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Individual, Not Collective: Justifying the Resort to Force against Members of Non-State Armed Groups

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I. INTRODUCTION

In the years since September 11, 2001, military campaigns by States against non-State groups based outside their borders have proliferated. Yet, despite the prevalence of these operations, people continue to disagree fiercely about the legal framework that governs them. There is particularly intense dispute about the U.S. campaign against al-Qaeda, the longest lasting and most expansive of such actions. As part of this campaign, the United States has conducted targeted killings in countries where it is not involved in regular hostilities, and has detained alleged enemy fighters (including many captured away from any battlefield) for over fifteen years. While the United States presents these measures as the legitimate acts of a country fighting a geographically dispersed foe, critics see them as troubling examples of military overreach that are undermining the international rule of law.

To a striking degree, the debate about the legality of U.S. actions against al-Qaeda has taken the form of an argument about the boundaries of armed conflict. Since 2001, successive U.S. administrations have argued that the existence of an armed conflict between al-Qaeda and the United States gives U.S. forces the right under international humanitarian law (IHL) to target individuals who are fighting on behalf of the enemy or detain them until the end of hostilities. While the United States acknowledges that this armed conflict is of a non-international character, where the legal rules are less developed than in international armed conflict, it claims that the applicable standards can be inferred by analogy to inter-State war.

It hardly needs to be said that these arguments have been and remain controversial. It is notable, however, that most opponents of the U.S. position have also treated the questions of whether an armed conflict exists, and what IHL permits in such conflicts, as the decisive factors in determining whether the United States has a right to kill or detain opposing fighters. One common objection has been that the concept of non-international armed conflict (NIAC) is subject to geographical limits.¹ Other critics have questioned the way that the United States has defined its enemy in this conflict,²

1. See, e.g., Mary Ellen O'Connell, *Combatants and the Combat Zone*, 43 UNIVERSITY OF RICHMOND LAW REVIEW 845, 858–60 (2009); Claus Kreß, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts*, 15 JOURNAL OF CONFLICT AND SECURITY LAW 245, 265–66 (2010).

2. Ken Gude, *It's All About the Associated Forces*, JUST SECURITY (Jan. 28, 2016), <https://www.justsecurity.org/29036/its-about-associated-forces/>.

The question of when a State is justified in using force against a non-State group has been the missing dimension of the debate over the U.S. “war on terror” and other extraterritorial military campaigns against non-state groups.⁷ There has been extensive discussion about the circumstances in which a State can use force on the territory of another State in defending itself against an attack by a non-State group, but there has been almost no consideration of the lawfulness of the resort to force against the non-State group itself.⁸ In the absence of an account of when the use of force in such circumstances is lawful, the rules on the conduct of hostilities have been allowed to take on an unfounded role in providing authority for U.S. military actions, a category mistake that has given rise to much confusion and even incoherence.⁹ Rather than parsing the meaning of NIAC to determine the scope of the U.S. authority to kill or detain enemy fighters, we should begin by considering whether and how far the United States has a legitimate justification under international law for the use of armed force against the members of al-Qaeda in response to the threat that the group poses.

In this article, I propose a way of thinking about the nature and limits of the justification for the U.S. use of force against al-Qaeda, grounding my argument in a more general account of how international law regulates the resort to force by States against non-State armed groups. Against the widespread assumption that international law is silent on the recourse to force in the context of NIAC, I argue that a correct interpretation of the relevant bodies of law provides a framework that regulates the use of force, independent of the restrictions on the conduct of hostilities imposed symmetrically on both parties by IHL. By recasting the legal analysis of military campaigns against non-State groups in this way, we link the lawful scope of a State’s military action to the necessity and proportionality of the use of force in relation to a legitimate objective—a normative standard that the conventional framework of analysis for NIAC completely neglects.

7. While the role of justification in NIAC has received comparatively little scholarly attention, it is the subject of an important recent article. See Eliav Lieblich, *Internal Jus Ad Bellum*, 67 HASTINGS LAW JOURNAL 687 (2016), whose analysis I share in a number of significant respects.

8. To illustrate the difference between these two questions, consider what body of law would govern the resort to force against a non-State group located within a State’s own territory, or in another State when the territorial State had consented to the use of force within its borders. *See infra* text accompanying notes 29–32.

9. For a similar point, see Ryan Goodman, *Authorization versus Regulation of Detention in Non-International Armed Conflicts*, 91 INTERNATIONAL LAW STUDIES 155, 167–68 (2015).

Furthermore, by distinguishing between the legal regimes governing the resort to force and the conduct of hostilities in NIAC, we can shed new light on many of the questions about States' use of military force against non-State groups that have seemed hardest to resolve in recent years. Most significantly, I argue that the justification for the use of force in a non-international context is rooted in international human rights law and therefore operates *at the level of the individual*, in contrast to the collective basis for the use of force by one State against another under *jus ad bellum*. Because the use of force against each member of a non-State group must in principle be independently justified according to the standards of necessity and proportionality enshrined in human rights law, there can be no automatic entitlement in NIAC to kill or detain enemy fighters merely based on their status. From this perspective, the existence or otherwise of an armed conflict recedes in importance as a factor determining when the targeting or detention of enemy fighters is authorized. Instead, we must look to the threat posed by the individuals against whom military force is directed.

In this way, this article proposes a framework for evaluating the legality of the use of force against armed groups that is appropriate for a world in which the boundaries of armed conflict have become blurred, and in which military action is increasingly directed against individual members of armed groups. This framework does not depend on the elaboration of new law, but rather a re-interpretation of the way that the bodies of existing law relate to each other. In place of the idea that all enemy fighters may lawfully be targeted or detained in NIAC, I argue that States need to develop criteria for determining when these measures are justified in individual cases. Although this article makes some suggestions about possible standards that might be applied, it is worth emphasizing that other approaches might also be plausible. Basing the State's authority to target or detain members of non-State groups on the necessity and proportionality of the use of force against the individuals involved is compatible with a range of views about how that justification applies in practice. Crucially, however, States should explicitly articulate and defend the necessity and proportionality of the policies they adopt, rather than ducking the issue by defaulting to a pre-determined framework carried over from the different context of inter-State war.

II. JUSTIFICATION AS THE MISSING DIMENSION IN THE ANALYSIS OF
NON-INTERNATIONAL ARMED CONFLICT

In the case of an armed conflict between States, it is well established that IHL does not provide positive authorization for any act of violence, because it does not take a position on whether the overall use of force is lawful. Historically, the laws of war have taken the form of an attempt to contain the violence of conflict rather than bestowing any right to engage in hostilities.¹⁰ Richard Baxter wrote that the law of war should be seen as prohibitive law “in the sense that it forbids rather than authorizes certain manifestations of force.”¹¹ While IHL states that combatants have the right to participate directly in hostilities,¹² this right should be understood as a legal shield protecting them from trial and punishment by an opposing State for acts of violence,¹³ rather than as an affirmative grant of authority for military action.

Moreover, as hostilities between States represent a clash of two collective entities, the default assumption underlying IHL is that every individual citizen or inhabitant of each State is a legitimate object of hostilities except in so far as he or she is protected under this body of law.¹⁴ In this way, IHL establishes the category of those who may be targeted or detained through a process of subtraction of protected persons from a collective whole. When it is said that IHL permits status-based targeting or detention of enemy combatants, it should be understood only in this narrow or “second-order” sense, meaning that the body of law regulating the conduct of hostilities allows this action as part of one collective entity’s use of force against another.¹⁵

10. Christopher Greenwood, *The Relationship between Jus ad Bellum and Jus in Bello*, 9 REVIEW OF INTERNATIONAL STUDIES 221, 228 (1983); Adam Roberts, *The Equal Application of the Laws of War: A Principle under Pressure*, 90 INTERNATIONAL REVIEW OF THE RED CROSS 931, 935 (2008).

11. Richard R. Baxter, *So-Called “Unprivileged Belligerency”: Spies, Guerrillas and Saboteurs*, 28 BRITISH YEARBOOK OF INTERNATIONAL LAW 323, 324 (1951); see also ROBERT KOLB, ADVANCED INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW 17–21 (2014).

12. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 43(2), June 8, 1977, 1125 U.N.T.S. 3.

13. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 45 (3d ed. 2016).

14. Baxter, *supra* note 11, at 324.

15. Derek Jinks, *International Human Rights Law in Time of Armed Conflict*, in THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT 656, 668 (Andrew Clapham & Paola Gaeta eds., 2014).

However, the laws of war have never addressed the question of whether a State is justified in using force against another State. In the period preceding the twentieth century, this was essentially a matter of sovereign discretion, and it is now regulated by the law on the use of force (or *jus ad bellum*) embodied in the UN Charter.¹⁶ Moreover, *jus ad bellum* not only governs the initial resort to force, by defining and limiting the purposes for which force may lawfully be used, but it also continues to shape the scope and degree of force that a State may employ throughout the duration of the conflict. It is now widely accepted that the use of force that goes beyond what is justified in order to achieve a legitimate goal remains unlawful even once an international armed conflict is underway.¹⁷ As Christopher Greenwood has written:

The fact that a particular use of force does not contravene the laws of war no longer suffices to make it lawful if it fails to meet the criteria of being necessary and proportionate for the achievement of the goals of self-defence, the discharge of a Security Council mandate, the exercise of an authority granted by the Security Council or, perhaps, some other goal for which the use of force may be permitted by international law.¹⁸

A further significant aspect of this body of law is that, in contrast to the necessarily equal application of IHL to all parties to a conflict, it always applies asymmetrically. If one State is entitled to use force in self-defence

16. Hersch Lauterpacht, *The Limits of the Operation of the Law of War*, 30 BRITISH YEAR-BOOK OF INTERNATIONAL LAW 206, 208 (1953).

17. Greenwood, *supra* note 10, at 223; see also UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶¶ 2.8–2.8.2 (2004); David Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum*, 24 EUROPEAN JOURNAL OF INTERNATIONAL LAW 235, 276–79 (2013). For an opposing view, see YORAM DINSTEN, WAR, AGGRESSION AND SELF-DEFENSE 262–67 (5th ed. 2012).

18. Christopher Greenwood, *International Humanitarian Law (Laws of War): Revised Report for the Centennial Commemoration of the First Hague Peace Conference 1899*, in THE CENTENNIAL OF THE FIRST INTERNATIONAL PEACE CONFERENCE: REPORTS AND CONCLUSIONS 161, 184 (Frits Kalshoven ed., 2000). For an argument that the limiting effect of *jus ad bellum* during armed conflict applies to the overall scope of the campaign rather than individual incidents of force, see Noam Lubell, *Comments on David Kretzmer's "The Inherent Right to Self-Defence and Proportionality in Jus ad Bellum"*, EJIL: TALK! (April 17, 2013), <https://www.ejiltalk.org/comments-on-david-kretzmers-the-inherent-right-to-self-defence-and-proportionality-in-jus-ad-bellum/>.

against another, it is because the second State is engaged in an unlawful act of aggression against the first.¹⁹

The operation of *jus ad bellum* to limit the use of force between States to situations where it is both necessary and proportionate to a legitimate objective forms an essential part of the international rule of law, as we understand it today.²⁰ Against this background, it seems discordant that, when we turn back to the U.S. campaign against al-Qaeda, we find that the scope of the U.S. authority to kill or detain alleged enemy fighters is discussed largely in relation to the law of armed conflict, and not at all in terms of any justification for the use of force. The near-total disconnect between the legal authority claimed by the United States to target or detain enemy fighters, and any justification showing the necessity and proportionality of the use of force on this scale to accomplish a legitimate purpose, has made the debate over U.S. counterterrorism operations both normatively and analytically impoverished. It is as if the determination of the U.S. legal authority could be conducted essentially as a procedural matter, divorced from any relation to the ends that the use of force is intended to achieve.²¹ This disjunction between the legal and normative frames of reference may account for the fact that the Obama administration asserted a claim to legal powers in the fight against al-Qaeda that it apparently saw as both normatively problematic and militarily unnecessary, as shown by the discretionary restrictions that it put in place as a matter of policy.²²

Yet the notion that the United States requires some justification for its use of force against al-Qaeda, beyond the mere existence of an armed con-

19. STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS: A GENERAL HISTORY* 335 (2005); Jeff McMahan, *Laws of War*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 493, 502–03 (Samantha Besson & John Tasioulas eds., 2010).

20. *See, e.g.*, Christopher Greenwood, *Historical Development and Legal Basis*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 1, 36 (Dieter Fleck ed., 2d ed. 2008). Greenwood describes the prohibition on the use of force in the UN Charter as “the cornerstone of modern international law.”

21. *See* Lieblich, *supra* note 7, at 737. Lieblich distinguishes the “seemingly technical discussion” that IHL questions lead to from consideration of the necessity or proportionality of the resort to force itself.

