

The fragmentation of international law and efforts to harmonize or somehow link the different notions used in different branches of it has been an “always-contemporary” issue for the scholars. The present paper will try to contribute to this *quête*, by comparing the notions of “armed attack” under the United Nations Charter (UN Charter) and of “international armed conflict” (IAC) as it’s defined under International Humanitarian Law (IHL).

Jus ad bellum and *jus in bello* have both as an object “to impose legal restraints upon international violence”¹; one by prohibiting use of force between states and one by regulating the use force in favour of the affected persons. However, they remain distinct branches of law. The former is formed by the rules on resort to force whereas the latter regulates the acts of the parties during an armed conflict. This distinction can simply be explained by the *raison d’être* of IHL which is to protect persons affected by the conflict. No matter if a state is using force for a *just* cause or as a result of legitimate exercise of self-defence and the other is acting *mala fide* and in violation of the UN Charter, IHL treats both sides equally.² If *jus ad bellum* (which itself is in a close embrace with politics) could influence the obligations of the parties *in bello*, the sought protection would be impossible to achieve.

The UN Charter is the fruit of a very optimistic marriage between the states, in the aftermath of a great tragedy. Unfortunately, as all optimistic marriages, there was no prenuptial agreement included; any possibility of a future war is disregarded and left unregulated. However, even in the face of a very strict prohibition of use of force³, conflicts do occur and it is not contradistinctive that the prohibition exists along with the regulation of armed conflicts.⁴ Furthermore, the prohibition of use of force has only two exceptions⁵ and an armed conflict as such is not one of them. In other words, the existence of an IAC does not mean that states are no longer bound by the prohibition. The absolute distinction does not mean that one’s application excludes the other;

¹ Christopher Greenwood, ‘The Relationship between *Jus ad Bellum* and *Jus in Bello*’ (1983) 9(4) *Review of International Studies* 221, 232.

² Andrew Carswell, ‘Classifying The Conflict: A Soldier’s Dilemma’ (2009) 94(873) *International Review of the Red Cross* 143, 156.

³ United Nations Charter (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Art.2(4).

⁴ Greenwood, above note 1, 233.

⁵ These exceptions consist of the exercise of right to self-defence (UN Charter Art.51) and collective action by the authorisation of the Security Council to “maintain and restore international peace and security” (UN Charter Art.42).

on the contrary, they co-exist as two systems that analyse an act from different perspectives.⁶ Thus, all relevant acts are covered by both but their lawfulness in respect of each of the branches depends on two independent sets of criteria.

I will now examine the notion of armed attack, as a necessary element for the exercise of right to self-defence as an exception to the prohibition of use of force. I will then continue with the notion of IAC and then conclude by comparing the constitutive elements of the two notions.

A. The notion of “armed attack”

i. The UN Charter system

The UN Charter was concluded in an era where the whole of the international community was in search of (a long lasting) peace. As a consequence, the prohibition on threat or use of force is set forward in very strict terms in Art.2(4) of the Charter, which reads “all Members shall 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”.

As strict as it is, the provision is far from being unambiguous in itself and also in relation with other related provisions of the Charter. The provisions regarding “contra-peace situations” envisaged in the Charter employ different terms. As has just been set forth, the first term we see is *use of force*, in Article 2(4). The second term is *aggression* in Article 39, which is utilised in relation to the powers of Security Council regarding threats to peace, breaches of the peace and acts of aggression. The last term, *armed attack* in Article 51 has been put as a pre-condition for the exercise of the right to self-defence of the States. However, no definition has been given to these terms and thus their relationship has been left unclear. Before going into the definition of armed attack, a clarification on how these notions are related is necessary.

Article 51 of the UN Charter, which regulates the exercise of the right to self-defence stipulates that “[n]othing in the present Charter shall impair the inherent right of individual or collective

⁶ Greenwood, above note 1, 231.

self-defence if an armed attack occurs against a Member of the United Nations”.⁷ The undefined notion of armed attack will now be explained by comparison to the notions of “aggression” and “use of force”.

ii. “Aggression” versus “armed attack”

The term aggression used in Article 39 of the UN Charter is defined in the well-known General Assembly Resolution on the Definition of Aggression.⁸ The definition given herein is composed by a general conception of the notion and a list of exemplary situations. The first Article is read as follows; “aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.”

This definition, which can be interpreted as including both direct and indirect use of force⁹, shows a significant resemblance to Art.2(4) of the UN Charter which prohibits the threat or use of force but it does not include “threat”; for an act to be qualified as aggression, “an actual use of armed force is required”.¹⁰ Interestingly, the following Article of the Resolution, referring to “relevant circumstances” that should be taken into account in defining aggression also includes a certain gravity of the acts or of their consequences.

What makes defining aggression crucial for the analysis of the meaning of armed attack is the utilization of the Resolution 3314 by the International Court of Justice (ICJ) while elaborating on the notion of armed attack. Indeed, all in the *Nicaragua*¹¹, *Oil Platforms*¹² and *Armed Activities*¹³ cases, the Court takes the Resolution as a starting point in its analysis on the definition of armed attack. Furthermore, it is also noteworthy that while the Preamble of the Resolution

⁷ It should also be noted that the equally authentic French text adopts the words “*aggression armée*” instead of “*attaquarmée*” as one would expect.

⁸ UNGA Res 3314 (XXIX) (14 December 1974).

⁹ NicoKrisch, ‘Article 39’ in Bruno Simma, Hermann Mosler, Andreas Paulus and EleniChaitidou (eds), *The Charter of the United Nations: A Commentary* (3rd edition, Oxford University Press, Oxford 2013) 1293.

¹⁰ James Kraska, ‘A Social Justice Theory of Self-Defense at the World Court’ (2011) 9(1) Loyola University Chicago International Law Review 25, 37.

¹¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)* (Merits) 1986 <<http://www.icj-cij.org/docket/files/70/6503.pdf>> accessed 12 August 2014.

¹² *Oil Platforms (Iran v. US)* 2003 <<http://www.icj-cij.org/docket/files/90/9715.pdf>> accessed 12 August 2014.

