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## From Protecting Lives to Protecting States: Use of Force Across the Threat Continuum

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## BOOK REVIEWS

### From Protecting Lives to Protecting States: Use of Force Across the Threat Continuum

FIGHTING AT THE LEGAL BOUNDARIES: CONTROLLING THE USE OF FORCE IN CONTEMPORARY CONFLICT. By Kenneth Watkin. New York and Oxford: OXFORD UNIVERSITY PRESS, 2016. Pp. 631. \$150.00

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#### INTRODUCTION

Two developments in recent decades have the potential to reshape the terms in which we think about state use of force by blurring the traditional categories we have used to analyze it. The first is what Theodor Meron has called the “humanization” of the law governing armed conflict, or international humanitarian law (IHL).<sup>1</sup> In this process, “the recognition as customary of norms rooted in international human rights instruments has affected the interpretation, and eventually the status, of the parallel norms in instruments of international humanitarian law.”<sup>2</sup> This phenomenon is reflected in increasing acceptance of the view that IHL does not completely displace human rights law during armed conflict, but that human rights law applies at all times.<sup>3</sup> In practice, this means that IHL generally prevails with respect to matters that it specifically addresses, with human rights law applying in other situations.<sup>4</sup> The result is that the two bodies of law

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1. Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239 (2000).

2. *Id.* at 244.

3. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136 ¶ 106 (July 9).

4. Thus, the International Committee of the Red Cross states, “IHL rules on the conduct of hostilities would govern the use of force against lawful targets, i.e., the fighters and civilians directly participating in hostilities .... Any concomitant use of force against persons protected against direct attack would remain governed by the more restrictive rules on the use of force in law enforcement operations.” INT’L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF ARMED CONFLICTS 36 (2015), <https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts>. The United States has consistently declared that IHL is *lex specialis* during armed conflict but has acknowledged that human rights law may apply to subjects to which IHL does not speak. Thus, for instance, the Department of Defense Law of War Manual says, “In some circumstances, the rules in the law of war and the rules in human rights treaties may appear to conflict; these apparent conflicts may be resolved by the principle that the law of war is the *lex specialis* during situations of armed conflict, and, as such, is the controlling body of law with regard to the conduct of hostilities and the protection of war victims . . . . [D]uring armed conflict, human rights treaties would clearly be controlling with respect to matters that are

must be interpreted during armed conflict in a way that gives due weight to the concerns of each.<sup>5</sup>

The second development is the emergence of transnational threats to security that do not consist of conventional state armed forces that are distinguishable from civilians. These threats are comprised of loose networks of non-state actors who may have access to significant instruments of harm that they deploy outside of a centralized command structure. This has raised questions about the extent to which the conventional conception of armed conflict, based on the model of armed forces engaged in large-scale hostilities, is adequate to guide states in how they may respond to these threats.<sup>6</sup>

As Deborah Pearlstein has described in her discussion of this development, the traditional binary framework distinguishing law enforcement from armed conflict provides a crucial “on-off switch.” The existence of an armed conflict permits first-resort use of lethal force without regard to individual culpability, which is forbidden outside of this situation.<sup>7</sup> It also permits unintended civilian deaths in an attack as long as they are not “excessive” compared to the anticipated military advantage that the attack will gain.<sup>8</sup> In this respect, the boundary between the use of force inside and outside of armed conflict represents a moral Rubicon, dividing two morally distinct universes. For some critics, reliance on this boundary is an anachronism that fails to capture the complexity of the situations that states

within their scope of application and that are not addressed by the law of war. For example, a time of war does not suspend the operation of the ICCPR with respect to matters within its scope of application.” GENERAL COUNSEL OF THE DEP’T OF DEFENSE, DEP’T OF DEFENSE LAW OF WAR MANUAL §1.6.3.1 (2016), <http://archive.defense.gov/pubs/law-of-war-manual-june-2015.pdf>.

5. See, e.g., DARAGH MURRAY, PRACTITIONER’S GUIDE TO HUMAN RIGHTS LAW IN ARMED CONFLICT (2016); GERD OBERLEITNER, HUMAN RIGHTS IN ARMED CONFLICT (2015); RESEARCH HANDBOOK ON HUMAN RIGHTS AND HUMANITARIAN LAW (Robert Kulb & Floria Gaggioli eds., 2013); RENE PROVOST, INTERNATIONAL HUMAN RIGHTS LAW AND HUMANITARIAN LAW (2002); Oona Hathaway et al., *Which Law Governs During Armed Conflict? The Relationship between International Humanitarian Law and Human Rights Law*, 96 MINN. L. REV. 1883 (2012); Noam Lubell, *Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate*, 40 ISR. L. REV. 648 (2007).

6. See, e.g., HELEN DUFFY, THE ‘WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW (2d. ed. 2015); CHARLIE SAVAGE, POWER WARS: INSIDE OBAMA’S POST-9/11 PRESIDENCY (2015); MARK MAZZETTI, THE WAY OF THE KNIFE: THE CIA, A SECRET ARMY, AND A WAR AT THE ENDS OF THE EARTH (2013); NEW BATTLEFIELDS, OLD LAWS: CRITICAL DEBATES ON ASYMMETRIC WARFARE (William C. Banks ed., 2011); PHILIP BOBBITT, TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY (2008); GLOBAL INSURGENCY AND THE FUTURE OF ARMED CONFLICT: DEBATING FOURTH GENERATION WARFARE (Terry Terriff, Aaron Kapp & Regina Karp eds., 2008).

7. Deborah Pearlstein, *Armed Conflict at the Threshold?* VA. J. INT’L L. (forthcoming) (manuscript at 3), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3130225](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3130225).

8. Additional Protocol I to the Geneva Conventions, art. 57(2)(a)(iii), Jun. 8, 1977, 1125 U.N.T.S. 3. [hereinafter Additional Protocol I]. The notion that civilian deaths are “unintended” even though they are foreseeable and inflicted with knowledge that they will occur rests on the doctrine of double effect. See Alison Hills, *Intentions, Foreseen Consequences and the Doctrine of Double Effect*, 133 PHILOS. STUD. 257 (2007).

face in the contemporary threat environment.<sup>9</sup> As a result, as Pearlstein notes, “a growing array of critics today call into question the wisdom and utility of preserving the ‘armed conflict’ threshold as a proxy test for the legality of first-resort killing.”<sup>10</sup>

Each of the two developments that I have described blurs the line between what conventionally have been two discrete and relatively self-contained conceptual categories. The implications of this, however, are different in each case. The simultaneous co-existence of human rights law and IHL raises the prospect that war may be fought more humanely. Human rights law may elaborate in more detail the provisions of IHL based on the principle of humanity. More ambitiously, it may even alter our understanding of the competing principle of military necessity in a way that gives greater weight to the principle of humanity.<sup>11</sup> Most ambitiously, some suggest that IHL should be seen as a subset of human rights law, which shares the latter’s core commitment to the intrinsic value of human life.<sup>12</sup>

By contrast, dissatisfaction with the traditional binary framework governing the use of force could lead to more expansive permissions for state use of force. One impetus for this is the view that a Non-International Armed Conflict (NIAC) should not be limited to hostilities within a single state, but may involve a “transnational” conflict between a state and non-state forces that operate in more than one state.<sup>13</sup> Others suggest creating a new hybrid category that draws on both law enforcement and armed conflict standards to provide authority more permissive than the former but more restrictive than the latter.<sup>14</sup> Finally, one critic proposes abandoning reliance altogether on ostensibly outmoded binary categories, in favor of engaging in contextual analysis that focuses on the underlying values at stake in each particular situation.<sup>15</sup> To varying degrees, these approaches may increase the prospect that states will be able to use force based on standards that are drawn at least in part from IHL more often than they do now. The consequence of the two trends that I have described thus may be that, even as war becomes more humane, it may become more widespread.

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9. See, e.g., ROSA BROOKS, *HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING* (2016); MONICA HAKIMI, *A Functional Approach to Targeting and Detention*, 110 MICH. L. REV. 1365 (2012).

10. Pearlstein, *supra* note 7, at 3.

11. See, e.g., NILS MELZER, INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES 77-83 (2009), <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

12. Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 183 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (“The general principle of respect for human dignity . . . is the very *raison d’être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law.”).

13. See, e.g., Geoffrey S. Corn & Eric Talbot Jensen, *Transnational Armed Conflict: A Principled Approach to the Regulation of Counter-Terror Combat Operations*, 42 ISR. L. REV. 46 (2012); Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

14. See BROOKS, *supra* note 9.

15. See HAKIMI, *supra* note 9, at 1388.

Brigadier General (Ret.) Kenneth Watkin has first-hand experience with both these trends in many years of service as a lawyer with the Canadian armed forces, culminating in his position as Judge Advocate General of the Canadian military. Watkin also has offered valuable reflections on these experiences over the years as a prolific scholar of international law. His rich and insightful recent book, *Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict*, is a notable contribution to the discussion of the implications of the trends that I have described. He argues that the twenty-first century approach to conflict must be “holistic” in nature.<sup>16</sup> That is, on the one hand it must acknowledge “the simultaneous application of humanitarian and human rights law,” and the greater influence of the latter in shaping perceptions of the legitimacy of violence.<sup>17</sup> On the other hand, it must appreciate that “the altered security environment of this century has witnessed a definite move away from looking at conflict itself as being uniquely conventional or unconventional,” as transnational non-state organized armed groups have emerged that do not resemble traditional armed forces.

Watkin notes that, even as theorists contend over the implications of blurred boundaries and the integrity of distinctive categories, commanders on the ground have no choice but to respond in flexible ways that incorporate principles from multiple bodies of law. “The theory of ‘exclusion,’” he says, “where each body of law is treated in isolation from the other, is simply inconsistent with the types of operational challenges faced by military commanders and the questions being asked of State legal advisors.”<sup>18</sup> This accounts for the emergence of the distinct field of operational law, which aims to provide guidance on how to “resolve the simultaneous application, interaction, and overlap of the various bodies of law.”<sup>19</sup>

Watkin’s book can be seen both as a work of operational law and a major scholarly treatment of the law governing the use of force. It provides detailed accounts of how situations arise on the ground that evade easy classification in terms of our existing conceptual and legal categories. These will provide vivid instruction for those not familiar with the reality of modern military operations. At the same time, it furnishes a valuable framework for analyzing the features of such operations that are relevant in assessing how force should be used in particular scenarios. Finally, Watkin offers a set of principles for both operational law and broader policy decisions to help navigate the complex terrain of modern security challenges.

I cannot hope here to do justice to all the ideas in this multi-layered book. In this review, I will first discuss the trends that Watkin regards as posing novel and

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16. KENNETH WATKIN, *FIGHTING AT THE LEGAL BOUNDARIES: CONTROLLING THE USE OF FORCE IN CONTEMPORARY CONFLICT* 573 (2016).

17. *Id.* at 574 n.20.

18. *Id.* at 574.

19. *Id.*; see, e.g., GEOFFREY S. CORN & RACHEL E. VAN LANDINGHAM, *U.S. MILITARY OPERATIONS LAW, POLICY AND PRACTICE* (2015); TERRY GILL & DIETER FLECK, *THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS* (2010).

difficult challenges for states accustomed to conceptualizing hostilities requiring the use of military force as having certain typical features. I will then discuss two of his ideas that are especially relevant to the question of how much the traditional categories of law enforcement guided by human rights principles and armed conflict governed by IHL should continue to frame our thinking about the use of force. The first idea is Watkin's suggestion that state forces should presumptively operate under law enforcement rules until this is insufficient to meet a threat, even in the course of an armed conflict. The second is his acceptance and elaboration of the view that we should determine the existence of a non-international armed conflict (NIAC) based on an analysis of a "totality of the circumstances" rather than the two current criteria.<sup>20</sup> This approach, he says, may lead to the designation of certain specific hostile engagements as armed conflicts of limited duration.

Watkin's first suggestion reflects the incorporation of human rights principles as a matter of policy even when more permissive rules on use of force are available. His second suggestion arguably reflects movement in the opposite direction: that some situations that we conventionally regard as subject to human rights principles should be temporarily governed by IHL during a period of intense engagements.

Despite Watkin's thorough description of the pressures that modern security threats place on our binary framework for evaluating force, his proposed approach still relies on the categories of law enforcement and armed conflict to guide analysis. Is this warranted? I will address this question by discussing Monica Hakimi's argument that the complex operational reality that Watkin describes should lead us for the most part to eschew using these two categories in judging the permissibility of uses of force.<sup>21</sup> Instead, Hakimi maintains, we should engage in case-by case contextual analysis based on a set of principles that are common to both categories.

Hakimi makes important and useful points in her provocative argument. I conclude, however, that these categories remain useful even in a world in which many threats and hostilities do not conform to the paradigmatic scenarios of either category. One reason is that human rights law is more flexible than many realize, and that it provides an important deontological constraint on any tendency to move too quickly to the consequentialist domain of IHL. By "consequentialist" I mean the view that the morality of an action should be evaluated according to the outcomes that it produces compared to other alternative courses of action.<sup>22</sup>

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20. Prior suggestions of the use of this test can be found in Laurie S. Blank & Geoffrey R. Corn, *Losing the Forest for the Trees: Syria, Law, and the Pragmatics of Conflict Recognition*, 46 VAND. J. TRANSNAT'L L. 693 (2013); *Prosecutor v. Boskoski*, Case No. IT-04-82-T 90, Judgment, ¶257 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008).

21. See Hakimi, *supra* note 9, at 1370.

22. JULIA DRIVER, *CONSEQUENTIALISM* 5 (2012). I do not distinguish at this point between a rights consequentialist approach for which the relevant outcomes are the net violation of rights and a more thoroughgoing consequentialism whose focus is not restricted to such outcomes. I discuss the difference *supra* in the text accompanying notes 291-296.

A second reason is that a case-by-case approach implicitly uses the deontological presumptions of human rights law as its frame of reference, thereby eliding the fact that at some point a consequentialist approach is unavoidable. When we reach that point, I argue, it is better explicitly to acknowledge it. Notwithstanding arguments in some quarters that the distinction between war and peace has become so blurred as to become meaningless, the distinction marks a moral Rubicon between two radically different moral universes. A better approach, I suggest, is Watkin's framework, which continues to rely on these two categories and their incommensurable moral perspectives, while adopting flexible policy presumptions that attempt to conform as much as possible to the presumptions of human rights law. This may mean that in many cases we navigate the Rubicon while attempting to avoid crossing it.

### I. THE CHALLENGES

In its simplest form, the paradigmatic scenario that informs the use of force under human rights law is the cop on the beat, while the scenario that informs IHL is World War II. Much of Watkin's book is devoted to exploring the ways in which many security threats that require the use of force do not squarely correspond to either scenario. He suggests that responding to these threats potentially may implicate the law governing state resort to force, IHL, international human rights law, international criminal law, and domestic law, including human rights law. The tendency to treat "these areas of law in an exclusionary fashion," he says, "presents considerable challenges for practitioners attempting to apply the law across the full range of conflict."<sup>23</sup> What is necessary, he argues, is an approach that seeks to integrate these bodies of law as circumstances demand.

While Watkin describes developments in recent years that have increased the need for such integration, he observes that there has always been some need for it even in what we might regard as conventional conflicts between states. Any wartime operation that involves occupation of territory, for instance, places an obligation on the occupying force to provide security for the local population. Thus, the Fourth Geneva Convention requires that an occupier maintain the penal laws of the occupied territory in place, and states that it is responsible for the "effective administration of justice." It also imposes a wide range of responsibilities to provide for the welfare of the local population, including the provision of various public services.

While IHL is the source of these responsibilities, the role of the occupier as the governing authority in the territory arguably subjects it to the human rights obligations that accompany that status.<sup>24</sup> Furthermore, human rights law can supplement IHL in cases in which more detailed guidance is necessary on the

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23. WATKIN, *supra* note 16, at 14.

24. Aeyal M. Gross, *Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?*, 18 EUR. J. INT'L L. 1, 8 (2007); Danio Campanelli, *The Law of Military Occupation Put to the Test of Human Rights Law*, 90 INT'L REV. RED CROSS 653 (2008).

responsibilities of humanity set forth in the latter body of law. In particular, the policing role played by the occupying forces requires reference to human rights law and law enforcement standards to determine the rules governing the use of force. Thus, Watkin notes, militaries often have needed simultaneously to draw on IHL and human rights law for guidance on the use of force during conditions of armed conflict, depending on whether their interaction is with combatants or innocent civilians and on the functions that they are performing. As I discuss further below, Watkin draws on the concept of territorial control to suggest that extraterritorial state human rights obligations may arise even in circumstances that do not formally constitute an occupation.

Watkin maintains that the need for greater integration of multiple bodies of law has become more urgent in light of how military operations and situations of conflict have evolved in recent years. Indeed, he argues that such integration is already occurring at the operational level even when it fails to occur at the strategic level. First, it is increasingly the case that “participation in war requires a capacity to perform conventional operations; conduct counterinsurgency operations, or otherwise fight guerilla wars; and assist in maintaining law and order in respect of a civilian population.”<sup>25</sup> Second, militaries are now commonly engaged outside of war in a “myriad of lower intensity operations such as counterinsurgency, counterterrorism, noncombat evacuation, international hostage rescue, and peace support operations.”<sup>26</sup> The result is that state forces now confront security threats across the continuum of violence that call for calibrated levels of force and rules of engagement (ROE) for which the current binary framework often may seem to provide limited guidance.

This complexity of the operational environment is captured in Marine Corps General Charles Krulak’s well-known concept of the “three-block war.”<sup>27</sup> This represents situations in which forces may be engaged on one block in traditional armed conflict, on a second block in peacekeeping, and on yet a third block in providing humanitarian assistance. One challenge for commanders is the need to conduct simultaneous operations over the span of these three “blocks” that require different standards for the use of force. A second challenge is that the security threats with which each operation contends are unlikely to remain static and confined to discrete blocks, but may morph into lesser or more violent threats that require corresponding adjustments to ROE. As Krulak puts it, armed forces “may be confronted by the entire spectrum of tactical challenges in the span of a few hours and within the space of three contiguous city blocks.”<sup>28</sup>

Watkin argues that the need for integration among legal regimes is especially urgent given the fact that hostilities between states and non-state groups are now more prevalent than conflicts between states. “In the twenty-first century,”

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25. WATKIN, *supra* note 16, at 8-9.

26. WATKIN, *supra* note 16, at 15.

27. Gen. Charles C. Krulak, *The Strategic Corporal: Leadership in the Three Block War*, MARINE CORPS GAZETTE (Jan. 1999), at 18, 20-21.

28. *Id.* at 20.



Watkin observes, “other States are no longer uniquely viewed as the most significant security threat. Instead, that threat is presented in the form of an exceptionally diverse set of non-State actors. . . .”<sup>29</sup> IHL contains a detailed set of regulations to govern force in conflicts between states, known as international armed conflict (IAC), but provides sparse guidance on those involving non-state groups, denominated as non-international armed conflict (NIAC).<sup>30</sup>

The main reason for the latter is that state signatories to IHL conventions generally assumed that NIACs would involve rebels challenging government authority. States preferred to treat such conflicts as involving the unlawful use of force by criminals who are subject to domestic law, rather than as matters of concern to the international community.<sup>31</sup> Thus, for instance, while the law relating to IACs distinguishes between and defines combatants and non-combatants, the law governing NIACs does not. This is because the term “combatant” designates someone who is an enemy soldier entitled to engage in violence as part of warfare. This is a status that states are reluctant to bestow on persons they regard essentially as outlaws who should be subject to criminal prosecution for the unlawful use of force.

The rise of transnational terrorism, however, and of insurgencies drawing support from sources in multiple states, challenge the notion that conflicts with non-state groups are purely internal matters subject to the law enforcement jurisdiction of a single state. Actors located in one state can pose a threat to several other states, and thus are not solely the concern of the territorial state. These other states may be less reluctant than the territorial state to declare that they are engaged in a NIAC with a transnational non-state armed group.<sup>32</sup> The growing prevalence of conflicts between states and non-state groups thus places increasing strain on the underdeveloped framework for regulating NIACs.

While adjustments within rules of engagement may help calibrate the use of force, the extent of those adjustments will be constrained by relatively restrictive law enforcement standards unless an engagement passes the threshold of constituting an armed conflict. With respect to hostilities with non-state armed groups, a commonly held view is that the criteria for this are that violence must rise to a certain level of intensity, and the non-state entity involved in it must have a reasonably integrated organizational structure that indicates its ability to engage in

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29. WATKIN, *supra* note 16, at 569.

