

as the paramount arbiter of international law. Whether his service on the Court affected his evaluation is unknown. What is clear is that the distinction of his own judicial service embodied his ideal.

Lauterpacht unexpectedly died in 1960 at the peak of his powers at the age of 62. His son, whose own distinguished career in the field was marked in 2013 by the award of The Hague Prize, has written a splendid biography which is not the only product of his devotion to the memory of his father. He has carried forward, together with Christopher Greenwood, for all the years from 1960 onwards the editing of *International Law Reports*, the publication of which was dear to his father. He has collected his father's papers in five annotated volumes published by the Cambridge University Press. He founded and directed the Cambridge's Centre for International Law, rightly renamed at the instance of the current Whewell Professor, James Crawford, as the Lauterpacht Centre.

At Lauterpacht's funeral, Dr C Wilfred Jenks, another titan in the field, gave a magnificent address in tribute 'to a warm and staunch friend, a fine scholar, a fearless judge, one of the greatest international lawyers not only of our own but of any time . . . Hersch Lauterpacht acknowledged, in the things of the mind, under Grotius, two great masters, Hans Kelsen and Arnold McNair, and his own work represents the confluence of speculative philosophy with the abiding vitality of the common law. Therein lies its richness, its strength, and its assurance of immortality . . . He brought to everything he undertook the moral horizon and stature of the great prophets of his race. He leaves with us . . . a sense of moral purpose . . . which represents the supreme need of our troubled age and world. His belief that the State exists for man and not man for the State, that the moral law applies to public as to private conduct, that the use of force for the protection of private interests is alien to, whereas the judicial process is an expression of, the moral nature of man, that right is ultimately the only right . . . was not an academic conviction but a consuming fire – a fire which has consumed' (420).

STEPHEN M SCHWEBEL

FORMER PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

doi:10.1093/bybil/bt012

Advance Access published on 13 November 2013

The Treatment of Combatants and Insurgents under the Law of Armed Conflict. By EMILY CRAWFORD, Oxford, Oxford University Press, 2010, 213 pp. £69.00.

The Concept of Non-International Armed Conflict in International Humanitarian Law. By ANTHONY CULLEN, Cambridge, Cambridge University Press, 2010. 219 pp. £64.00

Extraterritorial Use of Force Against Non-State Actors. By NOAM LUBELL, Oxford, Oxford University Press, 2010. 288 pp. £85.00

The Law of Non-International Armed Conflict. By SANDESH SIVAKUMARAN, Oxford, Oxford University Press, 2012, 657 pp. £95.00

It is common knowledge that the vast majority of armed conflicts since 1945 have been non-international in nature. International law was fairly slow in responding to this

challenge. Common Article 3 of the four 1949 Geneva Conventions (GCs) introduced only a rudimentary treaty framework; the 1977 Second Additional Protocol to these Conventions (AP II) only made limited progress, and the status of customary international law long remained unsettled. This legal landscape has undergone significant changes since the 1990s, occurring on two tracks. First, the establishment by the Security Council of the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) has prepared the ground for a remarkably dynamic evolution of the customary law of non-international armed conflict; the 2 October 1995 decision of the first of those tribunals in *Prosecutor v Tadic* will continue to stand out as the decisive catalyst force within that process. The main characteristic of what may be called the ‘*Tadic*-dynamic’ was the far reaching assimilation of the law of non-international armed conflict to the already well-developed body of the law of international armed conflict. The driving force was the belief that it was morally required to extend the humanitarian protection provided by the latter body of law as widely as possible to the victims of non-international armed conflict. ‘9/11’ marks the second track of the recent development of the law of non-international armed conflict. The main feature of what may be referred to as the ‘Al Qaeda-dynamic’ is the application of the law of non-international armed conflict to a transnational armed conflict between a State and a non-State organisation. The driving force behind the recognition of a transnational non-international armed conflict is not so much a humanitarian impetus, as the need felt by States facing an extraordinarily serious threat by non-State actors to resort to targeting and detention powers which are unavailable under the law enforcement paradigm governed by international human rights law. As a result of these two dynamics, the law of non-international armed conflict has become a fairly complex subject. While the body of law has grown extensively, the intentions behind and the effects of this stormy process are deeply ambiguous as David Kretzmer has highlighted in his ground-breaking article ‘Rethinking the Application of IHL in Non-International Armed Conflicts’ ((2009) 42 *Israel Law Review* 8-45, 39): ‘While the original intention behind extension of IHL to non-international armed conflicts was to enhance the protection granted to potential victims of such conflicts, given the dramatic development of IHRL, categorisation of a situation as one of armed conflict, rather than internal unrest, may serve to weaken the protection offered to potential victims rather than to strengthen it.’ These few introductory remarks should be sufficient to indicate that the law of non-international armed conflict is in urgent need of close scholarly attention. It can therefore only be welcomed that the four monographs, which form the subject of this review, focus on this body of international law, completely or at least in important parts.

Anthony Cullen deals with the threshold(s) of application of the law of non-international armed conflict. While the author (rightly) attaches the utmost significance to the case-law of the international criminal courts, and above all, to the *Tadic* decision, the greatest merit of his study consists in the most careful analysis of the *travaux préparatoires* of Common Article 3 of the GCs, of Article 1 of AP II, and of Article 8 of the Statute of the International Criminal Court (ICC). Emily Crawford’s study is not confined to the law of non-international armed conflict. Her book, for example, also contains a convincing critique of the idea to introduce a third category of ‘unlawful/enemy combatants’ into the law of international armed conflict. Most importantly, however, she takes a closer look at the above mentioned process of assimilation and presents a powerful argument that the differences between the treatment of combatants in international armed conflict and the treatment of insurgents in non-international armed conflict have lost much of their significance. While Cullen and E Crawford shed light on important elements of the ‘*Tadic*-dynamic’, Noam Lubell explores the

'Al Qaeda-dynamic' as part of his comprehensive treatise of the extra-territorial use of force against non-State actors. Another equally important and excellent part of his book, which will not be dealt with in this review, argues in favour of a carefully defined right of self-defence under Article 51 of the United Nations (UN) Charter against non-State armed attacks. Sandesh Sivakumaran's voluminous work illuminates both conflicting tendencies and presents the most comprehensive and sophisticated account of this body of law to date. Following the impetus of Marco Sassòli's important study 'Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law' (1 International Humanitarian Legal Studies (2010), 5-51), Sivakumaran's book is written with a particular sensitivity for the perspective of the non-State parties to these conflicts. The study presents the most detailed analysis of the practice of such non-State parties to date and it goes so far to conclude with the proposal that States and non-State armed groups should create a comprehensive new instrument bringing together the different (hard and soft) legal sources and including strong provisions on implementation.