¹³ *Armed Activities on the Territory of the Congo (DRC v. Uganda)* 2005 <<http://www.icj-cij.org/docket/files/116/10455.pdf>> accessed 12 August 2014.

refers to aggression as “the most serious and dangerous form of the illegal use of force”, the ICJ interprets armed attack as “the most grave form of the use of force”.¹⁴

Today, it is accepted by the majority of the doctrine that an armed attack necessarily constitutes aggression.¹⁵ It can be seen that the same view was shared by most of the states during the discussions within the Fourth Special Committee on the Question of Defining Aggression where they agreed that there is a “cascading relationship between the terms ‘use of force’, ‘aggression’ and ‘armed attack’”.¹⁶

iii. “Use of force” versus “armed attack”

To draw the borders of the prohibition of use of force, one must primarily define “force”. The general tendency in State practice, embodied in the Friendly Relations Declaration¹⁷, is to limit its meaning to the military use of force.¹⁸

Regarding the notion’s relation with that of armed attack, it is widely accepted that the former constitutes a part of the latter. It is of note that the use of force is not only confined to the “armed force” whereas the notion of armed attack necessarily requires resort to arms. The direct and most important conclusion that can be drawn from this differentiation is that there exists a “force gap” between the two Articles and thus not every use of force can be replied by an exercise of the right to self-defence.

The distinction between the notions is made mainly due to the gravity of the act or of its effects. Brownlie, for example, explains that a use of force must attain certain gravity in order to be defined as an armed attack.¹⁹ Looking at *formal* state practice, it can also be seen that during the *travaux* aiming at defining aggression, numerous states were of the view that only “most serious uses of force qualified as armed attack”.²⁰ In any case, the most significant statement on the

¹⁴ ICJ, *Nicaragua*, above note 11, para.191.

¹⁵ Krisch, above note 9, 1293.

¹⁶ Tom Ruys, “*Armed Attack*” and Article 51 of the UN Charter’ (Cambridge University Press, Cambridge 2010) 134.

¹⁷ UNGA Res 2625 (XXV) (24 October 1970).

¹⁸ Oliver Dörr, ‘Prohibition of Use of Force’ (2011) Max Planck Encyclopaedia of Public International Law <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e427?rskey=dJDxeN&result=2&prd=EPIL>> accessed 12 August 2014., para.11.

¹⁹ Ian Brownlie, *International Law and the Use of Force between States* (Oxford University Press, Oxford 1963) 366.

²⁰ Ruys, above note 16, 150.

relationship of use of force and armed attack has been made by the ICJ, which has distinguished the “most grave forms of use of force” (i.e. those amounting to an armed attack) from “other less grave forms”.²¹ This confirms the view that there indeed is a gap between the two relevant articles of the Charter. Second, it implies that there exists “a form of de minimis threshold” which is required for an act to constitute an armed attack.²² Thus, not every illegal use of force warrants states to resort to self-defence; the different wordings bring with them a considerable limitation to the exercise of the right to self-defence.²³ In other words, “minor violations of the prohibition of the use of force falling below the threshold of the notion of armed attack do not justify a corresponding minor use of force as self-defence.”²⁴

It is true that the Court, with its consistent statements, have put forward the gravity element as an important factor in determining an armed attack.²⁵ Thus, an armed attack under Article 51 requires “a relatively large scale, [...] a sufficient gravity, and [...] a substantial effect.”²⁶ According to the ICJ, for example, “mere frontier incidents” do not have the necessary gravity to be considered as armed attacks.²⁷ However, the Court does not draw the lines of what can be an armed attack in a very concrete way; on the contrary, it can be inferred from the *Oil Platforms* judgment that the threshold of gravity is a flexible one, which is dependent on the specific circumstances of each case.²⁸ Taking into consideration the comparison the Court made between the use of force and armed attack as the “most grave form” of it, it can be said that such an intensity threshold is not needed or at least is much lower for an act to constitute use of force.

²¹ ICJ, *Nicaragua*, above note 11, para.191; ICJ, *Oil Platforms*, above note 12, para.51. Judgment of 6 November 2003, (2003) ICJ Rep 161–219, §§ 51, 64.

²² Ruys, above note 16, 140. For the criticism of the Court’s statement, see 143. As the existence of a gap between Art.2(4) and Art.51 is majorly accepted, the discussion will not be presented.

²³ Albrecht Randelzhofer and Georg Nolte, ‘Article 51’ in Bruno Simma, Hermann Mosler, Andreas Paulus and EleniChaitidou (eds), *The Charter of the United Nations: A Commentary* (3rd edition, Oxford University Press, Oxford 2013) 1401.

²⁴ Enzo Cannizzaro, ‘Contextualizing Proportionality: Jus ad Bellum and Jus in Bello in the Lebanese War’ (2006) 88(864) *International Review of the Red Cross* 779, 782.

²⁵ James Green *The International Court of Justice and Self-Defence in International Law* (Hart Publishing, Oxford 2009) 31.

²⁶ Randelzhofer and Nolte, above note 23, 1409.

²⁷ ICJ, *Nicaragua*, above note 11, para.195; Similarly, the Eritrea-Ethiopia Claims Commission has held that “[l]ocalized border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack for purposes of the Charter’ (Eritrea-Ethiopia Claims Commission, *Jus ad Bellum (Partial Award)* 2005<<http://www.pca-cpa.org/upload/files/FINAL%20ET%20JAB.pdf>> accessed 12 August 2014, para.11)

²⁸ Ruys, above note 16, 143. Furthermore, the Court explicitly stated that it ‘[did] not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the “inherent right of self-defence”’ (ICJ, *Oil platforms*, above note 12, para.72).

Lastly, a recent debate must be mentioned. The prohibition embodied in Article 2(4) of the Charter includes only inter-state use of force. In other words, the only entities bound by it are the states. The traditional acceptance regarding the source of armed attack and thus the target of the exercise of self-defence was also in parallel; only states could engage in such activities. However, the post-9/11 era brought upon some discussions on possibility of non-state groups engaging in armed attacks within the meaning of Article 51 of the Charter. Acknowledgment of such a possibility would lead to the creation of a group of acts which are not covered by the prohibition of use of force but which constitute armed attacks and thus the classical hierarchical categorisation of the notions will be changed.

