

WAR

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ABSTRACT

The legal term “war” is considered a term of the past that has no substance in modern international law. The desire to abandon the term has a clear rationale—historically, war was triggered by a formal declaration and fought between states, allowing parties with more power to manipulate the application of international humanitarian law, which would commence only upon a declaration of war. However, the post-Geneva Conventions understanding of hostilities has largely changed, most notably in the adoption of the notion of “armed conflict,” which is based on factual assessment rather than on a declaration in both international and non-international conflicts.

However, this Article suggests that the term “war” is still in use by states, international courts, international institutions, and legal scholars. The term “war” has not ceased to exist in the context of international law; rather, it has evolved to indicate an escalation in the intensity of hostilities *within* the paradigm of “armed conflict.” This new use of “war” has significant explanatory value because the term “armed conflict,” especially in international armed conflicts, covers a wide spectrum of intensity. While humanitarian law applies as soon as an armed conflict has commenced, the indication of intensity escalation within the armed conflict paradigm is relevant in various aspects, including the provision of humanitarian aid, humanitarian intervention and the perception of urgency by international tribunals.

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INTRODUCTION

A familiar scenario that takes place in most international law classes is when a student asks a question using the word “war,” and the professor gently but decisively responds that the term “armed conflict” should be used instead. Indeed, generations of post-Geneva Conventions students have been taught that the word “war” is no longer in use. Similar to the name Voldemort in *Harry Potter*, the term “war” is not to be articulated aloud in reference to the modern era in international law classes. This prohibition is in striking contrast to the fact that, as this Article demonstrates, the term “war” is widely used outside the classroom and is of significant explanatory value in the context of international law.

Prohibition of the term “war” was the result of Common Article 2 (CA2) and Common Article 3 (CA3) of the Geneva Conventions of 1949, which replaced the term “war” with “armed conflict.” The latter term differs in several aspects, most notably in the factual assessment of conflict and its applicability to conflicts involving non-states.¹ Since the Geneva Conventions, the term “war” has been perceived as meaningless and disregarded as a legal term:

It is doubtful . . . whether it is still meaningful to talk of war as a legal concept or institution at all. If no direct legal consequences flow from the creation of a state of war, the state of war has become an empty shell which international law has already discarded in all but name.²

Dinstein explains that “it is necessary . . . to differentiate between ‘war’ as a figure of speech heightening the effect of an oral argument or a news story in the media, and ‘war’ as a legal term of art.”³ Indeed, as Dinstein points out, the term “war” is widely used

¹ Common Article 2 and Common Article 3 refer to language in specific provisions – Articles 2 and 3 – common to all four Geneva Conventions. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 2, art.3 Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, art. 3 Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War art. 2, art.3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter CA 2 and CA 3].

² Christopher Greenwood, *The Concept of War in Modern International Law*, 36 INT’L & COMPAR. L.Q. 283, 305 (1987).

³ YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENCE* 3 (4th ed. 2005).

outside of the legal context, such as in the expressions “class war,” “war on terror,” or “war against the traffic in narcotic drugs,”⁴ which are undeniably figures of speech that do not carry legal implications in the international law context. Dinstein further notes that it is important to distinguish the legal term “war” used in domestic and international law as “[w]ar, especially a lengthy one, is likely to have a tremendous impact on the internal legal systems of the belligerents.”⁵

This Article does not dispute the existence of the word “war” outside of the legal context or in the domestic legal context because such an existence is apparent and is not of scholarly importance in the fields of international law. Rather, this Article argues that the legal use of the term “war” in international law has not ceased to exist, as the prevalent modern doctrine suggests, but rather that it has changed to imply an escalation in armed conflict (*jus in bello*). This new definition is not limited to states and it intersects with, rather than contradicts, the concept of armed conflict. This Article aims to demonstrate that states, international tribunals, non-government organizations (NGOs), and scholars use the term “war” to describe high-intensity armed conflicts. This Article further demonstrates the frequency of the term “war” to justify the decisions and actions triggered by escalations in armed conflict. I argue that there is little value in the academic prohibition of the term “war” if it does not reflect that which takes place in the real world. This purist approach may mean that the actual behaviors of actors in the field of international law, reflected by their use of the word “war,” are overlooked. A better approach would be to redefine “war” in its new context and accurately frame it within the armed conflict paradigm without interfering with state obligations stemming from armed conflict.⁶

This Article proceeds as follows: Part I describes the development of international law and the shift from the “war” paradigm to the “armed conflict” paradigm. Part II describes the existing post-Geneva Conventions use of the term “war.” It provides a diverse range of examples from international tribunal rulings, NGO reports, legal literature, and various legal actors to

⁴ *Id.*

⁵ DINSTEIN, *supra* note 3, at 3-4 (explaining that the domestic definition of law has very different consideration than that of the international law, since the state of war causes many private and public law repercussions such as frustration of contracts, liability for insurance, different tax exemptions, and so on).

⁶ See *infra* Section I.b.

demonstrate the wide use of the term “war” in a specific context—the escalation of low-intensity armed conflict into one that is violent and intense. Part III attempts to place the term “war” within the armed conflict paradigm, identifying its new characteristics and establishing the threshold of war in its new context.

I. THE SHIFT FROM “WAR” TO “ARMED CONFLICT”

a. War

Unlike the term “armed conflict,” “war” is an ancient term. In the distant past, “it was the struggle of one warlike people to dominate all the rest, and consequently rights of nations were little respected.”⁷ In other words, war was regarded as an efficient means of gaining land, collecting taxes, strengthening the state, and consolidating the ruler’s authority.⁸ The perception of peace as something to strive towards began with the just war theory, which introduced a new perspective on the morality of war and required war to achieve certain goals, including peace.⁹ Classical or premodern *jus ad bellum* philosophers considered the notions of legitimate authority, just cause, and right intention to provide the basic framework for assessing the morality of war.¹⁰

The 1648 Peace of Westphalia marked a turning point in which the international community began shifting from justifying war to regulating it.¹¹ This attitude, which developed significantly during the nineteenth century, was described as being both “dominated by an unrestricted right of war and the recognition of conquests”¹² as well as showing a new concern and will to regulate hostilities.¹³

⁷ John W. Foster, *Evolution of International Law*, 18 YALE L.J. 149, 149 (1909).

⁸ CRAIG A. LOCKARD, *SOCIETIES, NETWORKS, AND TRANSITIONS: A GLOBAL HISTORY* 5 (3d ed. 2014).

⁹ James G. Murphy, *Just War Thought and the Notion of Peace*, in *THE NATURE OF PEACE AND THE MORALITY OF ARMED CONFLICT* 105, 108 (Florian Demont-Biaggi ed., 2017).

¹⁰ *Id.*

¹¹ John Dugard, *International Terrorism and the Just War*, 12 STAN. J. INT’L L. 21, 22 (1977).

¹² IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 19 (Oxford ed. 1963).

¹³ Dugard, *supra* note 11, at 22.