The main ingredients of Cullen's carefully documented account of the evolution of the concept of non-international armed conflict since 1949 are as follows. The *travaux préparatoires* of Common Article 3 of the GCs strongly suggest that States favoured a high threshold of application akin to the traditional notion of 'civil war' (25-61). The *Tadic* decision has decisively contributed to an interpretation which distinctly broadens (122) the concept of non-international armed conflict; the two elements now being a certain intensity of the fighting between a State and a non-State armed group and a certain level of organisation of the non-State armed group. Cullen welcomes this development because it widens the scope of application of the humanitarian protection the law of non-international armed conflict affords. In line with this positive appraisal of the re-interpretation of Common Article 3 of the GCs, Cullen deplores the creation of the distinct threshold in Article 1(1) of AP II which, he thinks, is met only in 'situations at or near the level of full-scale civil war' (114). The author hastens to add, however, that as a result of the recent development of customary international law, the significance in practice of the temporary regression through the adoption of AP II need not be overemphasised. According to Cullen, the customary law concept of non-international armed conflict corresponds with Common Article 3 of the GCs in its modern interpretation and it is this relatively low threshold which, in the author's view, triggers the application of the full body of customary rules of non-international armed conflict, a body which, as he recognises, has grown significantly as a result of the '*Tadic*-dynamic' (114). Cullen argues that essentially the same broad customary law concept of non-international armed conflict should also guide the interpretation of Article 8(2)(d) and (f) of the ICC Statute (159-185).

Cullen's account of the law and its evolution is broadly in line with the predominant scholarly view. Sivakumaran forcefully challenges this position in important respects. He construes the threshold of application in Common Article 3 of the GCs' more narrowly and the threshold set in Article 1(1) of AP II less stringently than Cullen and, on that basis, Sivakumaran denies the existence of a significant difference between the two types of non-international armed conflict. With regard to Article 1(1) of AP II, Sivakumaran's main point is that this provision does not require 'territorial control in and of itself, but that (the armed group) exercises such territorial control as to enable it to carry out hostilities and implement the Protocol' (190-191). Sivakumaran further holds that the level of violence implied by the terms 'sustained and concerted military operations' does not exceed the minimum level required by Common Article 3 of the GCs (188) and he finally argues that the implementation of AP II does not require any territorial control at

all where the armed group decides not to detain persons (186). Sivakumaran concludes that Article 1(1) of AP II does not require the intensive control of a large territory and that it does certainly not allude to a situation where the conditions for the recognition of belligerency are present (190-192). Regarding Common Article 3 of the GCs, Sivakumaran, like Cullen, accepts the two criteria as established in the 1995 *Tadic* decision and as confirmed in the subsequent case-law of the international criminal courts, of the intensity of the fighting and the necessary organisation of the non-State party. Yet, Sivakumaran prefers a more restrictive understanding of those criteria than Cullen. At the outset, he specifically rejects the often cited exhortation in the ICRC commentaries that Common Article 3 of the GCs should be applied 'as widely as possible' (162). With respect to the intensity requirement, Sivakumaran favourably cites the use of the term 'large-scale violence' in the 1995 *Tadic* decision (167), while he accepts that the intensity may be more moderate where the violence takes place over an extended duration (168). A particularly interesting part of Sivakumaran's book is devoted to the organisation requirement. This, in the author's view, mainly serves the purpose of ensuring that only such non-State groups qualify as parties to non-international armed conflicts which are capable of complying with the law governing these conflicts (177). Sivakumaran thus insists on the need for a responsible command (174-176, 179) and the existence of some kind of an internal disciplinary system (179).

I believe that Sivakumaran has made a strong case against construing the threshold set up in AP II overly narrowly by reference to a requirement of significant and intensive territorial control. At the same time, as both Cullen and Sivakumaran correctly observe, the proper interpretation of Article 1(1) of AP II has lost a good part of its practical significance in light of the more recent development of customary international law. What really matters is therefore the concept of non-international armed conflict in Common Article 3 of the GCs, in customary international law, and in Article 8 of the ICC Statute. As both authors convincingly explain, there should be one single concept of non-international armed conflict for these three legal contexts. Unfortunately, neither Cullen nor Sivakumaran acknowledge with sufficient clarity that the determination of the proper threshold is so challenging because of two fundamentally conflicting considerations. The interest to provide victims of violence with humanitarian protection suggests a rather low intensity threshold. But the need not to allow State parties to resort too easily to broad targeting and detention powers under an armed conflict conduct of hostilities as opposed to the law enforcement paradigm points in the opposite direction. In his article mentioned above, Kretzmer powerfully argues that the latter consideration should prevail in light of the fact that international human rights law already provides for the necessary humanitarian protection in cases of lower-scale internal violence. In light of the expansion of the US targeted killing policy over the last number of years, it is indeed difficult to ignore the danger of construing the concept of non-international armed conflict too broadly and it must therefore be welcomed that this danger is clearly identified in the most recent report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns (A/68/30532, 13 September 2013, paras 15, 16, 22). At the same time, the application of international human rights standards to non-State armed groups poses difficulties (a point taken up in greater detail below) so that the tension between the two mentioned conflicting considerations cannot be completely resolved by reference to the existence of a rich body of international human rights law. One is therefore tempted to consider the third possibility of a fairly low intensity threshold for the strictly humanitarian rules of non-international armed conflict, but to allow resort to broad targeting and detention powers only in cases of particularly large-scale violence which makes resort to the armed conflict conduct of hostilities paradigm a dire

necessity. As will be shown below, Lubell, who is sensitive to the problem, alludes to the possibility of such a differentiated approach (155), but it is not easy to accommodate it within the law as it stands.