30. Compare Additional Protocol I, *supra* note 8 (discussion of IAC), with Additional Protocol II to the Geneva Conventions, Jun. 8, 1977, 1125 U.N.T.S. 609, and Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Prisoners of War Convention] (discussion of NIAC).

31. As with the United States, they may be less reluctant to recognize a NIAC when the threat is posed from outside the state. See Geoffrey R. Corn, *Drone Warfare and the Erosion of Traditional Limits on War Powers*, in RESEARCH HANDBOOK ON REMOTE WARFARE 246 (Jens David Ohlin ed., 2017).

32. Notably, for instance, the United States. See Authorization for the Use of Military Force 115 Stat. 224, 107th Cong. (Sept. 18, 2001).

ongoing violence rather than a single attack.<sup>33</sup> In addition, some formulations provide that the violence must be “protracted” rather than consisting of isolated incidents.<sup>34</sup> Once these criteria are met, the law enforcement switch is turned off and the more permissive IHL switch is turned on. The consequences of determining that an armed conflict exists thus can be of critical importance for a commander and a political decision-maker.

This state of affairs can be problematic with respect to decisions about the appropriate level of force to use in responding to a threat. On the one hand, state officials who perceive the law enforcement template as restricting force based on the paradigm of police encounters with criminals may conclude that this template is inadequate to deal with the threat at hand. They thus may have an incentive to treat an engagement as an armed conflict in order to gain the expansive permissions under that regime. On the other hand, it may be difficult to satisfy the criteria for armed conflict if that paradigm is seen as requiring ongoing extended hostilities that involve non-state groups organized in a manner akin to state armed forces.

Another issue raised by the growth of transnational terrorism is whether a state that regards itself as involved in a NIAC is permitted to use force against its non-state adversary operating in another state.<sup>35</sup> The principle of sovereignty dictates that the territorial states from which such groups operate have the primary responsibility for addressing unlawful activity occurring within them under those states’ domestic law enforcement regimes. It requires that the threatened state obtain the consent of the territorial state to use force against the threat located in the latter. Non-state armed groups, however, may operate in effectively ungoverned or weakly governed states that may not be able to respond effectively to them. In addition, factions in these states may receive support from, or at least acquiesce in the presence of, non-state armed groups.

If consent is not forthcoming from such a state, does a threatened state that nonetheless uses force against non-state actors within the first state violate UN Charter Article 2(4)’s prohibition on the use of force against the territorial integrity of another state? Some observers believe so, and argue that this establishes an international armed conflict between the two states in which the intervening state is the aggressor.<sup>36</sup> Others contend that UN Charter Article 51 permits a state to use force in self-defense when doing so is necessary and proportionate.<sup>37</sup> Some states claim that if a territorial state is unwilling or unable to neutralize a

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33. Prosecutor v Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); INT’L L. ASS’N, FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW (2010).

34. See, e.g., Tadić, IT-94-1-I ¶ 70.

35. See NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS (2011).

36. See, e.g., Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 32, 73 (Elizabeth Wilmhurst ed., 2012).

37. See, e.g., Kenneth Anderson, *Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is A ‘Legal Geography of War’*, in FUTURE CHALLENGES IN NATIONAL SECURITY AND LAW 8-9 (Peter Berkowitz ed., 2011), [http://media.hoover.org/sites/default/files/documents/FutureChallenges\\_Anderson.pdf](http://media.hoover.org/sites/default/files/documents/FutureChallenges_Anderson.pdf);

threat emanating from its territory, it may be necessary in order to engage in effective self-defense for the threatened state to enter the other state to eliminate the threat.<sup>38</sup> The profoundly different ways in which the same conduct may be characterized testifies to the lack of consensus about this scenario. As Watkin argues, non-state threats “challenge not only the authority of States but also the very basis of the Westphalia system of governance” whose bedrock principle is the inviolability of state sovereignty.<sup>39</sup>

Even if entry into a territorial state is permissible, what body of law governs the intervening state’s use of force against the threatening non-state group? On one view, that state is simply performing the law enforcement function that the territorial state is unable to perform, which suggests that human rights law is the appropriate regulatory regime. On the other hand, if the threatened state is in a NIAC with a non-state group whose members are planning hostilities from another state, does that mean that the threatened state is entitled to use force under IHL in the territorial state?<sup>40</sup> The United States takes the position that it is in a global armed conflict against Al Qaeda and associated forces, which provides authority to use IHL against combatants wherever they are located.<sup>41</sup> Others contest this claim, and argue, for instance, that IHL governs only in locations in which the criteria for a NIAC are met.<sup>42</sup>

With regard to the last issue, is it appropriate that the criterion for an IAC is simply any use of military force by one state against another, regardless of its intensity, while the criteria for a NIAC are more demanding?<sup>43</sup> On the one hand, as Watkin observes, “a high threshold for the existence of an armed conflict favors the application of human rights–based law enforcement” as the governing legal regime.<sup>44</sup> This can be a useful impediment to the temptation to use more force than is necessary, especially in hostilities in which it often is difficult to distinguish combatants from innocent civilians. At the same time, Watkin suggests,

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Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT’L L. & POL’Y 237, 238–44 (2010).

38. Ashley Deeks, “Unwilling or Unable”: *Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT’L L. 483, 495 (2012).

39. WATKIN, *supra* note 16, at 569.

40. See, e.g., Eric Holder, Attorney General, Address at Northwestern Law School (Mar. 5, 2012), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law>; John O. Brennan, Assistant to the President for Homeland Sec. and Counterterrorism, Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>; Harold Hongju Koh, Legal Advisor, U.S. State Dept., Keynote Address: The Obama Administration and International Law (Mar. 25, 2010), in 104, AM. SOC’Y INT’L L. PROC. 207, 218–20 (2010).

41. See, e.g., Koh, *supra* note 40, at 218.

42. See, e.g., Mary Ellen O’Connell, *When Is A War Not A War? The Myth of the Global War on Terror*, 12 INT’L L. STUDENTS ASS’N J. INT’L & COMP. L. 535, 537 (2005).

43. On criteria for IAC, see INT’L COMM. OF THE RED CROSS, COMMENTARY I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD ¶ 218 (Knut Dörmann et al. eds., 2016) (“Armed conflicts in the sense of Article 2(1) are those which oppose High Contracting Parties (i.e. States) and occur when one or more States have recourse to armed force against another State, regardless of the reasons for or the intensity of the confrontation.”).

44. WATKIN, *supra* note 16, at 365.

the threshold cannot be insensitive to the nature of the particular threat that security forces confront. “An essential task for the international community and State security forces,” he says, “is to establish a threshold for conflict that matches the reality of the violence being faced on the ground.”<sup>45</sup> Furthermore, even if each tactical use of force is governed by IHL, should the overall operation be constrained by the more restrictive necessity and proportionality requirements of the *jus ad bellum*?<sup>46</sup>

Finally, organization of non-state groups along transnational lines may mean that they are able to accumulate and deploy resources against a territorial state that overwhelm the capacity of conventional law enforcement operations by that state to respond effectively to them. While this state may prefer not to claim that it is engaged in an armed conflict, some engagements with non-state forces may require the use of military-grade weapons and tactics, which fits uneasily at best within the law enforcement framework. Should these incidents be regarded as hostilities within a NIAC, even if the territorial state does not treat them as such?

The fluidity of modern security threats and violent engagements with them thus create challenges in responding in ways that are effective but constrained with respect to taking human life. Human rights norms expressed in law enforcement principles generally emphasize the goal of protecting individuals from relatively urgent threats, and therefore place strict limits on the use of deadly force. Such threats arise from individuals, or from groups of them, on a scale that presents a danger to identified persons, but not to the capacity of the state to perform its basic functions.

By contrast, IHL reflects the need to respond to collective threats that are substantial enough to pose such a threat to the state, and thereby to the population that the state is responsible for protecting. This widens the lens to permit the use of force on a much larger scale. It also authorizes the use of force against persons based on their membership in a collective rather than their responsibility for posing an identifiable threat to particular individuals.<sup>47</sup> While human rights law applies at all times during any period of violence, at some point the nature of that violence is deemed to reach a threshold that results in a dramatically different perspective on the interests at stake and the force that can be used to protect them. Hostile engagements may occur on a continuum of violence that call for gradually calibrated state responses, but at some point the law posits a radical discontinuity in the force that it permits as it shifts from human rights law to IHL.

Watkin argues that there is a pressing need to “situate the solution for countering contemporary non-State actor threats in an analytical framework that more broadly encompasses conventional conflict, irregular warfare, and criminal

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45. WATKIN, *supra* note 16, at 365.

46. See WATKIN, *supra* note 16, at 55-89.

47. See Geoffrey R. Corn, Laurie R. Blank, Chris Jenks & Eric Talbot Jensen, *Belligerent Targeting and the Invalidity of a Least Harmful Means Rule*, 89 INT'L L. STUD. 536 (2013) (elaborating on the distinction between individualized and collective threats).

activity. . . .”<sup>48</sup> He suggests several ways to incorporate more flexibility on the operational level than strict adherence to the reigning dichotomy would provide. His suggestions are based on both his appreciation of how commanders have sought to integrate different bodies of law more smoothly, as well as his own analysis of how the values at stake might best be accommodated. They also reflect a strong commitment to human rights values in their emphasis on use of the minimal level of force necessary to deal effectively with a threat.

I will focus on two important suggestions by Watkin that illuminate significant issues regarding the relationship between human rights law and IHL, and whether these categories should continue to guide our thinking on state use of force. The first is his recommendation that the default approach to responding to violent threats by non-state groups should be the use of force under a law enforcement framework whenever this is realistically feasible. The second is that the criteria for a NIAC should not be limited to the current two criteria that are widely cited, but should depend on an assessment of the “totality of the circumstances.”<sup>49</sup> Among other things, this creates the possibility that discrete short-term violent engagements may be regarded as limited duration armed conflicts regulated by IHL standards for the period of the engagement.

## II. FIGHTING AT THE LEGAL BOUNDARIES

### A. *Human Rights Law as the Default Regime*

In dealing with violence by transnational non-state groups, Watkin argues that “the response by the targeted State should become expected to be human rights–based when feasible, and [when] it can be applied to effectively deal with the threat.”<sup>50</sup> It should be “incumbent upon a state to explain why it does not follow this approach.” This “police primacy” policy,<sup>51</sup> drawn from counterinsurgency policy, applies both to attacks within a state by a non-state group, as well as attacks by such groups outside that state on a state’s citizens or facilities. Every effort should be made to address a threat within the limits imposed by law enforcement standards, Watkin says, with a reluctance to declare the existence of an armed conflict that triggers IHL rules.

Perhaps more controversially in some quarters, police primacy also means that, even when state forces are engaged in an armed conflict, they should seek whenever reasonably possible to use force in conformity with the human rights principles reflected in the law enforcement regulatory regime. In other words, states should not hesitate in armed conflict to rely on the expansive permissions of IHL when doing so is required to fight effectively. They also, however, should be alert to opportunities to use lesser levels of force when that will not compromise their objectives in the conflict.

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48. WATKIN, *supra* note 16, at 570.

49. WATKIN, *supra* note 16, at 375.

50. WATKIN, *supra* note 16, at 606.

51. WATKIN, *supra* note 16, at 224.

Watkin sets forth a decision tree that identifies the key junctures at which decisions must be made that affect the rules that govern the use of force.<sup>52</sup> First, if an attack is not deemed to be part of an armed conflict, the state is required to follow law enforcement standards. Second, even if an armed conflict exists, a state must follow these standards with respect to any civilians not directly participating in hostilities. Third, within an armed conflict a state should adopt a policy to default to a law enforcement approach in responding to a threat within its territory, guided by domestic human rights law that must be broadly consistent with international human rights norms. The presumption to follow this approach may be rebutted if operations conducted under law enforcement standards are ineffective in dealing with the threat. Fourth – also within armed conflict – in responding to attacks on the state outside its territory when the territorial state is unwilling or unable to address the threat, a state as a matter of policy should follow international human rights law as expressed in law enforcement standards. The law enforcement approach can be abandoned, however, if it is “not operationally feasible or effective.”<sup>53</sup>

Watkin describes examples of ways in which the policy to give priority to law enforcement norms whenever possible can be implemented. First, a police primacy approach can be used to counter transnational insurgency and terrorism as military forces are asked to support other security forces or take on responsibility themselves for the provision of security. Second, national command can impose restrictions on the use of force through rules of engagement or policy based on unit and individual self-defense principles or law enforcement norms. Finally, human rights norms may be used to limit the use of force in targeted killing operations in armed conflict, such as the Obama administration’s imposition of restrictions on direct action outside of “areas of active hostilities” that approximate human rights standards.<sup>54</sup> The overall approach thus is based on “defaulting to the application of human rights–based law enforcement when it proves an effective means of dealing with the threat. Such a default should be the normative standard to which all States are expected to act.”<sup>55</sup>

“There is much to be gained,” Watkin observes, “in reinforcing the role of policing in terms of avoiding the death and destruction that can result from armed conflict.”<sup>56</sup> In addition, perceptions of the legitimacy of uses of force appear increasingly to be sensitive to civilian death and injury, with expectations in some cases such as the use of airpower that “such casualties could or at least should be reduced to almost zero. In other words, according to a human rights law standard.”<sup>57</sup> Furthermore, counterinsurgency campaigns that seek to gain support from the local population can undermine that aim if harm to civilians

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52. WATKIN, *supra* note 16, at 617.

53. WATKIN, *supra* note 16, at 617.

54. *See infra* p. 190 for a fuller discussion of this policy.

55. WATKIN, *supra* note 16, at 605.

56. WATKIN, *supra* note 16, at 590.

57. WATKIN, *supra* note 16, at 602.

calls into question the ability and willingness of the local government to protect its citizens. Finally, arresting and prosecuting insurgents and terrorists as criminals can impose a stigma that undermines any perceptions of the legitimacy of their activity.

### *B. The Flexibility of Human Rights Law*

Watkin's support for a default law enforcement approach rests on the belief that this approach "allows the use of force on a much broader scale than is often acknowledged."<sup>58</sup> A common perception is that law enforcement standards permit the use of force only to avert an imminent threat to oneself or to others. Such a formulation, Watkin notes, "leaves little scope for the use of deadly force, if necessary, to maintain order in society."<sup>59</sup> Article 2 of the European Convention on Human Rights (ECHR), however, states that it is not a violation of the right to life when force that is no more than is absolutely necessary is used not only in defense of anyone from unlawful violence, but also "in order to effect a lawful arrest or to prevent the escape of a person lawfully detained," as well as "for the purpose of quelling a riot or insurrection."<sup>60</sup>

Similarly, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provide that firearms may be used "in self-defence or defence of others against the imminent threat of death or serious injury." In addition, however, they permit the use of firearms to "prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, and to prevent such a person from escaping."<sup>61</sup> Both the ECHR and the UN Principles make clear that the use of deadly force in all instances must be a last resort after the failure of non-forcible attempts to resolve the situation, and that there must be no lesser level of force that is sufficient to achieve law enforcement aims. Nonetheless, they authorize force beyond situations that involve an imminent threat.

The permission to use force in situations beyond immediate self-defense or defense of others reflects cases in which, as Seumas Miller has put it, "The police are morally and legally entitled – and perhaps morally and legally obliged – to use lethal force in order to uphold the law."<sup>62</sup> A person who has killed another person and is fleeing from the police, for instance, does not pose an imminent threat to anyone. Indeed, he would seem the very opposite of such a threat. For the police to allow him to escape, however, would represent a violation of their duty to enforce the law against murder. It also would allow someone to remain at

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58. WATKIN, *supra* note 16, at 458.

59. WATKIN, *supra* note 16, at 459.

60. European Convention on Human Rights art. 2(2)(a)-(c), Nov. 4, 1950, E.T.S. No. 005 [hereinafter ECHR].

61. Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, *U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, ¶ 9, U.N. Doc. A/CONF.144/28/Rev.1 (Sept. 7, 1990) [hereinafter *U.N. Basic Principles*].

62. SEUMAS MILLER, SHOOTING TO KILL: THE ETHICS OF POLICE AND MILITARY USE OF LETHAL FORCE 123 (2016).

large who represents a “*standing* threat” of grave harm to the public.<sup>63</sup> Similarly, police who have a dangerous suspect cornered in a building who is attempting to leave the country could avoid a threat to themselves and to residents of the jurisdiction by simply getting in their police cars and returning to the station. To do so, however, “would be an abrogation of their legal and moral duty.”<sup>64</sup>

Watkin describes this authority to use force beyond the goal of self-defense or defense of others as the permission to use force for the purpose of “mission accomplishment.”<sup>65</sup> The term is drawn from military rules of engagement, which authorize force in self-defense and defense of others, as well as in order to accomplish the mission of a particular operation. In broad terms, the mission in the law enforcement setting is “to make others desist from illegal activity” and to enforce “compliance with the law.”<sup>66</sup> Thus, “[t]he person being arrested or escaping only has to present a ‘danger’ rather than actually be using or imminently about to use force in order for deadly force to be justified.”<sup>67</sup> This does not provide authority to use force in a manner as expansive as is permitted under IHL, but it does authorize force “to protect broader society” not simply to protect individuals.<sup>68</sup> At the same time, it still requires that someone be individually responsible for posing a threat.

What about operations that would result in the unintended but foreseeable death of innocent bystanders? Can a law enforcement framework encompass uses of force that result in such harm? Or is this permissible only under the IHL regime? European Court of Human Rights jurisprudence in cases arising out of hostilities between Russia and Chechen rebels suggests that law enforcement operations that result in the deaths of innocent persons may be permissible under human rights law in some circumstances. Russia never declared these hostilities to constitute armed conflicts, despite significant casualties and damage on both sides. The European Court of Human Rights therefore felt compelled to review Russia’s use of force in operations against the rebels under human rights law and law enforcement standards.

In *Finogenov v. Russia*, the Court reviewed an operation conducted by Russian security forces to rescue 900 hostages held by 40 Chechen rebels in a theater in Moscow.<sup>69</sup> The operation involved pumping an ostensibly non-lethal, narcotic gas based on derivatives of phentanyl into the main auditorium of the theater through the building’s ventilation system, followed by an assault by security forces. While most of the hostages were rescued and all the terrorists killed, 129 of the hostages died from effects of the gas.

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63. *Id.* at 127.

64. *Id.* at 126.

65. WATKIN, *supra* note 16, at 458.

66. WATKIN, *supra* note 16, at 459.

67. WATKIN, *supra* note 16, at 460.

68. WATKIN, *supra* note 16, at 460.

69. *Finogenov v. Russia*, 2011-VI Eur. Ct. H.R. 365.



A suit by relatives of hostages who had died in the incident, and hostages who had been injured in it, claimed that Russia used excessive force in the operation in violation of the right to life under Article 2 of the ECHR. Russia acknowledged that “when considering various options for intervention the authorities had considered possible losses amongst the hostages, but these had been unavoidable in the circumstances.”<sup>70</sup> It said that it was impossible to calculate the dosage of the gas more precisely than to base it on “the average person’s resistance to it,” because of differences in age, physical condition, and medical condition of all 900 hostages.<sup>71</sup>

The Court held that, even though the gas was believed not to be lethal, it was “at best, potentially dangerous for an ordinary person, and potentially fatal for a weakened person.”<sup>72</sup> It therefore was “a primary cause of the death of a large number of the victims,” which meant that it implicated the right to life under the European Convention.<sup>73</sup> The Court accepted that the government was pursuing legitimate aims under Article 2, and said that “[t]he question is whether those aims could have been attained by other, less drastic, means.”<sup>74</sup>

The Court stated that it had authority in certain circumstances to depart from the standard of absolute necessity contained in Article 2 when application of that standard “may be simply impossible where certain aspects of the situation lie far beyond the Court’s expertise and where the authorities had to act under tremendous time pressure and where their control of the situation was minimal.”<sup>75</sup> In this case, the Court said:

The lives of several hundred hostages were at stake, the terrorists were heavily armed, well-trained and devoted to their cause and, with regard to the military aspect of the storming, no specific preliminary measures could have been taken. The hostage-taking came as a surprise for the authorities . . . so the military preparations for the storming had to be made very quickly and in full secrecy. It should be noted that the authorities were not in control of the situation inside the building. In such a situation the Court accepts that difficult and agonising decisions had to be made by the domestic authorities. It is prepared to grant them a margin of appreciation, at least in so far as the military and technical aspects of the situation are concerned, even if now, with hindsight, some of the decisions taken by the authorities may appear open to doubt.<sup>76</sup>

The Court concluded that “the use of the gas was capable of facilitating the liberation of the hostages and reducing the likelihood of explosion, even if it did not

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70. *Id.* at 398.