B. The notion of “international armed conflict”

The adoption the Geneva Conventions of 1949 was a milestone in the history of the *law of war*; until then, the law of peace and the law of war were mutually exclusive. From the outset of a war (in legal terms), belligerent states’ “normal” relations would be disrupted. The Conventions have brought about the notion of “armed conflict”, a notion which is material rather than legal. With this “semantic contribution”²⁹, the application of humanitarian law was no longer dependent on the will of the states which, until then, could avoid being bound by the “rules of war” by simply denying the existence of a state of war. This purpose is clearly stated in the Commentary:

One may argue almost endlessly about the legal definition of ‘war’. A State can always pretend, when it commits a hostile act against another State, that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence. The expression ‘armed conflict’ makes such arguments less easy.³⁰

Common Article 2(1) of the Conventions thus reads as follows:

In addition to the provisions which shall be implemented in peacetime, 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.

²⁹ Sylvain Vite, ‘Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations’ (2009) 91(873) *International Review of the Red Cross* 69, 72.

³⁰ Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949, Vol. 1: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC, Geneva 1952) 32.

The following paragraph states that the Conventions will also apply to the cases of occupation “even if the said occupation meets with no armed resistance”. Therefore, there are three main situations to which the IHL of IAC is applicable.³¹ For the purposes of this paper, the only relevant one is that of “any other armed conflict” so the other options will just be briefly explained. The first option is declaration of war, which was a crucial element in the pre-1949 period as the *laws of war* and *laws of peace* were mutually exclusive. For the former to become into play, the war in legal terms (as opposed to in material sense) had to begin. However these declarations have today become obsolete.³² The second option is occupation, the beginning of which is still controversial and constitutes a debate. Be that as it may, any occupation amounts to an IAC, even without resistance, and IHL as a whole is applicable.

Turning to “any other armed conflict”, it is rather straightforward that IHL applies to them. What not as clear-cut is the *beginning* of an armed conflict; thus, the beginning of the application of IHL. It can be said that IHL deals with the rules applicable *in bello* and does not thoroughly draw the borders of its scope of application. It is understandable, due to the strict distinction between *jus ad bellum* and *jus in bello*; the classification of a situation as an armed conflict is almost never detached from the political nature of the former.³³ Even so, there are two main sources which to a certain extent clarify the notion and which have been widely accepted in the academia. The Commentaries to the Geneva Conventions are a classical starting point in clarifying the provisions and Pictet introduces the so-called “first-shot theory” regarding the beginning of the application of IHL. He explains 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. The respect due to human personality is not measured by the number

³¹ Additional Protocol I of 1979 has widened the material scope of application of IHL of IAC to national liberation war but these will not be taken into consideration in this paper.

³² Julia Grignon, ‘L’Application Temporelle du Droit International Humanitaire’ (Thèse de Doctorat, Université de Genève, 2013), 46.

³³ E.g. the conflict that took place between Netherland and Indonesia in the beginning of the 1950s, both parties (at least initially) denied the existence of an armed conflict and thus chose not to apply the third Geneva Convention (Frits Kalshoven and LiesbethZegveld, *Constraints on the Waging of War* (3rd edition, ICRC, Geneva 2001) 39.

of victims. Nor, incidentally, does the application of the Convention necessarily involve the intervention of cumbersome machinery. It all depends on circumstances.³⁴

According to this theory, “as soon as the first (protected) person is affected by the conflict, the first segment of territory occupied, the first attack launched” IHL starts to apply.³⁵ This purely facts-based approach is also later taken by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadic* case.³⁶ According to the Court, “an armed conflict exists whenever there is a resort to armed force between States”.³⁷ In the first glance, it can be thought that whereas the Pictet Commentary directly refers to the beginning of a conflict, the ICTY refers its general description. In any case, a conciliating interpretation of the texts together leads to the result that IHL starts to apply from the first act.

The clarification by these sources is in any case not detailed. Now, through a comparison with the notion of armed attack, the notion of triggering act will be decomposed into the elements of nature, intensity, origin, target, intent and legality and will be analysed in order to bring a slightly more clear meaning to the notion.

C. Comparison of the two notions

i. The nature of the act

It has been explained in the previous section that the majority view is that any *violent* act can trigger the application of IHL and independently of any (subjective) statements of states. There is no limit on *where* the act is taken; it can be in the high seas or even in the space. Equally, the appreciation on *how* the violent act is taken is also quite inclusive; it can be air raids (“à la Pearl Harbor” as Dinstein puts it³⁸), shelling and today, even launching a cyber-attack. It is crystal clear

³⁴Pictet, above note 30, 32.

³⁵ Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?* (Vol.1, 3rd edition, ICRC, Geneva 2011) 34.

³⁶*Tadic Case* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1 (2 October 1995).

³⁷*Ibid.* para.70.

³⁸Yoram Dinstein, ‘The Initiation, Suspension and Termination of War’ in Michael Schmitt (ed.) *International Law across the Spectrum of Conflict: Essays in Honour of Professor L.C. Green on the Occasion of his Eightieth Birthday* (Naval War College, Newport 2009) 131, 134.

that “any kind of use of arms”³⁹ activates IHL. The Pictet Commentary and the *Tadic* interpretation are both inclusive of such incidents.

Looking from the reverse angle, it is also clear that the threat of force, as long as it does not amount to a declaration of war, is not enough to commence an IAC.⁴⁰ On the other hand, threatening to use force and taking essential steps in what can objectively end in material damage are different things. For example, laying mines, if they directly endanger even one person, is qualified as an attack in the Commentary to the Additional Protocols of 1977.⁴¹ The sought clarification is about the notion of attack within the meaning of Article 49 of the Additional Protocol I but it is clear that any attack that goes under that Article can *a fortiori* trigger the application of IHL.