With respect to the use of the term “war” in international law, various definitions have been proposed over the years. Grotius began his argument with Cicero’s definition of war: “Cicero says that War is a contest or contestation carried on by force. But usage applies the term, not to an action [a contest,] but to a state or condition: and thus we may say, war is the state of persons contending by force, as such.”¹⁴

Oppenheim defined war as “a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases.”¹⁵ Oppenheim added a normative aspect to the definition because, for him, peace was always the end goal of war. The reference to peace is not unique to Oppenheim—war is often defined with reference to peace.¹⁶ However, such a definition creates a somewhat circular problem because peace is usually defined as the absence of war.¹⁷

In admitting that no definition of war can capture the concept perfectly, Dinstein has suggested the following definition:

War is a hostile interaction between two or more States, either in a technical or in a material sense. War in the technical sense is a formal status produced by a declaration of war. War in the material sense is generated by actual use of armed force, which must be comprehensive on the part of at least one party to the conflict.¹⁸

The definitions above contain various components, the first being that war is fought between states. Dapo Akande explains that the laws of war traditionally came under the realm of states because intrastate affairs were not considered an interest of international law:

¹⁴ HUGO GROTIUS, *ON THE RIGHTS OF WAR AND PEACE*, BOOK I 1-2 (William Whewell ed., 2009) (1625).

¹⁵ LASSA FRANCIS LAWRENCE OPPENHEIM, *DISPUTES, WAR AND NEUTRALITY* 202 (H. Lauterpacht ed., 7th ed. 1952).

¹⁶ Jay Winter, *Imagining Peace in Twentieth-Century Europe*, 17 *CONTEMP. EUR. HIST.* 413, 413 (2008) (“Any definition of peace is also a definition of war. The two cannot be described other than in each other’s image.”).

¹⁷ Paul F. Diehl, *Exploring Peace: Looking beyond War and Negative Peace*, 60 *INT’L STUDS. Q.* 1, 1-10 (2016) (explaining that the absence of war is the most common form of conceptualizing peace).

¹⁸ DINSTEIN, *supra* note 3, at 15.

In the period following the peace of Westphalia and until the end of the Second World War, the international laws of war applied only to wars between States. This was a consequence of the fact that international law as a whole was concerned only with relations between States and eschewed regulation of matters considered to be within the domestic jurisdiction of States. Internal armed conflicts, or civil wars, were not considered to be 'real war[s] in the strict sense of the term in International Law', since that term was reserved for conflicts between States.¹⁹

A second component is that war must be declared.²⁰ Support for such a requirement can be found in customary international law²¹ as well as in the 1907 Hague Convention (III) on the Opening of Hostilities, which states in Article 1 that "[t]he Contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war."²² The requirement for a formal declaration of war for the laws of war to apply meant "that where the parties failed to consider themselves at war they were able to escape the application of the laws of war."²³ Louise Arimatsu explains that the requirement for an expressed declaration of war to enable the application of international humanitarian law (IHL) has led to an arbitrary application of the law:

[I]t was common practice for States to insist that the applicability of a law of war treaty was contingent on the existence of a 'state of war' in the *legal* rather than material sense. The fact that States were engaged in armed hostilities was consequently regarded as *insufficient* to displace the law of peace with the law of war; what was required was an express declaration of war or compelling evidence of an intention on the part of the States to initiate a 'state of war'.

¹⁹ Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in *INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS* 32, 32-33 (E. Wilmshurst ed., 2012).

²⁰ This research refers to *jus in bello* rather than *jus ad bellum*, and therefore the reasons to go to war will not be discussed here.

²¹ DINSTEIN, *supra* note 3, at 11.

²² Convention (III) Relative to the Opening of Hostilities art. 1, Oct. 18, 1907, 190 I.H.L 18.

²³ Akande, *supra* note 19, at 11.

Since the applicability of IHL was, for the most part, dependent on whether a State chose to recognise the existence of a 'state of war', the humanitarian ambitions embedded in the law were often thwarted by arbitrary political decisions.²⁴

The lack of a formal declaration of war did not mean that IHL was axiomatically inapplicable, rather that it depended on states' will—adversaries who decided not to consider themselves at war have sometimes, nevertheless, chosen to apply the rules of war with regard to hostilities.²⁵ For example, in 1915–1916, Italy went to war with Austria-Hungary when German divisions joined Austro-Hungarian troops against Italy: "Although neither Italy nor Germany considered itself in a state of war against the other, there was no disagreement as to the applicability of the 1906 Geneva Convention and 1907 Hague Conventions."²⁶ Another example is the 1931–1933 Sino-Japanese conflict: "[D]espite widescale fighting, both belligerents denied that there was a 'war' within the meaning of Article 16 of the League of Nations Covenant . . . Japan and China nevertheless considered that the Geneva and Hague Conventions were applicable to this 'non-war.'"²⁷

Despite these examples, it is clear that the war paradigm was given much of its power by states because only interstate hostilities were considered wars. States could determine whether they were at war and, consequently, whether the relevant obligations applied. The immediate result of such power was the weak protection of civilians' and fighters' rights during hostilities, as woefully discovered in the aftermath of the two World Wars.

b. Armed Conflict

The aftermath of World War II and the horrors it caused brought a shift in paradigm because "international law as a discipline began to recognize the possibility of extending rights and, indeed,

²⁴ Louise Arimatsu, *Scope of Application of International Humanitarian Law*, COLLEGIUM, Autumn 2013, at 71, 73.

²⁵ RENÉ PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 249 (2002).

²⁶ *Id.*

²⁷ *Id.*

obligations to individuals and other non-state actors.”²⁸ The Geneva Conventions articulated the legal term “armed conflict” with reference to international armed conflict (IAC) in CA2 and non-international armed conflict (NIAC) in CA3.²⁹ IAC refers to conflicts involving two or more states fighting each other³⁰ as well as those “in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination”³¹ In contrast, NIAC refers to armed conflicts involving non-state groups and was defined by the International Court of Justice (ICJ) in the *Tadić* case as “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”³²

CA2, which includes the first mention of “armed conflict” in the Geneva Conventions, states:

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.³³

Jean Pictet clarified in his 1954 commentary on the Geneva Convention (I) that the substitution of “war” with “armed conflict” was intentional because of the broader scope of armed conflict, which arises primarily from the notion that it is determined based on fact rather than on declaration, thus preventing the avoidance of obligations through the denial of armed conflict, as was the case in the war paradigm:

It remains to ascertain what is meant by “armed conflict”. The substitution of this much more general expression, for the word “war” was deliberate. One may argue almost

²⁸ Akande, *supra* note 19, at 2.

²⁹ See CA 2 and CA 3, *supra* note 1.

³⁰ See CA 2, *supra* note 1 (“[A]ll cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties”); see also Akande, *supra* note 19, at 25 (“[A]n international armed conflict involves two (or more) States in conflict against each other”).

³¹ Protocol Additional to the Geneva Conventions of 12 Aug. 1949, Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (AP/I), Art. 1(4), June 8, 1977, 1125 U.N.T.S. 17512 [hereinafter AP 1].

³² Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

³³ CA 2, *supra* note 1.

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. 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.³⁴

A similar argument was made in a 2016 commentary on CA2: “Article 2(1) broadens the Geneva Conventions’ scope of application by introducing the notion of ‘armed conflict’, thereby making their application less dependent on the formalism attached to the notion of ‘declared war.’”³⁵ Indeed, it appears that both commentaries assume that the use of the term “armed conflict” may capture more meanings of the use of force between states than that of “war,” which traditionally has a more catastrophic meaning.