22. Exec. Order No. 13,567, 76 Fed. Reg. 13,227 (Mar. 7, 2011) [Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force], <https://www.gpo.gov/fdsys/pkg/FR-2011-03-10/pdf/2011-5728.pdf>; Presidential Policy Guidance, Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities (May 22, 2013), <https://www.aclu.org/foia-document/presidential-policy-guidance>.

flict, has enjoyed a shadow existence in the rhetoric of U.S. officials. Discussing the U.S. right to target or detain al-Qaeda fighters, U.S. officials have regularly presented U.S. actions as undertaken in self-defense. For example, in 2006, U.S. State Department Legal Advisor John Bellinger, referring to earlier U.S. military actions in Afghanistan, stated:

It is clear that as a matter of international law, the United States and its allies were engaged in an armed conflict—not a police action—against al Qaeda and the Taliban in Afghanistan as part of a lawful action in self-defense against an armed attack, and the law of war applied to these actions. Because the United States was in an armed conflict with al Qaeda and the Taliban, it was proper for the United States and its allies to detain individuals who were fighting in that conflict.²³

Likewise, in a speech to the American Society of International Law in 2010, U.S. State Department Legal Advisor Harold Koh said: “As a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law.”²⁴ Along similar lines, the White House Counter-Terrorism Advisor, John Brennan, said in 2011, “In an indisputable act of aggression, al-Qaeda attacked our nation and killed nearly 3,000 innocent people . . . Our ongoing armed conflict with al-Qaeda stems from our right—recognized under international law—to self defense.”²⁵ Finally, U.S. President Barack Obama said in 2013:

We were attacked on 9/11 . . . Under domestic law, and international law, the United States is at war with al-Qaeda, the Taliban, and their associated forces. We are at war with an organization that right now would kill as

23. John B. Bellinger III, Legal Advisor, U.S. Department of State, Address at the London School of Economics: Legal Issues in the War on Terrorism (Oct. 31, 2006) (transcript available at <https://www.state.gov/s/l/2006/98861.htm>).

24. Harold Hongju Koh, Legal Adviser, U.S. Department of State, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010) (transcript available at <https://2009-2017.state.gov/s/l/releases/remarks/139119.htm>)

25. John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at Harvard Law School: Strengthening our Security by Adhering to our Values and Laws (Sept. 16, 2011) (transcript available at <https://obamawhitehouse.archives.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>).

many Americans as they could if we did not stop them first. So this is a just war -- a war waged proportionally, in last resort, and in self-defense.²⁶

These statements testify to the intuitive power of the idea that armed force should only be used for a legitimate purpose, in this case that of self-defense against an unlawful attack. Moreover, it seems clear that the references to self-defense in these remarks do not refer only to the use of force on Afghan territory, but characterize the U.S. response to al-Qaeda as a whole. At the same time, it is not easy to derive a coherent account from any of the statements of how the justness of the U.S. cause affects the legality of its actions. The problem is that both the factual existence of an armed conflict and the right of the United States to use force in self-defense are invoked to provide authority for U.S. actions, but the relationship between them is left unclear.²⁷

For that reason, these remarks give rise to a nagging problem of redundancy. If the existence of an armed conflict in itself provides legal sanction for the United States to kill or detain enemy fighters under the laws of war, the justification of self-defense has no role left to play as a source of authority for these actions. The claim of self-defense might give moral weight to the U.S. military campaign, but it would have no significance in law. After all, the existence of an armed conflict is a factual matter based on the

26. President Barack Obama, Remarks at the National Defense University (May 23, 2013) (transcript available at <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>).

27. A similar analysis could be made of the debate over when U.S. military action against al-Qaeda should end. The United States accepts that status-based targeting and detention of functional members of al-Qaeda, the Taliban or associated forces will no longer be permitted after its armed conflict with these groups ends. However, it argues that the groups “still pose a real and profound threat to U.S. national security. As a result, the United States remains in a state of armed conflict against these groups as a matter of international law.” *See* THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 12 (2016), https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf. One might think that the existence of a threat was evidence of a continuing justification for the use of force rather than for the persistence of armed conflict. However, the question is complicated by the lack of a consensus about when NIAC ends: some authorities believe this is determined by whether hostilities continue as a factual matter, others by whether a non-State group continues to possess the capacity and will to mount attacks. For a comprehensive discussion, see DUSTIN A. LEWIS, GABRIELLA BLUM & NAZ K. MODIRZADEH, INDEFINITE WAR: UNSETTLED INTERNATIONAL LAW ON THE END OF ARMED CONFLICT 72–104 (2017), <http://blogs.harvard.edu/pilac/files/2017/03/Indefinite-War-February-2017.pdf>.

intensity of hostilities, irrespective of which side was responsible for triggering them. If the United States had launched an unprovoked military campaign against al-Qaeda, it might well have brought an armed conflict into being in the same way that al-Qaeda's attack on the United States is said to have done.

Conversely, if the defensive nature of U.S. action is to retain legal significance, we must identify a separate body of law that regulates the resort to force against non-State armed groups, and provides a way of distinguishing between uses of force that are justified under the principle of self-defense and those that are not. That body of law would then provide the primary authority for the U.S. use of military force against al-Qaeda. Individual acts of targeting and detention, even where permitted under the IHL of NIAC, would only be positively authorized insofar as they fell within the area defined by that justification. Building on these points, this article seeks to contribute to the aim of identifying the legal regime that plays this justifying role.

III. HUMAN RIGHTS LAW AS THE JUSTIFYING REGIME FOR THE USE OF FORCE AGAINST NON-STATE GROUPS

As a starting point, it is important to recognize that the legitimacy of the use of force against al-Qaeda or its members is distinct from the question of whether the United States was entitled to use force on the territory of another State in response to the attacks of 9/11. A traditional method of assessing the legality of extraterritorial military action against a non-State group proceeds through a two-step analysis, looking first at whether the extraterritorial use of force violates the sovereignty of the host State, and secondly whether the specific operation in question complies with the relevant rules on the conduct of hostilities.²⁸ Such an approach corresponds to the traditional division between *jus ad bellum* and *jus in bello*—but with the difference in this case that the two tests point in different directions. The test on the use of force applies with respect to the territorial State where the action takes place, while the examination of the conduct of hostilities looks at the way military operations against members of the non-State group are carried out.

28. See, e.g., Michael N. Schmitt, *Extraterritorial Lethal Targeting: Deconstructing the Logic of International Law*, 52 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 77 (2013); see also Jelena Pejic, *Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications*, 96 INTERNATIONAL REVIEW OF THE RED CROSS 67 (2014).

In this conventional analytical framework, the justification for the use of force against the non-State group itself goes unexamined.

The scope of States' right to use defensive force against extraterritorial non-State groups has been the subject of enormous debate in the years since 9/11.²⁹ But this debate has focused overwhelmingly on the circumstances in which States can respond to attacks by non-State groups without violating the UN Charter. The UN Charter has no bearing on the U.S. use of force against al-Qaeda as an organization. Because al-Qaeda is not a State, the use of force against it could not constitute a violation of Article 2(4), and there is no restriction in the Charter on the use of force against non-State groups to which the right of self-defense might establish an exception.³⁰ In cases where one State takes action against a non-State group in another State with that State's consent, the question of compatibility with the UN Charter does not arise. As the United Kingdom stated in expounding the legal basis for its military action against ISIS in Iraq, international law is clear that the prohibition on the use of force in international relations "does not apply to the use of military force by one State on the territory of another if the territorial State so requests or consents."³¹

For this reason, it is often said that international law is silent regarding the resort to armed force by a State against a non-State group. According to Marco Sassòli, "technically, no international *jus ad bellum* exists concerning non-international armed conflicts, since such conflicts are neither justified nor prohibited by international law."³² However, the fact that the UN Charter's rules on the use of force are not relevant to the U.S. military campaign against al-Qaeda does not mean that international law as a whole provides no standard for assessing how far such a campaign is justified. International law does not address the lawfulness of a State's use of force against a non-State group as a collective entity, but it does provide a detailed framework

29. See Monica Hakimi, *Defensive Force against Non-State Actors: The State of Play*, 91 INTERNATIONAL LAW STUDIES 1 (2015).

30. Marko Milanovic, *Self-Defense and Non-State Actors: Indeterminacy and the Jus ad Bellum*, EJIIL: TALK! (Feb. 21, 2010), <https://www.ejiltalk.org/self-defense-and-non-state-actors-indeterminacy-and-the-jus-ad-bellum/>.

31. Prime Minister's Office, *Policy Paper: Summary of the Government Legal Position on Military Action in Iraq against ISIL*, GOV.UK (Sept. 25, 2014), <https://www.gov.uk/government/publications/military-action-in-iraq-against-isil-government-legal-position/summary-of-the-government-legal-position-on-military-action-in-iraq-against-isil>.

32. Sassòli, *supra* note 5, at 254. Sassòli goes on to make the important point that domestic law can be presumed to forbid the use of force by a non-State group against the State.

that, under at least some circumstances, assesses the lawfulness of the resort to force against the *individual members* of such groups, limiting it to situations where it is necessary and proportionate to a legitimate purpose, such as the protection of life or the restoration of public order. This framework is found, of course, in the international law of human rights.

Correctly understood, international human rights law plays a role in defining the lawful scope of a State's use of force against members of a non-State group that is comparable to the role played by *jus ad bellum* in inter-State relations.³³ In the same way that *jus ad bellum* requires that any resort to force between States be justified as a necessary and proportionate exception to the background prohibition on the use of force, so human rights law requires that any action of a State that deprives individuals within its jurisdiction of life or liberty be justified as a necessary and proportionate exception to the presumption that such an act infringes those individuals' legal rights. In this way, human rights law establishes a distinction between lawful and unlawful uses of force against the members of non-State groups. A military action carried out by a State against an armed group within its jurisdiction that was not justified as a defensive response to the threat posed by the group to life or public order would violate the right to life and liberty of at least some of those individuals against whom force was deployed, as well as others killed as an incidental effect of military action. However, an action that represented a necessary and proportionate response to the threat posed by the group would not violate the rights of those affected.

Both *jus ad bellum* and human rights law are justificatory regimes, in that they assess the lawfulness of the use of force with reference to the ends that force is intended to achieve. They combine a general prohibition on the resort to force with a limited set of exceptions that permit its use in a graduated way where necessary to achieve a legitimate objective. By contrast, the law of armed conflict takes what could be described as a regulatory form, in that it assesses specific instances of force only in relation to their military utility rather than any external justification. This is inherent in the role played by the principle of military necessity underpinning IHL. As one influential formulation states, military necessity sanctions any act of force not otherwise

33. For a similar argument, see Lieblich, *supra* note 7, at 724–25. See also the *en passant* comment in NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 283 n.225 (2008).

unlawful that is required “to compel the complete submission of the enemy with the least possible expenditure of time, life, and money.”³⁴

Once an armed conflict is underway, both parties can appeal to military necessity because they each have an interest in prevailing over their enemy, and both are equally subject to IHL. However, the fact that IHL applies symmetrically means that it cannot distinguish between justified and unjustified uses of force. By contrast, human rights law, like *jus ad bellum*, operates asymmetrically. In both regimes, the lawfulness of a State’s use of coercive force depends on the failure of its target (whether another State or one or more individuals within its jurisdiction) to act within the bounds of its own obligations.³⁵

In the period preceding the twentieth century, there was no restriction in international law on how State authorities treated the individuals within their jurisdiction. States enjoyed complete freedom to employ armed force against their subjects as a matter of sovereign discretion, just as they also enjoyed the sovereign right to go to war against other States as they saw fit. However, in the middle decades of the last century, a series of far-reaching changes was introduced in the international legal order that amounted to a double-sided revolution against unfettered sovereign power. States were henceforth subject to strict limits on their right to project force outwards towards other States, and equally, to limits restricting their authority to project force downwards against their citizens.³⁶ These twin aspirations are expressed together in the preamble to the UN Charter, which announces in its first two points the determination of the signatories to “save succeeding generations from the scourge of war” and to “reaffirm faith in fundamental human rights [and] in the dignity and worth of the human person.”³⁷

As some scholars have observed, the notion that IHL authorizes targeting or detention in NIAC can be understood as an implicit claim about the

34. *United States v. List (The Hostage Case)*, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 757, 1253 (1950).

35. On the contrast between the asymmetrical application of human rights law versus the symmetrical application of the law of armed conflict, see DARAGH MURRAY, PRACTITIONERS’ GUIDE TO HUMAN RIGHTS LAW IN ARMED CONFLICT 14 (2017).

36. See Arthur Watts, *The International Rule of Law*, 36 GERMAN YEARBOOK OF INTERNATIONAL LAW 15, 24 (1993). Watts argues that acceptance of the need for significant restraints upon the freedom of action of States with respect both to the use of force against other States and human rights “may prove to be one of the twentieth century’s more valuable achievements.” *Id.*

37. U.N. Charter pmbll.

relationship between IHL and human rights law.³⁸ It rests on the presumption that once the threshold of armed conflict has been crossed, IHL displaces the more restrictive framework of human rights law as a regulatory regime governing the use of military force. In this way, it is said, the permissions defined in IHL concerning the targeting or detention of enemy fighters come to delimit the scope of action that a State may take against members of an opposing non-State armed group.

