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Rethinking the Permissive Function of Military Necessity in Internal Non-International Armed Conflict

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This article advocates limiting the permissive impact of military necessity on the right to life. It has been argued that military necessity justifies deviations from international human rights law (IHRL) because this body of law is inadequate to deal with the necessities arising out of armed conflict. The article argues that while this rationale is convincing, it should not mean that conduct that is lawful under humanitarian law is necessarily also lawful under human rights law. The degree of force that may be used under international humanitarian law (IHL) is often superfluous. In some instances such violence is tempered by the jus ad bellum*, but this body of law does not apply in internal non-international armed conflict (NIAC). The article concludes by exploring the potential for IHRL to play a role in tempering superfluous violence in NIAC that is similar to that which* jus ad bellum *plays in international conflict.*

Keywords: military necessity, internal non-international armed conflict, international humanitarian law, international human rights law, *jus ad bellum*

1. Introduction

The purpose of this article is to assess critically the relationship between international humanitarian law (IHL) and international human rights law (IHRL). In the famous *Nuclear Weapons* advisory opinion, the International Court of Justice (ICJ) laid down the foundation for this debate by acknowledging that IHRL continues to apply during armed conflict, thereby doing away with the notion that this body of law applies only during peacetime.[1] Moreover, the ICJ opined that IHL standards dictate whether the use of lethal force is an arbitrary deprivation of life and therefore unlawful under IHRL.[2]

A prominent interpretation of the ICJ's dictum is that targeting an assailable person, such as a combatant, will be lawful under both bodies of law.[3] From a human rights perspective, this relationship between IHL and IHRL creates a dilemma. Applying IHL rules effectively detracts from

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[1] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226 (*Nuclear Weapons*), [25].

[2] ibid.

[3] United Nations (UN) Human Rights Committee (HRC), Draft General Comment No 36 – Article 6: Right to Life (19 October–6 November 2015), UN Doc CCPR/C/GC/R.36/Rev.2, para 63 ('Uses of lethal force authorized and regulated by and complying with international humanitarian law are, in principle, not arbitrary'); *Case of Juan*

the protection of human rights. This issue has become even more urgent with the introduction of status-based targeting of 'quasi-combatants' or 'fighters' in non-international armed conflict (NIAC).[4] For instance, Colombia has used the status of the target under IHL to determine whether to apply rules of engagement flowing from human rights-oriented law enforcement paradigms, or those based on the conduct of hostilities regime.[5]

The rationale for the derogative impact of IHL is based on the principle *lex specialis derogat generali*, whereby IHL standards supersede those of IHRL because the former is considered more specific or 'special' in armed conflict.[6] That said, the *lex specialis* approach has been the subject of cogent criticisms that need not be reproduced here in full.[7] Suffice it to say that it is not self-evident that IHL is the *lex specialis*, especially in NIAC when the applicable treaty law is less detailed than is the case in IHRL.[8]

In light of the theoretical weakness of the *lex specialis* approach, other means of understanding the relationship between IHL and IHRL warrant exploration. One method has been to focus on the notion of 'necessity' that underpins IHL. In a convincing theory developed by Hill-Cawthorne the 'underlying state of necessity' that arises during armed conflict explains deviations from stringent peacetime rules such as IHRL.[9] This 'military necessity' licenses a set of exceptional measures, such as killing enemy combatants,[10] and has a permissive impact on IHRL.[11]

This article similarly focuses on military necessity because it is the fundamental principle under IHL which explains the degrees and types of violence that are permitted under this body of law. Moreover, understanding the relationship between IHL and IHRL through the lens of necessity provides opportunities to appraise conventional wisdom on how these laws interact. First and foremost, it reveals another flaw in the *lex specialis* approach. As Hill-Cawthorne argues, a lawful killing of a target under IHL may nonetheless be unlawful under IHRL if less harmful means, such as capturing or injuring, are sufficient to render the target *hors de combat*.[12] In other words, there are instances where the presumption that killing

Carlos Abella v Argentina (1997) Inter-Am Ct HR, Judgment, 18 November 1997, OEA/Ser L/V/II.98, [176]–[188].