Sivakumaran's analysis of the necessary organisation of the non-State party gives rise to a separate and intriguing question. If this organisation is, as the *Tadic* case-law suggests, a requirement for the existence of a non-international armed conflict, which is distinct from that of the requisite intensity of the violence, it is plausible to assume, as Sivakumaran does, that the necessary degree of organisation should be determined in light of the non-State party's ability to comply with the law. But one is left to wonder whether it is satisfactory to make the possibility for the State to resort to the armed conflict conduct of hostilities paradigm dependent not only on the intensity of the threat it is facing, but also on the ability of the relevant non-State group to comply with that body of law. It will be hard to explain to a government, which is challenged by an armed opposition sufficiently organised to pose an extremely intensive violent threat, that this government is precluded from resorting to the armed conflict conduct of hostilities paradigm because the opposition group is insufficiently organised to implement the law of armed conflict. Sivakumaran's response to this observation could be that this result is inevitable in order to ensure that there is always at least the chance that the law of non-international armed conflict is applied symmetrically. One may wish to accept this argument as reflecting the logic of any law of armed conflict. But one should not be too surprised then if the tight legal constraints following from international human rights law will come under pressure in cases where the inability of a non-State armed group to implement the law of armed conflicts constitutes the only reason for the inapplicability of that body of law.

One of the most vigorously debated aspects of the law of non-international armed conflict has recently been the question of whether such a conflict can be transnational in nature. Lubell presents one of the most elaborate arguments to date in support of an affirmative answer to that question. He concludes that an extraterritorial use of force by a State in the exercise of the right of self-defence against a non-State armed attack will be governed by the conduct of hostilities rules under the law of non-international armed conflict if the non-State armed attack brings about a non-international armed conflict (99-104). Contrary to some suggestions in recent literature, Lubell therefore does not see the need to recognise a new and third type of armed conflict, tailor-made for 'transnational armed conflicts' (121-134). Lubell's main argument is a purposive and systematic one. He points out that the key differences between the law of international and non-international armed conflict reflect the nature of the parties to the armed conflict and not the latter's geographical extension. Lubell refers to the absence of a combatant privilege for non-State fighters in non-international armed conflicts as the most prominent example. According to this author, it would therefore not be sensible to re-qualify a non-international armed conflict as international to the extent that it has spilled over to foreign territory. By the same token, he believes that it would lead to unsatisfactory results to qualify as international in nature the armed conflict between an armed opposition group and a foreign State, which has intervened into a non-international armed conflict at the invitation of the government. Lubell is of the view that the wording of Common Article 3 of the GCs does not preclude the possibility of a transnational non-international armed conflict, as suggested by this teleological and systematic interpretation. Sivakumaran elaborates on this point and further strengthens Lubell's position through a careful analysis of the *travaux préparatoires* of Common Article 3 of the GCs (228-234). Sivakumaran concedes that the reference in the latter provision to the armed conflict occurring 'in the territory of one of the High Contracting Parties' may, at first

sight, point towards a narrow geographical interpretation, but he then demonstrates that this reference was included 'in order to distinguish between armed conflicts that take place on the territory of states parties to the Conventions (...) and armed conflicts that take place on the territory of non-states parties (229). Sivakumaran concludes his argument with the confident statement that 'it is evident that non-international armed conflicts include both those conflicts that are purely internal in character and those that straddle an international boundary' (232). While I do not consider the matter evident, I do believe that Lubell and Sivakumaran have advanced a powerful and ultimately convincing case in favour of recognising the possibility of a transnational non-international armed conflict. To that important extent, there is thus agreement with the US Supreme Court in *Hamdan v Rumsfeld* ((2006) 126 S Ct 2749, 2757) and the subsequent evolution of the official US legal position *vis-à-vis* Al Qaeda.

Both Lubell and Sivakumaran are careful, however, not to hereby endorse the US policy of targeted killings as it has been evolving since 2002. Lubell does not rule out the possibility that there was a transnational non-international armed conflict between the USA and Al Qaeda in 2001/2 in Afghanistan (121), but he tends to reject the idea that such a conflict could have continued to exist after the US invasion in Afghanistan had led to the 'physical dispersal of the group and the transition towards a decentralised network of many groups and individuals operating on the basis of a shared ideology' (118). Sivakumaran is more reluctant than Lubell to enter into the analysis of the relevant facts, but makes it clear that he is uncertain to what extent the conflict between the USA and Al Qaeda has amounted to a non-international armed conflict (234). The fact that he calls this uncertainty 'an important caveat' (ibid) indicates that Sivakumaran entertains considerable doubts that the facts actually support the US claim, as it has evolved over the more recent years, that this State has been engaged in a non-international armed conflict with Al Qaeda stretching over many territories and lasting for more than a decade. The strong scepticism of both authors towards the application of the concept of (transnational) non-international armed conflict by the USA to Al Qaeda is a healthy one. It is rightly premised on the insistence on a sufficiently stringent intensity/organisation threshold and it is rightly based on the idea (to which I will subsequently return) that the violent activities of different, but 'associated' groups cannot be somehow aggregated in order to determine whether this threshold is passed (Lubell on 119-120; Sivakumaran on 233). Finally, the scepticism can perhaps also be taken to imply the view that the possibility of relying on the law of armed conflict conduct of hostilities paradigm must end as soon as the non-State party is no longer capable of exerting violence of a sufficient intensity. Somewhat unfortunately, the authors have not made their precise position about this important last question explicit. The authors could also have paid more attention to the question of whether a State should not be required to be more transparent *vis-à-vis* the international community in setting out the factual background which allegedly requires it to resort to the armed conflict paradigm. After all, the situation is not altogether different from that of a derogation from international human rights standards in a case of a serious emergency.