But this claim rests on a misconceived account of how the legal regimes of human rights law and IHL relate to each other in a non-international context. With respect to the use of force between a State and a non-State armed group, these bodies of law do not provide parallel regulatory frameworks appropriate to different background conditions or paradigms.³⁹ Instead, by tying the extent of the State's resort to force against individuals within its jurisdiction to an independent standard of justification, human rights law defines the field within which force may lawfully be used. And, because it sets the boundaries of the lawful use of force, human rights law operates in a way that is necessarily antecedent to IHL in authorizing military action in a non-international setting. By contrast, IHL regulates that use of force but does not provide any independent authorization. For this reason, it cannot be said to displace human rights law as a standard for determining when the resort to force against any individual is lawful.

Accordingly, we must recognize two distinct international law regimes bearing on the lawfulness of military campaigns by States against non-State groups. Human rights law establishes when the State's use of force in the form of targeting or detention is justified. IHL provides a regulatory regime that constrains the conduct of hostilities by the State's armed forces as well as insurgent forces with a set of rules contained in treaty and customary law. However, even if certain military actions by the State (such as the targeting or detention of members of organized armed groups) are permitted under the IHL applicable in NIAC, they are not legally authorized unless they also

38. See, e.g., Marko Milanovic, *The Applicability of the Conventions to 'Transnational' and 'Mixed' Conflicts*, in *THE 1949 GENEVA CONVENTIONS: A COMMENTARY* 27, 48–49 (Andrew Clapham, Paola Gaeta & Marco Sassòli eds., 2015); see also David Kretzmer, *Rethinking the Application of IHL in Non-International Armed Conflicts*, 42 *ISRAEL LAW REVIEW* 8, 23–31 (2009).

39. For a detailed exposition of the “different paradigms” approach, see GLORIA GAGGIOLI, INTERNATIONAL COMMITTEE OF THE RED CROSS, EXPERT MEETING: THE USE OF FORCE IN ARMED CONFLICTS: INTERPLAY BETWEEN THE CONDUCT OF HOSTILITIES AND LAW ENFORCEMENT PARADIGMS (2016), <http://www.icrc.org/eng/resources/documents/publication/p4171.htm>.

fall within the sphere of justification established by international human rights law.⁴⁰ The rebel forces meanwhile do not enjoy any license under international law to use force, and may be prosecuted under domestic law for doing so. At the same time, they are bound by IHL during any military operations that they conduct.

The distinction between the justificatory and regulatory regimes of international law is easy to perceive in international armed conflict because they largely operate at different levels. *Jus ad bellum* applies to the use of force against a collective body and sets the parameters of the overall military campaign, while *jus in bello* determines the legality of any individual action carried out as part of the conduct of hostilities.⁴¹ In a non-international context, the distinction between the two regimes is easier to miss because they operate at the same level. Since human rights law governs the relationship between the State and individuals, it adjudicates the lawfulness of the use of force as a series of discrete decisions concerning the justification of particular actions of the State in relation to their impact on those individuals affected by them. For this reason, it attaches to the same specific acts of targeting or detention as the regulatory regime of IHL. Consequently, the difference between the functions performed by the two bodies of law can be hard to make out. Nevertheless, the distinction is of fundamental importance in ensuring that the State's legal authority to use force against people within its jurisdiction is limited to what is strictly required for the protection of life or public order. This article now examines the justificatory role of human rights and its effects in more detail.

IV. HUMAN RIGHTS LAW ACROSS THE SPECTRUM OF ORGANIZED HOSTILITIES

In exploring the way that human rights law works to define the lawful scope of a State's resort to force against members of a non-State group, it may be helpful to begin by considering the most straightforward case, where a State confronts a threat from an armed group within its territory. It is a distinctive

40. It is sometimes said that authorization for the use of force in NIAC can be found in domestic law or a resolution of the UN Security Council. However, these should be properly seen as providing a legal basis for detention or targeting, and do not displace the requirement that the use of force be justified under international human rights law. See the discussion *infra* text accompanying note 54.

41. According to some views, *jus ad bellum* may reach down to consider the lawfulness of individual actions in specific instances. See *supra* text accompanying notes 17–18.

feature of international human rights law that it is rooted in a number of different overlapping legal sources, but for the purposes of discussion, we can consider the common principles that they broadly share.

Human rights law recognizes that the right to life and liberty are not absolute, but it places strict limits on the State's ability to kill or detain individuals within its control.⁴² It requires that any interference with these rights must have a legal basis, and must be strictly necessary and proportionate to a legitimate objective related to the protection of life or the preservation of public order (including the enforcement of criminal laws).⁴³ In addition, the right to life requires authorities to take precautionary measures to minimize, as far as possible, the recourse to lethal force.⁴⁴ Under normal peacetime conditions, it is generally agreed that the right to life only permits the State to intentionally use lethal force when this is strictly necessary to protect life.⁴⁵ This is traditionally interpreted to mean that the existence of an imminent threat to life is required before the State's agents are entitled to intentionally kill any individual within its jurisdiction.⁴⁶ It is also established that the right to life entails an obligation on the part of the State to conduct an investigation in cases of potential violation.⁴⁷

Under peacetime conditions, the right to liberty is generally understood to require that individuals not be detained outside the established criminal process except in a very narrow range of circumstances. The detention without trial of individuals deemed to pose a security threat would not normally constitute one of these circumstances and can therefore be presumed to be impermissible against a background of established law and order.⁴⁸

42. U.N. Human Rights Comm., *General Comment No. 35 – Article 9: Liberty and Security of Person*, ¶¶ 10, 15, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014) [hereinafter *General Comment No. 35*]; U.N. Human Rights Comm., *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, On the Right to Life*, ¶¶ 16, 18, Advance Unedited Version, <http://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6.docx> (last visited Nov. 6, 2017) [hereinafter *General Comment No. 36*].

43. MELZER, *supra* note 33, at 118; *General Comment No. 35*, *supra* note 42, ¶ 12.

44. MELZER, *supra* note 33, at 118.

45. Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, ¶ 9, U.N. Doc. A/CONF.144/28/Rev.1, at 112 (Aug. 27 – Sept. 7, 1990).

46. Christof Heyns, Dapo Akande, Lawrence Hill-Cawthorne & Thompson Chengeta, *The International Law Framework Regulating the Use of Armed Drones*, 65 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 791, 819–20 (2016).

47. *McCann v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) 97, ¶ 161 (1995).

48. *General Comment No. 35*, *supra* note 42, ¶ 15.

However, the underlying structure of human rights law establishes that the application of these rights is necessarily dependent on context.⁴⁹ As threats to public order increase, the scope of State action that is permitted as a necessary and proportionate response to those threats increases correspondingly. The contextual application of the right to life is reflected both in the concept of arbitrariness found in the majority of human rights treaties (what counts as an arbitrary deprivation of life depends on the circumstances involved) and in the list of situations in which the intentional deprivation of life is permitted by the European Convention on Human Rights (ECHR). These situations include the use of that degree of force that is absolutely necessary “in action lawfully taken for the purpose of quelling a riot or insurrection.”⁵⁰

The contextual application of the right to liberty operates in a slightly different way, encompassing both the concept of arbitrariness and the principle of derogation. Many treaties prohibit arbitrary arrest or detention, and it is generally accepted that detention without trial may count as non-arbitrary when strictly necessary for security purposes.⁵¹ Again, the ECHR takes a different approach, providing a closed list of circumstances when deprivation of liberty is permitted that does not include detention for security purposes.⁵² However, the right to liberty is derogable in the ECHR, as in the other major treaties.⁵³ Nevertheless, the requirements of necessity and proportionality persist in the stipulation that derogation is only permitted to the extent strictly required by the situation.

Two points about this framework are worth emphasizing. First, the principle of legality requires that any measures that have an impact on life or liberty must have a basis in a State’s domestic law; however, a domestic legal basis alone cannot be said to authorize these measures in any strong sense, because they remain subject to the limiting effect of international human rights law. From an international perspective, it cannot be presumed that domestic law will enshrine the requirements of necessity and proportionality, and the normative regime of international human rights law takes precedence

49. *See, e.g.*, Heyns, Akande, Hill-Cawthorne & Chengeta, *supra* note 46, at 822.

50. Convention for the Protection of Human Rights and Fundamental Freedoms art. 2(2)(c), Nov. 4, 1950, 213 U.N.T.S. 222.

51. LAWRENCE HILL-CAWTHORNE, DETENTION IN NON-INTERNATIONAL ARMED CONFLICT 121 (2016).

52. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 50, art. 5.

53. *Id.*, art. 15.

over ordinary domestic legislation.⁵⁴ Second, even when a State employs lethal force against a group of rioters or detains them under emergency powers, the calculus involved in determining the lawfulness of the State's action under international human rights law continues to operate at an individual level. In principle, the State is obliged to show that actions resulting in loss of life or liberty are necessary and proportionate in the case of each individual affected, because it is to the individual that the rights to life and liberty adhere, even if in practice it can be assumed that a similar assessment will apply to a group of similarly situated people.

As the level of confrontation between the State and an armed group increases, it may cross the threshold of NIAC. A NIAC exists when violence between a State and an organized armed group has reached a certain level of intensity.⁵⁵ States or armed groups do not "launch" NIACs; they come into effect because of factual conditions, and it does not make sense to talk of any required justification for initiating them. Any justification attaches to the particular actions and responses that bring a NIAC into being. Moreover, it is clear that the human rights regime does not attach great significance to the armed conflict threshold. Article 2(2) of the ECHR establishes that the use of force necessary to put down a riot or insurrection does not constitute a violation of the right to life, where these two alternatives might be thought to fall on opposing sides of the NIAC threshold. Similarly, human rights treaties link the possibility of derogation to the existence of a public emergency as well as (in the case of some treaties) war. This threshold does not equate to that of armed conflict, and is more significant for the human rights regime.

Nevertheless, the transition to armed conflict is widely held to mark a significant moment in terms of the powers that are legally available to a State confronting an armed insurgency. According to this view, a set of norms recognized under the laws of armed conflict comes into play once the threshold of non-international armed conflict is crossed, authorizing the targeting and (subject to a somewhat greater degree of debate) detention of all those who are classed as fighters for the armed group involved.

54. *Id.*, ¶ 12; *General Comment No. 36*, *supra* note 42, ¶ 18.

55. INTERNATIONAL COMMITTEE FOR THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION ¶ 387 (2016) [hereinafter COMMENTARY ON THE FIRST GENEVA CONVENTION]; *see also* Dapo Akande, *Classification of Conflicts: Relevant Legal Concepts*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 32, 52–54 (Elizabeth Wilms-hurst ed., 2012).

On careful consideration, it is hard to make out a coherent account of where this kind of legal authority could come from. The law of armed conflict itself cannot provide such positive authorization. As discussed above, the law of armed conflict is a second-level regime that merely places limits on actions that are undertaken as part of an armed conflict. In Sandesh Sivakumaran's words, the law of NIAC "does not provide the parties to the conflict with a right to undertake certain actions. Rather, it prohibits certain actions and regulates other conduct should the parties choose to engage in particular endeavours."⁵⁶ An opposing view would lead to the absurd result that the formulation of the law of NIAC, starting with the Geneva Conventions of 1949, marked an increase in the powers that a State could employ against insurgent groups within its territory. It would also imply, equally implausibly, that an insurgent group involved in a non-international armed conflict had a right to use force against the State against which it was fighting, since equal application is a fundamental principle of the law of armed conflict.

At the same time, there is no apparent reason why the transition to non-international armed conflict would coincide with a shift in the level at which the State's justification for the resort to force operated from the individual to the collective. Justification for the use of force in international law arises through the operation of State sovereignty in defense of national security, conditioned by the limits imposed by any relevant first-order legal regime restricting the State's resort to force. As we have seen, there is no such framework regulating the use of force against a non-State group as a whole. No qualified prohibition on using force against an armed group *per se* exists in international law, such that the transition to NIAC could lift it. Below the level of inter-State relations, the only applicable justificatory regime is that of human rights, operating at the level of the individual.

Moreover, the States that were involved in drafting Common Article 3 of the 1949 Geneva Conventions made it clear that the application of the laws of armed conflict to NIAC should not be understood as giving armed groups any new legal status or authority that might put them on par with the State.⁵⁷ These States' determination to retain the right to prosecute members of armed groups for the act of taking up arms against their government was

56. SANDESH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* 71 (2012).

57. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; COMMENTARY ON THE FIRST GENEVA CONVENTION, *supra* note 55, ¶ 864.

reflected in the absence of any provision in the law recognising combatant status or establishing prisoner of war detention.⁵⁸ By denying non-State groups involved in an armed conflict the rights of belligerent equality, States at the same time deprived themselves of any claim to treat these groups as collective entities for the purpose of the State's prosecution of the conflict. There is a direct and necessary connection between the persistence of a State's claim of governance authority over the individuals involved in an insurgency, and its obligation to limit its recourse to armed force against them to situations where this can be justified on an individual basis.

