

# International Law and the Humanization of Warfare

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A prominent feature of the liberal international order is a commitment to universal human rights based on the worth and dignity of each individual.<sup>1</sup> The expanding influence of this idea is reflected in what Theodor Meron calls the “humanization of international law.”<sup>2</sup> Traditional international law regarded states as the only parties with rights, with individuals enjoying rights that were derivative of their status as residents of states. As Meron puts it, the humanization of international law “has shifted its focus above all from State-centered to individual-centered.”<sup>3</sup> Individuals now have rights *qua* individuals, not simply rights dependent on state rights.

Especially striking has been the “humanization of the law of war” as part of this trend.<sup>4</sup> This has elevated regard for individuals in a domain previously regarded as solely concerned with relations among states. It includes individual criminal responsibility for violating the laws of war, or international humanitarian law (IHL), and recognition that individuals do not lose their human rights even during wartime, or what is now known as “armed conflict.” The latter means that human rights law (HRL) continues to apply when the existence of an armed conflict triggers IHL.<sup>5</sup> While IHL takes precedence on those matters it explicitly regulates, HRL may influence its interpretation, as well as provide guidance on other matters. HRL thus may further humanize IHL by incrementally incorporating more protections for individuals during armed conflict. This reflects the aspiration of the liberal international order to temper warfare by the liberal democratic principle of respect for the individual.<sup>6</sup>

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Some see additional potential for the humanization of conflict in applying HRL, rather than IHL, to hostilities between a state and nonstate group that constitute a noninternational armed conflict (NIAC).<sup>7</sup> Such conflicts are distinct from international armed conflicts (IAC) between states. State use of force against nonstate groups engaged in low-level violence typically is treated as a law enforcement operation subject to human rights law. When hostilities with organized nonstate groups become more intense and sustained, they constitute a NIAC governed by IHL.<sup>8</sup> Estimates are that, over the past fifty years, over 90 percent of the armed conflicts have been NIACs.<sup>9</sup>

States often refuse for political reasons, however, to characterize hostilities that satisfy these criteria as NIACs, especially when they occur solely within a state's territory. They prefer instead to treat members of nonstate groups as criminals whose violence they can address through their ordinary policing and law enforcement processes.<sup>10</sup> They fear that characterizing hostilities with an insurgent group as an armed conflict, and such a group as an enemy armed force, signals that the state has lost its ability to maintain order within its boundaries through exercise of the ordinary activities of a sovereign. A state also may fear a public backlash against treating members of its own population as combatants who may be killed at any time, and against regarding the death of innocent civilians as lawful collateral damage. Thus, for instance, the United Kingdom resolutely refused to characterize hostilities against the Provisional Irish Republican Army during the thirty years of "The Troubles" as an armed conflict. Courts, such as human rights courts in which claims are frequently brought, typically defer to state decisions on how to classify hostilities, which may result in hostilities that meet the criteria for an armed conflict not being formally acknowledged as such.

When a court accepts a state's position that hostilities with a nonstate group do not constitute a NIAC, HRL will be the only body of law that applies.<sup>11</sup> Thus a court arguably has an opportunity to further the humanization project by expanding HRL beyond its ordinary law enforcement context to regulate intense hostilities. In theory, a court can advance this project by being more protective than IHL of the right to life, permitting a state to deny it only when strictly necessary.<sup>12</sup> By doing so, a court thus can strengthen a core commitment of the liberal international order by reaffirming that individuals, not just states, are worthy of protection under international law. In many cases, it will be human rights courts engaged in interpretation of regional human rights conventions that extend the reach of HRL in this way.

This essay suggests, however, that such expansion of HRL may come at the cost of diminishing the perceived normative force of the right to life. To begin with, if a court rigorously applies HRL to what in substance is an armed conflict, it is likely to elicit criticism as being unrealistic and out of touch with facts on the ground. This will impair what Marko Milanovic calls the “effectiveness” of the court, which depends in part on the perception that its judgments do not “tie the hands of the state behind its back.”<sup>13</sup> Such erosion of perceived legitimacy could weaken the humanization project by leading states to ignore judicial pronouncements.

This risk is then likely to lead a court to apply HRL in light of the practical exigencies of the hostilities. HRL contains standards that admit of such flexible application, and it makes sense to apply them flexibly in situations of violence more intensive than in ordinary police operations.<sup>14</sup> However, doing so in a setting too far removed from domestic law enforcement will, as a practical matter, require a court to give considerable deference to military judgment about the need to take life. Further, applying the HRL standard of absolute necessity in this way risks diluting the perceived deontological nature of the right to life and may appear to subject it to consequentialist balancing. To the extent this occurs, courts may undermine their effectiveness by interpreting HRL in a way that compromises the integrity of that body of law: “By nominally expanding the regime’s coverage [courts] would actually be diminishing its substance.”<sup>15</sup>