[4] In this article the terms 'quasi-combatant' and 'fighter' will be used interchangeably to denote de facto combatants in NIAC: see Section 2.2.

[5] Constantin von Groeben, 'The Conflict in Colombia and the Relationship between Humanitarian Law and Human Rights Law in Practice: Analysis of the New Operational Law of the Colombian Armed Forces' (2011) 16 *Journal of Conflict and Security Law* 141.

[6] Marco Sassòli and Laura M Olson, 'The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts' (2008) 90 *International Review of the Red Cross* 603.

[7] ibid 613–14; Nancie Prud'homme, '*Lex Specialis*: Oversimplifying a More Complex and Multifaceted Relationship?' (2007) 40 *Israel Law Review* 356.

[8] See, albeit in relation to arbitrary detention, *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB), [291].

[9] Lawrence Hill-Cawthorne, 'The Role of Necessity in International Humanitarian and Human Rights Law' (2014) 47 *Israel Law Review* 225, 232–34.

[10] Jens David Ohlin and Larry May, *Necessity in International Law* (Oxford University Press 2016) 3.

[11] Hill-Cawthorne (n 9) 232–34.

[12] ibid 242–45.

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combatants is justified by military necessity may be overturned. This nuance is lost if IHL standards always supersede those of IHRL.

Hill-Cawthorne's argument critically assesses the legitimate means of armed conflict – namely, whether *killing* is always necessary. There is another fundamental question relating to the 'legitimate aim' of armed conflict and its role in shaping IHL. As will be discussed in Section 2, IHL assumes that the ends of all armed conflicts are the same: weakening the enemy's military force. This is true even for states engaging in aggressive armed conflict, and there are prudent reasons why this must be the case.[13] Issues arise, however, when IHL standards replace those under IHRL. For instance, Schabas has advocated the independence between IHL and IHRL on the grounds that the former is indifferent to the legality of the conflict under the *jus ad bellum* while the latter includes an anti-war dimension.[14] It is indeed difficult to accept that a state conducting an aggressive war could rely on the application of IHL to justify deprivations of the right to life of individuals within the victim state.[15]

This article seeks to demonstrate that the agnosticism of IHL towards the overall purpose of the conflict leads to significant practical problems in addition to the issues that have already been illustrated by Schabas. In short, there are instances where the violence that is purportedly justified by military necessity under IHL is superfluous, given the actual purpose of the conflict. The presumption that violence that is legal under IHL is also lawful under IHRL is problematic in that it takes for granted that such violence is actually necessary. This approach is far too formalistic and has the potential to depart from the realities of contemporary armed conflict. The death of every soldier may be sufficient to prevail in an armed conflict, but that does not mean that this is always necessary.

As will be argued, *jus ad bellum* has the potential to temper the superfluous violence within IHL by constraining the overall purpose of the armed conflict. Such a safeguard, however, does not apply in purely internal NIAC. As such, superfluity is of particular concern in these types of conflict. Permitting IHL standards to relax the protection of the right to life under IHRL is problematic for the simple reason that this would result in tolerating unnecessary deprivations of life under IHL and IHRL. As an alternative, this article advocates rethinking the permissive impact of the principle of military necessity. Put simply, the legitimate aims for depriving human life under IHRL ought to withstand the derogative function of the principle. In this way, human rights law plays a similar function to the *jus ad bellum* insofar as it posits the legitimate purposes of internal NIAC.