At the same time, and in part for similar reasons, there can be no question that human rights law continues to apply during internal armed conflict. As two commentators note, this fact "is now firmly established and cannot reasonably be contested."⁵⁹ David Kretzmer has articulated the theoretical basis of this principle, finding that the defining feature of human rights law is not that it applies during peacetime, but that it applies to the relationship between governor and governed. Thus, in the case of internal armed conflict, he concludes, "those involved in the armed conflict are subject to the State's jurisdiction, and this certainly does not change because an internal armed conflict exists."⁶⁰

The legal position would change only in the event that a State recognized the belligerency of an armed group against which it was fighting, a practice that has fallen into disuse but remains legally available.⁶¹ In that case, the relationship between the parties would change from a conflict between a combination of individuals and their government to a clash between two collective bodies operating on the basis of formal equality, in which the State was justified in using force against any member of the opposing party, except where this was prohibited under the law of international armed conflict. To adopt a distinction used by the legal historian Stephen Neff, the government would be required "to deal with the crisis through the use of *belligerent* powers rather than the application of its normal *sovereign* powers."⁶² At the same time,

58. GEOFFREY BEST, *WAR AND LAW SINCE 1945*, at 174 (1994).

59. Noam Lubell & Nancie Prud'homme, *Impact of Human Rights*, in *ROUTLEDGE HANDBOOK OF THE LAW OF ARMED CONFLICT* 106, 108 (Rain Liivoja & Tim McCormack eds., 2016); see also U.N. Human Rights Comm., *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (May 26, 2004).

60. Kretzmer, *supra* note 38, at 17.

61. SIVAKUMARAN *supra* note 56, at 19–20; Akande, *supra* note 55, at 49–50.

62. NEFF, *supra* note 19, at 269; see also Jens David Ohlin, *Acting as a Sovereign versus Acting as a Belligerent*, in *THEORETICAL BOUNDARIES OF ARMED CONFLICT AND HUMAN RIGHTS*

the government would forfeit the right to treat rebels as criminals for taking up arms against the State, at least until it was successful in defeating the insurgency and re-establishing a sovereignty relationship with them.⁶³

Aside from any recognition of belligerency, the asymmetrical relationship between the State and individuals within its jurisdiction provides the framework for assessing the lawfulness of the State's use of force both below and above the threshold of non-international armed conflict. There is no moment at which the State acquires the authorization under international law to use force against an armed group as a whole, as one State does against another State under *jus ad bellum*. Instead, the justification for killing or detaining rebel fighters during an internal armed conflict remains rooted in the operation of human rights law at the individual level. There is a continuing requirement that each particular use of force be justified as a necessary and proportionate response to the threat posed by the individual targets against whom force is used. In this respect, human rights law does not merely govern the first resort to armed force between a State and a non-State armed group, but rather provides a spectrum of justification based on individual threat for all uses of force by the State against those within its jurisdiction, whether or not an armed conflict exists as a factual matter.⁶⁴

V. DETERMINING THE SUBSTANCE OF HUMAN RIGHTS LAW IN NON-INTERNATIONAL ARMED CONFLICT: THE IRRELEVANCE OF *LEX SPECIALIS*

If human rights law continues to arbitrate the lawfulness of a State's resort to force even during an internal armed conflict, we still need to consider how the obligations it imposes on the State should be interpreted in this context. According to a widely held view, the content of human rights laws protecting the right to life and the right to liberty during armed conflict should be understood by reference to the *lex specialis*, the legal regime specifically designed

118 (Jens David Ohlin ed., 2016). Ohlin makes reference to the same distinction, but interprets its application to the use of force against non-State groups in a different way than this article. *See id.*

63. 2 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 66 (1905).

64. For a somewhat different view, see Lieblich, *supra* note 7, at 740–43. Lieblich argues that human rights law functions as a prohibition on the first resort to hostilities. *See id.*

to regulate situations of hostilities, which is IHL.⁶⁵ If so, the theoretical distinction between the justificatory regime of human rights law and the rules on the conduct of hostilities would break down once the threshold of armed conflict was crossed, and any incident of force on the part of the State that was permitted under the regulatory regime of the laws of armed conflict would automatically be lawful. Ultimately, however, the argument that IHL determines the substantive content of human rights protections for life and liberty in all circumstances of non-international armed conflict is unpersuasive.

It is true, of course, that the provisions of human rights law will apply differently in circumstances of widespread and organized violence than against the background of the peaceful rule of law.⁶⁶ Under some circumstances, that contextual application could be expected to overlap with the rules on the conduct of hostilities contained in the laws of armed conflict. It is plausible to think that in the immediate context of intense hostilities, the State would be entitled to regard any member of the armed wing of an insurgent group as posing a sufficiently serious threat that it was justified in targeting or detaining that person. Under such circumstances, membership of armed forces alone would constitute grounds for determining individual threat, so the human rights assessment would lead to a result that mirrored the rules on the conduct of hostilities in IHL. One might even posit that the moment when the State was entitled to regard membership of an armed group as evidence of a sufficient threat to justify status-based rules of engagement in at least some part of its territory coincided with the transition to an armed conflict.⁶⁷

Even so, it would be the factual conditions that determined the degree of force that the State could lawfully apply under the provisions of human rights law, rather than anything inherent in the existence of an armed conflict

65. See, e.g., Schmitt, *supra* note 28, at 91–92; Pejic, *supra* note 28, at 74. For the canonical articulation of the *lex specialis* principle, see Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 25 (July 8) [hereinafter Nuclear Weapons Advisory Opinion].

66. See *supra* text accompanying notes 49–53; see also Monica Hakimi, *Taking Stock of the Law on Targeting, Part I*, EJIL: TALK! (Dec. 12, 2016), <https://www.ejiltalk.org/taking-stock-of-the-law-on-targeting-part-i/>.

67. For an argument that “the threshold of armed conflict against transnational non-State enemies is crossed when armed forces operate pursuant to status-based rules of engagement,” see Geoffrey S. Corn & Eric Talbot Jensen, *Transnational Armed Conflict: A “Principled” Approach to the Regulation of Counter-Terror Combat Operations*, 42 ISRAEL LAW REVIEW 46, 65 (2012).

per se.⁶⁸ The fact that hostilities had reached a level where status-based rules of engagement were justified as non-arbitrary under the principles of human rights law would serve as an indicator of the existence of an armed conflict, rather than the existence of the conflict in itself providing justification for a more permissive interpretation of the State's authority for the use of force.

In any case, such a convergence between the limits on the resort to force against individuals imposed by human rights law and the rules on targeting contained in the law of armed conflict would remain limited to particular zones of active hostilities. There is no reason to believe that the contextual application of human rights law would extend to a blanket authority for the State to use force against any member of an opposing armed group in all circumstances where this was permitted under the laws of armed conflict, as the proponents of the *lex specialis* principle propose.

The purported justification for applying *lex specialis* as a principle to mediate between human rights law and IHL is to resolve an apparent conflict between the two legal regimes, but in the context of NIAC, it is a solution to a problem that does not arise. We can see this by contrasting the situation in international and non-international armed conflict. In a conflict between States, as argued above, the collective nature of the authority granted under *jus ad bellum* combines with the detailed rules of IHL to create a comprehensive regime that permits targeting and detention without proof of individual threat. Citizenship of the opposing State and the absence of protection are enough to make one a lawful target. However, if we agree that the targeting and detention of at least some citizens of the opposing State is also governed by human rights law that would bring into play an alternative legal framework, in which the justification for the use of force would be determined on an individual basis. We would then be faced with a clash between two divergent perspectives: one that assessed the use of force against a collective entity, and another that assessed the use of force against the individuals making up the entity. The *lex specialis* doctrine offers a way to resolve the tension between these viewpoints, by aligning the metric used in justifying the resort to force against individuals with the procedural rules that govern targeting and detention in the case of collective authorization. In this way, although the doctrine is generally presented as a way of reconciling the conflicting norms of IHL and human rights, it is in fact fundamentally driven by the tension between two alternative levels at which the justification required for

68. For a similar point, see HAQUE, *supra* note 6, at 37.

the resort to force might be thought to operate in the context of inter-State hostilities.

Once we appreciate that the right to life and the right to liberty function in NIAC as a limitation on the use of force rather than a way of regulating the conduct of hostilities, it is clear that they do not conflict with IHL in a way that would require reconciliation. There is no contradiction in the idea that some incidents of force that comply with IHL are nevertheless unlawful under the laws governing the use of force. This is true of all military acts carried out by an insurgent group (which are presumptively illegal under the State's domestic law, functioning as a form of *jus ad bellum* for the State's subjects) and, as we saw earlier, it may also be true of some actions in international armed conflict.⁶⁹

If the rights that govern the resort to force are correctly understood, no other significant conflicts between the regimes of international human rights law and the laws of armed conflict remain. As Marco Sassòli and Laura Olson have pointed out, targeting and detention comprise the only spheres of action in which the principles of human rights and the laws of armed conflict appear to conflict.⁷⁰ Other rights, such as those concerning the conditions of detention, play a protective role in parallel to the laws of armed conflict, and are generally in harmony with the rules of the latter regime.

Not only is the use of IHL to provide the substantive content of international human rights law in NIAC unnecessary, it would deprive human rights law of any normative force. Again, the contrast with international armed conflict is instructive. In armed conflicts between States, *jus ad bellum* ensures that the degree of force lawfully allowed is no more than is required for self-defense or another legitimate purpose. The normative function of *jus ad bellum* may therefore be said to reduce the need for a separate normative inquiry under human rights law. As Marko Milanovic has detailed in his genealogy of the *lex specialis* principle, a number of States argued in their written submissions to the ICJ in the *Nuclear Weapons* case that compliance with *jus ad bellum* as well as *jus in bello* was necessary to ensure that the taking of life

69. See *supra* text accompanying notes 17–18.

70. Marco Sassòli & Laura M. Olson, *The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts*, 90 INTERNATIONAL REVIEW OF THE RED CROSS 599, 600–601 (2008).

in armed conflict was not arbitrary.⁷¹ As the U.S. submission stated, the inherent right to self-defense

has long been understood and intended to comprehend the right to use lethal force, and it is inconceivable that the various human rights instruments cited could have been intended to abridge that right so long as the rules of armed conflict and the limitations of the UN Charter are observed.⁷²

In NIAC, however, human rights law provides the only limitation on the State's resort to force. The blanket alignment of the rights to life and liberty with the regime of IHL would have the effect of severing any link between the legality of the use of force and the legitimacy of the purpose for which it was used. The application of a *lex specialis* principle in such circumstances would, in effect, create a situation in which the existence of an armed conflict provided its own justification, a result that Eliav Lieblich rightly characterizes as "circular."⁷³ Such a regime would allow a State pursuing an unjustified campaign of violence against an organized non-State group in violation of human rights law to escape from its human rights obligations by escalating the use of force to the point where the threshold of armed conflict was reached. As Derek Jinks has written, the *lex specialis* regime would allow "ill-motivated States to bootstrap into a more favourable international legal framework."⁷⁴

Moreover, the internal logic of IHL and human rights law make it likely that their requirements will diverge even in the case of a State acting in good faith against an armed group that poses a genuine threat to life or public order. IHL accepts the use of force as given, and aims to limit the human suffering caused by war as far as possible considering the imperative of prevailing in armed conflict.⁷⁵ But, it does not take account of the fact that the

71. Marko Milanovic, *The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law*, in THEORETICAL BOUNDARIES, *supra* note 4, at 78, 85, 116–17.

72. Written Statement of the Government of the United States of America, Legality of the Threat or Use of Nuclear Weapons, at 43–44 (June 20, 1995), <http://www.icj-cij.org/files/case-related/95/8700.pdf>. Milanovic notes that the requirement of compliance with *jus ad bellum* to meet the arbitrariness standard of Article 6 of the ICCPR "somehow dropped from the Court's radar" in its opinion. *See* Milanovic, *supra* note 71, at 89.

73. Lieblich, *supra* note 7, at 735.

74. Jinks, *supra* note 15, at 669.

75. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 17 (2004).

State's goals of protecting life and restoring public order will often be achievable without seeking the complete submission of the opposing armed group in as short a time as possible. By contrast, human rights law aims to drive down the State's use of coercive force per se to the greatest extent that is compatible with the fulfilment of these objectives. It recognizes too that some actions that contribute in a marginal way to meeting these objectives cannot be justified because their impact on the rights of those affected is disproportionate to the benefit they offer. We may therefore expect human rights law to prohibit some uses of force by the State that would not in themselves contravene the rules of IHL in the same way that *jus ad bellum* might prevent a State acting in self-defense from seeking the complete submission of an attacking State, even though this goal would be compatible with the principle of military necessity.⁷⁶

The suggestion that the *lex specialis* principle is relevant only in international armed conflict is supported by the fact that the case law through which it was developed concerned the use of force between States rather than NIAC. Even though nuclear weapons might in principle be used in NIAC, the ICJ opinion in the *Nuclear Weapons* case explicitly limited its consideration of their use to international armed conflict.⁷⁷ The other cases in which the ICJ held that IHL should influence the interpretation of human rights law related to belligerent occupation and international armed conflict.⁷⁸ Similarly, the European Court of Human Rights' use of a comparable approach in *Hassan* was confined explicitly to the context of international armed conflict.⁷⁹

Until recently, State practice also suggested widespread acceptance of the idea that human rights law was applicable on its own terms to internal armed conflict, at least with respect to the deprivation of liberty, and that there was no need to determine its substantive content by reference to the laws of armed conflict. There is a long history of States using derogation to modify

76. Greenwood, *supra* note 20, at 36.

77. Nuclear Weapons Advisory Opinion, *supra* note 65, ¶ 50.

78. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136 (July 9); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168 (Dec. 19).