This essay suggests that the best way to vindicate the right to life in the liberal international order is for human rights courts to characterize intense sustained hostilities between states and nonstate groups as NIACs even when states refuse to do so. This would enable a court to engage in the task of determining how IHL and HRL should be harmonized in a particular case, given that the prevailing view is that HRL continues to apply in qualified fashion during armed conflict.<sup>16</sup> It thus would avoid the need for a court applying solely HRL to grant a state broad discretion to take life under that legal regime. It also would enable courts to develop a body of law that elaborates the relationship between IHL and HRL when they both apply. A court should be willing to follow this approach for hostilities that rise to the level of a NIAC even for internal hostilities that a state may prefer to characterize as ordinary law enforcement responses to violent crime. In sum, the humanization project of promoting respect for human life may be better served by acknowledging the limits of HRL rather than by attempting to expand its scope.

## NECESSITY AND THE RIGHT TO LIFE

The HRL principle of necessity limits taking life to situations in which no other measure will stop an immediate threat to life or prevent grave injury. The European Convention on Human Rights (ECHR) dictates that lethal force is permissible only when “absolutely necessary,”<sup>17</sup> and the UN’s Basic Principles on the Use of Force and Firearms by Law Enforcement Officials declare that lethal force may be used only “when strictly unavoidable in order to protect life.”<sup>18</sup> According to the April 2014 *Report of the Special Rapporteur on Extrajudicial, Summary, and Arbitrary Executions*, “The ‘protect life’ principle—a life may be taken intentionally only to save another life—may be described as the guiding star of the protection of the right to life.”<sup>19</sup> Compliance with this requirement will also satisfy the requirement that the level of force be proportionate to the threat it seeks to intercept. In addition, a state must plan its operations as much as possible to avoid a situation in which it is necessary to take life for this purpose.<sup>20</sup>

Human rights law thus acknowledges some instances in which the state may take life. It limits these, however, to cases in which the state acts to protect the right to life. One who poses an unjustified grave threat to others is conventionally regarded as forfeiting the right to life when nothing other than lethal force will intercept the grave threat he or she poses to an innocent person.<sup>21</sup> In this respect, HRL permits the state to kill based on its obligation to protect the right to life, not based on a balancing of that right against other state interests. In this respect, HRL expresses the idea that the right to life rests on a deontological foundation.

In contrast, IHL, which is triggered by the existence of an armed conflict, imposes significantly less stringent restrictions on taking life. The IHL principle of military necessity effectively permits a state to take the lives of combatants regardless of whether they pose a direct threat at the time they are killed. Furthermore, a party may unintentionally but foreseeably take innocent civilian lives as long as their number is not excessive compared to the anticipated military advantage. The rationale for IHL’s lenient regulation is that the nature of the threat and the level of violence in ongoing intense hostilities require expansive state authority to use lethal force, and that lethal force will save lives in the long run by ending the war sooner. IHL, thus, is starkly consequentialist. It accepts that it may be necessary to sacrifice some lives in order to save a larger number of other lives.

The differences between the two bodies of law reflect the paradigmatic setting of each. The setting for HRL is domestic law enforcement under relatively peaceful conditions, in which unlawful violence can be addressed by conventional police operations and the criminal justice system. By contrast, the milieu of IHL is a setting of intense, sustained violence between armed forces in circumstances that can be difficult for either party to control.

This means as a practical matter that the assessment of necessity is far more searching under HRL than IHL. While a court will acknowledge that police exercise professional judgment, it often may be able to rely on the perspective of the reasonable person in ordinary daily life to determine if there was an individual threat to life so urgent that there was no choice but to use lethal force to stop it. It therefore may be less necessary as a practical matter in many cases to defer to the judgment of state officers. Ordinary experience provides much less guidance, however, in determining whether an attack during an armed conflict will gain a military advantage. The scale of the violence and the multiple variables that influence events are well beyond the typical experience even of intensive police operations. Assessments of the use of lethal force in armed conflict therefore require much more deference to military judgment.<sup>22</sup>

HRL applies in all circumstances, but its protections during armed conflict need to take account of IHL when the latter explicitly regulates conduct. Since IHL directly governs when life may be taken in most cases, HRL's stringent protection of the right to life therefore often must give way to the more permissive IHL regime. The European Court of Human Rights has affirmed the need to interpret the ECHR with due regard for IHL in IACs involving extraterritorial military operations.<sup>23</sup> The case in question involved detention, but its logic would seem to apply as well to taking life. The court might reasonably not limit this approach to IAC, but also extend it to a NIAC.

As I have indicated, however, states frequently refuse to recognize conflicts as NIACs, and the European Court has been reluctant to find that IHL applies when this is the case.<sup>24</sup> It therefore assumes that any claim must be reviewed only under the ECHR. When it considers claims that a state has violated the right to life, it applies the HRL requirement of absolute necessity in a flexible way that leaves a state considerable discretion to take life. The next section illustrates this approach by describing the court's decision in one of the cases arising from the hostilities between Russia and Chechen rebels in the 1990s and early 2000s.