Regarding armed attacks within the meaning of Article 51 of the UN Charter, that is to say an attack that warrants the exercise of right to self-defence, it is generally accepted that certain intensity is needed. In some instances, e.g. when there is artillery shelling or air strikes, it is clear that the threshold is met.⁴²

It is suggested that any act can constitute an armed attack if “they result in, or are capable of resulting in destruction of property or loss of lives”.⁴³ This is however, a position that takes into account the necessity and proportionality criteria that must be respected in answering the attack by resort to self-defence. That is to say, in *less grave* cases, as long as these criteria are respected, the answering act will be a legitimate exercise of self-defence. However, this view is connecting the notion of armed attack, which must be objectively defined in order to prevent abuses, to the respective criteria that must be observed in the use of force through self-defence. As explained in Part I, the gap left between the Articles 2(4) and 51 is on purpose, to avoid escalation of violence between states; the above-mentioned view is dangerously blurring the lines between the two. Moreover, the ICJ doesn’t consider “mere frontier incidents” (unless they reach the necessary *high* intensity required in armed attacks) as forming armed attacks even though they are very well

³⁹ Dietrich Schindler, ‘The different Types of Armed Conflicts According to the Geneva Conventions and Protocols’ (1979) 163 *Recueil des Cours de l’Académie de Droit International* 128, 131.

⁴⁰ C. Greenwood ‘Scope of Application of Humanitarian Law’ in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* (2nd edition, Oxford University Press, Oxford 2009) 57.

⁴¹ Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols* (ICRC, Geneva 1987) 603.

⁴² Ruys, above note 16, 152.

⁴³ *Ibid.*, 155.

capable of resulting in loss of life.⁴⁴ It rather considers them as a “less grave forms of use of force”.

A more interesting debate on the nature of the triggering act is if capture of a soldier can qualify as such. The Commentary on the Geneva Convention III stipulates that

Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4. Even if there has been no fighting, the fact that persons covered by the Convention are detained is sufficient for its application. The number of persons captured in such circumstances is, of course, immaterial.⁴⁵

This text can be interpreted in two ways. The generally accepted view is that the capture of a soldier can be the starting point of an IAC and trigger the application of (at least) the third Geneva Convention. The absence of any other hostilities or even absence of a pre-existent IAC is irrelevant; the capture is the first and the triggering hostile act of the conflict.⁴⁶ In my opinion, it is not that clear, for two reasons. First of all, the phraseology of the text is ambiguous; it may as well be interpreted as explaining the beginning of the material application (as different from applicability – e.g. in the case of an IAC where there are no prisoners of war the third Geneva Convention is not *really* applying) of the third Geneva Convention during an IAC. Second, the use of the terms “capture of adversaries” can be understood as implying a pre-existing conception of an “adversary” in the moment of seizure, which itself implies a pre-existing IAC. In any case, the majority view is that the capture of a soldier is sufficient for an IAC to begin.⁴⁷ Regarding the notion of armed attack, as will shortly be explained, a certain intensity is needed. “An armed

⁴⁴ ICJ, *Nicaragua*, above note 11, para. 195.

⁴⁵ J. Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949, Vol. 3: Geneva Convention relative to the Treatment of Prisoners of War* (ICRC, Geneva 1960) 23.

⁴⁶ Grignon, above note 32, 72.

⁴⁷ E.g. Hans-Peter Gasser, ‘International Humanitarian Law: an Introduction’ in Hans Haug (ed.), *Humanity for All: The International Red Cross and Red Crescent Movement* (Henri Dunant Institute, Geneva 1993) 511 and; Robert Kolb, *Ius in Bello: le Droit International des Conflits Armés* (2nd edition, Helbing Lichtenhahn, Basel 2009) 73.

attack presupposes a use of force producing (or liable to produce) serious consequences, epitomized by territorial intrusions, human casualties or considerable destruction of property.”⁴⁸

In the clear cut armed attack cases such as artillery shelling, it is also clear that the application of IHL will be triggered; in these cases armed attack and the beginning of an IAC overlaps. However, “less grave” uses of force such as frontier incidents are not generally accepted as constituting armed attack, more due to the low intensity of the act rather than its nature.⁴⁹ Here, the notions of armed attack and the triggering act of IHL no longer overlap as “a mere frontier incident” is accepted as being capable of initiating an IAC. It should be noted that the first act is still unlawful under *jus ad bellum* as it’s a type of prohibited use of force. However, it does not give rise to the exercise of the right to self-defence. In other words, any *forceful* answer of the *attacked* state will still be in breach of the UN Charter. Apropos capture of a soldier as a specific triggering act, it is unlikely that it meets necessary intensity threshold for armed attacks. In this situation an act which is able to trigger the application of IHL will nevertheless not give rise to the exercise of right to self-defence.

ii. The intensity of the act

The *threshold*⁵⁰ of intensity needed in an act in order for it to trigger the application of IHL is extremely low⁵¹, as can be deduced from the discussion on the nature of the triggering act above. A literal reading of the commentary to Article 2⁵² and ICTY’s statement in the *Tadic* case⁵³ leads to the same result. Furthermore, the text of Article 2 reads that an IAC exists “even if the state of war is not recognized by one of them”; the existence of an IAC depends on an objective assessment of the facts. However, it has been argued that in state practice isolated incidents were never taken as initiating IAC⁵⁴ and so there indeed is an intensity threshold, but it is not the view

⁴⁸ Y. Dinstein, *War, Aggression and Self-Defence* (5th edition, Cambridge University Press, Cambridge 2012) 208.

⁴⁹ Randelzhofer and Nolte, above note 23, 1410.

⁵⁰ Actually, the word threshold may not be correct while discussing the triggering act in IHL; the weight is more on the nature of the act rather than its intensity.

⁵¹ Vite, above note 29, 72.

⁵² Pictet, above note 30, 32.

⁵³ ICTY, *Tadic*, above note 36, para.70.