79. *Hassan v. United Kingdom*, App. No. 29750/09, ¶ 104 (2014) (ECtHR), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146501>. However, it should be noted that the UK Supreme Court subsequently used *Hassan* as precedent to find that Article 5 should be read to permit security detention in NIAC when the UN Security Council had authorized the use of force, as long as relevant procedural safeguards were met. See *Al-Waheed v. Ministry of Defence* [2017] UKSC 2 ¶¶ 51–68.

their obligations under human rights law when detaining individuals in internal armed conflict, rather than appealing to any supposed right to detain in the law of armed conflict.⁸⁰ Recently, however, as States have undertaken extraterritorial military campaigns against non-State armed groups, a number of them have begun to claim that there is an inherent right to detain enemy fighters under the laws of war applicable in any NIAC.⁸¹

In response, many of those who deny the relevance of the *lex specialis* principle to detention in NIAC have grounded their argument in a supposed distinction between international armed conflict, where detention is authorized by IHL, and non-international armed conflict, where it is not. This distinction has been one of the central questions at issue in the *Serdar Mohammed* case in the United Kingdom, where the Court of Appeal held that the rules of IHL applicable in NIAC do not confer a power to detain on a State party to the conflict.⁸² From the perspective of this article, the question asked is the wrong one. The structure of international law determines that it is not IHL that confers a power to detain; the power to detain, like the power to kill, is a fundamental aspect of the use of force,⁸³ and one must first ask whether the use of force of this nature is justified, and second whether the regulations governing the conduct of hostilities contain any relevant restrictions. A separate question again, at least in NIAC, is whether detention or targeting is carried out on a legal basis, as human rights law requires. But, this legal basis cannot override the other obligations of non-arbitrariness that human rights law imposes.⁸⁴

In sum, to understand the legal picture in NIAC, we must recognize a complex interplay of regimes, whereby justification for the resort to force is available only to the State and applies on an individual basis, while the law

80. HILL-CAWTHORNE, *supra* note 51, at 164–84.

81. *Id.* at 71–72. Legal officials within the French Ministry of Defense have also suggested to the author that, in their view, the use of security detention in military operations against non-State groups in the Sahel does not require derogation from the ECHR, as IHL permissions apply in accordance with *Hassan*. Interview with French officials (Nov. 17, 2015).

82. *Serdar Mohammed and Others v. Secretary of State for Defence* [2015] EWCA (Civ) 843. The Supreme Court subsequently held that the use of force had been authorized by a resolution of the UN Security Council, but Lord Sumption in his plurality opinion expressed support *obiter dicta* for the idea that IHL did not confer a power to detain. *See Al-Waheed* [2017] UKSC 2 ¶ 14.

83. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518–19 (2004).

84. For a discussion of the form this legal basis may take in an extraterritorial NIAC, see *infra* text accompanying note 140.

regulating the conduct of hostilities applies on an equal basis to all collective groups that are parties to the conflict. The contrast between the ways in which these two bodies of law apply may appear anomalous, but there is no contradiction involved. Indeed, on reflection, it seems appropriate in light of the different functions they perform. To build on the distinction referred to above, the State remains in the position of a sovereign for the purposes of the legal regime governing the resort to force; it denies the armed group any legal status that would imply an entitlement to engage in hostilities and retains the right to punish individual members of the group under criminal law if they resort to the use of armed force. However, for the purposes of the regulatory regime of the laws of armed conflict, the State recognizes the armed group as a *de facto* belligerent whose members are entitled to the same protection and bound by the same obligations as members of the State's armed forces. The differential application of justificatory and regulatory regimes thus reflects the hybrid nature of non-international armed conflict, in which the State is engaged in organized hostilities against a group of its subjects while simultaneously asserting the right to subject them to prosecution under domestic law.⁸⁵

VI. THE IMPACT OF HUMAN RIGHTS LAW IN CONTROLLING TARGETING AND DETENTION

If human rights law controls the State's resort to force against members of armed groups even after hostilities reach the threshold of NIAC, what might this mean in practice? There is only a limited amount of jurisprudence concerning the application of human rights law in situations of organized violence. Nevertheless, for the purposes of the argument pursued here it is possible to make a few general points. This account draws principally on the jurisprudence of the European Court of Human Rights (ECtHR), which has gone further than other judicial bodies in addressing the use of organized violence through the direct application of human rights principles.

A. *The Right to Life*

Looking first at the right to life, the ECtHR has developed a consistent set of rules based on the provisions of Article 2 of the ECHR to regulate the

85. For a discussion of President Lincoln's treatment of the hybrid nature of civil war with respect to the blockade of Southern ports, see JOHN FABIAN WITT, *LINCOLN'S CODE: THE LAW OF WAR IN AMERICAN HISTORY* 142–57 (2012).

State's resort to lethal force in widely varying situations. These rules "have no 'triggers' or 'thresholds' but form a single body of law that covers everything from confrontations between rioters and police officers to pitched battles between rebel groups and national armies."⁸⁶ Applying this framework to cases arising from situations of organized violence, the ECtHR has determined that it may permit States to use a high degree of military force against insurgent fighters. For example, the Court's judgment in *Isayeva*, concerning Russian military action against Chechen rebels, contains this often-quoted passage:

The Court accepts that the situation that existed in Chechnya at the relevant time called for exceptional measures by the State in order to regain control over the Republic and to suppress the illegal armed insurgency. Given the context of the conflict in Chechnya at the relevant time, those measures could presumably include the deployment of army units equipped with combat weapons, including military aviation and artillery. The presence of a very large group of armed fighters in Katyr-Yurt, and their active resistance to the law-enforcement bodies, which are not disputed by the parties, may have justified use of lethal force by the agents of the State, thus bringing the situation within paragraph 2 of Article 2.⁸⁷

Two aspects of the *Isayeva* judgment are particularly noteworthy. First, the Court found that the use of military force, including military aviation and artillery, was justified as an exceptional measure to achieve a legitimate aim. As William Abresch noted, in looking to the ends for which force could be used, the Court went beyond the calculus of proportionality found in the laws of armed conflict and assessed the lawfulness of the use of force in relation to independent criteria.⁸⁸ For a humanitarian law analysis, to consider the legitimacy of the aims of an incident of force in this way "would be to trespass on the *jus ad bellum*."⁸⁹ But for an examination of the State's resort to force against individuals within its jurisdiction, it is appropriate.

Second, even in a context involving a high level of organized violence, the Court applied its well-established framework concerning the right to life, in which recourse to lethal force against any person is only permissible when

86. William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 741 (2005).

87. *Isayeva v. Russia*, 41 Eur. Ct. H.R. ¶ 180 (2005).

88. Abresch, *supra* note 86, at 765.

89. *Id.*

less harmful means of achieving the same end are not available.⁹⁰ It recognized an obligation to take appropriate care to ensure that any risk to life was minimized, including the life of rebel fighters.⁹¹ Having established that the use of lethal force was justified because of the presence of a large group of enemy fighters, the Court then shifted to consider whether the operation was planned and conducted to avoid or minimize harm to civilians, and decided that it was not.⁹²

There is, in this way, an apparent move in the Court's judgment from a traditional human rights approach based on the protection of all life to the use of an IHL framework based on categories of protected persons.⁹³ The Court's reasoning seems to reflect the idea that respect for the right to life as a limit on the recourse to lethal force is compatible in these circumstances with a status-based approach that permits the targeting of armed fighters while requiring the minimization of harm to civilians. Nevertheless, the Court's application here of an approach that mirrors the rules on the conduct of hostilities in IHL remains limited to the specific context of intense fighting, and is situated within a broader analytic framework that limits *any* recourse to lethal force to what is necessary and proportionate to achieve a legitimate objective.

There are a number of reasons to be hesitant of reading too coherent a theory into the *Isayeva* decision. In particular, the Court suggests in some passages that its approach might have been different if Russia had declared the situation to be one of armed conflict, without indicating what alternative position it would have adopted.⁹⁴ Nevertheless, *Isayeva* shows that an approach that uses human rights law to regulate the resort to lethal force can

90. *Isayeva v. Russia*, 41 Eur. Ct. H.R. ¶ 175 (2005).

91. Lieblich correctly observes that the Court's approach in this respect "essentially breaks down the conduct of hostilities to a continuous series of *ad bellum* decisions; there is no formal 'threshold' that once crossed allows the 'wholesale' targeting usually associated with armed conflict under IHL." Nevertheless, he argues that, taken as a whole, the ECtHR did not take IHRL so far "as to explicitly regulate the resort to force itself." See Lieblich, *supra* note 7, at 725–27.

92. *Isayeva v. Russia*, 41 Eur. Ct. H.R. ¶¶ 182–200 (2005).

93. MELZER, *supra* note 33, at 391–92.

94. The Court notes that Russia had not entered a derogation under Article 15, implying that if Russia had derogated from Article 2 with respect to "lawful acts of war," it might have analyzed the situation differently. *Isayeva v. Russia*, 41 Eur. Ct. H.R. ¶ 191 (2005). Yet derogation under ECHR Article 15 is only permitted "to the extent strictly required by the exigencies of the situation." It is hard to see what uses of force would have met this standard that were not already permitted under human rights law as necessary and proportionate to the purposes of protecting life and quelling the insurrection in Chechnya, in which case

work in the context of conventional hostilities.⁹⁵ Other case law from the ECtHR reflects a similar approach.⁹⁶

As a number of commentators have pointed out, the Court's interpretation of human rights law in the context of active hostilities leads to the same result as would have been obtained by applying IHL,⁹⁷ but this does not mean that it would have been preferable to apply IHL. Preserving human rights law as the standard for assessing the State's recourse to force against individuals within its jurisdiction allows a consistent framework to be used across the spectrum of the State's response to non-State threats to life or public order. And, it allows us to recognize that, even in armed conflict, there will be situations where hostilities are less intense and where the right to life prohibits the State from using lethal force against insurgent fighters, even where it would be lawful under IHL.

Questions about the permissibility of lethal targeting are particularly likely to arise in conflicts in which the State confronts a group that operates at least in part by using terrorist tactics, rather than trying to capture and hold territory through military action. One circumstance in which the State would not be justified in using lethal force is when it could safely capture enemy fighters rather than killing them, a possibility which is particularly relevant when the State can apprehend fighters away from the battlefield. The Israeli Supreme Court incorporated such a "less harmful means" test as a

derogation would have been redundant. In any case, the best interpretation of Article 15 may be that the words "lawful acts of war" should be taken to refer exclusively to international armed conflict, in line with the traditional understanding of the term "war." See the discussion in Marko Milanovic, *Extraterritorial Derogations from Human Rights Treaties in Armed Conflict*, in *THE FRONTIERS OF HUMAN RIGHTS: EXTRATERRITORIALITY AND ITS CHALLENGES* 55, 67–68 (Nehal Bhuta ed., 2016) [hereinafter *FRONTIERS OF HUMAN RIGHTS*].

95. See Kretzmer, *supra* note 38, at 30–31. Kretzmer writes that the ECtHR "has indeed demonstrated that it is possible to apply a human rights framework to certain types of non-international armed conflicts without ignoring the extraordinary features of such conflicts, which demand that the norms applied not prevent the States involved from pursuing their legitimate interests." *Id.*

96. See *Ergi v. Turkey*, 1998-IV Eur. Ct. H.R. ¶¶ 79–81; *Özkan v. Turkey*, App. No. 21689/93, ¶¶ 305–06 (2004) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-61696>; *Isayeva v. Russia*, 41 Eur. Ct. H.R. ¶¶ 178–200 (2005). For an analysis of the ECtHR's approach in these cases, see Cordula Droegge, *Elective Affinities? Human Rights and Humanitarian Law*, 90 *INTERNATIONAL REVIEW OF THE RED CROSS* 501, 532–33 (2008). Droegge points out that the Court broadly distinguishes between situations where insufficient precautions are taken to avoid the use of lethal force altogether, and situations involving more intense hostilities where the Court uses standards inspired by IHL. *Id.*

97. MELZER, *supra* note 33, at 392–93.

condition for the State's use of targeted killing in its 2006 judgment,⁹⁸ a requirement that appears to be drawn from human rights law and thus represents "a very progressive [result] in an armed conflict context."⁹⁹

The resort to lethal force would also be unjustified if the killing of an enemy fighter was not proportionate to the aim of protecting life or suppressing an insurrection, even in circumstances where capture was impossible. The impact of the right to life in governing the State's use of force in response to insurgency or other systematic threats to public security remains an under-explored topic.¹⁰⁰ Nevertheless, one can imagine a distinction between military operations to recapture territory from an armed group, where the use of lethal force against enemy fighters appears justified, and other circumstances away from the battlefield where the use of force against individual fighters might not be justified. The gravity of any decision by the State to kill an individual within its jurisdiction might be thought to require a restrictive approach to the resort to lethal force in circumstances where the immediate protection of life is not involved, even when the use of force is intended to play a part in suppressing an armed insurrection.