The Geneva Conventions (and their commentaries) do not provide a definition of “armed conflict.” The existence of such a definition is of tremendous importance because armed conflict activates the applicability of IHL which establishes the obligations of the conflicting parties.³⁶ As a result of the *Tadić* case, the ICJ defined “armed conflict” with reference to both IAC and NIAC:

An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between

³⁴ INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 32 (Jean S. Pictet ed., 1952); see also Arimatsu, *supra* note 24, at 73 (“In an attempt to remedy the disconnection between fact and law, the drafters of the 1949 Geneva Conventions deliberately avoided the term ‘war’ in the text, preferring to use ‘armed conflict’, founded on the reasoning that the latter entailed a factual assessment.”).

³⁵ INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD ¶ 193. (2016).

³⁶ Deborah Pearlstein, *Armed Conflict at the Threshold?*, 58 VA. J. INT’L L., 369, 372 (2019) (“As conventional IHL doctrine has it, the existence of an ‘armed conflict’ is an on/off switch of inescapable importance. When an ‘armed conflict’ exists (of international or non-international variety), lethal targeting, without regard to particular self-defensive need or immediacy of the threat, is permitted as a first resort. When ‘armed conflict’ does not exist, it is not.”).

governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or in the case of internal conflicts, a peace settlement is achieved. Until that moment, international humanitarian law continues to apply to the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.³⁷

In the *Tadić* case, the ICJ affirmed the position that only a low threshold of intensity in the use of force between states amounts to armed conflict. Commentators have argued that “factors such as duration and intensity are generally not considered to enter the equation,”³⁸ and that it is “not necessary for the conflict to extend over time or for it to create a certain number of victims”³⁹ to be classified as an IAC. It has been explained that “[t]he mere capture of a soldier or minor skirmishes between the armed forces of two or more States may spark off an international armed conflict and lead to the applicability of IHL, insofar as such acts may be taken as evidence of genuine belligerent intent.”⁴⁰

The *Tadić* formulation is easier to apply to identify the beginning of an armed conflict than the end because it requires an IAC to cease with a general conclusion of peace.⁴¹ Given that peace agreements are less common in the modern era, it is not always clear at what point peace may be identified.⁴² Greenwood suggests that “the cessation of active hostilities should be enough to terminate the

³⁷ Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

³⁸ 32nd International Conference of the Red Cross and Red Crescent, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, INTERNATIONAL COMMITTEE OF THE RED CROSS 8 (2015).

³⁹ Sylvain Vité, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INT’L REV. RED CROSS 69, 72 (2009).

⁴⁰ *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, *supra* note 38.

⁴¹ *Tadić*, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

⁴² Akande, *supra* note 19, at 15 (“However, since the Second World War, such peace treaties have not been common (the 1979 peace treaty between Israel and Egypt being a notable exception. This is probably due, in part, to the fact that peace treaties have in the past been used for the termination of ‘wars’ and there has been a noticeable decline in declared wars.”).

armed conflict.”⁴³ Dinstein suggests that in addition to a peace agreement or an armistice, armed conflict may cease by implied mutual consent, the utter defeat of a party (*debellatio*), or a unilateral declaration of the cessation of the conflict.⁴⁴

With respect to NIAC, matters become more complicated because a different threshold applies to the identification of the beginning of an armed conflict: “[W]hereas even a minor use of force between sovereign States may be considered an international armed conflict, in the case of internal conflict there is a higher threshold requiring a certain level of intensity.”⁴⁵ The difficulty here is to separate true NIACs from internal strife or civil disturbances, to which IHL does not apply.⁴⁶ Additional Protocol (II) and the International Criminal Court Statute indicate this notion clearly, stating that NIACs exclude “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence.”⁴⁷ To satisfy such demands, first, a non-state party to a NIAC must be an “organized armed group”⁴⁸ with a command structure.⁴⁹ In the *Haradinaj* case brought before the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, the Trial Chamber set forth indicative factors which suggest the formal organization of the non-state armed group:

Such indicative factors include the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain

⁴³ Christopher Greenwood, *Scope of Application of Humanitarian Law*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 45, 72 (Dieter Fleck ed., 2008).

⁴⁴ DINSTEIN, *supra* note 3, at 34-50.

⁴⁵ Thilo Marauhn & Zacharie F. Ntoubandi, *Armed Conflict, Non-International*, in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW A.3 (2016).

⁴⁶ Akande, *supra* note 19, at 27.

⁴⁷ Rome Statute of the International Criminal Court arts. 8(2)(d), 8(2)(f), July 17, 1998, 2187 U.N.T.S. 97; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1, Aug. 8, 1977, 17513 U.N.T.S. 611.

⁴⁸ Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

⁴⁹ Akande, *supra* note 19 at 28; Jelena Pejic, *Status of Armed Conflicts*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 85-87 (Elizabeth Wilmshurst ed., 2012).

access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords.⁵⁰

Akande states that while groups involved in NIACs usually “have a political purpose or aim, this is not a requirement under international humanitarian law”; thus, in this context, a group with a criminal purpose may qualify as a non-state actor.⁵¹

With respect to the threshold of intensity, the ICJ established a threshold of “protracted armed violence”⁵² in the *Tadić* case. Such a criterion has been “interpreted in practice [. . .] as referring more to the intensity of the armed violence than to its duration.”⁵³ In the *Haradinaj* case, the Trial Chamber set forth indicative factors for intensity:

These indicative factors include the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and caliber of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.⁵⁴

Dustin A. Lewis, Gabriella Blum, and Naz K. Modirzadeh have explained the four theories of the termination of a NIAC: The first suggests that a NIAC ends “as soon as at least one of the constituent elements of the NIAC [organization and intensity] ceases to exist”;⁵⁵ second, that NIAC ends “upon the general close of military operations as characterized by the cessation of actions of the armed

⁵⁰ Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment (Trial Chamber), ¶ 60 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008).

⁵¹ Akande, *supra* note 19, at 28.

⁵² *Tadić*, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

⁵³ *Haradinaj*, ¶ 49 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008).

⁵⁴ *Id.*

⁵⁵ DUSTIN A. LEWIS, GABRIELLA BLUM & NAZ K. MODIRZADEH, INDEFINITE WAR: UNSETTLED INTERNATIONAL LAW ON THE END OF ARMED CONFLICT 97 (2017).

forces with a view to combat";⁵⁶ third, that a NIAC ends when "there is no reasonable risk of hostilities resuming";⁵⁷ and fourth, that a NIAC ends "upon the achievement of a peaceful settlement between the formerly-warring parties."⁵⁸

While IAC and NIAC are easy to identify in theory, in practice there is often confusion and debate about whether an armed conflict is an IAC or a NIAC. For example, disagreement about a party's statehood, as was the case during the dissolution of the former Socialist Federal Republic of Yugoslavia, may lead to different outcomes with regard to the classification of the conflict. It is also possible "that what begins as a non-international armed conflict becomes international when an internal rebel group is successful in becoming a State."⁵⁹ The question of classification is of enormous practical importance because the body of law governing IAC is far more extensive than that governing NIAC. While the entirety of the Geneva Conventions of 1949, the Hague Conventions, and Additional Protocol (I) of 1977 apply to IAC, treaty rules applicable to NIAC are restricted to CA3, Additional Protocol (II), and articles 8(2)(c) and (e) of the International Criminal Court Statute.⁶⁰ However, customary international law bridges this gap and vastly expands the rules applicable to NIACs.⁶¹

II. IS THE LEGAL TERM "WAR" REALLY DEAD?

Legal scholars have established that the notion of armed conflict has substituted that of war. However, I suggest that the term "war" has not ceased to exist – it has simply been given a new meaning that does not compete with the definition of armed conflict *but rather*

⁵⁶ *Id.* at 100.