71. *Id.*

72. *Id.* at 401.

73. *Id.*

74. *Id.* at 405.

75. *Id.* at 403.

76. *Id.* at 404.

remove that risk completely,”<sup>77</sup> and that its use during the storming “was not in the circumstances a disproportionate measure, and, as such, did not breach Article 2 of the Convention.”<sup>78</sup> The Court did hold, however, that Russia had violated Article 2 of the Convention in planning the operation by failing to provide for sufficient medical care for persons who foreseeably would need it as a result of the operation.<sup>79</sup>

This case illustrates the flexibility of human rights law in evaluating uses of force that significantly depart from the paradigmatic law enforcement setting. The court said that it might be impossible to meet the standard of “absolute necessity,” but it effectively concluded that use of the gas was a reasonable last resort under the circumstances. In this respect, it fit within the law enforcement standard of necessity.

In *Kerimova v. Russia*, the Court was presented with a claim under Article 2 by relatives of persons who had been killed in a Russian aerial assault on a town held by Chechen insurgents.<sup>80</sup> The Court noted that “no martial law or state of emergency had ever been declared in the Chechen Republic, and no derogation had been made under Article 15 of the Convention. The attacks in question therefore have to be examined against a normal legal background.”<sup>81</sup> The Court said that it was aware of “the difficult situation in the Chechen Republic at the material time, which called for exceptional measures on the part of the State to suppress the illegal armed insurgency. Those measures could presumably comprise the deployment of armed forces equipped with combat weapons, including military aircraft.”<sup>82</sup> They also, said the Court, “could entail, as a regrettable but unavoidable consequence, human casualties.”<sup>83</sup> Thus, the Court declared, “the obligation to protect the right to life must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.”<sup>84</sup>

The Court acknowledged that “the town had been occupied by a considerable number of well-equipped extremists, armed with a range of large-yield weaponry, who were in fact conducting large-scale military actions against the federal forces, including attacks on federal aircraft, and had turned the town into a fortress.”<sup>85</sup> It accepted Russia’s claim that assaulting the town with ground troops would have involved “unjustified casualties,”<sup>86</sup> and therefore that “Russian authorities had no choice other than to carry out aerial strikes in order to be able

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77. *Id.* at 409.

78. *Id.*

79. *Id.* at 412-18.

80. *Kerimova v. Russia*, App. Nos. 17170/04, 20792/04, 22448/04, 23360/04, 5681/05, and 5684/05, Eur. Ct. H.R. (Sept. 15, 2011), <https://hudoc.echr.coe.int/eng#%7B%22tabview%22:%5B%22document%22%5D%22itemid%22:%5B%22001-104662%22%5D%7D>.

81. *Id.* ¶ 253.

82. *Id.* ¶ 246.

83. *Id.*

84. *Id.*

85. *Id.* ¶ 247.

86. *Id.*

to take over Urus-Martan, and that their actions were in pursuit of one or more of the aims set out in paragraph 2 (a) and (c) of Article 2 of the Convention.”<sup>87</sup>

The Court concluded, however, that Russia had failed to take sufficient steps “to avoid or minimise, to the greatest extent possible, the risk of a loss of life, both for persons at whom the measures were directed and for civilians.”<sup>88</sup> The use of high-explosive fragmentation bombs, said the Court, “in a populated area is impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society.”<sup>89</sup> Although Russia was “faced with a situation where the population of the town was held hostage by a large group of well-equipped and well-trained fighters,” the Court said, “the authorities’ primary aim should have been to protect lives from unlawful violence.”<sup>90</sup> The indiscriminate weapons used in the attack were incompatible with this aim.

As a law enforcement mission, the goal of the Russian military in the situation described in *Kerimova* was to capture or, if need be, kill, the insurgents in order to protect the lives of the civilians in the town, subject to requirements of necessity and proportionality. While the Court held that the use of force in that case violated the right to life, the case is notable for accepting that law enforcement standards are sufficiently flexible to permit in some cases the use of weapons that are more characteristic of engagements during armed conflict than police operations, which foreseeably could result in loss of innocent life. This formulation is not as permissive as under IHL, which would permit civilian casualties as long as they are not “excessive,” because the legitimate state aim is not to subdue the enemy but to protect endangered residents. Nonetheless, it suggests the possibility of more expansive levels of force than many might expect under human rights law.

The flexibility of human rights law in permitting the use of force in a range of situations makes Watkin comfortable that a default law enforcement approach in many cases will provide sufficient authority to respond to threats from non-state armed groups, while minimizing the loss of life. Indeed, he says, if human rights law were inflexible and were seen to restrict authority to use force too stringently to meet security threats, it would create incentives for states to characterize hostilities as armed conflicts, which would authorize far more extensive violence.<sup>91</sup>

Watkin notes that as a practical matter the response to most domestic attacks by non-state actors will be guided by law enforcement standards, since first responders are likely to be police. Furthermore, it can be difficult to know in the early stages of an attack who is perpetrating it and how extensive it is. This is the

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87. *Id.* ¶ 248.

88. *Id.*

89. *Id.* ¶ 253.

90. *Id.*

91. WATKIN, *supra* note 16, at 616. At the same time, he regards much of the European Court of Human Rights jurisprudence as applying human rights law in situations in which it would be more realistic to acknowledge that the parties were engaged in armed conflict. See WATKIN, *supra* note 16, at 552-59.

case even if an incident ultimately may be treated as an attack that is part of an armed conflict.<sup>92</sup> Improved counterterrorism capabilities on the part of police departments, including the availability of specially trained units, enhance the likelihood that using force under these standards can be effective in dealing with the threat.<sup>93</sup> Furthermore, arrest is likely to be a feasible alternative to lethal force when responding to domestic attacks, at least in jurisdictions with a reasonably well functioning legal system.

Watkin argues that the presumption of a law enforcement response should also apply to threats posed by large-scale criminal organizations capable of engaging in substantial violence, whether those threats emanate from inside or outside a state. He notes that these non-state actors now pose significant threats of violence in many parts of the world, and engage periodically in large-scale battles with state forces. The intensity of the violence these groups can inflict and their degree of organization are sufficient in some cases to support a characterization of ongoing hostilities with them as armed conflicts.<sup>94</sup>

Watkin maintains, however, that states and the international community should be reluctant “to cross the threshold into armed conflict in respect of what is essentially economically driven violence.”<sup>95</sup> As he puts it, “The adoption of a ‘war’ paradigm . . . should only be considered when it is clear that what is being threatened is the ability of the State to govern and more than a policing response is required for the State to succeed.”<sup>96</sup> This approach reflects the view that the expansive permissions to use force under IHL should be available only to respond to violence so serious that it threatens the state itself. Combatting crime, even at high levels of violence, is fundamentally about protecting the lives of individual citizens, which calls for more restrictive uses of force.

### C. *Human Rights Law in Armed Conflict*

Perhaps Watkin’s most notable suggestion is that states involved in armed conflicts with non-state groups should use force under human rights and law enforcement standards where this is feasible. “[T]he categorization of the situation as an armed conflict,” he says, “does not demand a conduct of hostilities [IHL] approach. The manner of the response remains in the discretion of the State. . . .”<sup>97</sup> This could mean, for instance, in some cases seeking to capture rather than kill non-state combatants or civilians directly participating in hostilities, attempting to avoid any civilian casualties when conducting an attack, and adopting rules of

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92. WATKIN, *supra* note 16, at 597.

93. WATKIN, *supra* note 16, at 598.

94. See, e.g., Julie Lambin, *Mexico: Armed Gang Violence Sliding Into Armed Conflict?*, WAR REP. (Geneva Acad. of Int’l Humanitarian Law and Human Rights, Geneva, Switz.), Mar. 2018, at 83 (“In 2017, Mexico’s security forces were arguably engaged in non-international armed conflicts with at least the Sinaloa Cartel and the Jalisco Cartel New Generation. It is important to note that this classification is controversial.”).

95. WATKIN, *supra* note 16, at 590.

96. WATKIN, *supra* note 16, at 590.

97. WATKIN, *supra* note 16, at 583.

engagement more restrictive than those under IHL. It could also mean tempering the use of force in ways that incorporate human rights concerns even when law enforcement standards are not formally adopted. Thus, for instance, a state might significantly reduce the number of civilian casualties permitted in an attack to a level below what would be deemed permissible under IHL proportionality calculations. In all these cases, a state reserves the right to use force under IHL rules but adopts a policy that requires less force in certain circumstances.

One example of this approach is President Obama's 2013 Presidential Policy Guidance (PPG) on direct action against terrorist targets outside the United States.<sup>98</sup> The U.S. maintains as a legal matter that it is in a global armed conflict with Al Qaeda and associated forces that permits it to use force under IHL rules wherever members of these groups may be engaged in planning hostilities against the U.S. The PPG, however, provided that the use of lethal force against a target located in areas "outside of active hostilities" is permissible only when "the individual's activities pose a continuing imminent threat to U.S. persons,"<sup>99</sup> and capture of the person "is not feasible and no other reasonable alternatives exist to effectively address the threat."<sup>100</sup> In addition, there must be "near certainty" of the identity and location of the target, and "near certainty that the action can be taken without injuring or killing non-combatants."<sup>101</sup>

The PPG thus imposed requirements for the use of force that draw significantly on human rights concepts. While a person regarded as a non-state combatant may be targeted under IHL at any time on the basis of status regardless of his or her behavior at the time, the PPG made targeting dependent on a person's conduct. While IHL permits use of force against a permissible target as a first resort, the PPG required that capture first must be considered as an option and be deemed infeasible before force can be used. Finally, IHL permits civilian casualties as long as they are not "excessive," while the PPG established the standard of no civilian casualties. While the PPG emphasized that the determination of which areas are inside or outside of active hostilities is not based on the criteria for an armed conflict, the policy reflects the position that operations in locations where law enforcement operations may be feasible should attempt to proceed on that basis if possible even when authority to act under IHL is available.

In 2017 the Trump administration adopted what has been termed Principles, Standards, and Procedures (PSP) that supersede the PPG.<sup>102</sup> While the text of PSP has not been released, the document reportedly preserves the distinction between areas of active hostilities and those outside them, and adopts a

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98. 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://fas.org/irp/offdocs/ppd/ppg-procedures.pdf>.

99. *Id.* at 11.

100. *Id.* at 1.

101. *Id.*

102. Charlie Savage & Eric Schmitt, *Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids*, N.Y. TIMES. (Sept. 21, 2017), <https://www.nytimes.com/2017/09/21/us/politics/trump-drone-strikes-commando-raids-rules.html>.

requirement of reasonable certainty that no civilians will be harmed.<sup>103</sup> The PSP purportedly revise the criterion for direct action against individuals outside areas of active hostilities so that they need not pose a continuing, imminent threat. Instead, targets may be persons who play key roles within terrorist networks whose removal can disrupt those networks.<sup>104</sup> This standard is more expansive than human rights law. Maintaining the goal of avoiding civilian casualties, however, and the requirement that capture be infeasible, effectively preserves important elements of human rights law. In this respect, the principles first enunciated in the PPG reflect the use of policy to limit the use of force compared to what a state asserts it has legal authority to do.<sup>105</sup>

Watkin notes that the policy of police primacy emerged from counterinsurgency campaigns, the success of which depends significantly on convincing local populations that the government is capable of providing security for the population and takes seriously the obligation to protect the lives of innocent civilians. Thus, for instance, General McChrystal, commander of the NATO International Security Assistance Force (ISAF) in Afghanistan, issued a directive in July 2009 that placed stringent limits on the ability of ground forces to call in close air support (CAS) for operations involving residential compounds.<sup>106</sup> These limits reflected policy constraints that voluntarily restricted the use of force more than IHL would ordinarily permit in the armed conflict in Afghanistan. The Directive said that “commanders must weigh the gain of using CAS against the cost of civilian casualties, which in the long run make mission success more difficult and turn the Afghan people against us.”<sup>107</sup> It also provided that ISAF forces could not enter or fire upon, or fire into a mosque or any religious or historical site except in self-defense. “[W]e must respect and protect the population from coercion and violence,” the Directive said, “and operate in a manner which will win their support.”<sup>108</sup>

The Directive generated some criticism that it placed ISAF forces at unreasonable risk, and was modified by McChrystal’s successor. This reflects the fact that the feasibility of particular voluntary restrictions on the use of force may be a subject of debate, and that situations may evolve in ways that make them less or

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103. Michael J. Adams & Ryan Goodman, “Reasonable Certainty” vs. “Near Certainty” in *Military Targeting—What the Law Requires*, JUST SECURITY (Feb. 15, 2018), <https://www.justsecurity.org/52343/reasonable-certainty-vs-near-certainty-military-targeting-what-law-requires/>.

104. Luke Hartig, *Trump’s New Drone Strike Policy: What’s Any Different? Why It Matters*, JUST SECURITY (Sept. 22, 2017), <https://www.justsecurity.org/45227/trumps-drone-strike-policy-different-matters/>.

105. For discussions of the PSP and international law, see Adriana Edmeades Jones, *Implications of Trump’s New Drone Policy for Countries Assisting the US*, JUST SECURITY (Nov. 13, 2017), <https://www.justsecurity.org/47011/implications-trumps-drone-policy-countries-assisting-u-s/>; Monica Hakimi, *Three Half-Truths on U.S. Lethal Operations and Policy Constraints*, JUST SECURITY (Sept. 25, 2017), <https://www.justsecurity.org/45315/half-truths-u-s-lethal-operations-policy-constraints/>.

106. N. Atl. Treaty Org. [NATO], *International Security Assistance Force Tactical Directive* (July 6, 2009), [https://www.nato.int/isaf/docu/official\\_texts/Tactical\\_Directive\\_090706.pdf](https://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf).

107. *Id.* at \*2.

108. *Id.* at \*1.

more acceptable. Nonetheless, that debate may be over where on a continuum rules of engagement should be located, rather than over whether the use of force should be based on human rights law or IHL.

Watkin suggests that the rules of engagement in the second battle of Fallujah in Iraq in November 2004 reflected a hybrid approach that eschewed full IHL permissions but permitted greater force than a strict human rights approach would allow.<sup>109</sup> By that point, the insurgency by both Sunni and Shi'ite forces had resulted in hostilities significant enough to constitute a NIAC governed by IHL, and Abu Musab al-Zarqawi had affiliated with Al Qaeda so that his group became Al Qaeda in Iraq in October of that year. US Marines were given the order to re-take Fallujah from insurgents, who were heavily armed with military-grade weapons and had erected substantial defensive fortifications around the town. Civilians were given the opportunity to leave the town before the assault, which most of them did.

Authorization to use force under IHL based simply on the status of persons as enemy combatants is provided by rules of engagement in which certain forces are "declared hostile." The rules for the assault on Fallujah, however, stated, "no forces are declared hostile."<sup>110</sup> Instead, Watkin says, the rules provided authority to use force mainly in self-defense. This permits force against someone who engages in "hostile action" or who exhibits "hostile intent." Such a focus on conduct rather than status resembles law enforcement standards for the use of force. At the same time, however, forces were authorized to treat anyone who was carrying arms as demonstrating hostile intent, even if they were not engaged in the act of firing or preparing to fire.<sup>111</sup> Permission to shoot persons on sight who carried weapons was a departure from policing rules that require more specific evidence of a likely attack before lethal force can be used.

The Fallujah ROE thus were more restrictive than IHL but more expansive than what law enforcement standards would authorize. Watkin suggests that the restrictions were based on two considerations. The first is the difficulty in identifying non-state actors who are combatants who can be shot on sight based on their status. For this reason, the rules incorporated a standard based on conduct. Second, the battle took place in an urban setting in the context of a counterinsurgency campaign, which resulted in an effort to limit civilian casualties and damage as much as possible. At the same time, as Watkin notes, the ROE were sufficient to "sustain the use of tank main gunfire, mortar fire, artillery, and close air support in combat that resulted in the death of an estimated 1,200 insurgents."<sup>112</sup> Notwithstanding ROE based on self-defense, "the U.S. military was engaged in an armed conflict against determined insurgent forces."<sup>113</sup>

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109. WATKIN, *supra* note 16, at 476-79.

110. WATKIN, *supra* note 16, at 476.

111. WATKIN, *supra* note 16, at 476.

112. WATKIN, *supra* note 16, at 477.

113. WATKIN, *supra* note 16, at 477.

Watkin emphasizes that the primacy of a law enforcement approach is dependent on its feasibility in various settings. Several factors are relevant to the determination of feasibility, including:

[T]he capabilities of State security forces; geography, including distances involved; the organization and potential scale of violence threatened by the terrorist or insurgent group; the degree of control that can be exercised by the affected State security forces over the immediate area of operations; and the risks to the soldiers involved and to civilians living in proximity to such action.<sup>114</sup>

Watkin regards effective control over territory as an especially important consideration in determining if state forces are in a position to follow policing rather than armed conflict rules on the use of force. As he observes, “[t]he conduct of physical surveillance, tracking of suspects, and the carrying out of arrests is often directly tied to the ability to control the territory where such operations are to be conducted.”<sup>115</sup> If there is not such control, the risks in proceeding according to law enforcement standards may be significant enough that “a more robust response is required.”<sup>116</sup>

It is worth emphasizing that Watkin’s approach to the potential incorporation of human rights standards into armed conflict operations as a matter of policy differs from the admonition that forces should use a least-restrictive means (LRM) standard in using force against enemy combatants in armed conflict. One source that expresses this approach is the International Committee of the Red Cross (ICRC) 2009 *Interpretive Guidance on Direct Participation in Hostilities*.<sup>117</sup> Section IX of that document declares, “The kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.”<sup>118</sup> This principle draws inspiration from former ICRC Vice-President Jean Pictet’s suggestion that “[i]f we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil.”<sup>119</sup>

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114. WATKIN, *supra* note 16, at 606-07.

115. WATKIN, *supra* note 16, at 550.

116. WATKIN, *supra* note 16, at 550.

117. NILS MELZER, INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009), <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

118. *Id.* at 77.

119. *Id.* at 82 n.221 (quoting JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 75 (1985)).



The *Guidance* describes this requirement as imposed by the IHL principles of necessity and humanity, rather than human rights law,<sup>120</sup> but it seems nonetheless to be informed by recent greater attention to human rights concerns in armed conflict. The ICRC acknowledges that it is unlikely that this requirement will be feasible in conventional battlefield settings, and that it is most likely to apply “where a party to the conflict exercises effective territorial control, most notably in occupied territories and non-international armed conflicts.”<sup>121</sup>

Ryan Goodman has drawn on the ICRC *Guidance* to argue on behalf of the LRM principle, but suggests that there is “no substantial precedent” for limiting it to situations in which forces exercise effective control over a territory.<sup>122</sup> He grounds the principle instead primarily on the protection provided to combatants who are *hors de combat*. Under IHL, he says, “the legal right to use armed force is limited to the objective of rendering individuals *hors de combat* (taken out of battle) or, in the collective sense, to defeating enemy forces.”<sup>123</sup> Goodman says, “In some circumstances, it is thus unlawful to use lethal force when a fighter could clearly be rendered *hors de combat* just as easily – and without endangering the attacking party – by injury or capture rather than death. This rule is embodied in the prohibition on superfluous injury and unnecessary suffering.”<sup>124</sup> Furthermore, he notes, Article 41(2)(a) of Additional Protocol I (AP I) to the Geneva Conventions provides that a person is *hors de combat* when “he is in the power of an adverse Party.”<sup>125</sup> This can occur in circumstances short of surrender when combatants “no longer have the means to defend themselves” and are “at the mercy of their adversary.”<sup>126</sup>

Watkin maintains that, notwithstanding any suggestion that the LRM requirement does not depend upon control over the area of military operations, the existence of such control in fact is an essential prerequisite for the applicability of the obligation. “[C]ontrol and risk (to both soldiers and civilians),” he says, “are intimately intertwined.”<sup>127</sup> Thus, decisions to capture rather than kill are dependent on “security forces being able to exert significant levels of physical control over the immediate area where the incident occurs.”<sup>128</sup> This control need not be absolute, he argues, which reflects his view that commanders will need to make all-things-considered assessments of the feasibility of following a law enforcement rather than armed conflict approach to the use of force in particular situations.

The need for such intensely contextual determinations is why Watkin is more comfortable suggesting that proceeding on the basis of law enforcement

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120. *Id.* at 82 n.222.

121. *Id.* at 81.

122. Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUR. J. INT'L L. 819, 827 (2013).

123. *Id.* at 822.

124. *Id.*

125. *Id.* at 832.

126. *Id.* at 836.