## HUMAN RIGHTS LAW AND INTENSE HOSTILITIES

The hostilities between Russia and Chechen insurgents from 1994 to 1996, and from 1999 until major military operations ended in 2003, constituted an armed conflict by any standard. They featured the use of military-grade weapons, intensive battles, and urban sieges. Estimates of casualties from the two conflicts are difficult to assess and sometimes controversial. The head of Chechnya's pro-Russian interim parliament said in 2005 that total civilian and military casualties were between 150,000 and 160,000, although some human rights groups questioned the accuracy of Russian figures.<sup>25</sup> The Russian human rights group Memorial estimated that 75,000 civilians died in the two wars,<sup>26</sup> a figure that historian Emma Gilligan describes as "the most reliable approximation."<sup>27</sup>

The conflict generated several claims under the ECHR.<sup>28</sup> Since Russia refused to treat hostilities as a NIAC, the court applied HRL to claims that Russia had violated the right to life of innocent persons. Its decisions reflect the difficulty in applying human rights principles to hostilities that are, in practice, armed conflicts but not recognized as such.

Consider *Kerimova v. Russia*, which involved Russian military operations against 1,500 Chechen rebels entrenched in Urus-Martan, a town of about thirty-five thousand persons.<sup>29</sup> The rebels "significantly fortified the town" and were "prepared for long-term defence."<sup>30</sup> Going inward from the outskirts of the city toward its center, "the fighters had dug trenches and dugouts, filled pits with oil to be able to explode them on the approach of the federal forces, and organised numerous firing posts in residential buildings."<sup>31</sup>

The fact that Russia had not recognized an armed conflict nor derogated from the ECHR meant that its operations "ha[d] to be examined against a normal legal background"—that is, HRL.<sup>32</sup> Claims that Russia had violated the right to life were based on aerial attacks on the town that killed fourteen residents. The court found that Russia's operations were authorized under the ECHR as efforts to protect residents from unlawful violence by the rebels. The court emphasized the requirement of absolute necessity to use lethal force, stating, "The situations where deprivation of life may be justified are exhaustive and must be narrowly interpreted," and that it must "subject deprivations of life to the most careful scrutiny."<sup>33</sup>

At the same time, the court acknowledged that Russia's operations occurred in circumstances very different from those in which HRL typically applies. It said,

“The Court is 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.”<sup>34</sup> Thus, “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>35</sup> Protecting life “could presumably comprise the deployment of armed forces equipped with combat weapons, including military aircraft, and could entail, as a regrettable but unavoidable consequence, human casualties.”<sup>36</sup>

Russia was entitled to use force because the rebels refused to surrender. The court then considered whether the aerial bombing was absolutely necessary. Russia argued that “the use of ground troops would have led to unacceptable losses on the part of the federal armed forces.”<sup>37</sup> The court noted that the town was occupied by a large number of insurgents with powerful weapons who were “conducting large-scale military actions” and “had turned the town into a fortress.”<sup>38</sup> In light of this, it said, “The Russian authorities had no choice other than to carry out aerial strikes in order to be able to take over Urus-Martan.”<sup>39</sup>

The court found, however, that Russia’s use of force was disproportionate because Russia had not effectively planned and conducted the operation to minimize loss of life. The government had not informed the residents of the attack beforehand nor made any attempt to secure their evacuation.<sup>40</sup> Nor had it attempted to identify specific structures where civilians might be located.<sup>41</sup> Finally, the court noted that the aerial attacks had used indiscriminate high-explosive fragmentation bombs.<sup>42</sup> It said that “using this kind of weapon in a populated area is impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society.”<sup>43</sup> The court did not suggest what alternative weapons might have been proportionate, but did note testimony indicating that missiles may have been effective while producing less damage.<sup>44</sup>

Some may argue that *Kerimova* reflects human rights law’s potential to humanize the regulation of conflict. The court’s opinion emphasized that hostilities under a law enforcement paradigm must be guided by the aim of protecting lives rather than, as under IHL, defeating opposing forces. It applied the HRL principle of proportionality with this in mind and did not completely defer to Russia’s decision on how to conduct this attack in accordance with this principle.

At the same time, assessing Russia’s claim that aerial attacks were absolutely necessary to protect life required the court to venture far beyond the setting in which it typically applies this requirement. First, HRL authorizes lethal force

based on an individual's conduct, not, as under IHL, on membership in a group. The court did not, however, require Russia to identify which rebels actually posed a grave threat to specific residents at the time of the bombing. It was infeasible for the court to determine with any rigor whether the attacks actually would target such persons, which required deference to the military's judgment that it would.