⁵⁴ A counter example is When a US pilot was shot down and captured by Syrian forces over Lebanon in the 1980s the United States maintained that this incident amounted to an armed conflict and that the pilot was thus entitled to be treated as a prisoner of war under the Third Convention (Greenwood, above note 40, 48).

of the majority.⁵⁵ Thus, there is no need for an act which is intense *per se* or in consequences or which continues for a certain amount of time.⁵⁶ In short, IHL “applies at the first resort to force between two state-armed forces”.⁵⁷ Returning to the example of frontier incidents, it is accepted in the doctrine as amounting to an act triggering the application of IHL.⁵⁸

Apropos the notion of armed attack, it has been mentioned before that there exists a threshold of intensity and the attacks that fall below this threshold are classified as use of force falling short of an armed attack. Nevertheless, this *seuil* is not a stable one; it is a “variable standard”.⁵⁹ It means that the necessary gravity or intensity is dependent of the specific circumstances of each case and it is not obligatory to apply them separately to each act, instead of in combination. In this regard, the decisions of the ICJ in *Nicaragua, Armed Activities* and *Oil Platforms* are interpreted as implying a doctrine of “accumulation of events”. A concrete explanation given by Ruys to the notion is as follows:

It deals with situations where consecutive attacks take place that are linked in time, source and cause, in particular when those attacks are part of a ‘continuous, overall plan of attack purposely relying on numerous small raids’. In this context, it is argued that incidents that would in themselves merely constitute ‘less grave uses of force’, when forming part of a chain of events, can qualitatively transform into an ‘armed attack’ triggering the right of self-defence.⁶⁰

It is true that in all the cases, even if implicitly, the Court has accepted that some acts which fall below the intensity threshold by nature can “collectively” constitute an armed attack, which would in its turn give rise to exercising self-defence.⁶¹ However, for the sake of *peace*, it is better to interpret this doctrine in a narrow manner and not be forgotten that even though the Court accepted the possibility in principle, an example in practice does not exist.

⁵⁵KrisztinaHusztiorban, ‘The Concept of Armed Conflict in International Humanitarian Law’ (PhD Thesis, Graduate Institute, 2014), 77.

⁵⁶Vite, above note 29, 72.

⁵⁷Carswell, above note 2, 149.

⁵⁸E.g. Kolb, above note 47, 73 and; Eric David, *Principes de Droit des Conflits Armés* (4th edition, Bruyant, Brussels 2008) 122.

⁵⁹Green, above note 25, 41.

⁶⁰Ruys, above note 16, 168.

⁶¹ ICJ, *Nicaragua*, above note 11, para.231 (emphasis added); ICJ, *Oil Platforms*, above note 12, para.64.

It is clear that apropos the element of intensity there is a gap between armed attack and IAC. Whereas an *attack* does not have to be necessarily “intense” or “grave” to be able to trigger an IAC, it must reach a certain threshold to be able to qualify as an armed attack within the meaning of Article 51 of the UN Charter. If the accumulation of events theory is accepted, there would still be discrepancy between the notions. Having a very low *threshold*, IAC would be triggered with the first act which does not (alone) constitute an armed attack. However, the armed attack would be formed at the moment of “accumulation”. Thus, during the time from the beginning of the IAC, until the formation of the armed attack, the prohibition of use of force would stay intact. (Unless an act of the *answering* state qualifies as an armed attack *per se* or cumulatively before.)

iii. The origin of the act

Traditionally, *wars* are carried out by the armed forces of the states. It is of no doubt that if the army of a state engages in hostile acts against another state, an IAC begins. However, this is not a prerequisite for an IAC; it is just a factual observation. Otherwise, it would practically be impossible for states which don't have armies, such as Costa Rica, to actually engage in such an activity.

Before going through other *means* the states may employ in IAC, it must be noted that the acts of the private persons cannot constitute an armed conflict⁶² and by *private* it is meant that persons or groups who are neither (*de facto* or *de jure*) organs of the state nor are under its direction or control that would lead to the attribution of their acts to the state.

First of all, other *de jure* organs of the state may be utilized to pursue hostile acts by the state, e.g. the police. In the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), it is set forth that a state is responsible for all the acts of its *de jure* organs.⁶³ Furthermore, an IAC “may also materialise as a consequence of a military operation by a state but conducted by entities other than the regular armed forces, the question of “who” is involved in the operation is irrelevant.”⁶⁴ Thus, in the case where other state organs which are not integrated into the armed forces are utilised in an act which would constitute a triggering act of

⁶² Greenwood, above note 40, 48.

⁶³ Annexed to UNGA Res 26/83 (28 January 2002) UN Doc A/Res/26/83.

⁶⁴ 13th Bruges Colloquium, ‘Scope of Application of International Humanitarian Law’ (2012) <https://www.coleurope.eu/sites/default/files/uploads/page/collegium_43_webversie.pdf> accessed 12 August 2014, 77.

IHL if carried out by the regular armed forces, the consequences can still be the same as in the latter situation.

Second, normally the use of force by individual persons or groups is not sufficient to trigger an IAC.⁶⁵ Nevertheless, under certain circumstances, some groups can be qualified as either *de facto* organs of the state or their acts can be attributable to the state and their acts can also amount to an IAC.⁶⁶ In order for a group to be considered as a *de facto* organ of the state, it must be completely dependent to it. The ICJ has explained this concept in the *Bosnian Genocide* case.⁶⁷ If this is the case, as any act of the group will be regarded as an act of the State within the meaning of Article 4 of ARSIWA, their acts will also be able to trigger an IAC. Furthermore, even if a group does not meet this high threshold of complete dependency, their acts still can be attributable to a state and thus they can initiate an IAC. The ICTY has ruled in the *Tadic* case that if a state has overall control over a group, a conflict between them and another state can be classified as an IAC between the two states.⁶⁸ The ICJ has acknowledged in the *Bosnian Genocide* case that even though it adopts the effective control test in order to establish states' international responsibility, the overall control test may as well be used to qualify a conflict.⁶⁹ Thus, if it can be established that a group is a *de facto* organ or under the overall control of a state, that group can be the origin of the triggering act of IHL.

Turning to *who* may engage in an armed attack, it is uncontroversial that a state can. Traditionally, the right to self-defence has always been exercised by one state against another. In this regard, the ICJ has held that "Article 51 of the Charter thus recognises the existence of an

⁶⁵Greenwood, above note 40, 48.

⁶⁶M.Sassòli, 'The Legal Qualification of the Conflict in the Former Yugoslavia: Double Standards or New Horizons for International Humanitarian Law?' in Sienho Yee and Wang Tieya, *International Law in the Post-Cold War World : Essays in Memory of Li Haopei*. (Routledge, London 2001) 324.