127. WATKIN, *supra* note 16, at 223.

128. WATKIN, *supra* note 16, at 223.

standards regarding the use of force against combatants in armed conflict should be a matter of policy rather than a legal obligation.<sup>129</sup> Furthermore, he regards the scenario depicted by the LRM approach as having much less practical significance than the risk posed to civilians by military operations in situations in which they are difficult to distinguish from combatants.<sup>130</sup> His proposal to default to a law enforcement approach even in armed conflict thus might be characterized as an effort to give full effect to Article 57(1) of AP I's requirement that "constant care shall be taken to spare the civilian population, civilians and civilian objects."<sup>131</sup> That directive is contained in the Article devoted to "Precautions in Attack," which explicitly provides for contextual judgments about what precautions are feasible in light of the need to achieve military objectives. A policy of defaulting to law enforcement standards whenever circumstances permit is a way of operationalizing this obligation in a way that can structure the exercise of discretion. By establishing a presumption, it signals a preferred approach; by making that presumption rebuttable, it provides flexibility to adjust based on conditions on the ground.

#### D. Extraterritorial Human Rights Obligations

Finally, a notable aspect of Watkin's police primacy approach is that a state that conducts self-defense operations in another state may owe basic human rights obligations to the residents of that territory.<sup>132</sup> This is the case even if the state cannot be characterized as conducting an occupation of the territory for purposes of Geneva Convention IV. Particularly when a state conducts extraterritorial operations based on the inability of another state to address a threat to the former, "the threatened State could be viewed as operating in the place of the territorial State."<sup>133</sup> While such operations would not trigger all the obligations of governance, a state should be required to "carry out a role involving a special trust toward uninvolved civilians of the enemy of any other State during cross-border deployments against non-State actors."<sup>134</sup> Watkin counsels that the nature of a state's obligations will depend upon what it is feasible to do under the circumstances, but at a minimum "the value attributed to human life must be the same regardless of whether civilians live inside or outside a threatened State."<sup>135</sup> Watkin suggests that, "[b]ased on human rights norms," it is immaterial whether this obligation arises from human rights law or IHL.<sup>136</sup>

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129. For an extended critique of the least restrictive means test, see Corn, Blank, Jenks & Jensen, *supra* note 47.

130. WATKIN, *supra* note 16, at 232.

131. Additional Protocol I, *supra* note 8, art. 57.

132. This is consistent with the focus on the extent to which IHL reflects what might be called "civilian protection law" with respect to its provisions relating to civilians. See Maj. Richard M. Whitaker, *Civilian Protection Law in Military Operations: An Essay*, ARMY LAWYER, Nov. 1996, at 3, 7.

133. WATKIN, *supra* note 16, at 608.

134. WATKIN, *supra* note 16, at 609.

135. WATKIN, *supra* note 16, at 609.

136. WATKIN, *supra* note 16, at 610.

Watkin says that “in looking at the concept of control, care must be taken to avoid extreme interpretations of the law that suggest human rights jurisdiction extends to the outermost range of a weapon system . . . The problem is that these approaches appear divorced from the reality of attempting to operationalize the rights involved.”<sup>137</sup> Presumably, he would say that a state has obligations under human rights law when it exercises a certain degree of control of an area, even for the purposes of a single cross-border operation rather than a more extended occupation, but when it does not its human rights obligations flow from IHL.

### *E. Conclusion*

Watkin’s emphasis on sensitivity to operational reality thus leads him to argue that states’ use of force should be guided as a default matter by law enforcement standards reflecting human rights norms, unless circumstances make this infeasible. This is the case even if an operation occurs in the course of an armed conflict. Such an approach counsels restricting the use of force whenever possible. At the same time, his focus on the operational level means that determining the rules that regulate the use of force in a given instance “must include an assessment of whether a policing approach will realistically enable the threatened State to counter the violence posed by the non-State actor.”<sup>138</sup>

Watkin does not explicitly distinguish between IACs and NIACs in proposing his police primacy approach. His emphasis on contextual considerations suggests that the identity of the participants in hostilities is less significant than the nature of those hostilities. At the same time, NIACs are more likely to involve differentiated situations in which reliance on law enforcement standards sometimes may be feasible. Furthermore, Watkin devotes considerable attention to describing the challenges posed by the involvement of non-state actors in hostilities, which may indicate that his main focus is on NIACs.

This focus on NIACs is reflected in Watkin’s suggestion that the test for when such a conflict exists should move beyond what many currently regard as two criteria to a broader, more flexible, standard that takes into account “the totality of the circumstances.”<sup>139</sup> As the next section discusses, he argues that this approach in some cases may lead to the characterization of a relatively brief but intensive engagement as a limited-duration armed conflict.

## III. IDENTIFYING NON-INTERNATIONAL ARMED CONFLICTS

### *A. Totality of the Circumstances*

While Watkin argues for a police primacy approach, he makes clear that “a realistic professional assessment” must occur on an ongoing basis to determine “whether the restrictions arising from the adoption of a law enforcement

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137. WATKIN, *supra* note 16, at 230.

138. WATKIN, *supra* note 16, at 367.

139. WATKIN, *supra* note 16, at 363-69.

approach are too operationally limiting.”<sup>140</sup> When this is the case within an ongoing armed conflict, there should be consideration whether it is appropriate to revert to use of force governed by IHL rules. When this occurs outside of an armed conflict, Watkin suggests that there should be consideration at an appropriate level of authority whether circumstances warrant characterization of hostilities as having escalated to the level of an armed conflict.

Watkin argues that what many commonly regard as the current test for determining the existence of a NIAC fails to take into account all factors relevant to such a determination. That putative test focuses on the intensity of the violence and whether the armed groups have a sufficient level of organization to be regarded as parties to a conflict.<sup>141</sup> Language in *Prosecutor v. Tadic* also suggests that the violence be “protracted,” although it is unclear exactly how much weight should be given to this consideration.<sup>142</sup> Watkin maintains that “[t]here is a danger that by focusing too much on the actions and organization of a non-State actor armed group,” the conventional test fails to consider the level of force that is necessary for a state to respond effectively to a threat.<sup>143</sup> Drawing on Geoff Corn’s concept of a “transnational armed conflict” between a state and a transnational non-state group, he argues that the means that the state regards as necessary to engage effectively in hostilities should also be an important consideration in an analysis that considers the “totality of the circumstances.”<sup>144</sup>

Watkin’s critique is consistent with Laurie Blank and Geoff Corn’s argument that the factors articulated in *Tadic* have unjustifiably come to be regarded as a two-part test in which each element must be independently satisfied.<sup>145</sup> Blank and Corn point out, for instance, that an early report by the UN Commission of Inquiry for Syria relied on this approach in its conclusion that the situation in Syria did not constitute an armed conflict. “While the commission is gravely concerned that the violence in certain areas may have reached the requisite level of intensity,” the Commission said, “it was unable to verify that the Free Syrian Army (FSA), local groups identifying themselves as such or other anti-Government armed groups

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140. WATKIN, *supra* note 16, at 594.

141. See Int’l Law Ass’n, *Final Report on the Meaning of Armed Conflict in International Law*, at 2 (2010).

142. *Prosecutor v Tadić*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). As Noam Lubell describes the uncertainty, “There is some debate on how to interpret the notion of “protracted,” as discussed initially in *Tadić* and revisited in *Haradinaj*, including whether “protracted” would always require a lengthy time period (which could be problematic if extremely high levels of violence break out early on), or whether it should be read as indicative of intensity, with the latter being the key criterion.” Noam Lubell, *Fragmented Wars: Multi-Territorial Military Operations Against Armed Groups*, 93 INT’L L. STUD. 215, 242 n.77 (2017).

143. WATKIN, *supra* note 16, at 376.

144. WATKIN, *supra* note 16, at 376. For Corn’s formulation, see Geoffrey Corn, *Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VAND. J. TRANSNAT’L L. 295 (2007).

145. Blank & Corn, *supra* note 20, at 696.

had reached the necessary level of organization.”<sup>146</sup>

This approach, Blank and Corn argue, is inconsistent with the intent of Common Article 3 to mitigate as much as possible the suffering of persons uninvolved in hostilities between state and non-state armed groups. The 1952 ICRC Commentary to this Article listed a few factors relevant to whether a NIAC exists, but then said, “Does this mean that Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfil any of the above conditions (which are not obligatory and are only mentioned as an indication)? We do not subscribe to this view. We think, on the contrary, that the Article should be applied as widely as possible.”<sup>147</sup> Blank and Corn believe that a “totality of the circumstances” approach is more faithful to this purpose of Common Article 3. Finally, reliance on only two criteria is inconsistent with Article 1 of Protocol II to the Geneva Conventions. While intended to apply only to NIACs of a certain intensity, this provision sets forth several factors that determine whether a NIAC exists that is subject to that Protocol.<sup>148</sup>

In light of these considerations, Watkin suggests that the criteria for a NIAC should include:

[T]he degree of organization of the group (hierarchical, horizontal, cellular, or “hybrid”); how that group conducts its operations (e.g., the tactics used); the weapons used in an attack, including explosives such as grenades, IEDs, rocket-propelled grenades, suicide belts; and the type of State security forces, weapons, tactics, and so forth reasonably required to defeat the threat (e.g., missiles, mortars, heavy weapons, airpower—meaning that State armed forces have to engage in “combat”).<sup>149</sup>

### B. Discrete Engagements as NIAC

Watkin says that taking account of the totality of the circumstances may lead to the conclusion that some engagements with non-state groups should be regarded as constituting intense but brief periods of armed conflict. The Inter-American Human Rights Commission decision in *Abella v. Argentina* provides some support for this position. The Court in that case found that a thirty-hour battle between soldiers and an armed group attacking a military barracks constituted an armed conflict because of the military-grade weapons that were used by both sides and the intensity of the violence.<sup>150</sup> Watkin argues that this reflects a

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146. U.N. Gen. Assembly, Human Rights Council, Rep. of the Independent International Commission of Inquiry on the Syrian Arab Republic, ¶13, U.N. Doc. A/HRC/19/69 (Feb. 22, 2012).

147. INT’L COMM. OF THE RED CROSS, COMMENTARY I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 50 (Jean S. Pictet ed., 1952).

148. Additional Protocol II, *supra* note 30.

149. WATKIN, *supra* note 16, at 583.

150. *Abella v. Argentina*, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97, OEA/Ser.L/V/II.98 doc. 6 rev. ¶¶ 155-56 (1997), <http://www.cidh.oas.org/annualrep/97eng/Argentina11137.htm>.

realistic assessment of whether a law enforcement approach “will realistically enable the threatened State to counter the violence posed by the non-State actor.”<sup>151</sup> He notes:

[I]t is difficult to see how the violence associated with the *Abella v. Argentina* case (i.e., 30 hours), the 2000 Sierra Leone hostage rescue (4 hours), the hijacked aircraft September 11, 2001, attacks (21 to 45 minutes), the November 26–28, 2008, Mumbai attack (60 hours), the September 11, 2012, attack on the U.S. diplomatic facilities in Benghazi (i.e., 13 hours), the September 21–24, 2013, Kenyan Westgate Mall attack (i.e., 80 hours), or the 2015 Paris assaults (3 hours) does not factually take on the attributes of an armed conflict and can only be dealt with by means of human rights–based law enforcement. . . . Whether a “one off” short term conflict, or the extension of an existing one from outside the borders of a State the nature of violence is the same.<sup>152</sup>

“Most of these intense attacks,” notes Watkin, “involved non-State actor use of weapons and levels of violence ordinarily associated with warfare.”<sup>153</sup> For this reason, “an armed conflict can be in existence even during limited self-defense operations.”<sup>154</sup> The ICRC Updated Commentaries for Geneva Conventions I & II, published after Watkin’s book, accepts this view, stating that “hostilities of only a brief duration may still reach the intensity level of a non-international armed conflict if, in a particular case, there are other indicators of hostilities of a sufficient intensity to require and justify such an assessment.”<sup>155</sup>

Watkin acknowledges potential concern that consideration of the level of force that a state considers necessary may provide too much discretion to determine the nature of the hostilities in which it is engaged, with the attendant temptation to “overreact in its application of combat power.”<sup>156</sup> He emphasizes that “there must be a rational connection between the security situation . . . and the methods used before force can be justified as an armed conflict response.”<sup>157</sup> An approach that takes this consideration into account, he suggests, “would be enhanced by a clearer indication of what level of threat or circumstances justifies a State response with combat forces applying a conduct of hostilities approach.”<sup>158</sup>

Watkin also admits that recognition of what he describes as a “lower conflict threshold” is inconsistent with interpretations of international law that aim to limit the violence connected with State cross-border use of force as much as

151. WATKIN, *supra* note 16, at 367.

152. WATKIN, *supra* note 16, at 367-69.

153. WATKIN, *supra* note 16, at 369.

154. WATKIN, *supra* note 16, at 417.

155. INT’L COMM. OF THE RED CROSS, COMMENTARY I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 159 (Knut Dörmann et al. eds., 2016)

156. WATKIN, *supra* note 16, at 355.

157. WATKIN, *supra* note 16, at 599.

158. WATKIN, *supra* note 16, at 355.

possible.<sup>159</sup> He argues, however, that contemporary violence is already requiring changes in “traditional views of the law, such as States not being permitted to exercise self-defense against non-State actors not attributable to a State. . . .”<sup>160</sup> The goal, he says, should be to match standards for the use of force to operational reality.

In some cases, this may mean responding to even elevated levels of violence within a law enforcement framework that provides some measure of flexibility. In other cases, it may mean using that framework even when there is authority to operate under IHL standards. In still other cases, it will require acknowledging as a practical matter that armed conflict rules are necessary in order to respond to non-state violence in a discrete engagement, even if that engagement is not part of a protracted course of hostilities. Moving beyond reliance on two discrete criteria in identifying a NIAC, he argues, will provide more realistic guidance while still giving states the option to restrict their use of force in response to a threat.

### C. Assessment

Watkin’s support for a totality of the circumstances approach in identifying a NIAC has some appeal as consistent with the underlying purpose of Common Article 3. Indeed, Blank and Corn observe that in elaborating on indicia of intensity and organization, courts have suggested a broad range of considerations that are relevant in identifying a NIAC.<sup>161</sup> In the ICTY decision in *Prosecutor v. Haradinaj*, for instance, the court noted:

Trial Chambers have relied on indicative factors relevant for assessing the ‘intensity’ criterion, none of which are, in themselves, essential to establish that the criterion is satisfied. These indicative factors include the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones.<sup>162</sup>

These are useful considerations to take into account. Blank and Corn nonetheless suggest that, “notwithstanding the relevance of any one or more of the various subfactors the cases have identified, the effect of a factor-based analysis for intensity and organization has only served to solidify the idea of a strict elements test for the definition of armed conflict.”<sup>163</sup>

One important concern about a totality of the circumstances test, however, is whether its open-ended nature sufficiently constrains state decision-making.

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159. WATKIN, *supra* note 16, at 369.

160. WATKIN, *supra* note 16, at 370.

161. Blank & Corn, *supra* note 20, at 722.

162. *Prosecutor v. Haradinaj*, Case No. IT-04-84, Judgment, ¶ 49 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008).

163. Blank & Corn, *supra* note 20, at 724.

Recall that Watkin advises that IHL should apply only “when it is clear that what is being threatened is the ability of the State to govern.”<sup>164</sup> To say the least, states have been known to decide very quickly that various forms of civil unrest and violence pose a threat to the state that must be met with substantial levels of force. Reliance on an all-things-considered standard for determining the existence of a NIAC could make it more difficult to challenge this conclusion than use of the two-part test that Watkin and others criticize. The criteria of intensity and level of organization arguably provide a more structured framework for analysis and debate, whose terms still require the type of flexible interpretation that the court conducted in *Haradinaj*. In this way, the requirement to make a persuasive claim with respect to these specific criteria may better constrain state tendencies to expand the use of force in the face of challenges to authority.

One might also question whether a totality of the circumstances standard should be used to characterize discrete engagements as NIACs. As Watkin has noted, jurisprudence suggests that human rights law provides considerable flexibility for security forces to adjust their use of force to substantial intense levels of violence. After all, the hostilities between Russia and Chechen rebels as an empirical matter constituted armed conflicts under any definition of the term, even if Russia never acknowledged them as such. The European Court of Human Rights nonetheless applied human rights law to those conflicts in a way that provided relatively expansive permissions to use force that included, for instance, the use of military weapons and aerial bombing. The Court also acknowledged that in such operations civilian casualties might be unavoidable and justified.

The Court did conclude in cases such as *Finogenov*, *Kerimova*, and *Isayeva* that Russia had not taken sufficient precautions to minimize the loss of civilian lives to satisfy its obligation under the ECHR. Is it necessary to make it easier to declare an armed conflict if human rights law has the capability to permit state forces to deal effectively with security threats on this scale while imposing reasonable limits on the use of force?

As Watkin notes, however, notwithstanding the flexibility of human rights law, its criteria of necessity and proportionality are fundamentally different from those of IHL. Necessity under human rights law requires that force be used only as a last resort in response to a threat posed by a specific individual, while IHL necessity requires simply that force be used to achieve a military advantage. Human rights law thus would entail application of the least-restrictive means test described above, which mandates capture of combatants instead of the use of lethal force when this option is feasible. A traditional understanding of IHL would not include this requirement.

Furthermore, human rights proportionality requires that the harm caused by the use of force be proportionate to the harm that this force seeks to prevent. In other words, the state should use no more force than is necessary. IHL proportionality, by contrast, requires a determination of whether civilian harms are excessive in

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164. WATKIN, *supra* note 16, at 590.



comparison to the military advantage that the use of force is meant to obtain. As Watkin notes, that principle “does not deal with the proportionality of a response in relation to the threat unless objectively the attacks may cause unnecessary suffering or superfluous injury.”<sup>165</sup> During armed conflict, security forces “may use an overwhelming, indeed disproportionate response against a lawful target.”<sup>166</sup> Thus, “human rights law and humanitarian law give fundamentally different answers to the question of when state agents can use lethal force.”<sup>167</sup> Put differently, human rights law proportionality aims to protect the deliberate object of state violence, while IHL proportionality seeks to protect innocent victims from excessive unintended harm.

Watkin illustrates the difference in his analysis of the European Court of Human Rights decision in *Isayeva v. Russia II*, which involved Russia’s use of aerial attacks, tanks, and rocket-launchers against Chechen rebels entrenched in Katyr-Yurt, a town of about 25,000 persons.<sup>168</sup> The Court held that Russia had violated the ECHR right to life because of its “massive use of indiscriminate weapons.”<sup>169</sup> Watkin notes that the Court used language that resembles the IHL principle of precaution in its reference to Russia’s failure “to take all feasible precautions in the choice of means and methods” in order to minimize loss of civilian life.<sup>170</sup> As he points out, however, the Court defined its task as to determine whether the force that was used in the attack was “no more than absolutely necessary for achieving the declared purpose” under the ECHR.<sup>171</sup> The Court described that purpose in this way: “Even when faced with a situation where, as the Government submit, the population of the village had been held hostage by a large group of well-equipped and well-trained fighters, the primary aim of the operation should be to protect lives from unlawful violence.”<sup>172</sup> The purpose of the operation thus was to protect individual lives, not to protect the state.

Had the rebels, for instance, begun vacating the town, Russia arguably could use only the level of force necessary to ensure that they did not pose a threat to the town’s residents – not necessarily the level of force necessary to defeat the rebels. By contrast, the aim of using force in armed conflict is to protect the state. Had the situation been characterized in this way, Russia could have attacked the fleeing rebels, and could have caused civilian deaths while doing so, as long as the number of such deaths was not excessive compared to the value of defeating the rebels. It might be possible to analogize fleeing rebels to a fleeing violent felon in the sense that each represents an ongoing threat if allowed to escape. The basis for treating the latter person as dangerous, however, is his or her prior

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165. WATKIN, *supra* note 16, at 554.

166. WATKIN, *supra* note 16, at 554.

167. Hathaway et al., *supra* note 5, at 1888.

168. *Isayeva v. Russia*, App. No. 57950/00, Eur. Ct. H.R. (Feb. 24, 2005).

169. *Id.* ¶ 191.

170. WATKIN, *supra* note 16, at 554. The passage to which Watkin refers is at ¶176 in the Court’s opinion.

171. *Isayeva*, App. No. 57950/00 ¶ 181.

172. *Id.* ¶191.

individual behavior. By contrast, treating all retreating rebels as dangerous would rest on their membership in a collective rather than on what each individual has specifically done. This is more akin to the status-based liability to force under IHL than liability based on individual responsibility that characterizes human rights law.