Second, the court accepted that aerial strikes were absolutely necessary to achieve the goal of protecting lives because a ground assault would be too costly to Russian forces. The court accepted Russia's claim based on general observations about the situation, since it was not in a position to scrutinize it closely. The court was more demanding in its assessment of proportionality, holding Russia liable for not taking adequate steps to minimize casualties from the bombing. Implicit in its holding, however, is that killing innocent persons to save others would be permissible under HRL if Russia had taken such steps. After all, the court surely was aware that, even with the best preparations, aerial strikes were likely to kill some innocent persons.

On the one hand, the court was faithful to HRL, in that the principles of that body of law admit flexible application to specific circumstances. Compared to reliance on IHL, Kenneth Watkin notes that the use of human rights standards "suggests a much more restrictive approach toward controlling State action during what is clearly an armed conflict."<sup>45</sup> On the other hand, the court's analysis in many respects seems unrecognizable as an application of HRL's principle of strict necessity. Given the scale of the violence, the court could not require the individualized determinations that provide assurance that taking life is absolutely necessary. It unavoidably had to grant Russia considerable discretion in making this determination based on military judgment. In this respect, the permission to take life was based on a finding that was more akin to military necessity under IHL than absolute necessity under HRL. Even the court's conclusion that Russia had violated HRL conceivably could have been based instead on a finding that Russia had not taken sufficient precautions under IHL.

None of this is to fault the court for failing to limit Russia's use of force more stringently. Applying HRL in the traditional way I have described likely would have subjected the court to the charge of being wildly out of touch with realities on the ground, thus potentially threatening its legitimacy. The court avoided this, however, only by interpreting HRL in a way that granted the state considerable discretion to take life. Louise Doswald-Beck observes that when human rights bodies have interpreted the right to life under HRL in hostilities between states



and nonstate groups, “in many cases the result was the same as if IHL had been used.”<sup>46</sup> Indeed, in another case involving Russian aerial operations similar to those in *Kerimova*, the court described the obligation to take steps to minimize casualties in terms that mirrored verbatim those contained in IHL.<sup>47</sup> Applying HRL in this way risks diluting its principles of necessity and proportionality, thereby weakening protection of the right to life in other settings. As Marko Milanovic points out, “Allowing the state to kill combatants or insurgents *under human rights law* without showing the absolute necessity for doing so . . . might lead to allowing the state to do the same outside armed conflict, with one precedent leading to another, and then another, and then another.”<sup>48</sup>

Similarly, Kenneth Watkin asks whether cases reviewing Russian-Chechen hostilities under HRL could result in the “militarization’ of human rights law,” which “raises concerns whether this approach will result in a more aggressive use of force by State authorities in ordinary policing situations.”<sup>49</sup> Given these concerns, would it have been more protective of life in the long run to base the decision on IHL and HRL rather than HRL alone?

As *Kerimova* suggests, a court that applies solely HRL to assess alleged violations of the right to life in hostilities that substantively are armed conflicts is unlikely to be able to apply the principle of absolute necessity in the demanding way that this body of law typically requires—at least if it hopes to maintain its legitimacy as a source of reasonable guidance. Even leaving legitimacy aside, as a practical matter a court unavoidably will need to grant a state considerable discretion in determining when it is necessary to take life. This creates a risk that the right to life may be perceived as less deontological in character, and more an individual interest that is subject to consequentialist balancing against state interests.<sup>50</sup>

How should a court in practical terms follow the approach that I have suggested? It is reasonable to imagine that a human rights court may be more willing to independently find a NIAC in conflicts between a state and a nonstate group that operates both inside and outside the state’s borders than in purely internal hostilities. It may regard respect for sovereignty as a more compelling concern in the latter situation, as well as be reluctant to characterize hostilities between a state and its own residents as an armed conflict.<sup>51</sup> This should not lead, however, to automatic deference to a state’s position. A court can be flexible in its interpretation of the NIAC criteria and take account of factors that make it feasible to apply HRL in ways that do not threaten its integrity. As Kenneth Watkin has suggested, states ideally should adopt a presumption of addressing nonstate violence

through policing operations governed by HRL, and should rely on that approach as long as they can.<sup>52</sup> When there are intensive internal hostilities that may make this infeasible, a court should not hesitate to find that they constitute an armed conflict.

The decision in *Arabella v. Argentina* by the Inter-American Commission on Human Rights provides an example of this approach.<sup>53</sup> That case involved about forty members of the Argentine Leftist guerilla group *Movimiento Todos por la Patria* who forcibly entered a military barrack and obtained weapons from the arsenal that they used to attack the soldiers inside. Hostilities between these individuals and military forces lasted thirty hours, resulting in the deaths of twenty-nine attackers and several soldiers. In considering the claim that the military had violated the right to life under the American Convention on Human Rights, the court stated that it first needed to consider whether the engagement was an armed conflict. Argentina characterized the operation as a response to criminal rebellion and maintained that IHL rules were not applicable because there was no IAC. This reflects the reluctance of states for political reasons to acknowledge that violence by members of its population cannot be managed by ordinary law enforcement operations, as I have described above.