⁶⁷*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgement) 2007 <<http://www.icj-cij.org/docket/files/91/13685.pdf>> accessed 12 August 2014, para.392. This paragraph reads as follows; "persons, groups of persons, or entities may, for purposes of international responsibility, be equated with state organs even if that status doesn't follow from internal law, provided that in fact the persons, groups or entities act in complete dependence on the state, of which they are ultimately merely the instrument".

⁶⁸*Tadic Case* (Appeals Chamber Judgement) ICTY-94-1 (15 July 1999), para.137. The overall control test requires "a role in organising, coordinating or planning the military actions of the military group" but it is not "necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations".

⁶⁹ ICJ, *Bosnian Genocide*, above note 67, para.405.

inherent right to self-defence in the case of an armed attack *by one state against another state*⁷⁰ (emphasis added).

The real debate on this subject has focused on whether an armed attack can be carried out by a non-state actor as opposed to a state rather than on which entities of the state can be used. Besides its emphasis on the fact that an armed attack can only be launched by a state against another state, the ICJ also accepts the possibility of having an *indirect* attack. In this regard, it seems to be of the view that only states can carry out such attacks.⁷¹ Especially in the *Nicaragua* and *Armed Activities* cases, the Court held that acts of non-state actors that were “sent by or on behalf of a state” may, if meeting the other criteria, amount to armed attacks.⁷² If the non-state actors are not sent by the State, for their attacks to be able to amount to an armed attack, the state must at least have a “substantial involvement therein”⁷³; this criteria is necessary, in the view of the Court, to attribute the attack to the state. Thus, an attack which was launched from the territory of a state but in which the state isn’t involved or which the state was simply unable to stop will not constitute an armed attack. The main conclusion that can be reached from the statements of the Court is that self-defence can only be exercised against a state and thus for a non-state group to be the origin of an armed attack, its acts must be done on behalf of the state or must be attributable otherwise to the state. An armed attack cannot be made by a non-state group *per se*, without any type of involvement from a state. It is of note that the Court has not used the effective control test it had adopted in order to establish state responsibility for certain violations of non-state groups and by doing so, it has distinguished the two issues.⁷⁴ However, the doctrine mainly accepts that Article 8 of ARSIWA which regulates responsibility for conducts directed or controlled by the state reflects the effective control test. In this case, when the threshold of this test is met, the act of non-state group will be attributable to the state and constitute an armed attack launched by the latter.⁷⁵ In any case, in my opinion “substantial involvement” seems like requiring a lower threshold so the effective control test may be unnecessary.

⁷⁰*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) 2004 <<http://www.icj-cij.org/docket/files/131/1671.pdf>> accessed 12 August 2014, para.139.

⁷¹Green, above note 25, 45.

⁷²ICJ, *Nicaragua*, above note 11, para.195; ICJ, *Armed Activities*, above note 13, para.146.

⁷³ICJ, *Nicaragua*, above note 11, para.195.

⁷⁴Jordan Paust, ‘Armed Attacks and Imputation: Would a Nuclear Weaponized Iran Trigger Permissible Israeli and US Measures of Self-Defense?’ (2014) 45 *Georgetown Journal of International Law* 411, 426.

⁷⁵Dinstein, above note 48, 224.

This is the position taken by the ICJ, however, after the 9/11 attacks, the general debate and the state practice on the subject have grown towards the acceptance of the possibility that an armed attack by a non-state group alone can also justify the exercise of right to self-defence. These may be the cases for groups harbouring in failed states or within states that passively tolerate them but without helping them materially. The wording of Article 51 of the UN Charter, while designating only states as targets of the attack, is silent on the issue of the origin of armed attack. There is thus space for an interpretation accepting that non-state actors can be the perpetrators of an act permitting the exercise of right to self-defence.⁷⁶ Furthermore, in Resolutions 1368⁷⁷ and 1373⁷⁸, the Security Council has implicitly accepted the possibility to engage in self-defence against non-state actors.⁷⁹ Lastly, even though as explained above that the majority of the ICJ has decided that an armed attack may only be engaged by a state, there was a considerable amount of judges who did not share this view.⁸⁰ At a second stage, it is also controversial if the target of the act of self-defence would be the group itself or the harbouring state, even in the absence of any control over the group. However, this debate is beyond the topic of the present paper.

In conclusion it may be said that both for IAC to begin and for an act to constitute an armed attack, states' own organs or entities can be engaged. Regarding acts of the non-state groups, the necessary control that a state must have over the group varies from one notion to the other; whilst for an IAC to be triggered overall control is sufficient, for an act to amount to an armed attack, the required threshold is higher. In this case, some acts that may trigger the application of IHL may nevertheless not warrant the exercise of the right to self-defence and thus the prohibition of use of force may stay intact. On the other hand, if we accept that a non-state group based in another state *per se* can launch an armed attack within the meaning of Article 51 of the UN Charter, this act can never set off an IAC. It is a subject of a completely different debate, if then, the self-defence answer which will naturally take place on the territory of a 3rd state can trigger the application of IHL of IAC.

⁷⁶*Ibid.*, 225.

⁷⁷UNSC Res 1368 (12 September 2001) UN Doc S/RES/1373.

⁷⁸UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.

⁷⁹Dinstein, above note 48, 228.

⁸⁰See the separate opinions of Judge Higgins and Judge Kooijmans and the declaration of Judge Buergenthal.

iv. The target of the act

For an act to trigger an IAC, it must be directed against the state. It is not obligatory that the target is the armed forces, even though normally, as explained above, they would be the ones *waging the war* once the conflict has begun. For example, for IHL to be triggered, the act can be directed against the civilian population or against the territory of the state.⁸¹ What is important is not the *material target* but the *abstract target*, i.e. the state.⁸² The triggering act may appear, since there is no level of intensity needed, as affecting only one single person. In terms of IHL, there should be no controversy if the target is a soldier, a commercial vessel or a random person. However, regarding especially capture as a triggering act, the intention of the state may prove useful; it may as well be a law enforcement act.