Earlier, I have taken it for granted that the law of non-international armed conflict includes a subset of rules on the conduct of hostilities and especially on targeting. Sivakumaran usefully reminds the reader of the fact that '(w)hether international law regulates the conduct of hostilities in non-international armed conflict has long been the subject of dispute' (336-337). The fact that the author's presentation of the now existing law on that matter covers almost 100 pages, sheds an impressive light on the significance of the recent customary process on the matter. Despite the length of this chapter and the detailed attention that the individual conduct of hostilities rules have received therein,

Sivakumaran does not completely illuminate the fundamental question whether and if yes to what extent the law of non-international armed conflict provides fighters with a targeting power equivalent to the combatant privilege in the law of international armed conflict. Correctly as a matter of the existing law, the author does not question that the fighters of the non-State party do not enjoy such a privilege. But he does not really clarify the legal position of the State soldiers. It is difficult to deny that state practice supports the view that the law of non-international armed conflict empowers the State party to a non-international armed conflict to go beyond the international human rights law constraints in fighting its adversary. It is less clear, however, whether the individual soldier enjoys a targeting privilege directly under the law of non-international armed conflict or whether such a power can only flow from a domestic legislation of the State concerned which, as it were, activates a non-international armed conflict conduct of hostilities paradigm. This question is of more than theoretical interest because, in the absence of any 'activating' domestic legislation, a criminal case against a State soldier for murder or manslaughter because of lethal action taken against an adversary in the course of a non-international armed conflict may very well depend on whether the international law governing that type of conflict provides the soldier with a defence in the form of a targeting power. The emerging judicial practice in Germany provides a useful illustration of the problem (see, most recently, the decision of the German Federal Prosecutor of 20 June 2013, *Drohneneinsatz vom 4. Oktober 2010 in Mir Ali/Pakistan* - 3 BJs 7/12-4, D III. 3; unpublished, on file with the author).

Regarding the precise content of the targeting rules under the law of non-international armed conflict, the 2009 *Interpretive Guidance of the International Committee of the Red Cross on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC Guidance) has soon established itself as the most important point of reference for the subsequent debate. The two most important legal propositions of the ICRC Guidance are the recognition of a non-State functional equivalent of State combatants (for targeting purposes) in the form of non-State fighters with a continuous combat function and the interpretation of the notion of direct participation according to the specific acts approach. Lubell devotes a thoughtful section to the discussion of these two interpretive suggestions and demonstrates that they are intimately related. On balance, Lubell (much along the lines of the Israeli High Court of Justice in *The Public Committee against Torture in Israel and ors v Israel and ors*, HCJ 769/02, 13 December 2006, para. 39) prefers not to accept the category of a non-State fighter with a continuous combat function, and instead to allow for an exception to the specific acts approach on direct participation in the case of civilians who 'take an ongoing part in the hostilities' (155). In that context, Lubell thoughtfully alludes to the desirability of a future law that differentiates between low intensity and high intensity non-international armed conflicts 'allowing for realistic approaches to high intensity conflicts without dragging down protection in the low intensity ones'. Sivakumaran, however, prefers the approach suggested in the ICRC Guidance (359-368) and pushes it even one step further by recognising the possibility of de jure members of the military wing of the armed group according to the law of the armed group in addition to de facto members through ongoing direct participation in the hostilities (360). In practice, there will not be much of a difference between Lubell's (and the Israeli High Court of Justice's) and Sivakumaran's (and the Guidance's) legal positions. As a matter of legal construction, I believe the latter view of the law is preferable because it is based on clear and convincing principles and because it can be brought in line with the wording of Art. 1 (1) of AP II without any significant problem. It is therefore unsurprising that the ICRC Guidance's approach has already found its way into the national judicial practice (*Drohneneinsatz vom 4. Oktober 2010*

in *Mir Ali/Pakistan*, D II. 3. b.) aa)) and has also been well received by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns (A/68/30532, 12 September 2013, para. 70). Lubell's main concern that the concept of members of a non-State armed group could be abused in the legal context of detention (153) is an interesting one, but ultimately it is of insufficient weight. The concept of a member of a non-State armed group for targeting purposes does not preclude the elaboration of a proper detention regime in non-international armed conflict and the possibility of abuse should not hinder one to devise a coherent legal framework. Sivakumaran's suggestion to accept *de jure* members of non-State armed groups constitutes an interesting addition to the debate. Whether or not it would significantly broaden the category of continuously targetable persons and whether 'the law of the non-State group' constitutes a satisfactory basis under international law for identifying membership within a non-State armed group certainly merits future debate. In any event, it is interesting to note that Sivakumaran's argument is based on a State party and ultimately an international armed conflict analogy (360) while the same author devotes an inspiring section on the 'methodological difficulties with regulation by drawing on the law of international armed conflict' (65-77).

Whatever its precise form, the application of a non-international armed conflict paradigm, which broadens the temporal scope for the targeting of persons and which does not categorically exclude the acceptance of damages among (not directly participating) civilians, sharply deviates from the otherwise applicable international human rights standards. This raises the question whether the use of these targeting powers is subject to geographical constraints. Unsurprisingly, the '*Tadic*' and the 'Al Qaeda' dynamics again clash. Cullen once more follows the *Tadic* dynamic and welcomes the case-law of the international criminal courts according to which the law of non-international armed conflict extends beyond the exact place of hostilities (140). There is nothing wrong with this case-law with respect to the genuinely humanitarian protections which this body of law affords. But in view of the broad targeting powers under the law of non-international armed conflict, Cullen's statement that the 'broad interpretation given to the geographical scope of armed conflict (...) avoids fragmentation of status' and 'facilitates a greater degree of clarity and cohesiveness' (142) only reflects one side of the coin.

Perhaps therefore the issue should not be couched in terms of the geographical scope of the non-international armed conflict as such but more specifically as the geographical scope of application of the non-international armed conflict conduct of hostilities paradigm. The view that there is no meaningful geographical restriction of the targeting powers flowing from the law of non-international armed conflict has recently been gaining ground and Lubell and Sivakumaran are important voices in that regard. The argument against a limitation *ratione loci* constitutes a central component of the legal position underlying the latest phase of the US targeted killing policy. An unpublished 2013 Justice Department White Paper argues that its authors 'ha(ve) not found any authority for the proposition that when one of the parties to an armed conflict plans and executes operations from a new location, an operation to engage the enemy in that location cannot be part of the original armed conflict, unless the hostilities become sufficiently intense and protracted in the new location' ('Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force', on file with the author). Lubell indicates a similar view in his book (254-259) and, together with Nathan Derejko, he has made this legal position more explicit in a recent article ('A Global Battlefield. Drones and the Geographical Scope of Armed Conflict', (2013) 11 *Journal of International Criminal Justice* 65-88). While the two