The court ruled, however, that the events constituted a NIAC. They were distinguishable from a mere internal disturbance, it said, because of “the concerted nature of the hostile acts undertaken by the attackers, the direct involvement of governmental armed forces, and the nature and level of the violence attending the events in question.”<sup>54</sup> Therefore, the court declared, it must interpret the convention by using “definitional standards and relevant rules of humanitarian law as sources of authoritative guidance.”<sup>55</sup> The court held that the attackers were legitimate targets under IHL, and that the use of lethal force against them therefore did not violate the convention.

Basing the application of IHL on the nature of hostilities rather than a state’s acknowledgment of an armed conflict would be consistent with Janina Dill’s argument that IHL does a better overall job of protecting the right to life in intense hostilities than does HRL.<sup>56</sup> As a practical matter, she maintains, soldiers are likely to disregard HRL in such hostilities because the individualized determination it requires would significantly reduce military effectiveness and the chance of survival.<sup>57</sup>

In addition, soldiers, as a psychological matter, are likely to interpret who constitutes an immediate threat in a biased way that favors themselves and their

comrades. This means that HRL risks ostensibly authorizing the violation of the right to life of many innocent individuals. By contrast, soldiers are more likely to comply with IHL because it does not require the individualized assessments that HRL does.<sup>58</sup> Neither regime, Dill suggests, is perfectly aligned as a moral matter with respect for the right to life, but IHL is preferable because law must consider the practical situations confronted by those whose conduct it governs.

## CONCLUSION

The criteria for determining the existence of a NIAC are widely accepted: hostilities of a certain intensity between groups with a sufficient level of organization to sustain them.<sup>59</sup> As Françoise Hampson notes, “IHL is, or is not, applicable as a matter of law, and not because a state recognizes its applicability.”<sup>60</sup> It is the fact of hostilities, not their formal recognition, that triggers IHL.<sup>61</sup> This essay suggests that human rights courts should take this principle seriously and find that hostilities constitute armed conflicts even when states do not formally treat them as such.

In closing, I will note three concerns about this approach that deserve attention. First, it may seem antithetical to the aim of protecting human life during hostilities to impose less restrictive limits on a state’s use of force than the state itself has said it will apply. As I have described, however, states typically refuse to characterize hostilities as a NIAC for political reasons, not necessarily because they are willing to accept stringent HRL restrictions. If the criteria for a NIAC have been met, it is likely that the state is already using military weapons and tactics to engage in intensive violence. Finding that IHL applies therefore is unlikely to provide authority to use more intensive force than the state is already deploying.

A second concern is that applying IHL will forego the opportunity to use HRL to impose more demanding limits on the use of force. Such limits reflect that a state’s objective under HRL is to protect life from grave threats rather than to defeat an enemy. This may occur in some cases. HRL is flexible enough to be applied to police operations of varying intensity, such as situations involving large numbers of hostages being held by terrorists.<sup>62</sup> Applying it to sustained intense hostilities, however, requires adopting the implausible view that large-scale military campaigns are simply law enforcement operations; that such campaigns consist of a series of engagements in which parties are entitled to kill based on self-defense; and that one or both sides are using lethal force in order to protect

persons from unlawful threats to life, much as police are tasked with doing when on patrol. Leaving aside the implausibility of this analytical framework, we need to weigh any protection that it provides against the potential cost of interpreting HRL in a way that weakens the perceived distinctive force of the right to life under that body of law.

Finally, there may be concern that human rights bodies are not well qualified to apply IHL to cases over which they have jurisdiction under HRL. Marko Milanovic notes, however, that “it is clear that the applicability of human rights in armed conflict . . . is firmly on the agenda [of the European Court] and that it will remain so.”<sup>63</sup> Recent cases, for instance, include the ones between Ukraine and Russia and the Netherlands and Russia regarding hostilities in eastern Ukraine,<sup>64</sup> between Georgia and Russia regarding the 2008 armed conflict between them;<sup>65</sup> and between Armenia and Azerbaijan over the armed conflict in Nagorno-Karabakh.<sup>66</sup>

While these are claims between states, the court will have several opportunities to develop a body of law on IHL and its relationship to HRL. Greater willingness of human rights bodies to recognize a NIAC independent of whether a state has acknowledged one would expand this body of law, as well as clarify issues such as the geographic scope of NIACs and the targeting and detention rules applicable to them. More generally, it would provide fora for potential reviews of claims of IHL violations in addition to criminal tribunals.