The controversial issue is again about the non-state armed groups based on a state's territory. Does attacking such a group necessarily trigger the application of IHL of IAC even if the *host* state is simply unable to stop the group or has no control over it? Or can it be considered only as a single non-international armed conflict as actually the state *per se* is not attacked? The majority opinion is that in these cases there are parallel conflicts; one international and one non-international.⁸³ However, it has also been argued that the mere trans-border nature of the conflict does not directly initiate an IAC and that the nature of the belligerent parties (one state and one non-state group) is the decisive factor in the absence of any hostile *intent* against the host state.⁸⁴

Regarding non-state groups over whom a state has overall control being targeted by another state, things are even less clear than the situation in which the groups *per se* is the origin of an act. There isn't much written in doctrine on this subject neither. First, the two mentioned situations must be distinguished; the reason why an act of a non-state group can initiate an IAC is because they are acting on behalf or under the control of a state and thus their acts are attributable to the latter. Taking into account the second view explained in the preceding paragraph, when such a

⁸¹Gasser, above note 47, 510.

⁸²Grignon, above note 32, 70.

⁸³This approach is also endorsed by the ICRC. See 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (31st International Conference of the Red Cross and Red Crescent, 2011) <<http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf>> accessed 12 August 2014, 10.

⁸⁴Sassòliis also of the same view. See M. Sassòli, 'Current Challenges to IHL: Qualification of conflicts and the issue of scope of the battlefield' (podcast) in ICRC, 'Advanced Training Course in International Humanitarian Law' (Geneva, November 2003), <<http://www.icrc.org/eng/resources/documents/feature/2014/02-03-ihl-advanced-training-course.htm>> accessed 12 August 2014.

group is targeted by another state, how far can the *host* state itself be considered as the *victim*? What if the group under control is not within the territory of the controlling state? Should we again try to get some help from the element of intent as in the abovementioned case? In borderline cases, especially in ones including non-state armed groups as targets, the use of this element can prove to be useful. On the other hand, the moment the groups *answers*, the conflict would be classified as an international one; it seems illogical to give different classifications to the same conflict.

For the notion of armed attack, the target again must be the state itself. The attack can materialise against the “state’s territory or its external manifestations abroad”.⁸⁵ So, it is not important *where* the target is located, it may even be within the territory of the attacking state.⁸⁶ There has been a limited debate on the issue of differentiation between private vessels and military vessels as targets. The Definition of Aggression, a source heavily relied on by the ICJ whilst defining armed attack, does not include any non-territorial non-military targets, so a potential distinction can be appropriate.⁸⁷ However, noting that “mining of a single military vessel” may warrant resort to the exercise of right to self-defence⁸⁸, the Court seems to imply that an attack against a private ship flying a state’s flag (distinct from being owned by the state) can also constitute an armed attack.⁸⁹ A possible difference on the required intensity has been left unclear.

On the issue of targeting of non-state actors based in third states, which are unable to stop them, it should first be reminded that the target of the armed attack can only be a state. In other words, if we accept that, taking into consideration *jus ad bellum* concerns such as avoiding the escalation of violation between states, it can be advocated that action can be taken against such groups without actually *attacking* the host state, i.e. without launching an armed attack. However, this is not uncontroversial, as there is definitely an attack against the territory of the state. For groups under the control of the hosting states, an interesting issue arises. As explained before, in terms of establishment of the responsibility of states, the group must either be a *de facto* organ of the state (ARSIWA Article 4) or must be under the effective control of it (ARSIWA Article 8). If a group is a *de facto* organ of the state, we may say that an attack against the former will definitely be an

⁸⁵Ruys, above note 16,152.

⁸⁶Dinstein, above note 48, 217.

⁸⁷Green, above note 25, 41.

⁸⁸ ICJ, *Oil Platforms*, above note 12, para.72

⁸⁹*Ibid.*

attack against the latter as the organs *are* the state. If a group is under the effective control of the state, they *are not* the state but their acts are attributable to it, but does this mean that any act against them is actually directed to the state? In my opinion, the object of the ARSIWA is rather to settle the rules of *active* attribution rather than the *passive* attribution. In other words, the state cannot be victimised through the group as it's the *acts* of the groups that are attributable but not the *group per se*.

In conclusion, targeting of a wide range of objects can constitute both an armed attack and trigger the application of IHL. The difference between the two groups of targets is mostly due to the intensity requirement embedded in the notion of armed attack. Regarding the targeting of non-state actors, many controversial issues arise. In very general terms, it can be said that if a group is under the overall control of a state, an act against them will trigger an IAC between the two states as it was explained above that there is no good explanation to give two different classifications to the very same situation. If not, it is debated if a conflict between a state and a non-state actor in the territory of a third state will necessarily start an IAC. For armed attacks, depending on the level of the *relationship* between them and the state, an attack against the group can also constitute an attack against the state. Even in the absence of such a relationship, the territorial state may be deemed to be a victim of an armed attack. Briefly, the *classical* targets for both acts more or less coincide (even though the group for IAC is bigger). For the non-state armed groups, they are determined according to different sets of rules.

v. The intent of the act

The replacement of the term “war” with “armed conflict” was, as explained before, a deliberate choice of the drafters of the Geneva Conventions. This replacement sought to base the application of IHL on objective norms and rendered how the states consider/classify the situation irrelevant.⁹⁰ Thus, the significance of *animus belligerendi* was ruled out.⁹¹ However, in some borderline cases, the element of intent may prove useful; especially for eliminating the acts occurred due to errors such as accidental entrance of the military troops of one army into a neighbouring state's

⁹⁰Greenwood, above note 40, 46.

⁹¹ Kolb, above note 47, 73.

territory.⁹² Then, it can be said that without an “intention to harm the enemy”, these *mistakes* will not amount to an IAC.⁹³ Furthermore, in cases where, for example, a member of the armed forces engages in a hostile act individually, it would be more logical to say that an IAC is not triggered. For his/her acts to be meaningful for the beginning of IHL, they must be placed within the regular hierarchy of the army.⁹⁴

When the act is carried out not by the state itself but by (or through) a non-state armed group, the overall test applied by the ICTY is more clear on the fact that there is no space for *animus belligerendi*. According to this test “a role in organising, coordinating or planning the military actions of the military group” is sufficient; it is not necessary for the state to “plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations”.⁹⁵ Thus, any act carried out by such a group, even the ones not foreseen or intended by the state, (in terms of IHL) will be attributable to the state.