authors express the view that ‘in situations of NIAC (non-international armed conflict) where the hostilities are restricted to limited areas, so too should the application of IHL (international humanitarian law)’ (ibid, 71), they also reject the view that the application of the armed conflict conduct of hostilities paradigm is restricted to ‘the immediate geographical sphere of hostilities’ (ibid, 75-76). To the contrary, they hold: ‘The requirements for the applicability of IHL are: that an armed conflict is taking place, and that the operations in question are in fact between Parties to this armed conflict (nexus). The status of the individuals targeted or the attributes of the objects targeted, will then be relevant as to the lawfulness in accordance with IHL (as opposed to its applicability)’ (83). I read Sivakumaran’s legal position as being essentially the same. It is true that, according to this author, ‘a global non-international armed conflict does not exist’ (234), and the same author also holds that ‘a conflict must have a territorial base’ (id.). At the same time, however, Sivakumaran is of the view that if a single armed group operates in or from different States ‘its acts (...) c(an) be aggregated to determine the intensity of the violence’. And with respect specifically to the applicability of the targeting rules *ratione loci*, Sivakumaran concludes very much along the lines of the legal position of the USA: ‘Ultimately (...), their (the targeted individuals’) location does not immunise them from the operation of the law and all this suggests the need to move away from geographic-based ideas of applicability of the law’ (251). Lubell and Sivakumaran have not remained lone scholarly voices in their support of that part of the US legal position. In a most recent study for the European Parliament’s Subcommittee on Human Rights Nils Melzer has added his voice to this growing body of opinion: ‘Once the objective criteria for the existence of an armed conflict are met, the applicability of humanitarian law is not territorially limited but governs the relations between the belligerents irrespective of geographical location. (...) Therefore, any drone attack (...) for reasons related to an armed conflict is necessarily governed by humanitarian law, regardless of territorial considerations’ (‘Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare’, May 2013, 21, sub 2.2.2).

There are two ways to formulate a geographical limitation on the application of the targeting powers, contrary to the US legal view, as supported by Lubell, Melzer and Sivakumaran. The first is to restrict such application to the ‘battlefield(s)’, the ‘conflict zone(s)’, the ‘zone(s) of actual armed hostilities’ or the like even in a purely internal non-international armed conflict, the other is to impose such a restriction with respect to any territory of a State other than that party to the non-international armed conflict. In an earlier piece, I have left open the first possibility and argued in support of the second. I have taken the view that in a transnational non-international armed conflict the targeting rules may be relied upon only on such a territory of a third State where the non-State party has established a (quasi-)military infrastructure of a kind that enables it to carry out intensive armed violence (‘Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts’, (2010) 15 *Journal of Conflict & Security Law* 245-274, 266). Lubell’s, and Sivakumaran’s arguments (as well as those advanced by the USA and Melzer) require a reconsideration of this position. This leads me to accept that State boundaries, while retaining all their importance at the *jus contra bellum* level of analysis, cannot make a decisive difference in our *jus in bello* context. (I do not think that this can be successfully challenged by drawing per analogy on the law of neutrality for international armed conflicts, a point which should, however, have received some attention in Lubell’s and Sivakumaran’s works.) The question can therefore only be whether the applicability *ratione loci* of the targeting rules should be generally limited to certain areas in non-international armed conflict. This view has been expressed, for example, by Mary Ellen O’Connell (‘Combatants and the Combat Zone’, (2008-2009) 43

University of Richmond Law Review 845-864, 863). The treaty law of non-international armed conflict does not contain an explicit rule to that effect and State practice does not present a clear picture. While the USA have made their conviction against any geographical constraint clear, the position of other States is more difficult to assess. While it cannot be disputed that the US policy of targeted killings outside Afghanistan has given rise to concern in many quarters of the world, it is unclear whether such reservations are based on the belief that the targeting rules in non-international armed conflict are geographically confined. Other possible explanations include a scepticism that there is or continues to be a non-international armed conflict between the USA and 'Al Qaeda and its associated forces' or a denial that the targeted persons are sufficiently connected with such a conflict through a continuous combat function or through direct participation in the hostilities at the relevant moment in time. In its recent decision on a US drone attack in Pakistan, Germany's Federal Prosecutor has indicated its preference to limit the application of the targeting rules in a non-international armed conflict to 'actual war zones' ('tatsächliche Kriegsgebiete'), but the specificity of this obiter dictum (*Drohneneinsatz vom 4. Oktober 2010 in Mir Ali/Pakistan*, D II. 1.) d) is rather the exception which confirms the rule. O'Connell is therefore quite bold to claim, 'that State practice shows that government officials do not recognise the rights and duties of the battlefield as extending far beyond it' (*ibid*, 862). It is, however, also questionable simply to work on the basis of a presumption against any geographical limitation as the USA does. Against such a presumption, it could be argued that any reliance of the permissive targeting rules under the law of non-international armed conflict constitutes an exception from the right to life as guaranteed under the peace time international human rights standard. Although the derogation clauses in the international human rights treaties are not technically applicable in our context, it may perhaps be seen as the expression of a general principle that a State which derogates from the peace time international human rights standard must geographically confine such derogation wherever the emergency so allows (see, for example, General Comment on Article 4 of the International Covenant on Civil and Political Rights, CCPR/C21/Rev.1/Add.11, 31.8.2001, paras. 4 and 17). The caveat 'wherever the emergency so allows' is, of course, important, and Lubell and Sivakumaran may respond that it is necessary in a non-international armed conflict to target enemy fighters with a continuous combat function and offensive civilians wherever they are. This need not be the end of the matter, though, as the UN Human Rights Committee also mentions in its General Comment on Article 4 that any derogation is subject to the principle of proportionality (*ibid*, para. 4). It is indeed not far-fetched to rely on that principle (in its broadest sense, as opposed to its more narrow law of armed conflict version) in support of the limitation *ratione loci* under consideration. The argument would be that it is excessive to extend the application of the permissive targeting regime under the law of non-international armed conflict beyond the 'zone(s) of actual hostilities' or the like. If one is prepared to follow this line of thought in principle (for a certain inclination in that direction, see the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns (A/68/30532, 13 September 2013, para. 64)), the question arises how to convincingly define the relevant geographical area. Sivakumaran would deny that such a possibility always exists. In line with modern war theorists, he points out that in 'some non-international armed conflicts, a traditional battlefield does not exist' so that the search for a 'geographic focus essentially constitutes the drawing of arbitrary boundaries' (251). To an extent, this is certainly true as it would indeed seem arbitrary to allow the leadership of a non-State party to a non-international armed conflict to immunise themselves from the application of the targeting rules by establishing their command centre far away from the scene of the actual fighting. An