The last point could raise another concern. This is the prospect of a substantial increase in litigation over operations in armed conflict that would undermine the perceived legitimacy of human rights courts. Potentially *any* death in an armed conflict could be the basis of at least a *prima facie* claim that the state has violated the right to life. Even if courts rarely find a violation because a state has complied with IHL, opening the door to such claims could impose a major burden on military operations during armed conflict.

This is a relevant concern. Courts could address it, however, by placing reasonable limits on when persons affected by state conduct are within a state’s extraterritorial jurisdiction under HRL. Yuval Shany, for instance, proposes a “functional” approach under which a state has human rights obligations when “the potential impact of the act or omission in question is direct, significant and foreseeable,” or when a state has special legal relations with an individual.<sup>67</sup> Alternatively, Marko Milanovic suggests that the European Court could broaden jurisdiction but avoid a surge of claims by weeding out as inadmissible those it regards as

“manifestly ill-founded” on the merits.<sup>68</sup> I will not attempt here to explore standards that courts might use, other than to note this possibility.

While no trend is irreversible, the humanization project of the liberal international order has done much to enhance sensitivity to individual human rights. A measure of the influence of this project is the extension of HRL even into the regulation of intense sustained hostilities, once regarded as the sole province of state decision-making. Treating HRL as the sole legal regime for NIACs, however, risks undermining the credibility of this project. Armed conflict is radically different from law enforcement, governed by a harsh consequentialism.<sup>69</sup> HRL cannot help but accept much of this logic when it, alone, purports to regulate armed conflict. Large-scale intensive military campaigns, however, are not police operations, and courts that acknowledge this will advance the humanization project further than those that do not.

#### NOTES

<sup>1</sup> According to the Universal Declaration of Human Rights, “All human beings are born free and equal in dignity and rights.” United Nations General Assembly, art. 1, Universal Declaration of Human Rights, December 10, 1948.

<sup>2</sup> Theodor Meron, *The Humanization of International Law* (Leiden, Holland: Brill, 2006).

<sup>3</sup> *Ibid.*, p. xv.

<sup>4</sup> *Ibid.*, p. 1. See also Theodor Meron, “The Humanization of Humanitarian Law,” *American Journal of International Law* 94, no. 2 (April 2000), pp. 239–78.

<sup>5</sup> I use the term “human rights law” rather than “international human rights law” simply to reflect that enforcement mainly occurs by human rights bodies applying regional human rights conventions. Regional conventions nonetheless can be regarded for the most part as reflecting commonly accepted international standards.

<sup>6</sup> For the sake of clarity, I use the colloquial general term “war” in this essay rather than the technical legal term “armed conflict,” except when referring to situations in which the legal standard for the latter is satisfied.

<sup>7</sup> This is the case at least regarding internal conflicts within a state’s territory. See Louise Doswald-Beck, “The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?,” *International Review of the Red Cross* 88, no. 864 (December 2006), pp. 881–904, at p. 890; and William Abresch, “A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya,” *European Journal of International Law* 16, no. 4 (September 2005), pp. 741–67.

<sup>8</sup> The Prosecutor v. Duško Tadić, IT-94-1-AR72, decision on the defense motion for interlocutory appeal on jurisdiction (International Criminal Tribunal for the Former Yugoslavia Appeals Chamber, October 2, 1995), sec. 70: [www.icty.org/x/cases/tadic/acdec/en/51002.htm](http://www.icty.org/x/cases/tadic/acdec/en/51002.htm); and Committee on the Use of Force, International Law Association, *Final Report on the Meaning of Armed Conflict in International Law* (Hague Conference, 2010).

<sup>9</sup> Uppsala Conflict Data Program, “Armed Conflicts by Type and Year Armed Conflict by Type, 1946–2016” (Uppsala, Sweden: Uppsala Conflict Data Program, Uppsala University, 2017).

<sup>10</sup> Marko Milanovic and Vidan Hadzi-Vidanovic, “A Taxonomy of Armed Conflict,” in Nigel White and Christian Henderson, eds., *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Jus post Bellum* (Cheltenham, U.K.: Edward Elgar, 2013), pp. 256–314, at pp. 254, 308–9.

<sup>11</sup> A state’s domestic law governing its use of force must conform to HRL.

<sup>12</sup> See Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (New York: Oxford University Press, 2011); and Kenneth Watkin, *Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict* (Oxford: Oxford University Press, 2016).

<sup>13</sup> Milanovic, *Extraterritorial Application of Human Rights Treaties*, pp. 109–10.