⁵⁷ *Id.*

⁵⁸ *Id.* at 103.

⁵⁹ Akande, *supra* note 19, at 17.

⁶⁰ *Id.* at 4.

⁶¹ See, e.g., 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECKS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW xxix (2005) ("This study provides evidence that many rules of customary international law apply in both international and non-international armed conflicts and show the extent to which State practice has gone beyond existing treaty law and expanded the rules applicable to non-international armed conflicts. In particular, the gaps in the regulations of the conduct of hostilities in Additional Protocol II have largely been filled through State practice, which has led to the creation of rules parallel to those in Additional Protocol I, but applicable as customary law to non-international armed conflicts.").

represents a stage within the existing paradigm. The clearest evidence of the existence of such a term is the actual name given to high-intensity armed conflicts: “We still use the term ‘war’ to refer to any serious armed conflict. Yugoslavia, Liberia, Sudan and Sri Lanka experienced civil war in the 1990s. We also had the Gulf War and the Ethiopia-Eritrea War in the 1990s.”⁶²

However, the existence of the term “war” is not only evident in the names given to conflicts; it is a legal term as it effects legal decision and outcomes. The following examples demonstrate that states, legal scholars, and international courts use the term “war” in the current context to describe escalations in the intensity of armed conflicts, affecting legal decisions. Given that the threshold of armed conflict is rather low, and especially so in IAC,⁶³ stating that an armed conflict has evolved into a full-scale war is relatively common. While the term “war” is theoretically considered out of use, there is still the practical need for a legal term that describes the escalation in intensity of an armed conflict. While “war” is sometimes used merely to express the fact that a low-intensity armed conflict has deteriorated into a high-intensity armed conflict causing extensive death and damage, it is sometimes used to justify the actions taken during armed conflict to prevent an increase in the intensity of hostilities.

a. Descriptive Use of the Term “War” to Indicate an Escalation of Armed Conflict

While academia has largely interpreted the Geneva Conventions as nullifying the term “war,” examples may still be found in the words of legal academic scholars who use the term “war” to describe escalated armed conflict. Most notably, Dinstein describes “war” as a high-intensity armed conflict: “Depending on their scale, IAC hostilities may make the grade of a fully-fledged war or they may amount to a ‘short of war’ clash of arms (namely, constitute a mere incident), but either way the military engagement between two or more States invites the application of LOIAC.”⁶⁴

⁶² Mary Ellen O’Connell, *The Legal Case Against the Global War on Terror*, 36 CASE W. RES. J. INT’L L. 349, 353 (2004).

⁶³ See *supra* notes 38-40 and accompanying text.

⁶⁴ YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 1 (2016).

Similarly, Ariel Zemach points out that “the sphere of armed conflict has come to encompass hostilities that are far short of a full-scale war.”⁶⁵ Feinstein has also referred to war as an escalation of armed conflict, stating that “[t]he main connotation of a ‘state of armed conflict’ is the applicability of the rules of armed conflict . . . irrespective of whether the international armed conflicts falls short of a full-fledged war.”⁶⁶ Janina Dill presents a similar approach, describing the difference in intensity between armed conflict and war:

[T]he element of scale is the most contestable as a constitutive feature of war. Not every instance of cross border violence presumably amounts to a full-fledged war. Yet, the minimum intensity and the required spatial and temporal extension of violence for it to count as an international armed conflict are subject to debate.⁶⁷

The European Court of Human Rights has also referred to war as the escalation of an armed conflict. The *Chiragov* case involved the complaints of six Azerbaijani refugees who had been unable to return to their homes and property in the district of Lachin, Azerbaijan, from where they had been forced to flee in 1992 during the conflict over Nagorno-Karabakh.⁶⁸ When describing the course of events leading to the displacement of Azerbaijani refugees, the Court described that the armed conflict had “escalated into a full-scale war . . . resulting in at least several hundred deaths and the departure of the population.”⁶⁹ The term “war” was used to express the fact that previous low-intensity conflicts between the parties had dramatically escalated to a point that could not be captured by the mere use of the term “armed conflict.”

⁶⁵ Ariel Zemach, *The Unpleasant Responsibilities of International Human Rights Law*, 38 DENV. J. INT'L L. & POL'Y 421, 425-26 (2010).

⁶⁶ Barry A. Feinstein, *The Applicability of the Regime of Human Rights in Times of Armed Conflict and Particularly to Occupied Territories: The Case of Israel's Security Barrier*, 4 NW. J. HUM. RTS. 238, 263 (2005).

⁶⁷ Janina Dill, *Forcible Alternatives to War: Legitimate Violence in 21st Century International Relations*, in THEORETICAL BOUNDARIES OF ARMED CONFLICT AND HUMAN RIGHTS 289, 292 (Jens David Ohlin ed., 2016).

⁶⁸ *Chiragov v. Armenia*, App. No. 13216/05 ¶ 18 (June 16, 2015), <https://hudoc.echr.coe.int/fre?i=001-155353> [<https://perma.cc/8VQM-5LLC>].

⁶⁹ *Id.*

Another example is that of the Ukrainian-Russian conflict. While the states were in an IAC with respect to Crimea and Sevastopol,⁷⁰ following the seizure of a Ukrainian vessel by Russian forces,⁷¹ Ukrainian president Petro Poroshenko warned, “I don’t want anyone to think this is fun and games. Ukraine is under threat of full-scale war with Russia.”⁷² This was clearly intended to describe the escalation of the IAC between Ukraine and Russia following Russia’s actions. The February 2022 Russian invasion to Ukraine has been referred to by Ukrainian officials as a full scale war initiated by Putin.⁷³ This reflects an escalation of affairs in the Russian-Ukrainian armed conflict.

The term “war” was also widely used to describe the escalation in the armed conflict between Eritrea and Ethiopia. The armed conflict was described as a “border dispute . . . [which has] triggered a full-scale war in 1998-2000 and reignited further hostilities in 2003.”⁷⁴ In the Eritrea-Ethiopia Claims Commission report, the terms “war” and “armed conflict” were used interchangeably, with the former being used with much higher frequency.⁷⁵

⁷⁰ OFF. OF THE PROSECUTOR, INT’L CRIM. CT., REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2016 ¶ 158 (2016) (“The information available suggests that the situation within the territory of Crimea and Sevastopol amounts to an international armed conflict between Ukraine and the Russian Federation.”).

⁷¹ The incident included Russian ships firing on and seizing three Ukrainian naval vessels in disputed coastal waters. See Neil MacFarquhar, *Putin Plays Down Sea Clash with Ukraine as ‘Border Incident’*, N.Y. TIMES (Nov. 28, 2018), <https://www.nytimes.com/2018/11/28/world/europe/putin-plays-down-sea-clash-with-ukraine-as-border-incident.html> [<https://perma.cc/H8DZ-HPZ3>].

⁷² Andrew Roth, *Ukraine President Warns Russia Tensions Could Lead To ‘Full-Scale War’*, GUARDIAN (Nov. 27, 2018), <https://www.theguardian.com/world/2018/nov/27/russia-to-charge-ukrainian-sailors-as-kerch-crisis-deepens> [<https://perma.cc/AM6D-6G4B>].