appropriate geographical limitation would therefore have to be formulated in different terms. Perhaps one could confine the targeting of persons and military objects to areas where the adversary has established a (quasi-)military infrastructure which significantly contributes to the fighting. The constraining force of such a criterion would be quite limited, though, and it would create new border-line issues such as the qualification as significant infrastructure or not of the location of a (or how many more?) drone pilots far away from any 'battlefield'. In light of all these considerations, I do accept that Lubell and Sivakumaran have made a powerful case against the existence of a geographical limitation of the targeting rules in non-international armed conflict. This, of course, means that the insistence on an appropriately high intensity threshold for the acceptance of the existence of an armed conflict (or at least the applicability of the armed conflict paradigm of the conduct of hostilities) becomes even more urgent. The continuous reference in the more recent US statements on 'Al Qaeda and its associated groups' must probably be seen in this context and more precisely as the attempt to aggregate the violence emanating from different groups under the undefined label of 'association' for legal purposes. As mentioned above, both Lubell and Sivakumaran correctly question the possibility of such an aggregation. The former author very usefully specifies this important point: 'If (...) incidents are perpetrated by separate groups with no unified and organised command and control structure it becomes difficult to add them all up together as evidence of an existing conflict (120).' I agree (and so does the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns (A/68/30532, 12 September 2013, para. 62)), but would have preferred had Lubell said 'impossible' instead of 'difficult'.

The wider the possible geographical scope of the targeting rules under the law of non-international armed conflict is, the greater the risks of erroneous targeting. Sivakumaran correctly confirms the widely held view that the rules on precautions applicable in international armed conflict *mutatis mutandis* apply in non-international armed conflict (351-357). But he could perhaps have highlighted the particular importance of a stringent application of those rules in cases of targeted killings outside any 'hot battlefield'. The determination of the High Court of Justice of Israel that 'the burden of proof on the attacking army is heavy' (*The Public Committee against Torture in Israel and others v Israel and others*, para. 40) could have served as a starting point of the discussion Melzer usefully elaborates on that judicial pronouncement and states: 'Decisions to carry out a drone attack are not typically taken under the time pressure and personal stress of immediate combat operations, but targeted individuals are often tracked for several days or weeks before being attacked. In many circumstances, the long loiter capacity of drone may significantly extend the period at the disposal of operators to verify targets, assess the likelihood of collateral harm and clarify other factors before taking the decision to attack. As a general rule, the context of targeted killing through drone-attacks allows - and therefore requires - a particularly high level of precaution' ('Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare', May 2013, 23, sub 3.1.2). It would also have been very useful, had Lubell and Sivakumaran considered as to whether this general rule could be concretised through more specific procedural standards and it would have been particularly interesting to read whether the authors see room for some kind of independent or even judicial control of targeting decisions of a lesser temporal urgency before the execution of the attack.

The fact that the possibility of a meaningful geographical delineation of the targeting powers under the law of non-international armed conflict paradigm is open to serious doubt, also underlines the possible practical importance of the ICRC Guidance's reference to the principles of military necessity and humanity to somewhat confine this paradigm. These principles may, according to the latter document, preclude the use of lethal

force in targeting 'where a party to the conflict exercises effective territorial control, most notably in occupied territories and non-international armed conflicts' because, in such circumstances, the same legitimate military purpose could perhaps be achieved 'through capture or other non-lethal means without additional risk to the operating forces or the surrounding civilian population' (81). This interpretation of the law of armed conflicts has proven to be controversial, but it has been positively received in a first national judicial decision in a case of a targeting killing (*Drohneinsatz vom 4. Oktober 2010 in Mir Ali/Pakistan*, D II. 3. c); the Israeli High Court of Justice had reached a similar result by reference to human rights law in *The Public Committee against Torture in Israel and ors v Israel and ors*, para. 40). Neither Lubell (162) nor Sivakumaran (371) endorse the ICRC's legal view under the *lex lata*. Both authors should have considered the matter more closely, though. In doing so, they should have given more attention to the question of where the 'burden of proof' lies because it may make quite a difference whether the Guidance's position is seen as a pleading for the recent emergence of an entirely new customary rule or rather, as Robin Geiß has argued in a thought-provoking recent piece ('Military Necessity: A Fundamental 'Principle' Fallen Into Oblivion', in H Ruiz Fabri, R Wolfrum and J Gogolin (eds), *Select Proceedings of the European Society of International Law* (Hart 2008), 554-568) as the application of an old, though insufficiently concretised, customary principle. As a matter of legal policy, Lubell (244-5) and Sivakumaran (371) tend to welcome the very modest restriction of the targeting powers under the law of armed conflict paradigm which results from the Guidance's position. There should indeed be little doubt that preference should be given to capture over the use of lethal force if this does not imply any significant additional risk for the operating forces or the civilian population.

In practice, this way of somewhat confining the use of lethal force against targetable individuals in a situation of non-international armed conflict presupposes the existence of a realistic legal regime for preventive detention. It is therefore unfortunate, to say the least, that the existing law of non-international armed conflict fails to spell out such a regime. The two decisive questions, which the existing law leaves without an explicit answer, are whether the law of non-international armed conflict allows for preventive detention beyond the very strict confines of international human rights law, as interpreted, for example by the European Court of Human Rights and, if so, under which precise conditions. E Crawford only touches on the issue when she alludes to the interest of a State party to a non-international armed conflict to detain its adversary 'for the duration of the armed conflict' (161). The point is taken up exclusively *de lege ferenda*, though, and the way this is done leaves open the question of whether E Crawford sees room for some form of preventive detention under the law as it stands. Lubell addresses the issue, but somewhat cursorily as his focus of interest is on the use of force. He recognises the need to have recourse to 'administrative detention for security reasons' (186-187, 189), but he seems to believe that domestic legislation is needed to activate this possibility (163). The question of how far precisely such domestic legislation may extend is left unanswered. Interestingly, however, Lubell tends to assume that States parties to the European Convention of Human Rights must derogate from the latter's Article 5 in case they feel the need to administratively detain non-State fighters (190). Importantly, Sivakumaran appreciates the interrelation between the targeting and the detention rules and also recognises that it would be hard to explain the absence of a detention power while targeting powers form part of the law of non-international armed conflict. He therefore states that an implicit 'power to detain is (...) a corollary of the power to target individuals during armed conflict' (301). (Whether it is a power in need of activation through domestic legislation is left open here as in the targeting context.)