In respect of the notion of armed attack, the “attack” itself implies a certain intention as opposed the notion of “incident”.⁹⁶ The holding of the ICJ in the *Nicaragua* case is also in line with this interpretation. Indeed, the Court, while analysing if the acts in question amount to an armed attack also mentioned “possible motivations” as an element to take into account.⁹⁷ However, as a part of the doctrine sets forth, it is not that easy to determine the intention of the aggressor party (and states will not tend to be straightforward about an intention to “attack”). They argue that for this very reason, a *mens rea* element should not be included in the notion of armed attack.⁹⁸ In my opinion, unless there is strong evidence otherwise, the necessary intensity for an armed attack to occur leaves the element of intent redundant; an act of sufficient gravity will imply also the *animus aggressionis*.

Regarding armed attacks carried out by non-state groups if they are accepted as being able to do it individually, the abovementioned considerations will still be valid. In the case of an armed

⁹² For a recent example, see Peter Stamm, ‘Switzerland invades Lichtenstein’ New York Times (New York, 13 March 2007) http://www.nytimes.com/2007/03/13/opinion/13iht-edstamm.4893796.html?_r=1& accessed 12 August 2014.

⁹³ Vite, above note 29, 72.

⁹⁴ Grignon, above note 32, 70.

⁹⁵ ICTY, *Tadic*, above note 68, para.137.

⁹⁶ Ruys, above note 16, 158.

⁹⁷ ICJ, *Nicaragua*, above note 11, para.231.

⁹⁸ E.g. AvraConstantinou, *The Right of Self-Defence under Customary International Law and Article 51 of the UN Charter* (Bruylan, Brussels 2000), 62.

attack attributable to a state, as explained the sub-section “Origin of the Triggering Act”, according to the ICJ, they must be sent on the behalf of the state or the state must have a substantial involvement in the act. It can be said that a state which has such a degree of involvement in the act will always also have the *animus aggressionis* and reversely, to meet the necessary threshold put by the Court, it is indispensable to have the said intent. Examining the same act through Article 8 of ARSIWA, thus through the effective control test, leads to the same result. In cases where a state has control over the armed group (thus is the origin of the attack), the intent that should be taken into account is that of the state and not of the armed group; it is irrelevant for what motives does the latter engage in such activities.

Briefly, it can be said that the notion of intent, at least for the simple and classical examples where states and only states are involved, does not play a crucial role in defining neither of the notions, though it can be useful in some specific cases. Mere attribution is sufficient for an act to constitute an armed attack and to trigger an IAC. Regarding the situations in which non-state actors are involved, it changes a little, especially for the notion of armed attack. The application of different attribution tests to same acts can sometimes result in an act triggering IHL without amounting to an armed attack, as the threshold of the overall test is lower. Furthermore, any act of the group under the overall control of a state is attributable to the latter, but effective control requires control for every specific act. Thus, it can be said that the second test inherently includes *intent*, no matter if the notion of armed attack *per se* requires it or not.

vi. The legality of the act

Concerning the legality of the act, the difference between the two notions stem not from their own characteristics but directly from the distinction between *jus ad bellum* and *jus in bello*. The legality⁹⁹ of the act is irrelevant for the beginning of an IAC; “the applicability of the Geneva Conventions and Protocols does not depend on whether the use of force against another State is permitted or not.”¹⁰⁰ Accordingly, state’s compliance/incompliance with *jus ad bellum* does not change the qualification of the situation as an armed conflict. The triggering act, “the act of war”,

⁹⁹ The word *legality* in here does not refer to compliance with the rules on conduct of hostilities in IHL.

¹⁰⁰ Schindler, above note 39, 131.

just displays the application of IHL and does not refer to any *jus ad bellum* issues.¹⁰¹ For IHL, an armed attack is just *another* attack.

Armed attack is a notion of *jus ad bellum* and, at least within the meaning of Article 51, it is inherently unlawful. This can simply be explained by the fact that it warrants a use of force which would normally be unlawful itself. Furthermore, both in International Criminal Law and in Public International Law, self-defence is limited only against unlawful acts; it is thus impossible for an armed attack to be lawful. In other words, as long as an act is lawful (e.g. if it is itself an exercise of self-defence), it cannot be defined as an armed attack under Article 51.

The triggering act of IHL may or may not be lawful under *jus ad bellum*, as its scope and the scope of armed attack do not exactly coincide. In general terms, the scope of the triggering act covers more acts than what armed attack does, with the exception of independent armed attacks by non-state groups which would not amount to an IAC.

Conclusion

Throughout the paper, an overall comparison between the constitutive elements of the notions of armed attack and the triggering act of IAC has been made. In conclusion, they remain distinct and the hazardous overlap of the notions is nothing more than what it is; a coincidence. No sources aiming to define the two notions borrow terms from the other. It is true that, as set forth in the introduction, both *jus ad bellum* and *jus in bello* serve the same cause; that is to limit the states' power to use force, though on different levels. However, the two systems remain as distinct as ever; they go hand in hand but looking their own directions.

The “force gap” created with the UN Charter, that is, the gradual difference between a use of force and an armed attack, which is explained by Zweifach as a preference of “peace over justice”¹⁰², leaves a considerable number of situations covered by IHL but also by the prohibition of use of force. In other words, *war* is not sufficient for one to *fight*. In most of the situations that amount to an IAC, prohibition of use of force continues in the absence of an armed attack. On top of all the existing divergences, the recent developments regarding the non-state groups create complex situations, e.g. the act of self-defence being the triggering act of an IAC and the notions

¹⁰¹ Greenwood, above note 40, 58.

¹⁰² Benjamin Zweifach, ‘Plugging the Gap: A Reconsideration of the UN Charter’s Approach to Low-Gravity Warfare’ (2013) 8 Intercultural Human Rights Law Review 379, 379.

even grow further away from each other due to different *control tests* utilised in each system. The only uncontroversial fact is that states are bound by their obligations in both simultaneously.

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