Thus, as Watkin puts it, “the adherence to human rights standards suggests a much more restrictive approach toward controlling State action during what is clearly an armed conflict.”<sup>173</sup> Of course, in this situation, the application of these standards was a result of Russia’s refusal to treat hostilities as constituting an armed conflict, rather than an overly stringent threshold for finding the existence of such a conflict. Nonetheless, Watkin’s concern is that a failure in some circumstances to consider the totality of the circumstances in assessing whether an armed conflict exists will result in a poor fit between the force necessary to respond effectively to a threat and the law that governs the use of force.

Watkin is concerned not only that human rights law may be too restrictive in some circumstances, but that it may become more expansive than it should if it is consistently applied to what for all intents and purposes are armed conflicts. “In order to apply human rights law to govern the use of force in armed conflict,” he says, “[a] court will become increasingly driven to adopt humanitarian law standards.”<sup>174</sup>

He notes, for example, that a UK operation to rescue hostages from a non-state armed gang in Sierra Leone in 2000 involved “the air insertion of a Special Forces squadron, a Parachute Regiment company, support from helicopter gunships, and indirect mortar fire . . . which anticipate[d] and result[ed] in an extensive firefight against an organized armed group armed with weapons of war.”<sup>175</sup> Any attempt to characterize that engagement as a law enforcement operation, Watkin says, strains credibility. It also risks diluting the protections of human rights law in order to accommodate state interests that are distinctive to armed conflict, which are not easily analogized to the paradigm of the cop on the beat. This is a point that I will address in more detail below in discussing whether we should continue to rely on the categories of human rights law and IHL to guide our judgments about the use of force.

In sum, Watkin argues for the opportunity to apply criteria for an armed conflict to specific incidents that more faithfully reflect operational realities in the use of force. He regards one benefit of this as avoiding the possibility that the use of law enforcement standards will not unduly restrict the ability to respond to threats that require significantly more force than that regulatory regime contemplates. A second benefit is that a more realistic test for identifying an armed

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173. See also Blank & Corn, *supra* note 20, at 699 (“Human rights law—the exclusive source of international legal regulation applicable in the absence of an armed conflict—simply does not contemplate massive uses of military power and therefore does not provide an effective regulatory framework for such use.”).

174. WATKIN, *supra* note 16, at 556.

175. WATKIN, *supra* note 16, at 577.

conflict can help preserve the integrity of human rights law by avoiding the dilution of its protections and basic commitments.

It is certainly true that human rights law proceeds from different premises than IHL. The aim of the state in the former is to protect individual lives, while the latter is to protect the state by defeating an enemy. Most of the situations that Watkin suggests could be characterized as limited duration armed conflicts, however, would seem to be ones in which extensive use of force would be authorized by law enforcement as self-defense and defense of others, as well as what Watkin describes as the principle of law enforcement “mission accomplishment.” They would also seem to be cases in which the state could make a declaration of a temporary period of emergency without the need to declare an armed conflict. Indeed, a derogation might not even be necessary under the European Convention in light of Article 2’s provision that an arbitrary deprivation of life does not occur if no more force than is absolutely necessary is used “for the purpose of quelling a riot or insurrection.”<sup>176</sup>

In *Abella v. Argentina*, for instance, the use of military-grade force would be justified in self-defense against attackers who were using such weapons to storm the military barracks. Self-defense also would justify the use of a substantial amount of force in responding to the use of fire from automatic weapons, mortars, and rocket-propelled grenades in the attack on the U.S. consulate in Benghazi. The attacks in Mumbai, on the Westgate Mall in Nairobi, and in Paris in November 2015 all involved sophisticated operations using military-grade weapons that would justify the use of intense force in response as measures in self-defense and defense of others, as well as measures akin to those aimed at quelling serious violent disorder or insurrection.

The Sierra Leone and Entebbe hostage rescue missions represent instances in which significant force could be necessary in order to accomplish the mission of rescuing the hostages.<sup>177</sup> As Watkin notes, for instance, non-combatant evacuations may evolve such that “an elevated level of threat is posed by blocking organized armed groups. In such situations a more proactive use of force than simply acting in self-defense may be required to carry out the evacuation of the nationals. That authority would have to be found in mission accomplishment ROE.”<sup>178</sup> Human rights law could authorize a substantial level of force in these cases, but it would not, for instance, authorize Israeli rescue forces to seek out and bomb Ugandan military bases in the Entebbe operation if this were not necessary to free the hostages at the airport.

The 9/11 airplane hijacking attacks present a more complicated case. Human rights law would certainly authorize whatever force was necessary to subdue the hijackers, and likely would accept that any deaths of innocent persons that

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176. ECHR, *supra* note 60, art. 2(2).

177. Watkin regards the hostilities at Entebbe as an IAC because of the engagement between Israeli and Ugandan forces. WATKIN, *supra* note 16, at 408-09.

178. WATKIN, *supra* note 16, at 463.

occurred during that operation would be justified. It is a more difficult question whether it would have permitted U.S. forces intentionally to destroy a hijacked plane in the air. It may be that it would be necessary to invoke IHL in order to engage in such an operation. I discuss this issue in more detail below when I describe the German Federal Constitutional Court reviewing German legislation that authorized such destruction.<sup>179</sup> In any event, while the scenario is a difficult one, those presented in the other situations are far more common. As I have described, in each of these cases human rights law likely would authorize the amount of force necessary to address the threat, while avoiding the expansive permissions provided by IHL.

Aside from the potential of human rights law to accommodate an elevated level of force in a discrete engagement, there may be reason to limit armed conflicts to hostilities that are ongoing in at least some sense. This need not mean that there must be a succession of battles as in a conventional war; periodic ongoing eruptions of violence may be sufficient in some cases. There should, however, be an understanding that an engagement in some way is part of a larger set of hostilities. What we think of as “peacetime” is punctuated by intermittent outbursts of violence, often intense in nature. The ability to characterize each of these as individual armed conflicts may create too much temptation for a state to use them as the occasion for using military force.

One might argue that the ability to designate temporary engagements as armed conflict is important not simply to provide more expansive permissions to use force, but to use IHL to provide individuals with protections against egregious misuses of force.<sup>180</sup> Blank and Corn articulate this view in their argument that the process of determining whether a NIAC exists should take into account the nature of the state’s use of force. This is especially important, they argue, in order to identify situations in which dissident groups may be vulnerable to state use of massive military force in order to repress opposition. As they note:

[W]hat history seems to demonstrate repeatedly is that states almost always tend to err on the side of aggressiveness when they feel threatened by dissident movements. This is unsurprising. A state seeking to preserve its warrant will almost always perceive even a nascent and poorly organized armed opposition movement as a critical national security challenge. From an operational and tactical perspective, it is often precisely at this point in the threat evolution that a massive and heavy-handed combat response will be perceived as decisive.<sup>181</sup>

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179. See *supra* text accompanying notes 279-95.

180. Adil Haque relies on this concern to argue that the criteria for a NIAC should be essentially the same as the minimal criteria for an international armed conflict. See Adil Ahmad Haque, *Triggers and Thresholds of Non-International Armed Conflict*, JUST SECURITY (Sept. 29, 2016), <https://www.justsecurity.org/33222/triggers-thresholds-non-international-armed-conflict/>.

181. Blank & Corn, *supra* note 20, at 738.

They suggest that in many parts of the world human rights law often is less likely to be effective than IHL in holding state actors to account, such as by international criminal prosecution.<sup>182</sup> Applied to the temporary engagement context, this would suggest that recognizing a limited duration armed conflict could serve to inhibit the state from using excessive levels of force against opposition groups in a particular engagement.

Blank and Corn acknowledge that an important concern about an expansive application of Common Article 3 is that recognizing a NIAC triggers not only protections but permissions with respect to the use of force.<sup>183</sup> In particular, there is the risk of authorizing “the premature and unjustified use of [IHL] powers by a state to address an internal crisis.”<sup>184</sup> They suggest, however, that the temptation for states to “unleash the full force and effect of their military capabilities to respond to nascent internal opposition threats” exists regardless of whether hostilities are characterized as a NIAC. The greater risk therefore is leaving persons unprotected from such levels of force. While we may aspire to a world in which human rights law provides background protections for persons across the world, the reality is that significant gaps exist.

It could be true that triggering IHL will provide protection that otherwise would be unavailable, although, as Deborah Pearlstein has pointed out, it is not clear why a state uninterested in complying with human rights law would be any more concerned about complying with IHL.<sup>185</sup> In any event, the scenario that Blank and Corn have in mind, such as Assad’s Syria, is not the type of setting with which Watkin is concerned. His examples involve democratic states that are responding to violence in situations in which there is more reason to believe that human rights law as expressed in law enforcement standards can provide meaningful but flexible constraints on the use of force. There is also more reason to believe that in these situations states will be sensitive to which body of law is deemed to apply to their use of force.

If recognizing an armed conflict is not necessary in such cases to provide adequate protection against the abusive use of force, we should think carefully about whether we want to grant the expansive permissions to use force that IHL provides. This suggests that perhaps one consideration in determining if hostilities constitute an armed conflict, including engagements of limited duration, should be whether such a designation is likely to be the only reasonable vehicle for providing protection against brutal uses of force. This would be consistent with Common Article 3’s desire to provide expansive protection, but would

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182. Blank & Corn, *supra* note 20, at 699-700

183. Blank & Corn, *supra* note 20, at 712.

184. Blank & Corn, *supra* note 20, at 713; *see also* Deborah Pearlstein, *The NIAC Threshold*, OPINIO JURIS (Apr. 10, 2016), <http://opiniojuris.org/2016/10/04/the-niac-threshold/>; Jonathan Horowitz, *Laws of War: Humanitarian Stallion or Trojan Horse?*, JUST SECURITY (Nov. 3, 2016), <https://www.justsecurity.org/34128/laws-war-humanitarian-stallion-trojan-horse/>; Jonathan Horowitz, *Letter to the Editor: Response to Human Rights in Armed Conflict, Part I*, JUST SECURITY (Nov. 23, 2016), <https://www.justsecurity.org/34846/letter-editor-response-human-rights-armed-conflict-part/>.

185. Pearlstein, *supra* note 7.

acknowledge that at least in some parts of the world human rights law provides protections that obviate the need to trigger IHL.

This leaves Watkin's second concern about a demanding test for a NIAC, which is that accommodating the use of force within a law enforcement framework might dilute the integrity of human rights law. That is a more complex question that I will address in the next section. That section will examine Monica Hakimi's suggestion that, in light of the hybrid nature of many current security threats, judgments about targeting and detention for the most part should not focus on whether activity falls into the category of law enforcement or armed conflict. Instead it should be based on case-by-case contextual analysis.

#### IV. CATEGORY AND CONTINUUM IN THE USE OF FORCE

##### *A. Use of Force and the "Domain Method"*

As I have described, Watkin argues for an approach based on the view that "contemporary warfare can be most effectively regulated by a more integrated application of all the various bodies of law that impact on armed conflict."<sup>186</sup> While theorists tend to treat these bodies of law as distinct and exclusive, the reality on the operational level is more fluid and dynamic. It requires responding to a wide range of gradually differentiated threats, rather than to situations that clearly fall within one of two conceptual categories.

If this is the case, should it lead us to rethink the value of assessing the use of force in terms of a binary framework? Does it make sense for an incremental shift in the nature of a violent threat to lead to radically different authority to use force? Is this an artifact of an historical period whose underlying assumptions no longer hold? If our binary framework provides a template that does not readily map on to a far more complex practical reality, should we abandon it in favor of a more flexible analytical approach? These questions raise fundamental issues about state power to use force that I discuss in this section. I will suggest that human rights law and IHL share certain commitments that may allow them to be harmoniously aligned in some, perhaps many, instances. With respect to taking life, however, they represent basic yet incommensurable ways of looking at state authority and responsibility that ultimately cannot be fully reconciled within a single analytical framework.

One way to think about Watkin's observations on the current operational reality of violent threats and the use of force in response to them is that they lie on a continuum. The Oxford English Dictionary defines a continuum as "a continuous sequence in which adjacent elements are not perceptibly different from each other, but the extremes are quite distinct."<sup>187</sup> John Lane Bell says that "to be continuous is to constitute an unbroken or uninterrupted whole, like the ocean or the

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186. WATKIN, *supra* note 16, at 15.

187. *Continuum*, OXFORD ENGLISH DICTIONARY (2018), <https://en.oxforddictionaries.com/definition/continuum>.

sky. A continuous entity – a continuum – has no ‘gaps.’”<sup>188</sup> Bell notes, “Opposed to continuity is discreteness: to be discrete is to be separated, like the scattered pebbles on a beach or the leaves on a tree. Continuity connotes unity; discreteness, plurality.”<sup>189</sup>

Experience by its nature is continuous, so it seems wrong to suggest that violent threats once were discrete but now are continuous. A better way to think about Watkin’s point is that violence previously seemed more readily conceptualized in terms of categories that were more discrete and distinctive than is now the case. Categories are a way of organizing our understanding of experience in terms of clusters that have what we might call, borrowing Wittgenstein’s term, “family resemblances.”<sup>190</sup> Together, they constitute “a possibly exhaustive set of classes among which all things might be distributed.”<sup>191</sup>

Thus, we might express Watkin’s point by saying that the categories of law enforcement and armed conflict seemed at one point to encompass family resemblances in the use of force that clustered around two paradigmatic scenarios. Together, these two scenarios were seen as, if not completely exhaustive, nonetheless as organizing our understanding of state use of force in a way that adequately captured most of experience. Now, however, instances of violence and the demands of responding to them are more diffuse; their features are less tightly clustered around the two paradigms. This means that the categories that reflect those paradigms seem to do a less effective job in capturing the full range of experience across the continuum. This in turn means that they are less useful to commanders on the ground who must determine how to respond to violent threats that do not readily fit into the binary legal categories that are available.

One way to respond to this challenge is to attempt to develop new categories that more accurately capture operational experience. This may result in a larger number of categories, or perhaps categories formulated along new lines that reflect different dimensions of experience.<sup>192</sup> Another way is to eschew reliance on existing categories in favor of a case-by-case analysis that ostensibly focuses on the common underlying goals and concerns that relate to state use of force.

Monica Hakimi has made a powerful argument in support of the second alternative with respect to targeting and detention. I will focus here on her analysis of targeting.<sup>193</sup> Hakimi maintains that current debate over targeting and detention is

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188. John L. Bell, *Continuity and Infinitesimals*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Sept 6, 2013), <https://plato.stanford.edu/entries/continuity/#1>.

189. *Id.*

190. See generally LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (Blackwell Publishing, 4th ed. 2009).

191. *Category*, OXFORD ENGLISH DICTIONARY (2018), <https://en.oxforddictionaries.com/definition/category>.

192. See BROOKS, *supra* note 9 at 353-362.

193. I will also not discuss Hakimi’s discussion of emergencies, but will focus on her analysis of law enforcement and armed conflict as the two basic frameworks that are used to govern the situations that she discusses.

structured according to what she calls the “domain method.”<sup>194</sup> That method requires that decision-makers justify their choices by classifying situations in terms of one of four domains: (1) law enforcement, (2) emergency, (3) armed conflict for civilians, and (4) armed conflict for combatants. Hakimi describes the decision-making process that this approach prescribes:

First, decisionmakers must identify the correct domain before assessing state conduct. Second, decisionmakers should fill regulatory gaps by expanding an existing domain’s scope of application. Third, extending a domain means requiring in the new context the outcome that was designed for its original context. Fourth, to the extent a domain is underdeveloped, its outcomes must be derived internally. No overarching framework exists for developing the law within domains.<sup>195</sup>

One problem with this approach is that “[m]any modern situations do not fit comfortably in any domain, leading to intractable disputes about which one governs.”<sup>196</sup> A second problem occurs when decision-makers who attempt to respond to this challenge by suggesting hybrid standards are unable to justify them in terms of the domain method. It may seem to make sense, for instance, to develop an operational approach that is more permissive than one domain but less permissive than another. The prevailing emphasis on classification into discrete domains, however, discredits such approaches “in favor of the available but contested extremes.”<sup>197</sup>

The result is that decision-makers must justify their proposals “by invoking legal categories that are often inapposite to the facts.” Thus, for instance, “instead of assessing the bin Laden operation on the merits, analysts debated which domain governed. Those who disagree on the domain talk past one another, applying different standards to assess the same or similar conduct.” The rules for using force would be very different if the mission were characterized as a law enforcement operation or a military operation during armed conflict.<sup>198</sup>

Hakimi argues that this focus on classification prevents a substantive debate on the underlying concerns that are implicated in various scenarios, which could lead to agreement on how to address at least some situations that don’t seem to fit squarely into any single domain. She suggests that this is a particular concern with respect to issues in international law, because that field of law functions and evolves discursively through the presentation of argument and counterargument rather than through authoritative pronouncements by an international sovereign.

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194. See Hakimi, *supra* note 9, at 1366.

195. Hakimi, *supra* note 9, at 1373.

196. Hakimi, *supra* note 9, at 1366-67.

197. Hakimi, *supra* note 9, at 1367.

198. It also could be characterized as a discrete act of state self-defense subject to the *ius ad bellum*, but the requirements under that regime are not as strikingly different from the law enforcement paradigm as those under an armed conflict model.



The domain method and the specific domains that it recognizes, Hakimi says, are products of a particular historical period. IHL reflects the predominance of conflicts between states in the period from the mid-nineteenth century through World War II. Its rules on targeting and detention are based on a paradigm of hostilities in which uniformed state forces distinguish themselves from civilians. The human rights law that has become more prominent since World War II focuses on “everyday relations between a government and its people. By default, its norms have been crafted for domestic law enforcement settings,” with some limited exceptions for emergencies. “The predicament,” Hakimi says, “is that, because of its splintered origins, the international law on targeting and detention specifies outcomes for only some contexts. Modern sensibilities demand that it regulate all contexts.”

Hakimi argues we should abandon the domain method in favor of what she describes as a “functional” approach to targeting and detention. That approach focuses on the core concerns that cut across all four current domains. These concerns are reflected in three principles. The first is the liberty-security principle. This requires that “[t]he security benefits of targeting or detaining someone must be proportional to or outweigh the costs to individual liberty.”<sup>199</sup> Thus, “[t]he greater the threat and the less intrusive the deprivation of liberty, the more expansive the state’s coercive authority.”<sup>200</sup>

In general, Hakimi says, “targeting satisfies the liberty–security principle if the person poses an active, serious threat to bodily integrity. In that event, the benefit of a targeting operation (protecting life or limb) is proportional to its cost (taking life).”<sup>201</sup> Combatants in armed conflict, she says, are presumed to pose an active deadly threat.<sup>202</sup> In law enforcement settings, human rights law “prohibits targeted killings that are disproportionate to their intended ends. A targeted killing is disproportionate unless the target poses a threat of death or serious bodily injury.”<sup>203</sup>

The second basic principle is the mitigation principle. This requires that even faced with a serious threat, “a state must use reasonable nonlethal measures to contain it.”<sup>204</sup> Hakimi notes that “[m]easures that are reasonable in law enforcement settings—where states exercise considerable control—are almost always too burdensome during active combat.”<sup>205</sup> Combatants are entitled to use lethal force against one another in armed conflict as a first resort because IHL presumes that they have no reasonably available alternative to eliminate the threat that each presumptively poses to the other.<sup>206</sup> Furthermore, even a combatant who appears

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199. Hakimi, *supra* note 9, at 1385.

200. Hakimi, *supra* note 9, at 1386.

201. Hakimi, *supra* note 9, at 1386.

202. Hakimi, *supra* note 9, at 1391.

203. Hakimi, *supra* note 9, at 1392.

204. Hakimi, *supra* note 9, at 1392.

205. Hakimi, *supra* note 9, at 1392-93.

206. Hakimi, *supra* note 9, at 1395.

alone and unarmed might be involved in a ruse, or his compatriots might be just around the corner.”<sup>207</sup> As a result, Hakimi observes, “[t]he combatant domain declines to muddy its otherwise rule-like prescription—targetable unless *hors de combat*—for the exceptional case in which an officer knows that he can capture a combatant without putting himself at serious risk or undermining his mission.”<sup>208</sup>

The final fundamental principle with regard to targeting and detention, Hakimi says, is the mistake principle. This requires that a state verify that:

(1) the specific person being targeted or detained (2) poses a sufficiently serious threat (3) that cannot reasonably be contained less intrusively. In other words, states must exercise due diligence to avoid mistakes and establish a reasonable and honest belief that their conduct is lawful. That diligence is generally less when a state acts in the heat of the moment than when it acts with time for deliberation.<sup>209</sup>

IHL assumes that there is little likelihood of mistake once someone has been positively identified as a combatant. When the situation is ambiguous, a state must presume that someone is a civilian and “may target him only after establishing an honest and reasonable belief that he is targetable.”<sup>210</sup> It must make more of an effort to establish this conclusion the more time that it has available before it must act. Similarly, in the law enforcement context, “the state must do more when acting with time for deliberation than when responding to events as they unfold.”<sup>211</sup>

Hakimi maintains that these are the principles that underlie the law of targeting and detention under both human rights law and IHL: “The same core principles animate targeting and detention law in all domains.”<sup>212</sup> Decisions about targeting and detention in specific situations should be based on the application of these principles to the circumstances at hand, she argues, rather than on classification of the situation into one of the four domains that she describes.