- <sup>14</sup> Watkin, *Fighting at the Legal Boundaries*, pp. 458–64.
- <sup>15</sup> Milanovic, *Extraterritorial Application of Human Rights Treaties*, p. 115.
- <sup>16</sup> “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,” advisory opinion, 2004 I.C.J. 136 (July 9), para. 106. As 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.” International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Armed Conflicts in 2015* (report prepared for the 32nd International Conference of the Red Cross and Red Crescent, Geneva, December 8–10, 2015), sec. 179.
- <sup>17</sup> European Court of Human Rights, Council of Europe, art. 2, European Convention on Human Rights, November 4, 1950.
- <sup>18</sup> Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, September 7, 1990, sec. 9.
- <sup>19</sup> Human Rights Council, United Nations General Assembly, art. 70, *Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, Christof Heyns*, A/HRC/26/36, April 1, 2014.
- <sup>20</sup> *McCann v. United Kingdom*, 21 E.H.H.R., App. no. 18984/91 (September 27, 1995).
- <sup>21</sup> Massimo Renzo, “Rights Forfeiture and Liability to Harm,” *Journal of Political Philosophy* 25, no. 3 (September 2017), pp. 324–42.
- <sup>22</sup> See Public Committee against Torture in Israel v. Government of Israel, H.C.J. 769/02, Supreme Court of Israel Judgment (December 13, 2006) (Ehud Barak, President Emeritus), sec. 57: “The Court will ask itself if a reasonable military commander could have made the decision which was made. The question is whether the decision of the military commander falls within the zone of reasonable activity on the part of the military commander. If the answer is yes, the Court will not exchange the military commander’s security discretion with the security discretion of the Court.”
- <sup>23</sup> *Case of Hassan v. The United Kingdom*, European Court of Human Rights, No. 29750/09, September 16, [hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-146501%22%5D%7D](http://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-146501%22%5D%7D).
- <sup>24</sup> See, for example, *Isayeva v. Russia*, European Court of Human Rights, App. no. 57950/00, Judgment (February 24, 2005), sec. 19, [hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-68381%22%5D%7D](http://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-68381%22%5D%7D).
- <sup>25</sup> New York Times, “Chechen official puts death toll for 2 wars at up to 160,000,” August 16, 2005, [www.nytimes.com/2005/08/16/world/europe/chechen-official-puts-death-toll-for-2-wars-at-up-to-160000.html](http://www.nytimes.com/2005/08/16/world/europe/chechen-official-puts-death-toll-for-2-wars-at-up-to-160000.html).
- <sup>26</sup> *Ibid.*
- <sup>27</sup> Emma Gilligan, *Terror in Chechnya: Russia and the Tragedy of Civilians in War* (Princeton, N.J.: Princeton University Press, 2010), p. 3.
- <sup>28</sup> For discussion of several of these cases, see Abresch, “A Human Rights Law of Internal Armed Conflict.”
- <sup>29</sup> *Kerimova et al. v. Russia*, European Court of Human Rights, Judgment, App. No. 29851/05, May 3, 2011: [www.refworld.org/cases,ECHR,4dc90a3d2.html](http://www.refworld.org/cases,ECHR,4dc90a3d2.html) (2012).
- <sup>30</sup> *Ibid.*, para. 245.
- <sup>31</sup> *Ibid.*, para. 31.
- <sup>32</sup> *Ibid.*, para. 253.
- <sup>33</sup> *Ibid.*, para. 238.
- <sup>34</sup> *Ibid.*, para. 246.
- <sup>35</sup> *Ibid.*, para. 246.
- <sup>36</sup> *Ibid.*, para. 236.
- <sup>37</sup> *Ibid.*, para. 236.
- <sup>38</sup> *Ibid.*, para. 247.
- <sup>39</sup> *Ibid.*, para. 248.
- <sup>40</sup> *Ibid.*, para. 251.
- <sup>41</sup> *Ibid.*, para. 252.
- <sup>42</sup> *Ibid.*, para. 253.
- <sup>43</sup> *Ibid.*, para. 253.
- <sup>44</sup> *Ibid.*, para. 254.
- <sup>45</sup> Watkin, *Fighting at the Legal Boundaries*, p. 555.
- <sup>46</sup> Doswald-Beck, “The Right to Life in Armed Conflict,” p. 884.
- <sup>47</sup> *Isayeva*, sec. 176.
- <sup>48</sup> Milanovic, *Extraterritorial Application of Human Rights Treaties*, pp. 114–15 (emphasis in original).