⁷³ Olafimihan Oshin, *Top Ukrainian Official: ‘Putin Has Launched a Full-Scale War’*, HILL (Feb. 23, 2022), <https://thehill.com/policy/international/europe/595611-top-ukrainian-official-putin-has-launched-a-full-scale-war> [<https://perma.cc/RFS2-U2GP>]; Holly Ellyatt, *Ukraine Warns of ‘Full-Scale War’ and Tragedy in Europe if Russia Attacks*, CNBC (Feb. 2, 2022), <https://www.cnbc.com/2022/02/02/ukraine-warns-of-full-scale-war-and-tragedy-in-europe-if-russia-attacks.html> [<https://perma.cc/XX3X-AMHR>].

⁷⁴ Yoram Dinstein, *Autonomy Regimes and International Law*, 56 VILL. L. REV. 437, 451 (2011).

⁷⁵ Reports of International Arbitral Awards, Eritrea-Ethiopia Claims Commission – Final Award – Ethiopia’s Damages Claims, Vol. XXVI 631 (2009), https://legal.un.org/riaa/cases/vol_XXVI/631-770.pdf [<https://perma.cc/9N8L-FGYS>].

John H. Gill described the 1999 armed conflict between India and Pakistan in the Kargil district of Kashmir as being “between low-intensity conflict and a full-scale war,” with consideration of various factors of intensity and intent to back his claim:

Military operations around Kargil in the summer of 1999 fall in a gray zone between low-intensity conflict and full-scale war. On the one hand, the scale, intensity, and significance of the fighting exceeded even the upwardly distorted standards of the India–Pakistan Kashmir confrontation, where extended artillery duels and ten-person-a-day body counts often have been the peacetime norm. On the other hand, both sides intentionally confined the combat to a restricted segment of the volatile Kashmir Line of Control (LoC); the proportion of forces engaged was relatively small; the duration was limited; and, captivating television news coverage notwithstanding, the conflict did not require either country to commit extraordinary resources beyond those immediately available to their standing militaries.⁷⁶

In its Europe Report, the International Crisis Group addressed the armed conflict between Georgia and South Ossetia, describing the escalation in the armed conflict using war rhetoric:

The Georgian–South Ossetian dispute was frozen for twelve years and largely ignored—not only by the international community but also by many Georgians. President Saakashvili was intent on changing this. He succeeded, but in doing so he also rapidly raised tensions in the region. *The new fighting was on the verge of erupting into full-fledged war until a ceasefire was agreed on 18 August.* In November 2004, however, even though the situation in the field remains tense and gunfire is still exchanged, there is again a hope that the conflict can be resolved peacefully, with demilitarisation and a negotiated settlement.⁷⁷

The Kenya National Commission on Human Rights also described an escalation in violence during the 2007 elections as a deterioration into war:

⁷⁶ John H. Gill, *Military Operations in the Kargil Conflict*, in *ASYMMETRIC WARFARE IN SOUTH ASIA: THE CAUSES AND CONSEQUENCES OF THE KARGIL CONFLICT* 92 (Peter R. Lavoy ed., 2009).

⁷⁷ INT’L CRISIS GRP., REP. NO. 159, *GEORGIA: AVOIDING WAR IN SOUTH OSSETIA* 29 (2004) (emphasis added).

For example, in Chebilat, the celebrations of Kibaki's victory by members of the Kissi community on the 30th of December, 2007 sparked off the violent demonstrations that soon became a full fledged war between the Kisii and the Kipsigis. Businesses and houses belonging to members of the Kisii community were burnt down. In response, the Kisii Community mobilised youths to defend themselves. The youths, who included the infamous chinkororo organised gangs began targeting homes that belonged to Kipsigis.⁷⁸

The United Nations Refugee Agency, in its report on the Bosnia-Herzegovina conflict of 1992–1995, compared the armed conflict in some areas of former Yugoslav republics to the war in Bosnia and Herzegovina: “As the Federal Republic of Yugoslavia disintegrated, and ideologies of ethnic and religious separatism developed, armed conflict raged in several of the former Yugoslav republics, while a fully-fledged war broke out in Bosnia and Herzegovina.”⁷⁹

Human Rights Watch, in its report on the 2004 conflict in Yemen, carefully observed the rules of classification by describing the conflict as a NIAC.⁸⁰ However, when describing the escalation of the NIAC, the report states: “[T]he same day security forces in some 18 military vehicles attempted to arrest al-Huthi, escalating the fighting into full-blown war.”⁸¹

b. Use of the Term “War” to Explain Decision-Making in International Law

The ICJ case of *Cameroon vs. Nigeria* provides a good example of the legal implications that escalation from armed conflict to war may carry. The case concerned the clashes between Cameroonian and

⁷⁸ KENYA NAT'L COMM'N ON HUM. RTS., ON THE BRINK OF THE PRECIPICE: A HUMAN RIGHTS ACCOUNT OF KENYA'S POST-2007 ELECTION VIOLENCE 118 (2008).

⁷⁹ U.N. High Comm'r for Refugees, *Review of the UNHCR Housing Programme in Bosnia and Herzegovina*, at 10, U.N. Doc. Eval/05/98 (Nov. 1998).

⁸⁰ *Invisible Civilians: The Challenge of Humanitarian Access in Yemen's Forgotten War*, HUM. RTS. WATCH (Nov. 19, 2008), <https://www.hrw.org/report/2008/11/19/invisible-civilians/challenge-humanitarian-access-yemens-forgotten-war> [https://perma.cc/Y9H4-JW3Q] (“Under international law, the conflict since 2004 between the Yemen government and the Huthis in northern Yemen has been a non-international (internal) armed conflict in which all parties are bound by international humanitarian law . . .”).

⁸¹ *Id.*

Nigerian forces in the Bakassi Peninsula.⁸² Judge Ajibola assessed whether provisional measures were to be indicated. Article 74 of the Rules of Court provides that “[t]he Court, if it is not Sitting when the request is made, shall be convened forthwith for the purpose of proceeding to a decision on the request as a matter of urgency.”⁸³ Given that urgency is a requirement for the indication of provisional measures, Judge Ajibola found that the potential for the IAC between Cameroon and Nigeria to escalate into “full-scale war” made it a matter of urgency: “Considering all the intermittent incidents in the recent past involving sporadic clashes that have degenerated into serious skirmishes and which could possibly explode into a full-scale war, can it be denied that this request is urgent?”⁸⁴

The escalation of a conflict to war may also be seen as a catalyst for humanitarian intervention. In 2011, the United Nations Security Council adopted Resolution 1973, authorizing member states “to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack.”⁸⁵ The humanitarian intervention in Libya was considered a “responsibility to protect” and “marking the Council’s first explicit authorization to use military force against a UN member to stop a perpetrator government from committing human rights atrocities.”⁸⁶ The Security Council’s decision to intervene in Libya has been described as the result of the escalation of the conflict into full-scale war. This decision was not made in similar situations that did not escalate to such a degree:

As in other Arab states, popular protests began peacefully, but were immediately met with a violent and repressive response by the ruling regime. Unlike protests in Tunisia and Egypt, however, the situation quickly escalated into a full-scale war between the opposition . . . and the ruling authorities, who used overwhelming force against civilians and the armed opposition alike. The escalated violence in

⁸² See *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)*, Judgment, 2002 I.C.J. 94 (Oct. 10).

⁸³ Rules of Court, International Court of Justice, art. 74, (Apr. 14, 1978).