This conception of the rules governing the use of force is that they rest on three fundamental principles, which we apply to situations that can be arrayed on a continuum. Moving from restrictive to permissive authority to use force, these situations reflect threats that gradually increase in gravity, circumstances that incrementally make it less feasible for the state to respond non-forcibly to these threats, and conditions that gradually make it more difficult for the state to determine if a particular individual poses an actual threat. The domains of law enforcement/human rights and armed conflict thus simply reflect segments of the continuum that encompass particular combinations of these contextual features.

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207. Hakimi, *supra* note 9, at 1395.

208. Hakimi, *supra* note 9, at 1395.

209. Hakimi, *supra* note 9, at 1387.

210. Hakimi, *supra* note 9, at 1396.

211. Hakimi, *supra* note 9, at 1397.

212. Hakimi, *supra* note 9, at 1385.

It is the contextual analysis of these features, however, not the classification of a situation as falling within a particular domain, that does the analytical work.

Thus in all situations “[t]argeting is lawful if (1) the person poses a threat of deadly force, (2) the state pursues reasonable alternatives for containing that threat, and (3) the state exercises due diligence to prevent mistakes.”<sup>213</sup> With respect to detention in all cases, those detained “must actually pose a threat;”<sup>214</sup> as detention increases, “the benefits of containing the threat must be more substantial to remain proportional;”<sup>215</sup> states “presumptively should prosecute and punish people, rather than detain them without trial;”<sup>216</sup> and states should provide procedures to ensure accurate decisions, whose features may vary based on what is reasonably feasible under the circumstances.<sup>217</sup> While Hakimi does not explicitly suggest that we should abandon altogether the categories of law enforcement and armed conflict, the logic of her position is that we could do so because they obscure the substantive analytical judgments that are most significant.

Hakimi surely is right that debates over the use of force often devolve into formalistic disputes over classification that ignore the complex features of particular security threats and the responses that are appropriate to them. There are many instances in which classification of hostilities in either category seems unsatisfying and Procrustean. Hakimi’s plea to focus instead on the values that are implicated in specific contexts points us in the right direction, and her articulation of those values provides helpful guidance for engaging in that type of analysis.

The basic spirit of Hakimi’s model is consistent with Rosa Brooks’s suggestion that we need to recognize that “war and peace are not binary opposites, but lie along a continuum.”<sup>218</sup> Much as we may long for a world in which peace is the norm and war the exception, says Brooks, “some degree of war has been the norm for much of human history, and pure ‘peace’ has been the exception.”<sup>219</sup> She argues that the nature of modern security threats are such that we no longer have any principled way to make this distinction, and thus are left with legal categories that cannot do the work that we ask of them. We therefore need to develop new frameworks for analyzing situations that fall in the gray area between war and peace.

Thus, for instance, Brooks suggests, rather than trying to determine if targeted killing is governed by law enforcement or armed conflict standards, we should acknowledge that it implicates concerns from each category. Targets of such operations aim to inflict harm on a much larger scale than conventional criminals, and often are located in areas beyond effective control by law enforcement operations. At the same time, operations against some targets do not represent simply

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213. Hakimi, *supra* note 9, at 1397-98.

214. Hakimi, *supra* note 9, at 1407.

215. Hakimi, *supra* note 9, at 1409.

216. Hakimi, *supra* note 9, at 1410.

217. Hakimi, *supra* note 9, at 1413.

218. See BROOKS, *supra* note 9, at 345.

219. BROOKS, *supra* note 9, at 348.

the use of force on a battlefield, where there is little time for individualized determinations of liability to deadly force. Instead, they are the result of an extensive process in which individuals are nominated and selected for inclusion on a targeting list.<sup>220</sup> Perhaps, then, we could devise mechanisms that would provide greater transparency and accountability for such operations, while recognizing that these will not strictly conform to traditional criminal procedural requirements.<sup>221</sup> Brooks's book engages thoughtfully with a wider range of issues than are beyond my focus here, and she does not frame her approach in terms of Hakimi's principles. Nonetheless, her argument that we should eschew reliance on formal categories in favor of hybrid contextual analysis along a continuum reflects the same skepticism about the value of distinguishing between law enforcement and armed conflict settings as a guide to action.

### *B. Assessing the Assumption of Continuity*

While modern security threats may require analytical flexibility, it is not clear that we should simply engage in contextual analysis of the use of force without any reference to the categories of law enforcement and armed conflict. Watkin, for instance, does suggest that we should not treat human rights law and IHL as completely different categories that are mutually exclusive. Instead, he argues, we need to recognize that human rights law should guide operations within IHL in some cases.<sup>222</sup> While he does not discuss Hakimi's model at length, he concludes that "[t]here is considerable value in maintaining a separation between law enforcement and conduct of hostilities frameworks due to the exceptional levels of violence that can occur even in internal conflict."<sup>223</sup> It is worth considering at greater length why maintaining separate domains is desirable.

A purely contextual approach reflects the assumption that there is a basic continuity of state interests across the continuum, and a common normative commitment with regard to when the use of force is justified. This implicitly treats human rights principles as the governing norms across the continuum. We are to begin with the requirement of human rights law for individualized assessments of immediate threats, and then adjust our analysis as we gradually move away from the peaceful domestic setting in which such assessments are feasible. On this view, IHL rules are rooted in the core human rights principle of intrinsic individual dignity and worth. They simply reflect pragmatic adaption of these principles based on the distinctive circumstances of armed conflict, rather than a fundamentally different orientation toward taking life.

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220. See Presidential Policy Guidance, *supra* note 98; Gregory S. McNeal, *Targeting Killing and Accountability*, 102 GEO. L. J. 681 (2014).

221. BROOKS, *supra* note 9, at 354-355.

222. Thus, he says, "the issue will not only be how the two normative frameworks relate to one another but also how human rights norms interact with conduct of hostilities norms within the context of humanitarian law itself." WATKIN, *supra* note 16, at 149.

223. WATKIN, *supra* note 16, at 263.

Hakimi's description of how the basic principles governing targeting apply across the continuum illustrates her reliance on this assumption. Thus, she notes that law enforcement rules permit use of lethal force only against persons who pose an active serious threat of deadly force,<sup>224</sup> and require that the state pursue reasonably feasible alternatives before it uses force against such persons.<sup>225</sup> IHL, Hakimi says, accepts this principle but recognizes that it is not practicable during armed conflict to identify specific individuals who pose an active serious threat. It therefore conclusively presumes that all enemy combatants do so.<sup>226</sup> Similarly, IHL assumes that states engaged in armed conflict do not exercise control over their surroundings, which makes it too burdensome to require consideration of non-forcible alternatives before using force against enemy combatants.<sup>227</sup>

A continuum approach thus implicitly assumes that the underlying values that constrain state use of force are the same, but that the practicalities of armed conflict make bright-line presumptions necessary in certain cases. What we think of as armed conflict governed by IHL is simply that portion of the continuum where ordinary background conditions of law enforcement do not exist, which requires a shift in many cases from individualized determinations to presumptions. At its core, however, IHL is animated by the same aim as human rights law: to minimize loss of life and to limit state use of violence to situations in which it is absolutely necessary.

Before examining this assumption more closely, it is useful to consider how it reflects a view of the relationship between human rights law and armed conflict that has become more prominent in recent years. As I have noted, the prevailing view now is that IHL does not displace human rights law during armed conflict. Rather, the latter body of law applies at all times. The task therefore is to harmonize and give effect to the principles animating the two bodies of law when they simultaneously apply.

As Naz Modirzadeh notes, many observers seem to regard this harmonization as involving progressively greater incorporation of human rights principles into IHL.<sup>228</sup> This reflects "the notion that we are witnessing a now-inevitable trend of progress toward more human rights, that the question of convergence [between the two bodies of law] is no longer a question of 'whether' as much as 'how far.'"<sup>229</sup> Similarly, what Thomas Smith describes as "the marriage of human rights law and the law of war" has resulted in a state of affairs in which:

[h]uman rights and war law speak in one voice with respect to genocide and crimes against humanity, torture, and terrorism. Landmines and chemical

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224. Hakimi, *supra* note 9, at 1391.

225. Hakimi, *supra* note 9, at 1393.

226. Hakimi, *supra* note 9, at 1391-92.

227. Hakimi, *supra* note 9, at 1392-93.

228. Naz K. Modirzadeh, *The Dark Sides of Convergence: A Pro-Civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict*, 86 INT'L L. STUD. 349-50 (2010).

229. *Id.* at 358.

weapons have been banned, human rights courts masquerade as war crimes courts, and humanitarian rhetoric infuses the conduct of modern warfare. State reciprocity has begun to cede to global norms, legal rules are increasingly recognizable to human rights, and accountability has been strengthened.<sup>230</sup>

It is not hard to imagine that one might move from this view to the assumption that the underlying principle of both bodies of law is protection of human rights. Thus, for instance, the International Criminal Tribunal for the Former Yugoslavia trial chamber has declared: “The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person.”<sup>231</sup> Similarly, a United Nations report on International Legal Protection of Human Rights in Armed Conflict declares, “International human rights law and international humanitarian law share the goal of preserving the dignity and humanity of all . . . [I]n armed conflict, parties to the conflict have legally binding obligations concerning the rights of persons affected by the conflict.”<sup>232</sup> As Rene Provost observes, “There is an observable tendency in the literature inspired primarily by human rights law to consider humanitarian law as merely a subset of human rights.”<sup>233</sup> From this perspective, harmonization of the two bodies of law should result in convergence around human rights principles that have always been implicit in IHL.

It is certainly true that, as Watkin notes throughout his book, some provisions of IHL can be seen as at least implicitly expressing human rights norms, in that they provide protections for persons who are not part of the armed conflict.<sup>234</sup> Indeed, Watkin’s book is especially notable as an acknowledgment by a prominent military lawyer that human rights law and IHL share similar concerns with respect to many issues, that human rights law can provide guidance in some cases on how protections established in IHL can be given more detailed content. It emphasizes that there are situations within armed conflict in which armed forces should be guided by human rights and law enforcement standards.

Provost, for instance, has noted that the prohibition of discrimination in the Universal Declaration of Human Rights is reflected in Articles 12 of the first two Geneva Conventions, Article 16 of the Third, and Article 27 of the Fourth.<sup>235</sup> Article 16 of the Third provides, for instance, that “all prisoners of war shall be treated alike by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction

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230. Thomas W. Smith, *Can Human Rights Build a Better War?*, 9 J. HUM. RTS. 24, 24-25 (2010).

231. Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 183 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

232. U.N. OFF OF THE HIGH COMM’R FOR HUM. RTS., INTERNATIONAL LEGAL PROTECTION OF HUMAN RIGHTS IN ARMED CONFLICT, at 1, U.N. Doc. HR/PUB/11/01, U.N. Sales No. E.11.XIV.3 (2011).

233. PROVOST, *supra* note 5, at 9.

234. See, e.g., WATKIN, *supra* note 16, at 133 (mentioning treatment of civilians not participating in hostilities and obligations connected with military occupation).

235. PROVOST, *supra* note 5, at 6.

founded on similar criteria.”<sup>236</sup> Similarly, Common Article 3 requires that all persons not taking an active part in hostilities be treated “humanely,” and are protected against discrimination; “violence to life and person”; “outrages upon personal dignity, in particular, humiliating and degrading treatment”; and the imposition of sentences without a prior judgment by “a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>237</sup>

In addition, as Provost points out, Article 75 of the 1977 Additional Protocol I sets forth a host of “fundamental guarantees” for persons in the power of a party to the conflict that resemble Article 14 of the International Covenant on Civil and Political Rights.<sup>238</sup> Human rights principles and jurisprudence can serve to elaborate and specify the meaning of these protections in light of the fact that the two bodies of law are animated by similar concerns on these subjects. Such elaboration and specification more explicitly incorporates a deontological perspective within an IHL framework that is broadly consequentialist. To the extent this has occurred, there has indeed been some convergence between human rights law and IHL.

Similarly, greater use of criminal tribunals to try alleged perpetrators of war crimes serves to highlight and vindicate the rights of individual victims during armed conflict.<sup>239</sup> The idea that grave breaches of the Geneva Conventions and their Additional Protocols are universal criminal prohibitions represents a categorical exception to the priority that IHL accords to military necessity. It expresses the idea that some conduct is simply wrong, not that it is wrong because the harm that results does not gain a military advantage or is excessive in relation to such an advantage. Finally, greater acceptance of the idea that states may have human rights obligations during military operations outside of their territories reflects explicit incorporation of human rights concerns in some contexts within an armed conflict.<sup>240</sup>

### C. *Deontological and Consequentialist Moral Lenses*

Notwithstanding these similarities, it is important to appreciate that IHL and human rights law have very different roots that reflect basic commitments that are in tension, if not explicitly opposed. One way to conceptualize this is Jens Ohlin’s distinction between the state as sovereign and as belligerent.<sup>241</sup> Human rights law focuses on the state as sovereign, and assumes a fundamental

236. Prisoners of War Convention, *supra* note 30, art. 16.

237. *Id.*

238. International Covenant on Civil and Political Rights, art. 14, Dec. 19, 1966, 999 U.N.T.S. 171.

239. David Luban, *Human Rights Thinking and the Laws of War*, in *THEORETICAL BOUNDARIES OF ARMED CONFLICT AND HUMAN RIGHTS* 45, 61-62 (Jens David Ohlin ed., 2016).

240. See, e.g., *Al-Skeini v. Secretary of State for Defence [2007] UKHL 26* (appeal taken from Eng.); see also MARKO MILANOVIC, *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY* (2013).

241. Jens David Ohlin, *Acting as a Sovereign versus Acting as a Belligerent*, in *THEORETICAL BOUNDARIES OF ARMED CONFLICT AND HUMAN RIGHTS* (Jens David Ohlin ed, 2015).

asymmetry in power between the state and its citizens. Its aim is to constrain the sovereign's ability to exploit this asymmetry against the individuals over whom it exercises power.<sup>242</sup> IHL focuses on the state in its role as belligerent acting on behalf of subjects, and seeks to regulate the exercise of force against other belligerents who are regarded as legal equals.<sup>243</sup>

The difference in these roles is most stark with respect to the authority to take life. In the most basic terms, the approach of human rights law to this question is profoundly deontological, while IHL is predominantly consequentialist. These differences are worth elaborating in some detail.

The core principle of human rights law is the intrinsic value of each individual, as expressed in the pronouncement in the preamble to The Universal Declaration of Human Rights that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."

In keeping with this core commitment, the International Covenant on Civil and Political Rights states that "[e]very human being has the inherent right to life"<sup>244</sup>; the American Convention on Human Rights provides that "[e]very person has the right to have his life respected"<sup>245</sup>; and the African Charter on Human and Peoples Rights says, "[h]uman beings are inviolable. Every human being shall be entitled to respect for his life."<sup>246</sup> The European Convention provides, "[e]veryone's right to life shall be protected by law."<sup>247</sup> The first three Conventions provide that no one may be "arbitrarily deprived" of life, and permit no derogation from the obligation to respect the right to life. Article 2 of the European Convention specifies the situations in which deprivation of life is not considered a violation of the right when force is used that is no more than "absolutely necessary." It permits derogation from Article 2 for deaths that result from "lawful acts of war."<sup>248</sup> These provisions reflect a strong commitment to protection of life based on deontological grounds.

Respect for the intrinsic value of life, and the sovereign's responsibility to protect it, provides that the use of force by the state in the law enforcement setting is permissible only to protect individuals from the violent threats that they pose to one another. This expresses the idea that the life of each individual has intrinsic worth. A person's life may not be taken simply to benefit another person or group

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242. *Id.* at 126; see also Meron, *supra* note 1, at 240 ("Human rights laws protect physical integrity and human dignity in all circumstances. They apply to relationships between unequal parties, protecting the governed from their governments. Under human rights law, no one may be deprived of life except in pursuance of a judgment by a competent court.").

243. Ohlin, *supra* note 241 at 127; see also Meron, *supra* note 1, at 240 ("The law of armed conflict regulates aspects of a struggle for life and death between contestants who operate on the basis of formal equality.").

244. International Covenant on Civil and Political Rights, *supra* note 238, art. 6(1).

245. Organization of American States, American Convention on Human Rights art. 4, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

246. African Charter on Human and Peoples Rights, art. 4(1), Oct. 21, 1986, 1520 U.N.T.S. 217.

247. ECHR, *supra* note 60, art. 2(1).

248. ECHR, *supra* note 60, art. 15(2).



of persons, but only if she fails to respect the life of another by threatening his life without moral justification. Human rights law thus authorizes force in order to protect individual lives, in situations in which individuals become liable to loss of life by virtue of being morally responsible for posing a grave unjust threat to others.

The paradigmatic case in which police use of force is authorized is to protect someone “against the imminent threat of death or serious injury, [or] to prevent the perpetration of a particularly serious crime involving grave threat to life.”<sup>249</sup> As I have indicated, the imminence requirement is relaxed when it is necessary to effect the arrest of someone who poses such a grave threat, or to prevent him from escaping. The rationale for using force in that case is to protect the public from having such a dangerous person at large. The threat that the individual poses in that case is a matter more of probability than certainty. In this sense, the justification arguably has something of a consequentialist flavor, in that the goal of protecting the public is regarded as authorizing the use of force against someone who may not in fact commit future violent acts. This reflects the fact that, as I discuss in more detail below, movement from the aim of protecting individuals to that of protecting a broader collective begins to bring consequentialist considerations into play.

There is still a strong deontological element to the justification, however, in that the individual is responsible for engaging in prior behavior that makes it reasonable to regard him as a threat. As Jeff McMahan has suggested, “a person can make himself liable to be killed if he acts in a way that increases the objective probability that he will wrongly kill an innocent person.”<sup>250</sup> McMahan acknowledges that at the time lethal force is used it may not be absolutely certain that the potential murderer will carry out his plans if he is not killed. Nonetheless, “unless the objective probability that he will kill his intended victim is so low that killing him defensively would be disproportionate, it would be unjust for his wholly innocent potential victim to have to bear a risk of being murdered by him in order that he should be spared.”<sup>251</sup> McMahan has in mind an individual who is plotting against another individual, which is a situation in which there may be especially good reason to believe that he poses a future threat. Nonetheless, if there is enough evidence to meet the law enforcement standard for the use of force against a person resisting arrest or fleeing, the basic principle applies.

The law enforcement requirements of necessity and proportionality also have strong deontological grounding. With respect to necessity, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

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249. *U.N. Basic Principles*, *supra* note 61; *see also* ECHR, *supra* note 60, art. 2(2)(a) (“Deprivation of life shall not be regarded as inflicted in contravention of this Article when. . .in defence of any person from unlawful violence.”).

250. Jeff McMahan, *Targeted Killing: Murder, Combat, or Law Enforcement?*, in *TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD* 135, 140 (Claire Finkelstein et al. eds., 2012).

251. *Id.*

provide that “intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”<sup>252</sup> They express the principle of proportionality by stating that force may be used “only when less extreme means are insufficient to achieve” the objectives for which force is authorized.<sup>253</sup> These principles are served by the requirement that law enforcement officials “shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed,” unless this poses an unreasonable risk.<sup>254</sup>

The state as sovereign therefore is limited to using force in pursuit of the goal of protecting the lives of individuals within the state from violent threats by other individuals. Use of force for this purpose is constrained by human rights standards that are generally in accordance with deontological principles. The state is authorized to use force to accomplish its goal only when absolutely necessary, and the force that it may use even in that instance must be as minimal as possible. As William Boothby summarizes human rights requirements that apply to the state in this role:

When responses to anticipated security situations are being undertaken, care will be required and all viable non-lethal options should be pursued. Only if the use of lethal force is the only viable way of addressing the situation should it be adopted. . . Once it is determined that lethal force is indeed the only viable option, *i.e.* that it is absolutely necessary, the amount of force used, the time period during which it is used and the locations where it is used must also be reduced to that which is absolutely necessary and objectively proportionate to the circumstances.<sup>255</sup>

By contrast, in its role as belligerent under IHL, the purpose for which the state may use force is to act to defend itself against a threat posed by another collective. The state thus is engaged in state self-defense, not defense of individuals as in the law enforcement setting. Accomplishing this goal means defeating the enemy. Defeating the enemy may require the use of a substantial amount of force. IHL limits the use of that force by permitting it only in furtherance of military necessity, tempered by considerations of humanity and proportionality. Members of enemy forces may be killed in furtherance of military necessity, regardless of whether any of them are morally responsible for posing a threat at the time they die. Innocent persons also may be killed in pursuit of that aim if the number of their deaths is not excessive.