- <sup>49</sup> Kenneth Watkin, "Urban Warfare: Policing Conduct," in Claire Finkelstein, Christopher Fuller, Jens Ohlin, and Mitt Regan, eds., *Fighting War as Crime and Crime as War: Alternative Legal Frameworks for Asymmetric Conflict* (Oxford University Press, forthcoming).
- <sup>50</sup> For concern about this conceptualization of human rights, see Guglielmo Verdirame, "Rescuing Human Rights from Proportionality," in Rowan Cruft, S. Matthew Liao, and Massimo Renzo, eds., *Philosophical Foundations of Human Rights* (Oxford: Oxford University Press, 2015), pp. 341–59, at p. 343.
- <sup>51</sup> There may be less reluctance if those residents are joined in the hostilities by persons from other states.
- <sup>52</sup> Watkin, *Fighting at the Legal Boundaries*, pp. 223–28. While I do not have the space to discuss it here, Watkin offers a sophisticated analytical framework that eschews reliance on rigid legal categories in favor of an approach that is sensitive to the continuum of violence that states may face.
- <sup>53</sup> Juan Carlos Abella v. Argentina, Case 11.137, Report No. 55/97, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 271 (November 18, 1997).
- <sup>54</sup> *Ibid.*, sec. 155.
- <sup>55</sup> *Ibid.*, sec. 161.
- <sup>56</sup> Janina Dill, "Towards a Moral Division of Labour between IHL and IHRL during the Conduct of Hostilities," in Ziv Bohrer, Janina Dill, and Helen Duffy, eds., *Law Applicable to Armed Conflict* (Cambridge, U.K.: Cambridge University Press, 2020), pp. 197–265.
- <sup>57</sup> *Ibid.*, pp. 260–61.
- <sup>58</sup> *Ibid.*, pp. 261–63.
- <sup>59</sup> Duško Tadić; and International Law Association, *Final Report on the Meaning of Armed Conflict in International Law*.
- <sup>60</sup> Françoise Hampson, "The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body," *International Review of the Red Cross* 90, no. 871 (September 2008), pp. 549–72, at p. 556.
- <sup>61</sup> Thus, contrary to the court's holding in para. 107 of Hassan, ECtHR No. 29750/09, a state should not be required to plead that an armed conflict subject to IHL exists for the court to find that this is the case.
- <sup>62</sup> See Finogenov et al. v. Russia, European Court of Human Rights Judgment, App. Nos. 18299/03 and 27311/03 (December 20, 2011), [hudoc.echr.coe.int/tkp197/view.asp?%22itemid%22:%22001-108231%22](https://hudoc.echr.coe.int/tkp197/view.asp?%22itemid%22:%22001-108231%22)]. The Russian hostage operation occurred within the context of the broader hostilities with Chechen rebels. It may be that such discrete operations under certain conditions are amenable to reasonable application of HRL even if a court characterizes the larger hostilities as an armed conflict.
- <sup>63</sup> Marko Milanovic, "Jurisdiction and Responsibility: Trends in the Jurisprudence of the Strasbourg Court," in Anne van Aaken and Iulia Motoc, eds., *The European Convention on Human Rights and General International Law* (New York: Oxford University Press, 2018), pp. 97–110.
- <sup>64</sup> Ukraine and the Netherlands v. Russia, European Court of Human Rights, [Grand Chamber] App. Nos. 43800/14, 8019/16 and 28525/20, Decision (November 30, 2022), [hudoc.echr.coe.int/eng#%22itemid%22:%22001-222889%22](https://hudoc.echr.coe.int/eng#%22itemid%22:%22001-222889%22)].
- <sup>65</sup> Georgia v. Russia (II) (just satisfaction) European Court of Human Rights, [Grand Chamber] App. No. 38263/08, Judgment (April 28, 2021), [hudoc.echr.coe.int/eng#%22itemid%22:%22001-207757%22](https://hudoc.echr.coe.int/eng#%22itemid%22:%22001-207757%22)].
- <sup>66</sup> Badalyan v. Azerbaijan, App. No. 51295/11, European Court of Human Rights, Judgment (July 22, 2021).
- <sup>67</sup> Yuval Shany, "Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law," *Law & Ethics of Human Rights* 7, no. 1 (2013), pp. 47–71, at p. 69.
- <sup>68</sup> Milanovic, *Extraterritorial Application of Human Rights Treaties*, p. 221.
- <sup>69</sup> Mitt Regan, "From Protecting Lives to Protecting States: Use of Force across the Threat Continuum," *Journal of National Security Law & Policy* 10, no. 1 (February 2019), pp. 171–236.

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Abstract: The trend toward the "humanization" of international law reflects a greater emphasis on individuals rather than simply states as objects of concern. The advance of human rights law (HRL) has been an important impetus for this trend. Some observers suggest that humanization can be furthered even more by applying HRL rather than international humanitarian law (IHL) to hostilities between states and nonstate armed groups, unless a state explicitly declares that it is engaged in an armed conflict. This essay argues, however, that a court should not defer to a state's characterization of hostilities, but should base its analysis on whether hostilities meet the criteria for an armed conflict. Applying HRL to hostilities that effectively are an armed conflict but not acknowledged as such risks diluting the legitimacy and normative force of HRL. On the one hand, if a court applies conventional stringent HRL standards, this body of law may be seen as unrealistic and is likely to be ignored. On the other hand, a court that adapts HRL standards to armed conflict

may need to take a consequentialist approach at odds with HRL's deontological foundations. Clearly differentiating between HRL and IHL may thus best promote the humanization of warfare.

Keywords: armed conflict, warfare, international humanitarian law, human rights law, right to life, non-international armed conflict, humanization, international law