⁸⁴ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Separate Opinion of Judge Ajibola, 1996 I.C.J. 13, 47 (Mar. 15).

⁸⁵ S.C. Res.1973, ¶ 4 (Mar. 17, 2011).

⁸⁶ Carrie Booth Walling, *Human Rights Norms, State Sovereignty and Humanitarian Intervention*, 37 HUM. RTS. Q. 383, 409 (2015).

Libya quickly captured the attention of the United Nations Security Council, which held its first formal consultation on the situation within the first week of protests.⁸⁷

Another case in which the escalation of a conflict to “war” has triggered an attempt to take action by the Security Council was with regards the conflict between India and Pakistan of 1971. It has been argued that “[n]ot until full-scale war between India and Pakistan had erupted did the Security Council and the General Assembly see fit to discuss the matter.”⁸⁸ Two cease fire resolutions were vetoed by the Soviet Union, which led to the reference of the question to the General Assembly.⁸⁹ The General Assembly has ultimately adopted a resolution calling for an immediate cease-fire.⁹⁰

In the context of humanitarian aid, the United Nations Office for the Coordination of Humanitarian Affairs presented a graph in its Global Humanitarian Overview 2020 report, categorizing the 41 active highly violent conflicts of 2019 into “limited wars” (25) and “full-scale wars” (16).⁹¹ The report stated that these violent conflicts, divided into different types of “wars,” “are causing immense suffering and a huge need for humanitarian assistance,”⁹² apparently using the term “war” to aid in the identification of the need for humanitarian aid. Gottlieb also linked the escalation of a conflict to full-scale war and the need for humanitarian aid, stating with regard to the India-Pakistan conflict of 1971 that the “United Nations emergency assistance is unfortunately likely to be needed again. In light of full scale war between India and Pakistan . . . a renewed United Nations effort to come to the assistance of the civilian population in the area will now probably be again required.”⁹³

⁸⁷ CARRIE BOOTH WALLING, *ALL NECESSARY MEASURES: THE UNITED NATIONS AND HUMANITARIAN INTERVENTION* 213 (2013).

⁸⁸ Ved P. Nanda, *A Critique of the United Nations Inaction in the Bangladesh Crisis*, 49 *DENV. L. REV.* 53, 57 (1972).

⁸⁹ *Id.* at 57, 61, 62.

⁹⁰ *Id.* at 57; G.A. Res. 2793 (XXVI) (Dec. 7, 1971).

⁹¹ U.N Off. for the Coordination of Humanitarian Affs., *Global Humanitarian Overview 2020*, at 11 (2020), https://www.unocha.org/sites/unocha/files/GHO-2020_v9.1.pdf [<https://perma.cc/JB8W-VN86>].

⁹² *Id.*

⁹³ Gidon A.G. Gottlieb, *International Assistance to Civilian Populations in Armed Conflicts*, 4 *N.Y.U. J. INT'L L. & POL.* 403, 430; see also Gidon A.G. Gottlieb, *The United Nations and Emergency Humanitarian Assistance in India-Pakistan*, 66 *AM. J. INT'L L.* 362, 365 (1972).

Arguably, the most problematic instance of the use of the term “war” to influence decision-making was by Israel, which took the notion of war as an escalated armed conflict to a new level by classifying the violence of the second intifada⁹⁴ as “armed conflict short of war”:

Israel is engaged in an armed conflict short of war. This is not a civilian disturbance or a demonstration or a riot. It is characterised by live-fire attacks on a significant scale, both quantitatively and geographically—around 2,700 such attacks over the entire area of the West Bank and the Gaza Strip. The attacks are carried out by a well-armed and organised militia, under the command of the Palestinian political establishment, operating from areas outside Israeli control.⁹⁵

Scobbie has explained that Israel used the phrase “armed conflict short of war” as a tactic “intended not to correspond to either an international or a non-international armed conflict, and thus is a purported novel classification which introduces ambiguity regarding the applicable law.”⁹⁶ However, it is not clear how the use of the phrase exempted Israel from having to classify the conflict—for such a purpose, Israel could have simply used the term “armed conflict” without adding “short of war.” Israel, however, has claimed that such differentiation within the armed conflict paradigm is used mainly for diplomatic reasons, “having no actual legal ramifications.”⁹⁷

Israel’s perception of a high-intensity armed conflict being equivalent to war is also reflected in the Great March of Return

⁹⁴ See generally Jonathan Schachter, *The End of the Second Intifada?* 13 STRATEGIC ASSESSMENT 63 (2010) (describing that the second intifada (uprising) which commenced in 2000 is a term used to describe a period of violent clashes between Israelis and Palestinians in Gaza and the West Bank, including vast use of suicide bombings by Palestinians and targeted killings of Palestinians by Israel).

⁹⁵ *Sharm el-Sheikh Fact-finding Committee, First Statement of the Government of Israel*, MINISTRY FOREIGN AFFS. (Dec. 28, 2000), ¶ 282, <https://www.gov.il/en/Departments/General/sharm-el-sheikh-fact-finding-committee-first-statement-of-the-government-of-israel-28-dec-2000>.

⁹⁶ Ian Scobbie, *International Law and the Prolonged Occupation of Palestine* 7 (May 2015) (unpublished manuscript) (available at https://www.researchgate.net/publication/277290147_International_law_and_the_prolonged_occupation_of_Palestine).

⁹⁷ PUB. COMM’N TO EXAMINE THE MARITIME INCIDENT OF 31 MAY, 2010, POSITION PAPER ON BEHALF OF THE MILITARY ADVOCATE GENERAL’S CORPS 9 n.20 (2010), <https://foi.gov.il/sites/default/files/Annex%20L.pdf>.

protests at the Gaza border.⁹⁸ By then, Israel had abandoned its “armed conflict short of war” rhetoric and took the position that it was in continuous armed conflict with Hamas in Gaza.⁹⁹ When referring to its rules of engagement during the protests at the Gaza border, Israel stated that “they permit live fire aimed at the legs of ‘central inciters’ as a last resort, to avoid a situation of mass breach of the fence that would require much greater use of force.”¹⁰⁰ Israel’s Minister of Defense, Lieberman, and Prime Minister Netanyahu both explained Israel’s use of force at the border as an attempt to avoid war.¹⁰¹ Given that they already perceived Israel to be in a state of armed conflict, this was not a preemptive claim of self-defense, meaning that *jus ad bellum* was irrelevant; rather, the use of force (which was possibly in breach of the rules of armed conflict) was aimed at preventing an escalation from a state of armed conflict to full-scale war.¹⁰²

Other scholars have also provided examples of when the escalation of an armed conflict to “war” has influenced decision-making. Jaroslav Tir and Johannes Karreth have argued for “highly structured IGOs [international governmental organizations] commanding substantial resources” because such IGOs “substantially reduce the risk of low-level armed conflict escalating

⁹⁸ The great march of return protests is a name describing the most recent clash between Israel and Hamas, which refers to a series of protests that started on “Land Day” of March 30, 2018. The protests included civilian activity as well as participation of military personnel threatening to breach the fence between Gaza and Israel. Israel’s use of force against the protestors sparked much criticism both within the international community and within Israeli society. See Shelly Aviv Yeini, *The Law Enforcement Paradigm Under the Laws of Armed Conflict: Conceptualizing Yesh Din v. IDF Chief of Staff*, 10 HARV. NAT’L SEC. J. 461, 461-64 (2019).