The central place of the concept of military necessity in armed conflict embodies, as the U.S. Department of Defense Law of War Manual says, “the

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252. *U.N. Basic Principles*, *supra* note 61, ¶ 9.

253. *U.N. Basic Principles*, *supra* note 61, ¶ 9.

254. *U.N. Basic Principles*, *supra* note 61, ¶ 10.

255. See W.H. BOOTHBY, *CONFLICT LAW: THE INFLUENCE OF NEW WEAPONS TECHNOLOGY, HUMAN RIGHTS AND EMERGING ACTORS* 317-64.

principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war.”<sup>256</sup> This reflects the view that Francis Lieber expressed in Article 29 of the Code that he devised for the Union Army during the American Civil War: “The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.”<sup>257</sup> Similarly, the 1868 St. Petersburg Declaration states in its preamble that the only aim that states may seek to achieve during war is “to weaken the military forces of the enemy,” and “for this purpose it is sufficient to disable the greatest possible number of men.”<sup>258</sup>

Thus, unlike the concept of necessity under law enforcement standards, the IHL principle of necessity is not animated principally by the aim of limiting use of force to situations in which it is unavoidable. IHL assumes that force will be used, and attempts to limit its use to deployment against targets whose destruction will result in a military advantage in the conflict. Jens Ohlin and Larry May elaborate on this point in their analysis of the concept of military necessity propounded by Lieber.<sup>259</sup> Notwithstanding changes in international law since then, they argue, “it is clear that the principle of necessity has largely remained unchanged since Lieber.”<sup>260</sup>

Ohlin and May suggest that, for Lieber, necessity served as a license to use force, not as a constraint on it. His Code makes clear that “what is outlawed by the principle of necessity is death and destruction not related to the war effort.”<sup>261</sup> Thus, the Code says, “Military necessity does not admit of cruelty – that is, the infliction of suffering for the sake of suffering or for revenge.”<sup>262</sup> Any use of force that contributes to ending the conflict by defeating the enemy is permissible, and is in fact salutary on humanitarian grounds, because it helps hasten the end of the suffering that war inevitably entails. Ohlin and May emphasize that appreciating this philosophy clarifies that this conception of necessity is not equivalent to requiring that an action is indispensable to achieve a military aim, as Grotius suggested in the seventeenth century, and as current proponents of the least restrictive means test argue today. This conception of necessity as constraint characterizes human rights law, but it is the conception of necessity as license that distinguishes IHL:

Necessity *permits* killing and destruction of enemy forces, whereas the specific prohibitions (distinction, proportionality, restrictions on various weapons, the prohibition on unnecessary suffering, perfidy, etc.) *restrict* the use of force.

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256. GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE, *supra* note 4, §2.2.

257. Francis Lieber, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, (Washington, Government Printing Office 1898) [Hereinafter “Lieber Code”].

258. The Saint Petersburg Declaration of 1868, Dec. 11, 1868, 138 Consol. T.S. 297, <http://e-brief.icrc.org/wp-content/uploads/2016/08/7-st-petersburg-declaration.pdf>.

259. JENS DAVID OHLIN & LARRY MAY, NECESSITY IN INTERNATIONAL LAW 95-106 (2016).

260. *Id.* at 109.

261. *Id.* at 96.

262. Lieber Code, *supra* note 257, art. 16.

But it is important not to confuse the two, and one certainly cannot use the specific prohibitions as a rationale for reading the general principle of necessity in a wider fashion.<sup>263</sup>

Similarly, the IHL principle of proportionality is not meant, as in the law enforcement setting, to ensure that the least amount of force is used to achieve the state's goal. Instead, it authorizes whatever force is necessary for an attack to succeed against a military target, as long as there is not an excessive amount of civilian harm compared to the military advantage. As David Luban notes, "individual civilians can lose protection against attack merely because they have the bad luck to be near an important target and surrounded by too few other civilians. Their human rights play no role in the proportionality assessment [.]” Rather, that assessment “aggregates damage to civilian persons [.]”<sup>264</sup>

IHL, in other words, does not attempt to prevent violence or loss of life. Rather, it accepts that it will occur, often on a massive scale. IHL attempts simply to ensure that the harm that results from these efforts does not significantly exceed the harm necessary to win the war. As David Kennedy puts it, IHL demands “*no unnecessary damage, not one more civilian than necessary.*”<sup>265</sup> This consequentialist approach to state use of force is in sharp contrast to the deontological foundations of human rights law.

David Luban underscores this character of IHL by describing it as “benthamite” in nature.<sup>266</sup> That is, it reflects a commitment to maximizing pleasure and minimizing pain. In particular it embodies a “negative” version of benthamism in that its primary aim is the latter.<sup>267</sup> The focus is on the aggregate net amount of pleasure and pain, or benefits and costs, not on the particular individuals whose experiences contribute to this sum. The benefits represent the outcomes from operations based on military necessity; the costs represent the suffering that is incurred in pursuit of that end. Luban suggests that even the IHL principle of distinction can be seen as based on consequentialist concerns. “If disabling combatants suffices to win wars,” he observes, “targeting civilians is unnecessary, and so it is not” a permissible object for states.<sup>268</sup> This reasoning, “grounding IHL in the benthamite concern to alleviate the calamities of war rather than respect for human dignity, seems the more plausible origin of the principle of distinction.”<sup>269</sup> Indeed, intentionally targeting innocent civilians can be seen as a violation of the principle of military necessity.

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263. OHLIN & MAY, *supra* note 259, at 99.

264. Luban, *supra* note 239, at 51.

265. David Kennedy, *Reassessing International Humanitarianism: The Dark Sides*, in INTERNATIONAL LAW AND ITS OTHERS 131, 139 (Anne Orford ed., 2006).

266. Luban, *supra* note 239, at 50. Luban uses the lower case to refer to a basic utilitarian or consequentialist approach to differentiate the concept from Jeremy Bentham's specific version of this.

267. Luban, *supra* note 239, at 50.

268. Luban, *supra* note 239, at 52.

269. Luban, *supra* note 239, at 52.

The state goal of protecting its population therefore ostensibly is pursued most humanely by using whatever force will most quickly defeat the enemy within the bounds of the law of war. Soldiers will die, and innocent civilians almost certainly will die, not because they are morally liable to the use of force, but because their deaths are intended to serve the larger good of ending the war as quickly as possible. An attack on a military target is permissible as long as the expectation is that it will produce some military advantage. Moral responsibility, the cornerstone of law enforcement standards for liability to force, plays no role in these calculations. Instead, the use of force is regulated according to consequentialist considerations that focus on the aggregate, not the individual level. IHL is meant to temper this awful reality, not to apply deontological human rights principles to armed conflict. As David Luban has noted, the original motivation of IHL “is more like disaster relief than the vindication of rights.”<sup>270</sup>

A final point about IHL is its emphasis on providing clear rules that can be readily applied by the average combatant during the chaos, ambiguity and violence that mark armed conflict. Anyone who is a combatant can be targeted at any time, and can be detained for the duration of the hostilities. Anyone who meets certain criteria must be treated as a prisoner of war. Any civilian who directly participates in hostilities may be attacked while they are doing so, but not afterward. Any civilian who is not participating in hostilities may not be attacked.

Asymmetric conflict creates challenges in applying these categories, and soldiers in fact may need to exercise considerable discretion. The aim of IHL, however, is to reduce as much as possible the need for intricate contextual deliberations about the use of force. Law enforcement settings also can place difficult demands on officers, but human rights law assumes that these representatives of the state are in a position to make more fine-grained particularistic assessments than IHL assumes combatants are in a position to make. Unlike under human rights law, state obligations under IHL apply to individuals not *qua* individuals, but as members of specific categories of persons.

In sum, “[f]or humanitarian law, the use of force is an integral part of the law, while killing is antithetical to the very idea of human rights.”<sup>271</sup> As Ohlin and May put it, military necessity “is that aspect of the law of armed conflict that changes the default rule . . . that killing is impermissible.”<sup>272</sup> IHL is, as two other authors describe it, a set of rules “written by the utilitarians for the warriors.”<sup>273</sup> For these reasons, a comparison of IHL with human rights law must recognize that “the issue of differing origins, differing foundational philosophies, and differing imagined communities of the law is not simply a historical artifact to be overcome by progress; it reflects the wisdom of not pretending that armed

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270. Luban, *supra* note 239, at 55.

271. OBERLEITNER, *supra* note 5, at 131.

272. OHLIN & MAY, *supra* note 259, at 105.

273. Eric S. Krause & Mike O. Lacey, *Utilitarian vs. Humanitarian: The Battle Over the Law of War*, 32 PARAMETERS 73, 73 (2002).

conflict is anything other than what it is: unpredictable, often cruel, bloody and unjust.”<sup>274</sup>

### *C. Protecting Lives and Protecting States*

The sharply divergent deontological and consequentialist perspectives on taking life reflected in human rights law and IHL therefore are not simply contingent historical features that could be reconciled by simply reformulating IHL in deontological terms. Rather, they reflect differences that are rooted in the distinctive moral demands that apply to the state’s protection of its subjects from violence against one another on the one hand – the state as sovereign, in Ohlin’s terms – and the state’s actions to protect itself in the name of those subjects in armed conflict on the other – the state as belligerent.

With respect to the state’s role in protecting its subjects, the asymmetry between the sovereign and those subject to its power, and the potential for abuse of that power, mandates that the state use force to protect its subjects in a way that embodies respect for the intrinsic value of each individual life. This requires individualized assessments of moral responsibility of individuals for posing grave unjust threats to others before the state may take a life. This deontological imperative is reflected in the requirement that force be used as a last resort, and that no more force than necessary be used against someone who poses an unjust threat. The paradigmatic instance of justified deadly force based on deontological principles is when one individual poses an imminent threat to the life of another. In this case, the moral responsibility and liability to deadly force are clear, as is the state’s authority to use force to protect the life of one of its subjects.

As I have suggested, the deontological imperative in the law enforcement setting remains as we move toward protection of collective interests rather than particular individuals, but it arguably is qualified to some degree by consequentialist considerations. A fleeing person may be killed not because he poses an imminent grave threat to a particular individual, but because he poses such a threat to the public at large. This authority to use deadly force is based to some extent on consequentialism, in that it is not certain that the individual will ever pose a threat to anyone in the future. The risk that he may do so, however, is deemed sufficient to take his life, on the view that on balance this best protects the larger population from harm in the future.

There is still a strong deontological grounding for the authority to use force in this situation in that, as Jeff McMahan has suggested, the individual in question is morally responsible for the reasonable belief that he poses a future threat. The important point nonetheless is that the state’s desire to protect the public at large does allow for at least some deviation from strict deontological demands. Such deviation seems inevitable when the state is attempting to protect the collective from future harms, given the difficulty, if not impossibility, of making precise

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274. Modirzadeh, *supra* note 228, at 367.

judgments about the threat that particular individuals pose to specific other individuals who make up the collective in this situation.

Similarly, the need to quell a riot or civil disturbance that threatens the public order may provide some latitude to depart from the requirement to identify precisely the threat that specific individuals pose to other particular individuals.<sup>275</sup> In this way, consequentialist considerations may have at least some influence. Nonetheless, deontological principles still impose stringent constraints. Police may not, for instance, simply fire into a crowd that contains some people with weapons, or use force likely to kill or cause serious injury if the crowd does not pose a threat of these types of harm.

The paradigmatic case in which the state attempts to protect a collective interest is when it engages in armed conflict in its own defense. The threat in this case is not simply to the individuals who comprise the population of the state. Instead, it is deemed to be to the state's very ability to meet its basic obligation to protect its subjects. Given the fundamentally collective nature of the interest under threat, it is very difficult to imagine constraining the use of force according to deontological principles. As Janina Dill has carefully elaborated, it is simply impossible for war to be waged according to the rights-respecting principle that liability to force must be based on individualized assessment of moral responsibility for posing an unjust threat of harm.<sup>276</sup>

It is thus no surprise that IHL rules with respect to taking life are grounded in consequentialist principles. These principles apply to the state as belligerent in a conflict with another belligerent that is regarded as its legal equal. Each belligerent acts on behalf of a collective. It is authorized to protect that collective by taking the lives of individuals based on whether they fall into categories that are deemed likely to include persons who pose a threat to the collective. This is morality on the aggregate, not the individual, level. As Dill observes, "There is nothing more obviously at odds with the deontological premise of individual rights than killing human beings as a means to a military end."<sup>277</sup>

The German Federal Constitutional Court decision in *Dr. H. et al. v. s.14.3 of the Aviation Security Act of 11 January 2005* underscores the sharp discontinuity in the bases for using force in the law enforcement and armed conflict settings.<sup>278</sup> In that case, the Court reviewed a challenge to German legislation that addressed

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275. ECHR, *supra* note 60, art. 2(2)(c).

276. Janina Dill, *Should International Law Ensure the Moral Acceptability of War?*, 26 LEIDEN J. INT'L L. 253, 263 (2013) [hereinafter *Moral Acceptability of War*] (War cannot conform to the moral requirement of respecting individual rights because it is an "epistemically cloaked forced choice" situation in which actors will unavoidably commit a moral wrong either by acting or not acting, and "[a] well-informed, impartial observer cannot determine with reasonable certainty, which course of action will in the end represent the lesser evil."); see also Janina Dill & Henry Shue, *Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption*, 26 ETHICS & INT'L AFF. 311, 313 (2012) ("[T]he moral calibration of individual conduct during combat operations on the basis of the rights of individual adversaries is not an achievable goal.")

277. Janina Dill, *The 21st-Century Belligerent's Trilemma*, 26 EUR. J. INT'L L. 83, 104 (2015).

278. BVERfG, 1 BVR 357/05, Feb 15, 2006, [http://www.bverfg.de/e/rs20060215\\_1bvr035705en.html](http://www.bverfg.de/e/rs20060215_1bvr035705en.html).

the situation in which one or more persons have taken command of an aircraft with the apparent intention of using it as a weapon by crashing it into a building or other populated area. In such a situation, the law authorized the armed forces to assist the police in attempting to avert the threat posed by the aircraft. This assistance was to take the form of attempting first to warn and divert the craft by attempting to force it off its course or force it to land, threatening to use armed force, or firing warning shots.

If these efforts were unsuccessful, the law authorized the use of armed force against the aircraft. As the Court described, this was permissible “only if the occurrence of an especially grave accident cannot be prevented” by other measures.<sup>279</sup> “This, however, only applies where it must be assumed under the circumstances that the aircraft is intended to be used as a weapon against human lives, and where the direct use of armed force is the only means to avert this imminent danger.”<sup>280</sup> Authorization for such action was lodged exclusively with the Federal Minister of Defense.

A challenge was brought to the law by persons who frequently use planes for private and professional reasons on the ground that it violated their fundamental rights to human dignity and to life under the German Basic Law. Article 1.1 of that law provides: “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.”<sup>281</sup> The first sentence of Article 2.2 states: “Every person shall have the right to life and physical integrity.”<sup>282</sup> Plaintiffs asserted that the consequentialist decision-making with regard to the use of deadly force authorized by the law violated these Basic Law provisions:

The state may not protect a majority of its citizens by intentionally killing a minority – in this case, the crew and the passengers of a plane. A weighing up of lives against lives according to the standard of how many people are possibly affected on the one side and how many on the other side is impermissible. The state may not kill people because they are fewer in number than the ones whom the state hopes to save by their being killed.<sup>283</sup>

The Act, they claimed, therefore made them “mere objects of state action.”<sup>284</sup>

In defending the law, the government argued that “[a] weighing up of lives against lives does not take place in this context.”<sup>285</sup> Rather, the state was faced with the need to reconcile duties to both innocent persons on the plane and those who would be harmed by the crash of the aircraft:

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279. *Id.* ¶ 14.

280. *Id.*

281. GRUNDGESETZ [GG] [BASIC LAW], art. 1 § 1, *translation at* [https://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#p0026](https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0026) (Ger.).

282. *Id.* art. 2 § 2.

283. 1 BVR 357/05, ¶ 38.

284. *Id.* ¶ 39.

285. *Id.* ¶ 54.



In this context, the active encroachment upon the fundamental rights of the people on board the plane is of extraordinary importance. This, however, cannot ipso jure enforce non-performance of the duty of protection vis-à-vis third parties where the same legal interest, life, is directly endangered as far as they are concerned. The function of averting a danger does not take precedence over the function of protection. To perform the latter function, the legislature may therefore provide that an imminent attack on human lives may be averted even if, in doing so, other people are killed or endangered for instance by falling plane wreckage.<sup>286</sup>

The Court noted that the use of deadly force by the armed forces authorized under the Act was to be carried out in support of police operations, not in the context of war. “[M]issions of the armed forces of a non-warlike nature,” the Court said, “are incompatible with the right to life and the obligation of the state to respect and protect human dignity”<sup>287</sup> when they are directed against individuals “who are not participants in the crime.”<sup>288</sup> The Court declared with respect to such individuals:

By their killing being used as a means to save others, they are treated as objects and at the same time deprived of their rights; with their lives being disposed of unilaterally by the state, the persons on board the aircraft, who, as victims, are themselves in need of protection, are denied the value which is due to a human being for his or her own sake.<sup>289</sup>

The Court also rejected the argument that innocent persons on the aircraft were virtually certain to die in any event when it crashed, which mitigated the infringement on their rights vis-vis those whom the state was seeking to protect. “[T]he assessment that the persons who are on board a plane that is intended to be used against other people’s lives within the meaning of § 14.3 of the Aviation Security Act are doomed anyway,” said the Court, does not prevent their intentional killing from violating their right to life:

Human life and human dignity enjoy the same constitutional protection regardless of the duration of the physical existence of the individual human being . . . . Whoever denies this or calls this into question denies those who, such as the victims of a hijacking, are in a desperate situation that offers no alternative to them, precisely the respect which is due to them for the sake of their human dignity . . . .<sup>290</sup>

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286. *Id.*

287. *Id.* ¶ 130.

288. *Id.*

289. *Id.* ¶ 124.

290. *Id.* ¶ 132.

There could not be a clearer articulation of the deontological grounding of human rights law and law enforcement standards than the Court's opinion in this case. The Court reasoned that the state cannot intentionally use lethal force against innocent passengers on a hijacked aircraft because those individuals are not morally responsible for the threat to others posed by the potential crash of the plane. Taking their lives in these circumstances in order to save the lives of others, the Court concluded, is to devalue their intrinsic worth by treating them as means to an end.

By contrast, the Court said, shooting down the plane could be permissible if officials conclude "that there are only offenders on board the aircraft and . . . that the shooting down of the aircraft can avert the danger from the people on the ground who are threatened by the plane."<sup>291</sup> In that situation, deadly force would be used only against those whose conduct has made them morally liable to it. In this respect, it would be consistent with deontological principles. When the state's goal is to protect individuals from grave harm by others, these are the principles that must govern the state's use of force.

If, however, an aircraft in these circumstances were commandeered by persons who were members of a group with whom the state was engaged in an armed conflict, the very same action would be permissible under IHL. The doctrine of double effect would characterize the state's action not as intentionally killing the innocent passengers on board, but as killing them unintentionally in the course of killing combatants or civilians directly participating in hostilities, or in the course of destroying a military object.<sup>292</sup> State use of force would be for the goal of protecting the state, which means that it would be governed by consequentialist, not deontological principles. This is the case even though the actions of state forces would be precisely the same in each case.

The Court adverted to this state self-defense scenario when it observed, "The idea that the individual is obliged to sacrifice his or her life in the interest of the state as a whole in case of need if this is the only possible way of protecting the legally constituted body politic from attacks which are aimed at its breakdown and destruction" would not lead to a different result in this case. This is because the purpose of the law was not to "avert[ ] attacks aimed at abolishing the body politic and at eliminating the state's legal and constitutional system."<sup>293</sup> As a result, there was no need to decide "whether, and should the occasion arise, under which circumstances such a duty of taking responsibility, in solidarity, over and above the mechanisms of protection provided in the emergency constitution" would be consistent with the Basic Law.<sup>294</sup>

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291. *Id.* ¶ 146.