Finally, there is a question about how the obligation to investigate alleged violations of the right to life applies in the context of armed hostilities. It is sometimes said that any killing by State agents should be investigated, a position that is supported by case law of the ECtHR.¹⁰¹ This appears unrealistic in battlefield conditions, where a State's forces are engaged in large-scale hostilities with the armed forces of a non-State group.¹⁰² Instead, it seems

98. HCJ 769/02 Public Comm. Against Torture in Israel v. Government of Israel 62(1) PD 507, ¶ 40 (2006) (Isr.), reprinted in 46 INTERNATIONAL LEGAL MATERIALS 375, 393–94 (2007).

99. Philip Alston, *The CIA and Targeted Killing Beyond Borders*, 2 HARVARD NATIONAL SECURITY JOURNAL 283, 410 (2011). It is worth noting that the Israel Defense Forces have in recent years taken the position that the obligations imposed by the Supreme Court do not apply in the context of armed conflicts involving organized armed groups whose members "may be attacked at any time by the sole virtue of their membership, unless they become *hors de combat* or serve a function (such as medical personnel) which entitles them to special protection." See STATE OF ISRAEL, THE 2014 GAZA CONFLICT (7 JULY – 26 AUGUST 2014): FACTUAL AND LEGAL ASPECTS 156 (2015), [http://mfa.gov.il/ProtectiveEdge/Documents/2014 GazaConflictFullReport.pdf](http://mfa.gov.il/ProtectiveEdge/Documents/2014%20GazaConflictFullReport.pdf).

100. Sassòli & Olson, *supra* note 70, at 612.

101. Al-Skeini, App. No. 55721/07, ¶ 163 (2011) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-105606>; see also MURRAY, *supra* note 35, at 332.

102. Gloria Gaggioli, *A Legal Approach to Investigations of Arbitrary Deprivation of Life in Armed Conflicts: The Need for a Dynamic Understanding of the Interplay between IHL and HRL*, 36

reasonable to think that the underlying principle requiring investigation in the case of a credible allegation of a violation of the right to life should be interpreted according to the specific context of organized hostilities against an armed group.¹⁰³ This might mean that the killing of regular fighters for a non-State group during a battlefield encounter did not necessarily give rise to an obligation to investigate, but that killings away from the battlefield or the deaths of people who did not have a combat role required investigation.¹⁰⁴ In addition, case law has established that the form of investigation required is dependent on context.¹⁰⁵

B. *The Right to Liberty and Security*

Human rights law allows the State to detain individuals regarded as a security threat in times of public emergency or armed conflict, either through the flexibility inherent in the arbitrariness standard or through derogation. In such cases, the decision to detain must be taken on an individual basis as a necessary and proportionate measure to deal with “a present, direct and imperative threat” to State security or public order.¹⁰⁶ Other, less severe measures must have been found to be insufficient, and the duration of detention must be taken into account when assessing whether it continues to be proportionate to the public interest involved.¹⁰⁷

QUESTIONS OF INTERNATIONAL LAW 27, 41 (2017), <http://www.qil-qdi.org/legal-approach-investigations-arbitrary-deprivations-life-armed-conflicts-need-dynamic-understanding-interplay-ihl-hrl/>.

103. Luca Gervasoni, *A Contextual-Functional Approach to Investigations into Right to Life Violations in Armed Conflict*, 36 QUESTIONS OF INTERNATIONAL LAW 5, 22 (2017), <http://www.qil-qdi.org/contextual-functional-approach-investigations-right-life-violations-armed-conflict/>.

104. For an argument that all cases of targeted killing of suspected terrorists should be the subject of an independent investigation in line with human rights standards, see David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 171, 204 (2005).

105. See, e.g., *Al-Skeini*, App. No. 55721/07, ¶¶ 164–67 (2011) (ECtHR); *Jaloud v. Netherlands*, App. No. 47708/08, ¶ 226 (2014) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-148367>; see also Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, U.N. Doc. E/CN.4/2006/53/Add.2 (Mar. 27, 2006), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/121/29/PDF/G0612129.pdf>.

106. *General Comment No. 35*, *supra* note 42, ¶ 15.

107. *Id.*; see also HILL-CAWTHORNE, *supra* note 51, at 119–20; Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INTERNATIONAL REVIEW OF THE RED CROSS 375, 382–83 (2005).

Individuals who are detained are entitled to know the reasons for their detention and have the right to challenge the lawfulness of their detention before a court that has the power to order their release, as well as periodic reviews at reasonable intervals.¹⁰⁸ The main human rights treaties do not prohibit derogation from the right to liberty, but there is increasing support for the idea that States cannot derogate from the right to habeas corpus.¹⁰⁹ The ECtHR has ruled, however, that the United Kingdom was entitled to derogate from the requirement to provide review by a court for its internment regime in Northern Ireland, provided that other review procedures were in place.¹¹⁰ Lawrence Hill-Cawthorne has similarly suggested that States should be able—when strictly necessary—to derogate from the right to habeas corpus to the limited extent of allowing a body other than a court to review the lawfulness of detention, noting that this might permit review by a body drawn from the executive or military during NIAC, so long as it was independent of the authority that initiated the detention.¹¹¹ Such an approach would answer the concern expressed by Sassòli and Olson that it may in some circumstances be unrealistic to expect States engaged in a large-scale NIAC to bring all internees before a judge without delay.¹¹²

In practice, as Hill-Cawthorne has shown, most States that have been involved in large-scale traditional (i.e., internal) non-international armed conflicts in recent years have recognized human rights law as controlling their use of security detention even where they have arguably fallen short of its requirements.¹¹³ The United States has adopted a different position in the course of its campaign against al-Qaeda, basing its detention regimes at Guantanamo Bay and in Afghanistan (until detention operations were handed over to the Afghan government in 2014) on the claim that it “has captured and detained enemy belligerents, and is permitted under the law of

108. *Id.* at 389. Pejic suggests that these reviews should take place at no more than six-month intervals.

109. *General Comment No. 35*, *supra* note 42, ¶ 67; Pejic, *supra* note 107, at 382–83.

110. *Ireland v. United Kingdom*, 2 Eur. Ct. H.R. (ser. A) ¶¶ 215–21 (1978). Note that some people question whether the Court would reach the same result today. *See, e.g.*, HILL-CAWTHORNE, *supra* note 51, at 201.

111. HILL-CAWTHORNE, *supra* note 51, at 211; *see also* MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY 254 n.95 (2011); Gabor Rona, *Is There a Way Out of the Non-International Armed Conflict Detention Dilemma?*, 91 INTERNATIONAL LAW STUDIES 32, 58 (2015).

112. Sassòli & Olson, *supra* note 70, at 622.

113. HILL-CAWTHORNE, *supra* note 51, at 164–74. Murray also endorses this position. *See* MURRAY, *supra* note 35, at 190.

war to hold them until the end of hostilities.”¹¹⁴ In contrast to the human rights regime, this position allows detention based on status as a functional member of an opposing armed group, and takes no account of the length of time for which detainees have been held. U.S. federal courts hearing habeas petitions from Guantanamo detainees have upheld the principle of detention based on status until the end of hostilities, irrespective of whether the detainee would pose a threat if released.¹¹⁵ However, given the potentially indefinite nature of a conflict against a globally dispersed terrorist group, many in the United States and elsewhere have come to see the government’s legal claims as problematic.¹¹⁶

The Bush administration set up military review boards to assess whether there was a continuing need to hold detainees, and the Obama administration followed up with a more robust review process to determine if continued detention was justified to protect against a significant threat to the United States. These processes were established on a discretionary basis rather than in recognition of a legal obligation. At the same time, a number of scholars have called for a reconceptualization of the law to mitigate the dangers of indefinite detention. For example, Curtis Bradley and Jack Goldsmith have argued that, in the case of terrorist fighters captured away from a zone of hostilities,

The end of the conflict should be viewed in individual rather than group-based terms. Under this approach, the question is not whether hostilities have ceased with al-Qaeda and related terrorist organizations, but rather whether hostilities have, in essence, ceased with the individual because he no longer poses a substantial danger of rejoining hostilities.¹¹⁷

114. Submission of the Government of the United States to the Inter-American Commission on Human Rights with respect to the Draft Report on the Closure of Guantanamo, OEA/Ser.L/V/II (Jan. 30, 2015), <https://www.state.gov/documents/organization/258201.pdf>.

115. *Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010). For a detailed analysis of the Guantánamo habeas cases, see Robert M. Chesney, *Who May be Held? Military Detention through the Habeas Lens*, 52 BOSTON COLLEGE LAW REVIEW 769, 828–48 (2011).

116. For a detailed analysis of the problem of indefinite detention in an armed conflict against a terrorist group and the moves of courts in different jurisdictions to restrain it, see Yuval Shany, *A Human Rights Perspective to Global Battlefield Detention: Time to Reconsider Indefinite Detention*, 93 INTERNATIONAL LAW STUDIES 102 (2017).

117. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARVARD LAW REVIEW 2047, 2125 (2005).

This formula convincingly locates the authority to detain in a NIAC against a terrorist group in the State's relationship with each discrete individual under its control, rather than the armed group as a collective entity. However, it would seem more accurate to regard the fact that an individual no longer poses a danger of rejoining hostilities as marking the endpoint of any justification to employ coercive force against him or her, rather than as marking the end of an armed conflict with that individual—a concept that is hard to make sense of in circumstances where the individual remains forcibly detained by the State.¹¹⁸

If one accepts that the right to detain ends when the detainee no longer poses a threat to which his or her detention is a necessary and proportionate response, it is hard to see any reason why a similar standard should not also govern the beginning of detention. John Bellinger and Vijay Padmanabhan follow this logic in suggesting that States might adopt a rule that permitted detention in NIAC only of those members of non-State groups who pose an imperative threat to security, in line with the preventive detention regime permitted by human rights law as well as the individualized determination of prospective threat provided for civilians in the Fourth Geneva Convention.¹¹⁹ This article proposes, however, that no development of the law is necessary if we recognize that the human rights regime, correctly understood, already requires that the security detention of members of non-State groups must always be justified based on the threat they pose to life or public order.

VII. ADDITIONAL QUESTIONS ARISING IN TRANSNATIONAL ARMED CONFLICTS

So far, this article has considered how international human rights law functions to restrict the resort to force in NIAC in general terms, with a particular focus on conflicts taking place within the territory of a single State. Additional questions arise when we consider the specific context of transnational

118. However, see the discussion *supra* note 27 about the lack of consensus on the question of when NIAC ends, and the fact that some people see threat as an indicator of the continued existence of an armed conflict. See also Adam Klein, *Part III: Ending the AUMF War*, LAWFARE (Apr. 22, 2016), <https://www.lawfareblog.com/part-iii-ending-aumf-war>.

119. John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AMERICAN JOURNAL OF INTERNATIONAL LAW 201, 220 (2011).

conflicts. First, and most fundamentally, we must consider whether human rights law governs the use of force by a State outside its territory.

It is now widely accepted that the principal human rights conventions apply to at least some actions of the State outside its borders.¹²⁰ In recent decisions, the ECtHR has found that the ECHR applies in situations in which a contracting State exercises effective control over an area outside its territory, or in which State agents exercise control and authority over an individual, with respect to those rights that are relevant to that individual's situation.¹²¹ According to this approach, the detention of individuals overseas by a State's armed forces clearly falls within the scope of human rights law. The question of whether the extraterritorial killing of an individual outside occupied territory is covered by human rights law remains unsettled, though recent case law and scholarship suggests a trend in that direction.¹²² While the United States does not accept the extraterritorial application of human rights treaties, except perhaps to areas where a State exercises governmental authority, it recognizes that fundamental customary human rights law applies to all operations conducted by State forces, inside and outside the State's territory.¹²³ Moreover, in at least some circumstances of targeting and detention outside the United States, U.S. constitutional law applies and provides similar protections to international human rights law.¹²⁴

120 See, e.g., MURRAY, *supra* note 35, at 55–77.

121. Al-Skeini and Others v. United Kingdom, App. No. 55721/07, ¶¶ 137–38 (2011) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-105606>.