⁹⁹ HCJ 769/02 Public Committee Against Torture v. Government, IsrLR 459, 475 ¶ 16, (2006) (Isr.) (“[A] continuous state of armed conflict has existed between Israel and the various terrorist organizations that operate from Judaea, Samaria and the Gaza Strip”); HCJ 3003/18, 3250/18 Yesh Din v. IDF Chief of Staff (2018) ¶ 1 of President J. Hayut judgment (Isr.) (“Israel has been in a state of armed conflict with Hamas for some thirty years.”).

¹⁰⁰ Aviv Yeini, *supra* note 98, at 477.

¹⁰¹ Lieberman: Israel Does Not Want a War in Gaza, N12 (July 23, 2018), https://www.mako.co.il/news-military/security-q3_2018/Article-283a84bb796c461004.htm [<https://perma.cc/8GS2-CVCK>] (quoting Lieberman, “we have a clear policy and have no intention of changing it”); TOI Staff, *Netanyahu: There Is No Diplomatic Solution for Gaza*, TIMES OF ISR. (Nov. 11, 2018), <https://www.timesofisrael.com/netanyahu-there-is-no-diplomatic-solution-for-the-gaza-strip/> [<https://perma.cc/D4PM-S7ZB>] (quoting Netanyahu, “I am doing everything I can to avoid an unnecessary war”).

¹⁰² Aviv Yeini, *supra* note 98, at 483.

to full-fledged civil war.”¹⁰³ Steven Mintz has described states’ efforts to keep armed conflict at low levels of intensity, explaining that multinational peacekeeping has gained renewed interest because of the understanding that “containing or deterring armed conflict limits the chances of full blown war.”¹⁰⁴

III. THE EXPLANATORY VALUE OF “WAR”

a. What Is the Meaning of “War” in the Post–Geneva Conventions Context?

“War is among the greatest horrors known to mankind; it should never be romanticized . . . violence is an essential element of war, and its immediate result is bloodshed, destruction, and suffering.”¹⁰⁵

When examining the contexts in which states, judges, and scholars use the term “war,” it becomes evident that the term has evolved to describe an escalation of violence in both IAC and NIAC because the term “armed conflict” does not capture differences in intensity. In reality, there is a difference between low-intensity use of power between states, and intense and violent conflict deeply affecting people’s lives. Such differences do not affect the application of IHL but significantly affect the realities of the people involved. Indeed, for an individual living in a conflict zone, the escalation of an armed conflict into a full-scale war matters, as it does to the international community that aspires to prevent such an escalation. Disregarding such differences is an academic fiction, which does not correspond with the actual consequences of escalation of conflict on the ground.

The current use of the term “war” is detached from its pre-Geneva Conventions definition of a state of affairs dependent on a declaration that takes place between states and may be manipulated to avoid IHL obligations.¹⁰⁶ In fact, the use of the term “war” has no effect on the application of IHL, which applies as soon as an armed

¹⁰³ JAROSLAV TIR & JOHANNES KARRETH, INCENTIVIZING PEACE 103 (2018).

¹⁰⁴ STEVEN METZ, ARMED CONFLICT IN THE 21ST CENTURY: THE INFORMATION REVOLUTION AND POST-MODERN WARFARE 18 (2000).

¹⁰⁵ A.M. GRAY, WARFIGHTING 14 (Doubleday, 1st ed. 1994).

¹⁰⁶ See Arimatsu, *supra* note 24, at 73 (describing states of war prior to the adoption of the 1949 Geneva Conventions).

conflict exists based on factual analysis.¹⁰⁷ However, the escalation of an armed conflict into war may have other implications. Given the clear interest in the prevention of an escalation of an armed conflict to war, the attempt to prevent a war within the framework of armed conflict may justify urgent judicial measures,¹⁰⁸ decisions to provide humanitarian aid,¹⁰⁹ and, indeed, states' actions and decisions during armed conflict.¹¹⁰ It is unclear whether states may take *in bello* preemptive actions to prevent an escalation to war that would otherwise be deemed unlawful—I strongly suspect that they may not—however, to examine such a possibility, one first needs to acknowledge the notion of war in its modern context. Given that the term “war” has been used somewhat intuitively to date because of the academic disapproval of its use, removing its constraints will surely unravel further examples of when the prevention of “war” in the context of armed conflict will have some explanatory value with respect to international law and the decision-making of the actors involved.

b. What Is the Threshold of War?

If one accepts the argument that the term “war” is used in current international law to describe an escalation in the violence of an armed conflict, the question arises: what kind of an escalation creates “war”? In other words, a threshold of war must be determined for both NIAC and IAC. Given that the examples provided in Section II of this Article represent the somewhat intuitive use of the term “war,” it is difficult to establish a uniform standard.

To establish such a standard, it is helpful to search beyond the legal sphere to the field of political science, where the term “war” still normatively exists and there is a well-developed, solid doctrine to identify the threshold of war. Adopting such a definition would not only contribute to the understanding of what war is but allow

¹⁰⁷ See *supra* Section I.b.

¹⁰⁸ Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Separate Opinion of Judge Ajibola, 1996 I.C.J. 13, 47 (Mar. 15).

¹⁰⁹ See U.N. Off. for the Coordination of Humanitarian Affs., *supra* note 91, at 11 (describing how violent conflicts are creating suffering that requires humanitarian assistance).

¹¹⁰ See Aviv Yeini, *supra* note 98, at 483 (describing the *Yesh Din* case).

for a multidisciplinary discussion of war and the escalation of armed conflict.¹¹¹

David Singer and Melvin Small of the Correlates of War (COW) project have produced one of the most commonly used standards for the identification of war in the field of international relations. They have concluded that a definition of war that separates it from other conflicts should start with sustained combat involving substantial fatalities: “[W]e must define war in terms of violence. Not only is war impossible without violence (except of course in the metaphorical sense), but we consider the violent taking of human life the primary and dominant characteristic of war.”¹¹² Such definition makes a clear cut between low-intensity armed conflict, and a “war,” which is clearly absent in modern international law. While the COW standard offers a classification of war that differs somewhat from the IAC/NIAC dichotomy, the standard of qualification as war is identical in all COW categories. Thus, it is possible to adopt the severity standard and apply it to the classification system of international law. The COW criterion establishes the severity threshold of war as a minimum of 1,000 battle-related fatalities within a twelve-month period:

The current requirement for all categories of wars is for 1,000 battle-related deaths per year (twelve-month period beginning with the start date of the war) among all the qualified war participants. Battle-deaths include not only those armed personnel killed in combat but also those who subsequently died from combat wounds or from diseases contracted in the war theater.¹¹³

Admittedly, the COW criterion is problematic in the sense that it does not count civilians as a component of battle-related deaths, thus creating a challenge in assessing NIACs:

Since terrorizing the populace and civilian fatalities are fundamental parts of guerrilla wars, Small and Singer included civilian combat-connected fatalities in their total

¹¹¹ See generally Virginia Page Fortna, *Interstate Peacekeeping: Causal Mechanisms and Empirical Effects*, 56 *WORLD POL.* 481 (2004) (attempting to match social sciences research regarding the regression to war after peace agreements with the legal idea of regression to armed conflicts after peace agreements).

¹¹² MELVIN SMALL & DAVID SINGER, *RESORT TO ARMS: INTERNATIONAL AND CIVIL WAR, 1816-1980*, at 205-06 (1982).