Regrettably, Sivakumaran does not elaborate too much on the possible reasons for preventive detention. He seems to be amenable to the suggestion to draw on Articles 42 and 78 of the 4th GC, but his call 'to appreciate the differences between the situations in which that body of law applies and non-international armed conflict' (302) remains fairly vague. If in different ways, E Crawford's, Lubell's and Sivakumaran's treatments of the matter all confirm the widely shared conviction that the issue of preventive detention should urgently become the object of legal reform and be it only in the form of an agreed set of best practices. One is therefore surprised that Sivakumaran does not return to this question in the concluding part of his book on the 'developments needed in the law'.

The modalities of detention and the legal regime governing (criminal) trials in non-international armed conflicts lie at the heart of E Crawford's book. Her main intention is to demonstrate that it is not only undesirable as a matter of legal policy to have different levels of protection of detainees in international and non-international armed conflict but that already, as a matter of existing law, 'the confluence of treaty and customary international law has laid the groundwork for a more uniform application of the laws of armed conflict' (171). In order to reach her goal E Crawford begins with a succinct exposition of the law applicable in international armed conflict (48-77) to compare this regulation with that applicable in non-international armed conflict. With respect to the latter, she forms the four legal sub-sets of 'human treatment', 'conditions of captivity', 'relations with the exterior' and 'judicial guarantees' and for each of them she identifies the applicable treaty and customary rules of non-international armed conflict (78-104) as well as the treaty and customary rules under international human rights law (118-151). The author's careful and comprehensive analysis reveals to what an impressive extent the 'Tadic dynamic' has indeed led to a uniform body of international law aiming at the protection of detainees in international and non-international armed conflicts. In addition, the book also usefully exemplifies the significant potential of a harmonious interplay between rules of international humanitarian law and international human rights law in a situation of non-international armed conflict. Sivakumaran's analysis of this part of the law of non-international armed conflict (255-272, 292-311) confirms E Crawford's main point. Sivakumaran's study offers additional legal insight and interesting nuances, though, where the author goes into greater detail than E Crawford in explaining the application of individual rules to the non-State party. For example, Sivakumaran highlights the particular difficulty in construing the legal term 'regularly constituted court' with respect to a non-State armed group (305-306) and he also gives special attention to those obligations which leave room for differentiations according to the capabilities of the parties to the conflict (295-296). It is of particular interest to compare how E Crawford and Sivakumaran approach the possible interplay between the law of international armed conflict and international human rights law. Neither of them refers explicitly to one of the three categories of situations the International Court of Justice (ICJ) established in the *Wall Advisory Opinion* when dealing with the relationship between these two bodies of law (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) ICJ Rep 136, 178, para. 106), which is probably less a shortcoming of the two studies but rather evidence of the limited guidance the ICJ has offered. E Crawford and Sivakumaran are in agreement that there is ample room for a harmonious relationship between the two bodies of law in the sense that international human rights and the interpretation they have received in human rights practice may inform the interpretation of these 'Geneva law-type' rules of non-international armed conflict. Sivakumaran, however, notes that there may be exceptions and he usefully illustrates the point with respect to the controversial question whether parties to a non-international armed conflict must provide convicted persons with a right to appeal (310). While this is

a (helpful) nuance, Sivakumaran also formulates a more far reaching question concerning the potential of international human rights law in non-international armed conflicts. He questions the idea that the latter body of law, apart from informing certain rules of international humanitarian law, may directly regulate situations of non-international armed conflict (93-99). Sivakumaran's main concern is the preservation of the 'equality of obligation of belligerents' which he sees endangered wherever international human rights law only applies to the State party to the conflict (95). This concern would be unwarranted had customary international human rights law evolved to a point where it also binds non-State parties to a non-international armed conflict. E Crawford takes this view, but her analysis of customary law (126-129) is fairly brief and rather 'optimistic'. Sivakumaran, more reluctantly and probably more realistically, accepts the case for the applicability of international human rights law to non-State armed groups only where such groups exercise territorial control (97) so that for him the idea of the direct applicability of international human rights law in all situations of non-international armed conflict does indeed conflict with the principle of the 'equality of obligation of belligerents'. But Sivakumaran postulates rather than argues why there should be such a strict legal symmetry between the two parties to the non-international armed conflict with respect to the protection of the vulnerable. The reader is left to wonder why the State party to a non-international armed conflict should be able to reject one of its human right obligations, which is not superseded by any *lex specialis* under the law of non-international armed conflict, for the single reason that it creates a (limited) legal asymmetry. This comes to mind, all the more, as the law of non-international armed conflict also contains an important asymmetry 'to the benefit' of the State party, that is the lack of a combatant privilege on the side of the non-State party.

But, of course, the latter asymmetry in the law of non-international armed conflict may itself be criticised. E Crawford does precisely this and in her concluding chapter 'Achieving a Universal Combatant Status' she passionately pleads for the recognition of the category of a 'legitimate participant' (168). While E Crawford entertains the hope that the law of non-international armed conflict could slowly move in this direction under the advocacy of all interested parties (169), Sivakumaran deems it 'extremely unlikely that combatant immunity be granted in advance and as a matter of course' (514). But this does not mean that both authors are in disagreement as a matter of legal policy. To the contrary, Sivakumaran wishes to move in the same direction as E Crawford and he accordingly encourages State parties to make a greater use of the amnesty option referred to in Article 6(5) of AP II as a 'functional equivalent' for combatant immunity. He even goes one step further and contemplates a reading of this provision to the effect that the 'the relevant authorities are obliged, if not actually to grant amnesties, actively to consider the grant of amnesties (emphasis in the citation)' (520). It is very welcome that E Crawford and Sivakumaran have offered fresh thinking on the question of 'combatant immunity' because this question goes to the heart of the debate about the basic structure and the future of the law of non-international armed conflict. They both attach great weight to the argument that such immunity would provide the non-State fighters with an incentive to comply with the law of non-international armed conflict. Indeed, if one upholds the belief that international law may have an impact on the conduct of non-State parties in non-international armed conflicts (and it is difficult to conceive of a meaningful debate about the future of this body of law which is not premised upon this belief), this law should provide those non-State armed groups with as powerful an incentive for compliance as possible. E Crawford is therefore right to couch her argument in humanitarian terms. States will continue to answer, however, that they need their domestic criminal laws against rebellion etc. in order to deter non-State actors from