122. Al-Saadoon and Others v. Secretary of State for Defence [2015] EWHC (Admin) 715, [95]–[98] (noting that this aspect of the High Court decision was overturned by the Court of Appeal, which ruled that it was up to the ECtHR to draw this conclusion); see also Noam Lubell, *Fragmented Wars: Multi-Territorial Military Operations against Armed Groups*, 93 INTERNATIONAL LAW STUDIES 215, 247 (2017); Heyns, Akande, Hill-Cawthorne & Chengeta, *supra* note 46, at 822–25. See also *General Comment No. 36*, *supra* note 42, ¶ 66 (stating that Article 6 of the ICCPR covers “persons located outside any territory effectively controlled by the State who are nonetheless impacted by its military or other activities in a [direct], significant and foreseeable manner”).

123. INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK 53–54 (2015). For a discussion on this point, see KENNETH WATKIN, FIGHTING AT THE LEGAL BOUNDARIES: CONTROLLING THE USE OF FORCE IN CONTEMPORARY CONFLICT 149–52 (2016).

124. For an account of the way that international human rights law has been interpreted and applied through U.S. constitutional law, and the interplay of this regime with IHL, see Naz K. Modirzadeh, *Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance*, 5 HARVARD NATIONAL SECURITY JOURNAL 225 (2014).

The case for recognizing human rights law as the appropriate legal regime to govern the use of force against individuals overseas appears particularly strong when force is employed with the consent of the territorial State. In this case, the territorial State could be said to allow the attacking State to partake temporarily of its sovereign authority over the individuals within its territory, and it is therefore appropriate that the attacking State should assume a share of the obligations that flow from that relationship of sovereignty.¹²⁵ The attacking State acquires the power to employ force directly and with a claim of public legitimacy against the individuals that it targets in a way that is not mediated by the protection of another State. If the attacking State did not also assume the obligation to respect these individuals' rights against arbitrary deprivation of life and prolonged arbitrary deprivation of liberty, it would be hard to see that fundamental human rights had any meaning in their case.¹²⁶ A similar argument could be made with respect to the use of force against individuals located in a stateless area.

By contrast, where an attacking State uses force on the territory of another State without that State's consent, the sovereignty of the territorial State provides an additional layer of protection. The attacking State's use of force must be justified as a necessary and proportionate measure of self-defense under the UN Charter.¹²⁷ This requirement imposes restrictions on the attacking State that serve to limit any possible arbitrary use of force against the members of the armed group that is targeted.¹²⁸ For example, the

125. For a similar point, see Nehal Bhuta, *The Frontiers of Extraterritoriality—Human Rights Law as Global Law*, in FRONTIERS OF HUMAN RIGHTS, *supra* note 94, at 1, 11–12. Bhuta argues that a State conducting military operations against a non-State group on the territory of another State with that State's consent exercises "a public power characteristic of the territorial State's sovereignty." *Id.* Moreover, the connection between sovereignty and the legitimate use of force is implicit in Weber's celebrated definition of the modern State as "a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory." See Max Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 78 (H.H. Gerth & C. Wright Mills eds., 1948).

126. An alternative approach pursued by some scholars emphasizes the human rights obligations of the territorial State, and the limits that this places on that State's authority to consent to the use of force on its territory. See especially Jonathan Horowitz, *Ending the Global War: The Power of Human Rights in a Time of Unrestrained Armed Conflict*, in THEORETICAL BOUNDARIES, *supra* note 4, at 157. According to the argument presented here, responsibility for any human rights violations caused when a State uses force arbitrarily on the territory of another State would be shared between the attacking and the territorial States. *Id.*

127. See, e.g., Schmitt, *supra* note 28, at 87–88.

128. For a related point, see William Schabas, *The Right to Life*, in THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT, *supra* note 15, at 365, 382–85 (noting

States engaged in military action against ISIS in Syria are constrained by *jus ad bellum* to use force only to the extent that is required to suppress the threat that ISIS poses to themselves or other States. It could be argued that this test of the necessity and proportionality of the use of force under *jus ad bellum* significantly reduces the need for a separate examination regarding the lawfulness of the use of force against individual targets under the regime of international human rights law.

Assuming that international human rights law applies to at least some extraterritorial military operations, there is no reason why it should not define the scope of a State's lawful resort to force against individuals in the same way as it does internally. Although extraterritorial military operations may appear different from internal ones in a number of ways, the relationship between the justificatory and regulatory regimes of human rights law and IHL respectively is a structural matter, determined by the connection between a State and the individuals affected by its actions rather than the geographical location of those individuals.¹²⁹ The different context of extraterritorial military action would be reflected in such cases not through a different mechanism of justification, but in the way that the substantive provisions of human rights law are interpreted.

With respect to lethal targeting, extraterritorial military operations give additional force to the question of when the killing of enemy fighters is justified outside battlefield conditions. Some extraterritorial campaigns have involved efforts to retake territory controlled by a non-State group or to assist the forces of the territorial State in doing so, in a way that is comparable to domestic counterinsurgency. Coalition operations to recapture Mosul from ISIS provide one example of such a campaign.¹³⁰

But, the United States in particular has notoriously also conducted attacks against individual targets overseas that are divorced from any territorial campaign.¹³¹ These "away from the battlefield" strikes are particularly likely

that Schabas argues that in an unlawful war of aggression the deaths of those killed by the attacking State should be regarded as arbitrary); see also *Draft General Comment No. 36, supra* note 42, ¶ 71.

129. For an argument that the relationship between human rights law and IHL must be the same in internal and extraterritorial NIACs, see Milanovic, *supra* note 94, at 84.

130. If such action is covered by the ECtHR, its lawfulness may depend on whether Article 2(2)(c) can be read to permit the use of lethal force in quelling an insurrection on another State's territory.

131. For further discussion of the distinction between extraterritorial counterinsurgency and counter-terrorist military operations, see ANTHONY DWORKIN, EUROPEAN

to occur in lawless zones outside the territory of the attacking State, where local authorities cannot easily arrest the targeted individuals, but where the attacking State is not involved in any wider attempt to reassert effective control.¹³² In these circumstances, the goal of suppressing an insurgency is absent, and the justification for the resort to lethal force must be rooted solely in the protection of life in the attacking State. A targeting standard based on mere membership of the enemy's armed forces would be hard to reconcile with the requirement that the use of lethal force be necessary and proportionate to this purpose.

While asserting that such a status-based approach remained legally available, the Obama administration introduced a number of discretionary restrictions on its extraterritorial use of lethal force that brought the U.S. approach in practice closer to a threat-based model. First, the administration adopted the policy that strikes should only be conducted against those individuals who posed a significant threat, such as an operational leader, an operative in the course of being trained or planning to carry out an attack or an individual with unique operations skills that were being leveraged in a planned attack.¹³³ The standard was refined in President Obama's 2013 Presidential Policy Guidance, which set out a rule that individuals could only be targeted outside areas of active hostilities when they posed a "continuing, imminent threat to U.S. persons."¹³⁴ These policies give some indication of what a threat-based approach to extraterritorial targeting of terrorists might look like, but taken together they leave two important questions unresolved. These policies do not resolve whether it is permissible to target individuals (for instance, senior leaders) who cannot be linked to any specific planned attack, nor whether the requirement of imminence demands knowledge of

COUNCIL ON FOREIGN RELATIONS, EUROPE'S NEW COUNTER-TERROR WARS (2016), http://www.ecfr.eu/publications/summary/europes_new_counter_terror_wars7155.

132. Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the "Hot" Conflict Zone*, 161 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1165, 1197 (2013).

133. John Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at the Woodrow Wilson International Center for Scholars: The Ethics and Efficacy of the President's Counterterrorism Strategy (Apr. 30, 2012) (transcript available at <https://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy>).

134. Presidential Policy Guidance, *supra* note 22, at 15.

the time, date or location of a planned attack, or merely evidence that someone is planning an attack and that there may not be another opportunity to prevent it.¹³⁵

It is worth noting that, under the approach presented here, a similar calculation would apply to the targeting of individuals who were located within a region of hostilities, but who did not contribute to the local military operations of the armed group to which they belonged. For example, it seems that some of the ISIS members targeted by Western drone strikes in Syria, such as Reyaad Khan and Junaid Hussein, were involved only in global recruitment and planning of attacks, and not in the defense of territory seized by ISIS.¹³⁶ If so, the justification for resort to force against them would depend on the same criteria as those applying to non-battlefield strikes, even though the men were located in a region where more conventional hostilities were also underway. This is because the justification for the use of force applies on the basis of the threat posed by individuals, rather than the group to which they belong or the zone within which they are located.

The detention of militants captured away from the battlefield raises similar questions. Where detention is not designed to prevent people from engaging in conventional hostilities in a specific territory, but to forestall an anticipated or possible remote attack, the risk of a violation of that individual's right to liberty appears particularly high. In such cases, detention might appear permissible only as an exceptional and time-limited measure. Holding militants over a longer term in such circumstances might only be thought acceptable when it took the form of imprisonment after a criminal trial.¹³⁷

135. For further discussion of this point, see Kretzmer, *supra* note 104, at 203. Kretzmer argues that a necessity requirement would restrict lethal targeting to cases in which "there is credible evidence that the targeted persons are actively involved in planning or preparing further terrorist attacks against the victim state and no other operational means of stopping those attacks are available." *Id.* See also Daskal, *supra* note 132, at 1210; Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 3, 53–56 (2010).

136. On Reyaad Khan, see INTELLIGENCE AND SECURITY COMMITTEE OF PARLIAMENT, UK LETHAL DRONE STRIKES IN SYRIA 5–11 (2017), http://isc.independent.gov.uk/files/20170426_UK_Lethal_Drone_Strikes_in_Syria_Report.pdf. On Junaid Hussain, see Adam Goldman & Eric Schmitt, *One by One, ISIS Social Media Experts Are Killed as Result of F.B.I. Program*, NEW YORK TIMES (Nov. 24, 2016), <https://www.nytimes.com/2016/11/24/world/middleeast/isis-recruiters-social-media.html>.

137. See Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 YALE JOURNAL OF INTERNATIONAL LAW 369, 413 (2008). Hakimi suggests that two years might be appropriate as an upper limit for non-battlefield security detention, after which the State would be obliged to release, deport or

Two other questions arise specifically in the context of extraterritorial military operations. First, can States derogate under human rights treaties in such cases? At least for States that are party to the ECHR, derogation appears necessary if security detention is not to violate the right to liberty under Article 5. Some authorities have suggested that the condition for derogation, the existence of a public emergency threatening the life of the nation, will rarely be met in an extraterritorial context;¹³⁸ however, a better interpretation may be that this test is satisfied by a public emergency in the territorial State where the action takes place.¹³⁹ The second question concerns the human rights law requirement that there be a legal basis for the intentional use of lethal force or security detention. The form that this legal basis could take—whether, for instance, it could be satisfied by a resolution of the UN Security Council or legislation in the detaining State, as well as legislation in the territorial State—remains an unsettled question.¹⁴⁰

These questions highlight that a shift to the approach presented in this article would not prescribe a predetermined outcome, but rather would set a new framework for determining the appropriate standards that States should follow. Instead of appealing to the laws of armed conflict as if they provided simple answers in this context, States should understand that their practice and accompanying legal claims constitute a statement about when such actions are justified, and contribute to setting a precedent. Accepting the approach presented here could lead to a process of reflection and discussion among like-minded States and other parties that would try to develop common standards about when the use of lethal force and detention against members of armed groups should be understood as necessary and proportionate in the face of the security threats that such groups present.

prosecute the individual concerned except in the most exceptional circumstances. *Id.* Nonetheless, others might feel that even this standard would be difficult to reconcile with the right to liberty and security of those detained.

138. *Al Jeddah v. Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC (HL) 332, [38] (appeal taken from Eng.). *See also* *Al-Waheed v. Ministry of Defence* [2017] UKSC 2, [45].

139. *Milanovic*, *supra* note 94, at 68–73; *see also* *Mohammed v. Ministry of Defence* [2014] EWHC (QB) 1369 [154–57].

140. As noted above, the UK Supreme Court held in *Serdar Mohammed* that UN Security Council resolutions could provide a legal basis for detention. *See Al-Waheed* [2017] UKSC 2, [18–30].

VIII. IMPLICATIONS AND POSSIBLE OBJECTIONS

This article has suggested an approach to the legal regulation of military campaigns against non-State armed groups that grounds the State's authority for coercive action in the justification for the use of force rather than the laws regulating the conduct of hostilities. In arguing that this justification operates at the level of the individual, the article does not propose any new legal framework, but rather a reinterpretation of existing law prompted by changes in the character of armed conflict.

As non-State groups have developed the capacity to launch mass-casualty attacks at a distance without seeking to control territory, and as States have acquired drones and other technology that allow them remotely to track and kill specific individuals, the characterization of NIAC as a confrontation of regular forces fighting within a recognisable zone of hostilities has grown increasingly outdated.¹⁴¹ In turn, these changes have strained the legal regulation of NIAC, highlighting apparent anomalies in the mainstream interpretation that make it seem poorly fitted to contemporary conflict. In this article, I have suggested that we can resolve these dilemmas by recognizing the way that human rights law operates to govern the resort to force in a non-international context. In playing this role, human rights law does not provide authority for status-based targeting of insurgent forces except in particular geographic zones of intense hostilities, and it requires that the detention of members of non-State groups be individually justified, taking the duration of detention into account. These restrictions limit the State's actions even when the measures they prohibit would comply with the regulatory regime on the conduct of hostilities in NIAC provided by IHL.