¹¹³ Meredith Reid Sarkees, *The COW Typology of War: Defining and Categorizing Wars (Version 4 of the Data)* 15 (2010) (unpublished manuscript) (available at <https://correlatesofwar.org/wp-content/uploads/COW-Website-Typology-of-war.pdf> [<https://perma.cc/VGY2-WZY4>]) [hereinafter Reid Sarkees].

civil war deaths. This distinction also made practical sense in that in civil wars it is much more difficult to distinguish the combatants from the civilian population . . . However, since including civilian deaths put the civil war data at odds with the other war categories, the battle-related death definition for civil wars has been changed.¹¹⁴

While COW initially included civilian casualties in what it defines as civil wars, it later changed its policy to exclude civilian casualties in favor of standardization.¹¹⁵ Given that international law establishes a different threshold for IAC and NIAC and has not standardized its starting points, it may be more useful to adopt the earlier version of the COW criterion, which allows for the inclusion of civilian casualties in NIAC.

Like any precise number used as a benchmark, the 1,000-death mark may seem arbitrary. It creates a situation whereby an armed conflict with 999 casualties is one casualty short of a war, turning lives lost into statistics. However, this benchmark is the most common standard for the identification of war, “effectively used in perhaps 95 percent of the literature on the subject”¹¹⁶ in the political science field. Mueller explains that “[i]f an armed conflict inflicts fewer than 1,000 battle and battle-related deaths in a year, there has been a tendency to call it exactly that: an armed conflict, not war.”¹¹⁷

A further problem with a standard based solely on death count is that the number of casualties in an armed conflict is not easy to establish and is often disputed by the conflicting parties, who may report dramatically different casualty numbers.¹¹⁸ Indeed, adversaries may have different interests in portraying casualty numbers differently, and even disregarding such bias, they may

¹¹⁴ *Id.* at 15

¹¹⁵ *Id.*

¹¹⁶ John Mueller, *War Has Almost Ceased to Exist: An Assessment*, 124 POL. SCI. Q. 297, 300 (2009); *see also id.* at 299 (adding that while 1,000 is the prevalent number, “some analysts have focused on, and tallied, armed conflicts that inflict as few as 25 battle deaths yearly”).

¹¹⁷ *Id.* at 298-99.

¹¹⁸ Regarding difficulties in gathering statistics regarding casualties, *see* Reid Sarkees, *supra* note 113 at 17 (explaining how governments have used technology to conceal fatal victims figures). Regarding disputes over casualty number, *see*, for example, Report of the Detailed Findings of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1, U.N. Doc. A/HRC/29/CRP.4, ¶ 16 (2015) (noting that “the casualty figures gathered by the United Nations, Israel, the State of Palestine and non-governmental organizations differ”).

have different tools and capacities to evaluate casualty numbers accurately.¹¹⁹

A threshold of war may also be determined using tools already in use in international law. As described in Section I.b above, in the *Haradinaj* case, the tribunal formulated criteria to measure the intensity required for a conflict to qualify as a NIAC.¹²⁰ The indicative factors established include:

the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones.¹²¹

In addition to United Nations Security Council involvement, these criteria may be used to indicate the intensity of a conflict.¹²² Vité adds that the frequency of acts of violence and military operations may be considered to establish intensity.¹²³

These factors are applied to determine the intensity of NIAC; however, they may potentially be used to establish whether an armed conflict (IAC or NIAC) has escalated into war. Arguably, the threshold of war would have to be higher than the one set for the identification of NIAC to reflect the consequences of escalation. While I assert that these indicative criteria may also be suitable for IAC because they do not uniquely reflect NIAC, such a submission may well be contested. It must also be established whether the threshold of war should be identical for both IAC and NIAC. Although I believe that the term "war" should be used to describe a certain level of violence and suffering and that such notions are universal and should not differ between IAC and NIAC, such an argument may also be contested.

It is also possible that a new legal doctrine to identify the threshold of war will develop independently over time. Given that the modern legal notion of "war" is essentially explanatory and does

¹¹⁹ Reid Sarkees, *supra* note 113 at 17.

¹²⁰ Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment (Trial Chamber), ¶ 49 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008).

¹²¹ *Id.*

¹²² *Id.*

¹²³ Vité, *supra* note 39, at 76-77.

not affect IHL obligations, it is of the utmost importance that such a definition captures an escalation in intensity.

There are clear advantages in adopting the COW threshold because of the clarity it provides and the bridge it forms between legal and political science research in the field of armed conflict. While it may appear somewhat arbitrary, the intensity standard that COW offers has the potential to provide a simple, clear criterion that can be easily addressed. However, there are challenges associated with such a precise standard. For example, if the escalation of a conflict to war is the criterion for which to grant certain judicial measures, it makes little sense that an armed conflict with 999 casualties would not be granted the same treatment. A possible solution may be to combine the *Haradinaj* criteria with the COW standard. Given that one of the standards in *Haradinaj* is the number of casualties, such a number may be set to 1,000 for the purpose of identifying when an armed conflict has escalated to war, while the remaining *Haradinaj* criteria may be used to complete the assessment, providing an opportunity to grant war status to conflicts that fail to meet the COW standard but are nevertheless violent and warrant the status of war.

CONCLUSION

The term “war” in the legal context is considered a term of the past that has no substance in modern international law. The desire to abandon the term has a clear rationale—historically, war was triggered by a formal declaration and fought between states, allowing parties with more power to manipulate the application of IHL, which would commence only upon a declaration of war. However, the post-Geneva Conventions understanding of hostilities has largely changed, most notably in the adoption of the notion of “armed conflict,” which is based on factual assessment rather than on a declaration in both international and non-international contexts.

I argue that the term “war” has not ceased to exist in the context of international law. Rather, it has evolved to indicate an escalation of the intensity of hostilities within the paradigm of “armed conflict.” That is, all wars are armed conflicts, but not all armed conflicts are wars. This new use of the term “war” has significant explanatory value because the term “armed conflict,” especially in the IAC context, covers a wide spectrum of intensity. While the

intensity of hostilities is not relevant to the application of IHL, once an armed conflict has started, the identification of escalation intensity is important in various arenas, including the provision of humanitarian aid, humanitarian intervention, and the perception of urgency in international tribunals. Since the escalation of an armed conflict influences such legal and practical decisions, the term "war" is a legal term rather than a mere common expression of speech.

Given its use in practice by scholars, states, and courts, I argue that there is little value in rejecting the term "war" altogether and that it has significant value in portraying various shades within the concept of armed conflict.

Once the notion of war has been reestablished, it will become necessary to determine the threshold of war in its new context. I suggest a threshold that combines the COW standard used in the political sciences of 1,000 deaths in the course of a year and the indicative factors used in *Haradinaj* to set a level of intensity for NIACs. Because the COW standard would be the primary indicator, an armed conflict resulting in 1,000 would qualify as war immediately. An armed conflict of fewer than 1,000 deaths per year but still presenting a high level of intensity according to the *Haradinaj* indicators would still qualify as war. This will prevent an arbitrary situation in which a conflict with 999 deaths falls short by one casualty from qualifying as war. Such a formula would continue to maintain the high degree of clarity offered by the COW standard.

Once "war" has ceased being a forbidden word in international law, new uses and applications of the term will develop with time, potentially offering a differentiation between levels of intensity within the armed conflict paradigm without compromising the protection that IHL can provide in all types of armed conflict.