taking up arms. In light of the suffering inherent in any non-international armed conflict, it is difficult to deny that this response is also ultimately based on a humanitarian consideration. It is possible to move that argument one step further through a comparative look at the level of inter-State conflicts. The elimination of a legal instrument of deterrence against the use of force by a non-State party through a combatant privilege would result in a situation which characterised the international legal relationship between States before the emergence of a *jus contra bellum*. At that time, international law did not deter the recourse to war, but was content to provide, through the traditional *jus in bello*, an incentive to wage war as humanely as possible. In our times, however, international law does not only prohibit the inter-State use of force, but even threatens the leadership of an aggressor State with punishment – and this also in case the aggressive war is fought in accordance with the law of international armed conflict. This is based on the (in an important part also humanitarian!) conviction that the law should deter from the aggressive use of inter-State force in the first place. The asymmetric absence of a combatant privilege in non-international armed conflict might therefore be defended as some kind of a functional equivalent of the international prohibition of the external use of force and the international criminality of aggression. The current *pro et contra* with respect to the question of a combatant privilege for non-international armed conflicts therefore reveals a genuine dilemma how to mediate between the need to deter (massive) internal violence and to encourage moderation once such violence has erupted. Perhaps the debate can be moved forward by another look at the inter-State level which faces a similar tension between the need to prevent the aggressive use of force in the first place and the desire to control the violence once such a use of force has occurred. This tension cannot be eliminated, but current international law makes the following attempt to reconcile both goals. With respect to the leadership of the aggressor State the emphasis is on the deterrence of the use of force as such because these leaders are threatened with punishment even in the absence of any subsequent violation of the law of international armed conflict. Regarding the other participants in the aggressive use of force, preference is given to the deterrence of war crimes. These participants are not covered by the crime of aggression so that their combatant privilege under the law of international armed conflict retains its full value as an incentive to wage the (aggressive!) war humanely. This suggests the need of an even more ambitious reform of the law than envisaged by E Crawford and Sivakumaran. In line with E Crawford's proposal and based on her principal argument, such a privilege could be introduced, but it would have to be complemented by the introduction of a *jus contra bellum internum*. Under this new body of international law, the leadership of a non-State group would be threatened with punishment for (internal or transnational) aggression against a State even in the absence of subsequent violations of the law of non-international armed conflict. To be coherent and fair, such a modern *jus contra bellum internum* would also have to provide for a limited *jus ad bellum internum* in defence of a civilian population which is the victim of a State policy fulfilling the conditions of a grave crime against humanity or genocide. (And this text is not the first to articulate this idea (but see Frédéric Mégret, 'Causes worth Fighting for: Is there a Non-State Jus Ad Bellum?', A Constantinides and N Zaikos (eds), *The Diversity of International Law. Essays in Honour of Proffessor Kalliopi K Koufa* (Martinus Nijhoff 2009) 171-187). I am not making any claim as to how realistic the vision of such a new law is. My point is simply that the reflection about the intriguing question of a combatant privilege in non-international armed conflicts must ultimately transcend the realm of the law of non-international armed conflict.

The books by Emily Crawford, Anthony Cullen, Noam Lubell, and Sandesh Sivakumaran impressively confirm how much the law of non-international armed

conflict has overcome its rudimentary status. While it has been impossible in this review to do full justice to these four important publications, I hope to have been able to demonstrate that all of them, whilst each from a different angle, make a significant contribution to our understanding of the contemporaneous law of non-international armed conflict after two decades of a stunning development. The overall picture is one of a strongly increased density of the legal regulation coupled with significant complexity, a few important remaining gaps and a number of unresolved fundamental tensions. All this culminates in Sandesh Sivakumaran's monumental work, which makes it the book of our time on the law of non-international armed conflict.

CLAUS KREß
UNIVERSITY OF COLOGNE
doi:10.1093/bybil/brto10

'Armed Attack' and Article 51 of the UN Charter. Evolutions in Customary Law and Practice. By TOM RUYS. Cambridge University Press, Cambridge, 2010. xxx + 585 pp. £96.00.

In the *Nicaragua* case, the International Court of Justice (ICJ) opined that '[t]here appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks' (*Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgment, Merits, (1986) ICJ Rep 103, para. 195). If this were true, one would find it difficult to see the usefulness of a voluminous monograph devoted to the concept of armed attack. But, as Tom Ruys observes right at the beginning of his study, the ICJ's *dictum* is 'somewhat puzzling' (1), and, after having gone through this book, the reader wonders whether this assessment is not somewhat of an understatement. It is therefore a worthwhile scholarly effort to contribute to the clarification of the meaning of the term 'armed attack'. Ruys's overarching question is 'whether and to what extent recent evolutions have altered the customary boundaries of the right to self-defence' (3). In exploring this theme, the analysis (unsurprisingly) considerably extends the concept of 'armed attack' and also touches upon the other conditions of self-defence, such as necessity and proportionality (91-125) and the procedural obligations in Article 51 of the Charter (that is, the reporting obligation and the 'until clause'; 83) as well as the concept of collective self-defence (83-91). Enlightening as these passages are, the present review will focus on the book's main contribution, that is the elucidation of the concept of 'armed attack' and its possible evolutions.

Ruys begins his study with the important observation that the 'methodological approach one adopts to a large degree determines the outcome of any inquiry into the substantive content on the use of law' (6). It constitutes a praiseworthy feature of his book that it does not leave it there, but sets out to engage in a sophisticated methodological reflection in order to make the structure of the arguments fully transparent. The guiding principles are as follows: For States parties to the UN Charter, the law on the use of force contained in that treaty has rendered inapplicable incompatible rules of pre-existing custom by virtue of the *lex posterior* rule (13/4). The Charter law on the use of force has also had the effect of modifying incompatible pre-Charter custom because the quasi-universal ratification of the Charter implies the clear intention to accept more than