In light of the changing nature of armed conflict, a number of scholars have tried in recent years to formulate approaches to its legal regulation that impose more restrictive rules on targeting and detention than the permissions contained in IHL. Some have argued that international human rights law should be understood to apply in parallel to IHL in NIAC and to take precedence in circumstances removed from intense hostilities where it better

141. For an examination of the individualization of warfare from a legal standpoint, see Gabriella Blum, *The Individualization of War: From War to Policing in the Regulation of Armed Conflicts*, in *LAW AND WAR* 48 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2014); Samuel Issacharoff & Richard H. Pildes, *Targeted Warfare: Individuating Enemy Responsibility*, 88 *NEW YORK UNIVERSITY LAW REVIEW* 1521 (2013). For an analysis of the growing attention to the individual in the evolving international legal order, see RUTI TEITEL, *HUMANITY'S LAW* 34–72 (2011).

fits the conditions at hand.¹⁴² This approach yields results that are intuitively attractive, but it seems to lack a clear and principled justification for treating IHL as an enabling regime in some circumstances of NIAC but not in others. It also fails to take account of the structural differences between IHL and international human rights law discussed in this article. Other attempts have taken the form of proposing a new legal distinction between battlefield and non-battlefield conditions,¹⁴³ or suggesting that IHL itself contains restrictions on the use of force that is unnecessary for the achievement of military goals, rooted in the principles of military necessity and humanity.¹⁴⁴ However the first of these approaches is vulnerable to the charge that it will not win the backing of States that wish to benefit from maximum flexibility in their right to use force. The second approach, meanwhile, has met with widespread resistance,¹⁴⁵ and remains constrained by the fact that it ties the lawful use of force to the internal standard of military necessity rather than to an independent justification based on its necessity and proportionality to achieve a legitimate objective.

The approach presented in this article responds to the same concerns as these different approaches and might be thought to lead to broadly comparable results; however, it is grounded instead in a systematic and principled distinction between the justification for the use of force under international human rights law and the regulation of the conduct of hostilities under IHL. It rests on the idea that the human rights regime is capable of adjudicating the resort to force in a non-international context up to and including in situations of organized hostilities, and that there is therefore no need to read an enabling function into the rules of IHL. Instead of seeing human rights law as a regime that applies only in peacetime, or only in relation to the post-

142. See, e.g., Sassòli & Olson, *supra* note 70, at 613–16; David Kretzmer, Aviad Ben-Yehuda & Meirav Furth, ‘*Thou Shall Not Kill: The Use of Lethal Force in Non-International Armed Conflicts*, 47 ISRAEL LAW REVIEW 191, 220–23 (2014); MURRAY, *supra* note 35, at 88–99.

143. See, e.g., Daskal, *supra* note 132, at 1192 (arguing for a legal framework that “distinguishes between zones of active hostilities and elsewhere”).

144. INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 78–82 (2009).

145. See, e.g., Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARVARD NATIONAL SECURITY JOURNAL 5, 39–43 (2010). Schmitt describes the *Interpretive Guidance* as making a “circuitous attempt to squeeze a plainly human rights norm into a restraint on attacks against direct participants under the guise of IHL.” *Id.* at 43.

submission treatment of operational opponents,¹⁴⁶ we should understand it as a comprehensive system for assessing the justification for the State's interference with the life or liberty of individuals over whom it has jurisdiction across the entirety of its interaction with them. The approach set out here also answers the objection that international human rights law is not suited to regulate NIAC because it applies only to the State and thus violates the principle of the equality of obligations of belligerents.¹⁴⁷ I have argued that it is only with respect to the justification for the resort to force that an asymmetry exists (to the State's advantage) under international law, while the principle of equality of obligations persists in the equal application of IHL as a regulatory regime that is binding on all parties to the conflict.

One objection that may be made to this approach is that it does not provide a standard that members of armed forces could reasonably be expected to comply with in situations of active hostilities. Geoffrey Corn has argued that requiring military personnel to justify their judgments about the use of force on an individual basis would compromise State security and put members of the armed forces at risk by making them hesitant about employing lethal force even when they confront organized hostile opposition.¹⁴⁸ However, this objection does not take account of the way that human rights standards could accommodate the contextual application of status-based targeting in the limited circumstances of a battlefield encounter with the fighting force of an organized armed group.¹⁴⁹

Moreover, such circumstances are far from the norm in contemporary military operations against non-State groups, and partly reflecting this, a large part of the use of force by armed forces in such campaigns falls into the category of individual or unit self-defense or "hostile intent" use of force rather than positive identification of enemy targets.¹⁵⁰ Self-defense rules of engagement replicate the threat-based approach of human rights law rather than the membership approach of IHL, even if some analysts have expressed

146. Geoffrey S. Corn, *Mixing Apples and Hand Grenades: The Logical Limits of Applying Human Rights Norms to Armed Conflict*, 1 JOURNAL OF INTERNATIONAL HUMANITARIAN LEGAL STUDIES 52, 72 (2010).

147. SIVAKUMARAN, *supra* note 56, at 95.

148. Corn, *supra* note 146, at 89–90.

149. For a similar point, see Hakimi, *supra* note 66.

150. E.L. GASTON, GLOBAL PUBLIC POLICY INSTITUTE, WHEN LOOKS COULD KILL: EMERGING STATE PRACTICE ON SELF-DEFENSE AND HOSTILE INTENT 14–16 (2017), http://www.gppi.net/fileadmin/user_upload/media/pub/2017/gaston_2017_hostile-intent_web.pdf.

concern about the permissive standards used in practice to identify threats.¹⁵¹ NATO forces in Afghanistan regularly operated on rules of engagement based on hostile intent, and the more permissive Rule 429 (which allowed the use of force against those resisting the mission to help the Afghan government stabilize the country or those hindering NATO forces' freedom of movement) would appear to meet human rights conditions for the justification of the use of force in circumstances of active hostilities.¹⁵²

Beyond this, there is ample evidence from State practice that military forces are able to operate effectively—and indeed, that States often choose to operate—under more restrictive standards than those defined by IHL, even with respect to the “mission accomplishment” component of rules of engagement. This is particularly true with respect to the use of force in non-conventional military campaigns. President Obama restricted the use of force against terrorists outside areas of active hostilities. French troops deployed in the Sahel as part of Operation Serval in 2013 and its successor Operation Barkhane have operated under rules of engagement based on the use of minimal force that are more restrictive than the permissions of IHL.¹⁵³ The armed forces of the Netherlands regularly operate under rules of engagement that incorporate human rights-based considerations of necessity and proportionality, including when deployed in situations of armed conflict as well as security operations.¹⁵⁴

The fact that States regularly choose to follow restrictive rules of engagement as a matter of policy might make one question whether it is necessary

151. *Id.* at 56–57.

152. Documents released in connection with a German court case quote Rule No. 429. See Thomas Ruttig, *The Incident at Coordinate 42S VF 8934 5219: German Court Rejects Claim from Kunduz Air Strike Victims*, AFGHAN ANALYSTS NETWORK (Dec. 15, 2013), <https://www.afghanistan-analysts.org/the-incident-at-coordinate-42s-vf-8934-5219-german-court-rejects-claim-from-kunduz-air-strike-victims/>.

153. Bruno Tertrais, *Operation Serval, Sabel Region, Africa, 11 January–30 July 2013*, in HIGH LEVEL MILITARY GROUP, *OUR MILITARY FORCES' STRUGGLE AGAINST LAWLESS, MEDIA SAVVY TERRORIST ADVERSARIES: A COMPARATIVE STUDY* 66, 72–74 (2d ed. 2016), <http://www.high-level-military-group.org/pdf/hlmg-lawless-media-savvy-terrorist-adversaries.pdf>; Bruno Tertrais, *Operation Barkhane, Sabel Region, Africa, 1 August 2014 – Present Day*, in *id.* at 77, 81.

154. J. F. R. BODDENS HOSANG, *RULES OF ENGAGEMENT: RULES ON THE USE OF FORCE AS LINCHPIN FOR THE INTERNATIONAL LAW OF MILITARY OPERATIONS* 314 (2017), https://pure.uva.nl/ws/files/7940990/Boddens_Hosang_Thesis_complete.pdf.

or desirable to rethink the legal basis of such action.¹⁵⁵ But, I believe it is important to establish that such an approach is a legal requirement rather than merely a sensible policy to adopt. Policy restrictions are always subject to being reversed after a change of government.¹⁵⁶ Likewise, they do not constrain States that may be indifferent to the prudential reasons for restraint, and it is easier for a State to bend the interpretation of policy guidelines than that of a legal obligation.

A second objection might be that this approach would weaken the standards of the human rights regime by stretching it to take in situations of intense hostilities, and therefore undermine the protection of the right to life across the spectrum of situations where it applies.¹⁵⁷ According to this view, it is important to try to hold on to a distinction between situations of peace and armed conflict in order to prevent the deliberate killing of individuals deemed to be a security threat from becoming routinely accepted outside the exceptional circumstances of wartime. Yet, given the nature of security threats that many States now face, they can be expected to claim regularly that they are engaged in armed conflicts with non-State groups. Under these circumstances, where the boundaries between war and peace seem likely to remain blurred, the danger that States will exploit the supposed existence of armed conflict to target and detain those they claim to be enemy fighters in an unconstrained way seems greater than the danger of undermining the protections that people enjoy under normal situations of law enforcement.¹⁵⁸

Moreover, this objection seems, like the previous one, to underestimate the degree of contextual flexibility built into the regime of international human rights law. There is no necessary reason why the interpretation of the provisions of human rights law in circumstances where the State employs

155. See, e.g., Kenneth Roth, *Must It Always Be Wartime?*, NEW YORK REVIEW OF BOOKS (Mar. 9, 2017), <http://www.nybooks.com/articles/2017/03/09/must-it-always-be-wartime/>.

156. In October 2017, the New York Times reported that President Trump had scaled back President Obama's restrictions on the use of force outside areas of active hostilities. See Charlie Savage, *Will Congress Ever Limit the Forever-Expanding 9/11 War?*, NEW YORK TIMES (Oct. 28, 2017), <https://www.nytimes.com/2017/10/28/us/politics/aumf-congress-niger.html>.

157. I am grateful to Hina Shamsi in particular for alerting me to this point. See also Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 1, 22 (2004); Modirzadeh, *supra* note 124, at 295–98.

158. For a similar argument, see ROSA BROOKS, *HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING: TALES FROM THE PENTAGON* 351–57 (2016).

law enforcement powers, which is already the subject of extensive case law, should be affected if the same provisions are held to have a different force against very different background conditions. Indeed, as discussed earlier, it is widely accepted that human rights law continues to apply in NIAC. Many of those who reject its direct and unmediated regulation of armed conflict subscribe to some version of the *lex specialis* principle, whereby the interpretation of the substance of human rights law is shaped with reference to IHL. It is not clear why a vision of human rights law that allows it to accommodate IHL rules of engagement based on the status of the enemy (or that interprets human rights law “in the context of” IHL to tolerate such rules of engagement)¹⁵⁹ should be thought less harmful to the integrity of the human rights regime than a vision that permits a more limited threat-based recourse to lethal force or detention within armed conflict based on a direct application of human rights provisions.

Finally, against the concern that targeted strikes against terrorists will become increasingly normalized, it is worth remembering that in many cases domestic law or political conventions will require legislative authorization before a State may use military force overseas.¹⁶⁰ In cases where the territorial State does not consent to the use of force, the provisions of the UN Charter will also apply. Even if international law does not draw a clear line marking the transition to NIAC in terms of the authorization for the resort to force, other legal regimes are likely to provide ways of distinguishing between responses to security threats that fall under normal law enforcement measures and those that employ military force.

It is natural that anyone who cares about the international rule of law would want to ensure that the use of lethal targeting and detention remains subject to tight control. But, given the uncertain boundaries of NIAC, it is anomalous to think that a regime that allows automatic status-based targeting or detention of enemy fighters during an armed conflict against a non-State group provides the best way of doing this. Instead, an approach that grounds the lawfulness of the State’s resort to force against members of non-State groups in the necessity and proportionality of that use of force for the protection of life or the restoration of public order is the best foundation for

159. MURRAY, *supra* note 35, at 88.

160. JENNIFER K. ELSEA & MATTHEW C. WEED, CONG. RESEARCH SERV., RL31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS (2014), <https://fas.org/sgp/crs/natsec/RL31133.pdf>; MARC HOUBEN, INTERNATIONAL CRISIS MANAGEMENT: THE APPROACH OF EUROPEAN STATES 243–58 (2005).

upholding the rule of law in the context of contemporary security threats. Such an approach requires that we assess the legality of the resort to force on an individual, rather than collective basis.