292. On the doctrine, see Hills, *supra* note 8.

293. 1 BVR 357/05, ¶ 135.

294. *Id.*

The Court's decision has had a mixed reception,<sup>295</sup> and some states have taken a different approach. Furthermore, some theorists have suggested that it is possible to reconcile deontological principles with a balancing of interests.<sup>296</sup> While this may be the case, the decision reflects a straightforward and uncompromising application of deontological principles. Any attempt to uphold the legislation within such an analytical framework requires a more complex effort to rebut the strong presumption that these principles establish. Thus, the same events can be subject to radically different moral assessment depending on whether they fall on the human rights or IHL side of the divide. At least with respect to taking life, there is a sharp discontinuity between one body of law and the other. This is not to suggest that human rights principles might not inform even the use of force under IHL. This may be the case, but it will occur in the interstices of a legal regime whose governing moral perspective is consequentialist.

While one may accept as a descriptive matter that human rights law and IHL reflect different approaches to the use of force, it is fair to ask if we should regard this as morally acceptable. Given widespread acceptance of deontological principles with regard to taking life, perhaps we should strive to regulate armed conflict according to those principles. One response to this position is that, as Janina Dill has explained, there are fundamental epistemic obstacles to obtaining the information that would be necessary to do this.<sup>297</sup> On this view, the ostensible consequentialism of IHL is an unfortunate but unavoidable departure from basic moral principles rooted in deontology.

A second response is that IHL is consistent with deontological principles in that it is grounded in a lesser evil justification. This asserts that "the infringement of individual rights can be justified as the lesser evil if the greater evil would consist of more violations of individual rights."<sup>298</sup> This "utilitarianism of rights," as Robert Nozick critically termed it,<sup>299</sup> maintains that minimizing the level of rights violations is a way of respecting rights under challenging conditions. David Luban, for instance, acknowledges criticism that aggregating rights in this way is inconsistent with a commitment to individual human dignity. He suggests, however, that "[i]t is still human rights thinking because the weighing and trade-offs

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295. See, e.g., Kai Möller, *The Right to Life Between Absolute and Proportional Protection* (London Sch. of Econ. L., Society & Economy Working Paper No. 13-2010), [www.lse.ac.uk/collections/law/wps/wps.htm](http://www.lse.ac.uk/collections/law/wps/wps.htm); Robin F. Holman, *Law Enforcement, the Rogue Civil Airliner and Proportionality of Effects: An Analysis of International Human Rights Law*, 48 CANADIAN Y.B. INT'L L. 39 (2010); Tatjana Hörnle, *Hijacked Airplanes: May They Be Shot Down?*, 10 NEW CRIM. L. REV. 582 (2007); Oliver Lepsius, *Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-Terrorism Provision in the New Air-Transport Security Act*, 7 GERMAN L.J. 761 (2006).

296. See, e.g., Mattias Kumm & Alec D. Walen, *Human Dignity and Proportionality: Deontic Pluralism in Balancing* (N.Y.U. Public Law & Legal Theory Research Paper Series Working Paper No. 13-03, Feb. 2013), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2195663](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2195663); David Cummiskey, *Kantian Consequentialism*, 100 ETHICS 586 (1990).

297. *Moral Acceptability of War*, *supra* note 276.

298. *Moral Acceptability of War*, *supra* note 276, at 260.

299. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 28-30 (1974).

take place between rights and rights; basic rights cannot be traded off for interests less significant than basic rights.”<sup>300</sup> Ultimately, he says, “when entitlements conflict with each other, something has to give, and human rights thinking cannot ignore conflicts among rights or argue them away.”<sup>301</sup> This approach is consequentialist in that it focuses on outcomes or states of the world, but purports to respect intrinsic individual worth in a way that conventional consequentialism does not.

Finally, of course, one may argue that conventional consequentialism is a morality that is appropriate for the realm of public affairs and collective concerns in a way that deontological theory is not. As Terry Nardin has noted, “applied ethics assumes that public policy should be guided and judged by the same principles that govern individual conduct. Many philosophers of the past would have found this an odd view of the matter.”<sup>302</sup> Similarly, Thomas Nagel, while not a consequentialist, suggests that “[w]ithin the appropriate limits, public decisions will be justifiably more consequentialist than private ones. They will also have larger consequences to take into account.”<sup>303</sup> On this view, IHL is grounded in a moral theory that is justified for the arena of human affairs in which it operates.

I do not have the space in this article to assess the persuasiveness of claims regarding the moral defensibility of consequentialism. I will simply say that at a minimum the conduct of armed conflict seems unavoidably to involve the consequentialist approach that is embodied in IHL.

### *E. Crossing the Moral Rubicon*

What is the implication of recognizing the fundamentally different governing moral principles of human rights law and IHL for proposals such as those by Hakimi and Brooks? It suggests that the domain method serves an important purpose of demarcating a radical shift in perspectives, even if operational reality often presents scenarios that blur the distinction between law enforcement and armed conflict. Each domain reflects a strikingly different presumption with respect to taking human life. A state should not be able gradually to expand the force that it uses, and the terms on which it uses it, without eventually declaring that it is engaged in an armed conflict in defense of the state. It should not be able to avoid this requirement on the ground that such expansion of force simply represents a series of adjustments on a common continuum. At some point, incremental quantitative changes become qualitative, and deontological concerns give way to consequentialist ones.

At that point, a state should be required to inform the world that it intends to cross the Rubicon – that it plans to enter a moral universe that is different in profound ways from the one governed by human rights law. This should be a

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300. Luban, *supra* note 239, at 73.

301. Luban, *supra* note 239, at 73.

302. Terry Nardin, *International Ethics*, in OXFORD HANDBOOK OF INT’L REL. 594, 595 (Christian Reus-Smith & Duncan Snidal eds., 2008).

303. THOMAS NAGEL, MORTAL QUESTIONS 84 (1979).

momentous public step, not a simple adjustment of rules of engagement to take account of exigencies that make adherence to deontological principles progressively more difficult. Even if hostilities may be arrayed on a continuum – even if “peace” is never free of some violence and conflict – it is important to distinguish peace from war because of the expansive presumptions for the use of force that the latter involves.

At the same time, Hakimi’s important insight is that there is more flexibility within each domain than people commonly believe, especially in human rights law. For a variety of reasons, states are reluctant to declare themselves as involved in an armed conflict when engaged in hostilities with non-state groups, especially within their own territories. This means that many if not most counterterrorism campaigns will fall into the category of law enforcement operations governed by human rights law. As we have seen, that body of law has the flexibility to accommodate a wide range of circumstances in which the state uses force against various types of threats.

This underscores the importance of not assuming that human rights law reflects absolute principles that impose strict uniform limits on the use of force in all situations outside of armed conflict. That assumption reflects the notion of rights as trumps that never can be balanced against other interests. Yet even the most fundamental human right, the right to life, is protected against “arbitrary deprivation” in the ICCPR, and against the use of force that is more than “absolutely necessary” in the ECHR. This reflects the fact that what it means to respect even the most important human right will depend on deliberations about the weight of various interests in particular circumstances. This suggests that it may be more useful to think of rights as presumptions rather than trumps. Presumptions require rigorous demonstration in each case that they need to give way to some extent for the sake of other interests – and only to the extent that is necessary to further those interests. The standard for rebutting this presumption with respect to the right to life is the most demanding of all.

In the spirit of a friendly amendment, a useful way to utilize Hakimi’s approach, as well as to implement Brooks’s suggestion, might be to use human rights law as the default category, and to draw on Hakimi’s principles to guide analysis of the extent to which the strict deontological presumptions of human rights law should be relaxed in particular circumstances up to the point at which such presumptions are no longer reasonable. Sensitivity to these principles can enable sophisticated assessments of the nature and level of force that is permissible in various situations, with the presumption against taking life constraining flexibility as much as possible. These assessments would not rely on an idealized conception of “peacetime,” but would acknowledge that threats may take various forms that require differentiated permissions to use force in response. States would navigate the moral Rubicon in the sense that they would be a fair distance from the paradigmatic law enforcement scenario, and might even be able to glimpse the armed conflict side of the river. At the same time, they ideally would be able to avoid taking the fateful step of stepping on to it as long as possible.

At some point, this moment may come. The need to depart from deontological presumptions will become so extensive that there will be a need to acknowledge a discontinuity: the existence of “a specific and unique set of conditions, the existence of which suffices to justify first-resort killing that is otherwise unjustifiable.”<sup>304</sup> This should be regarded as an unavoidable and regrettable shift to a predominantly consequentialist framework, rather than an incremental adjustment along a continuum defined by common overarching principles. This would accept Hakimi’s implicit assumption that human rights law should provide the background framework for analysis, but would recognize that it cannot do so for all situations along the entire continuum.

Some might object that this posits a flexibility for human rights law so capacious that it threatens to undermine the integrity of this body of law as a distinct regime of governance. This concern about the dilution of human rights law has been explored in a thoughtful article by Naz Modirzadeh.<sup>305</sup> The article explores whether certain obligations under IHL should be characterized as human rights obligations, but her points are relevant as well to the extent to which human rights law should maintain a sharp distinction between itself and IHL. Modirzadeh focuses mainly, although not exclusively, on the implications of framing the obligations of an armed force exercising control over foreign territory as assuming extraterritorial human rights obligations. Her insights are relevant as well, however, to regulation of the use of force.

Modirzadeh notes the repudiation in most quarters of the notion that IHL completely displaces human rights law in times of armed conflict. As she observes, while it is now generally accepted that human rights law continues to apply in armed conflicts alongside IHL, “the question of how these bodies of law should apply in tandem, what provisions of human rights law continue to apply to the State and what additional obligations are created by the operation of human rights law are hotly contested.”<sup>306</sup> In particular, what if any human rights obligations does a state continue to have when engaged in extraterritorial military operations?

Modirzadeh notes that a common assumption is that progress in protecting individuals will involve greater convergence between human rights law and IHL, so that the former body of law expands its influence over the latter. From this perspective, she says:

[I]t seems natural that those in favor of human rights, humane treatment of individuals in detention and increased regulation of warfare would be on the side of more convergence, while those on the side of powerful States, limitation of individual rights in favor of national security and protection of the entitlements of the military against the involvement of the international community are on the side of discrete application and strong use of the *lex specialis* principle to privilege IHL over IHRL during armed conflict.<sup>307</sup>

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304. Pearlstein, *supra* note 7, at 31.

305. Modirzadeh, *supra* note 228.

306. Modirzadeh, *supra* note 228, at 355.

307. Modirzadeh, *supra* note 228, at 359.

A problem with the assumption of the desirability of convergence, Modirzadeh argues, is that for the most part it is simply an article of faith. As she puts it, “the field has not been subject to critical thinking on the possible costs of bringing human rights discourse and human rights frameworks into the realm of war.”<sup>308</sup>

Modirzadeh observes, for instance, that a commonly accepted criterion for when a state military force begins to have extraterritorial human rights obligations toward a foreign population is when it exercises effective control over the territory where that population is located, or over an individual. Indeed, this is the point at which Watkin argues that state forces should be held to at least some human rights obligations. Such a test defines a situation that also resembles, although it may not formally constitute, an occupation, which is regulated under IHL by the Fourth Geneva Convention. Support for the increasing application of human rights law in armed conflict would suggest that its requirements should be used to elaborate on and supplement the rights that are set forth in Geneva IV.

Modirzadeh maintains, however, that this approach rests on a fundamental misconception of the relationship of a foreign population to a military force that controls the territory where that population resides. As she suggests, “life under occupation was never meant to be like life in one’s country governed by one’s own leader(s),” which is the fundamental concern of human rights law.<sup>309</sup> Rather, “occupation law secures the minimum protections of the occupied, but it also acts to prevent the occupying power from slipping into the position of the legitimate (read national, territorial) government.”<sup>310</sup> Thus:

[w]hatever the specific function of these restraints in a given occupation situation, the normative spirit of the law, the message that it communicates to the occupied population, is clear: the international community does not believe that the occupier is in your country for your good or benefit, and its stay is temporary, potentially difficult, violent and limited.<sup>311</sup>

The advantage of occupation law, Modirzadeh says, “is that it does not allow us to forget that we are in armed conflict. It does not allow us to pretend that we are in peace, or that the population has consented to its situation.”<sup>312</sup>

For this reason, relying on effective control of an area as the basis for triggering extraterritorial human rights obligations during armed conflict “seems to threaten the very core of human rights principles: that they are intimately tied to the way in which a State governs, the ways in which it communicates its system of governance to its people, and the means by which it demonstrates its accountability to their rights claims and rights enjoyment over time. How can enemy soldiers step into this governance function?”<sup>313</sup> Their interaction with residents will be far

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308. Modirzadeh, *supra* note 228, at 358.

309. Modirzadeh, *supra* note 228, at 365.

310. Modirzadeh, *supra* note 228, at 365.

311. Modirzadeh, *supra* note 228, at 366.

312. Modirzadeh, *supra* note 228, at 366.

313. Modirzadeh, *supra* note 228, at 371.

more circumscribed, and the rights that they are able to honor will be far more limited than those contained in human rights instruments.

What will this mean for our understanding of human rights? “If the Iraqi cannot have the same rights during conflict or occupation as I do during peacetime in my home State, but human rights lawyers want to argue that he ‘has human rights’ what rights should he have? What does human rights mean if we strip it down this way, if we pick at which rights can be enforced in which circumstances by particular armies at particular times?”<sup>314</sup> Modirzadeh argues that if the greater influence of human rights law in these types of situations “fails to deliver in any meaningful way in terms of material changes to the experience of civilians in armed conflict . . . will human rights law and rights discourse suffer lasting damage?”<sup>315</sup> Furthermore, to what extent might extending the discourse of human rights to this setting “threaten the indivisibility principle of human rights law? Do we open the door for States to argue that other situations would justify applying rights obligations on a sliding scale?”<sup>316</sup>

Applying this perspective to the use of force, one might fear that as the level of violence that human rights law must assess intensifies, at some point this body of law will simply mirror the consequentialist presumptions of IHL in all but name only. As Modirzadeh puts it:

To the extent that human rights lawyers and advocates come to speak in the language of IHL, with its acceptance of civilian deaths that are not excessive in relation to the military advantage anticipated, its recognition of the massive destruction to military objects waged in war, its constant balancing of humanity against the powerful argument of military necessity, and its faith in the decision making of the reasonable commander, will something be lost in the advocacy for the rights of individuals?<sup>317</sup>

I have focused on one aspect of a complex argument that Modirzadeh presents, and there are potential responses to some of her concerns. Nonetheless, her argument illuminates the risk that applying human rights law in situations that may require significant concessions to practical exigencies could subtly reshape our understanding of that body of law. It is not the case, for instance, that human rights law could not conceivably take into account the demands of using force even in hostilities that effectively are armed conflict, as we have seen with the European Court of Human Rights jurisprudence on the hostilities between Russia and Chechen rebels. The concern rather is, as its influence expands, at what point does the conception of human rights that it reflects become unrecognizable in terms of the basic commitments of that body of law?

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314. Modirzadeh, *supra* note 228, at 373.

315. Modirzadeh, *supra* note 228, at 374.

316. Modirzadeh, *supra* note 228, at 378.

317. Modirzadeh, *supra* note 228, at 381.



This risk must be taken seriously. The question is whether it is worth accepting it for the sake of requiring that the use of force be justified within a framework that adopts deontological presumptions. These presumptions can do important work, even if human rights law may permit levels of military violence that are quite different from what is used by the police officer on the beat. The crucial difference between human rights law and IHL in cases involving escalation of force is that human rights law adopts the presumption that force should be used only to protect innocent lives from violent threats – not to protect the state by defeating an enemy. To reiterate, the human rights principle of necessity requires that force be used only when “strictly unavoidable,”<sup>318</sup> and “absolutely necessary,”<sup>319</sup> not simply when it achieves a military advantage. When the use of force is unavoidable, the principle of proportionality requires that force be used “in proportion to the seriousness of the offence and the legitimate objective to be achieved.”<sup>320</sup> This is quite different from assessing whether civilian casualties are excessive compared to the military advantage that has been achieved.

Human rights principles of necessity and proportionality thus aim to minimize loss of human life, rather than to do so within the demands of military necessity. A state may be able to use a significant amount of military force in a given instance, but it must justify this in terms that are more protective of life than IHL requires. As I have described above, for instance, the European Court of Human Rights evaluated Russia’s aerial assault on the town of Katyr-Yurt in *Isayeva II* as an operation to protect civilians within the town who were threatened by Chechen rebels, not to protect the state by defeating those rebels. Furthermore, the state’s responsibility to respect human life requires that it plan its operations in order to avoid the use of deadly force in general and civilian casualties in particular.<sup>321</sup> It therefore makes a difference if the use of force is subject to assessment under the presumptions of human rights law rather than IHL, even if a state may be able to depart from those presumptions to some extent in particular cases.

Watkin’s preference for a totality of the circumstances test is more sensitive to the discontinuity between human rights law and IHL than is the purely contextual approach that Hakimi proposes. As he puts it, “[i]t is . . . unlikely that the targeting provisions of international customary and treaty law could be readily changed to adopt a more homogeneous framework.”<sup>322</sup> At some point, circumstances may be such that the only way to respond effectively to a threat is to use force in a way that cannot conform to the deontological demands of human rights law. When this moment arrives, it reflects a change in perspective that is qualitative, not simply incrementally quantitative.

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318. *U.N. Basic Principles*, *supra* note 61, ¶ 9.

319. ECHR, *supra* note 60, art. 2(2).

320. *U.N. Basic Principles*, *supra* note 61, ¶ 5(a).

321. *See, e.g., McCann & Others v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) (1995), <http://hudoc.echr.coe.int/eng?i=001-57943>.

322. WATKIN, *supra* note 16, at 263.

## CONCLUSION

For better or worse, we seem to live in a period in which there is some skepticism about the integrity of legal categories relating to the use of force. This has led to the claim in some quarters that the boundary between these categories has been irrevocably eroded, and that we need new conceptual resources to navigate a novel terrain. The greater prominence of human rights law in recent decades also has led some to question whether that body of law and IHL reflect distinctive domains ordered by distinctive principles. On one view, human rights law is gradually colonizing IHL and remaking it in its own image. As I have argued, this claim elides the fact that IHL reflects the unavoidable necessity of relying on consequentialist reasoning in attempting to protect collective interests.

At the same time, the emergence of decentralized networks of non-state armed groups calls into question whether the existence of an armed conflict remains a realistic test for the use of force under a military rather than police model. This suggests that principles drawn from wartime may begin to penetrate what we traditionally have regarded as the domain of peace, as we evaluate uses of force along a continuum that reflects ostensibly common overarching principles. As I have argued, this claim also elides the significant discontinuity between the moral visions of human rights law and IHL.

Kenneth Watkin has lived in this dynamic world for some time, and appreciates the need to rethink many of our traditional assumptions in light of the complex nature of modern security threats and operations responding to them. He resists, however, the claim that it is necessary to abandon our traditional analytical categories in order to deal effectively with this messy reality. His police primacy principle assumes that human rights law can guide the use of force in many contexts in which it is necessary to use violence, including even some situations within armed conflict. His reliance on this category reflects the view that “the law enforcement paradigm has overall helped ensure life within States is more secure and less violent . . . . Too early a recognition of the existence of an armed conflict can result in greater potential for the use of violence.”<sup>323</sup>

Watkin thus regards distinguishing between law enforcement and armed conflict as both feasible and desirable. “[W]hile there can be controversy and disagreement as to when an armed conflict is in existence,” he says, “there is value in the debate in terms of defining and ultimately limiting the scope of that conflict.”<sup>324</sup> While operating within the flexible human rights framework can accommodate the need to use force to respond to a range of threats, at some point it will be necessary to consider whether the more expansive permissions of IHL are necessary for an effective response. This suggestion by someone who has worked directly with the challenges facing military forces in war time reflects awareness of the need to demarcate entry into that grim moral universe.

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323. WATKIN, *supra* note 16, at 264.

324. WATKIN, *supra* note 16, at 264.

Life inevitably outruns our conceptual categories; the challenge is to determine when we can adapt them and when we must abandon them in our quest for experiential coherence. The world has always been a dangerous place, and violence has always been with us, but the concepts of war and peace have provided ways of making sense of the world and our aspirations for it for quite some time. We should think hard about whether the world we now live in is so radically different from the past that these categories are no longer useful. We may never live in a world in which there is a clear boundary between war and peace. We may be better off, however, if – without illusions – we act as if we do.