This argument is made pursuant to the following structure. Section 2 addresses the presumption within IHL that the legitimate aim in all armed conflicts is to disable as many members of the opposing armed forces as possible. Section 3 then delves into the primary argument of the article by demonstrating the way that this presumption results in the acquiescence of IHL in unnecessary

[13] Robert D Sloane, 'The Cost of Conflation: Preserving the Dualism of *Jus ad Bellum* and *Jus in Bello* in the Contemporary Law of War' (2009) 34 *The Yale Journal of International Law* 48.
[14] William A Schabas, '*Lex Specialis*? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of *Jus ad Bellum*' (2007) 40 *Israel Law Review* 592, 607, 610.
[15] HRC, Draft General Comment No 36 (n 3) para 67.

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violence. Furthermore, the crucial role played by the *jus ad bellum* in mitigating this issue will be addressed. Section 4 illustrates how superfluity is particularly problematic in internal NIAC where the *jus ad bellum* does not apply. If IHL standards are to supersede those under IHRL in these types of armed conflict, this results in importing superfluous violence as an exception to the human right to life. Finally, Section 5 will advocate keeping IHRL standards, particularly the legitimate aims for using lethal force under this body of law, intact during armed conflict in order to prevent unnecessary deprivations of life.

2. Military Necessity and the Legitimate Aim of Armed Conflict

This section highlights the presumption under IHL that weakening the enemy's military apparatus is necessary, and therefore legitimate, in armed conflict. Moreover, it traces the impact that this presumption has on black-letter IHL, with particular attention paid to the principle of distinction. Simply put, this aim of armed conflict posits that killing enemy military personnel, namely 'combatants' or 'fighters', is justified by military necessity.

2.1. The Legitimate Aim of Armed Conflict and the Principle of Distinction

Military necessity is a fundamental principle of IHL. It is widely held that the entire corpus of IHL is predicated on a balance between military necessity and humanity.[16] IHL is therefore the product of a pragmatic compromise between the humanitarian impulse to do away with the effects of warfare and the requirement that IHL does not hinder a warring party's ability to prevail over its adversaries.[17] The latter is to ensure that states do not jettison IHL at the outbreak of armed conflict.[18] In this sense, military necessity has a permissive impact vis-à-vis the principle of humanity. This permissive impact, however, licenses only those measures that are necessary for the legitimate aim of the conflict.[19]

Since the Saint Petersburg Declaration of 1868 it has been understood that the 'only legitimate object which States should endeavour to accomplish during war is to weaken the military force of the enemy'.[20] As such, IHL is predicated on the logic of attrition where the overall motivations for the armed conflict, in a political sense, are sought indirectly through defeating the enemy on the battlefield. Under this paradigm, a militarily victorious party imposes its will on the defeated following its surrender, capitulation or, in exceptional cases, until the state is

[16] Yoram Dinstein, 'The Principle of Proportionality' in Kjetil Mujezinović Larsen, Camilla Guldahl Cooper and Gro Nystuen (eds), *Searching for a 'Principle of Humanity' in International Humanitarian Law* (Cambridge University Press 2013) 72–74.
[17] ibid.
[18] ibid.
[19] See, eg, United Kingdom, 'Joint Service Manual of the Law of Armed Conflict', Joint Service Publication 383, 2004, para 2.2.
[20] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg, 1868, 138 CTS (Saint Petersburg Declaration), Preamble.

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destroyed, thereby leading to *debellatio*.[21] For a time this actually reflected the way in which war was conducted.[22]

This presumption is traceable throughout the conduct of hostilities regime under IHL. Prohibitions of violent conduct, or the absence thereof, are a consequence of whether states, while drafting relevant rules, believed that such conduct would be militarily necessary. These beliefs were accounted for when drafting the law, and are embedded in IHL.[23] The military necessity that is embedded in the law applicable to international armed conflict reflects, and therefore gives states the discretion to choose, measures that are supposed to accommodate necessities that arise out of the most intense phases of interstate armed conflict.[24]

One of the rules of IHL that has an intimate relationship with military necessity and the legitimate aim of armed conflict is the principle of distinction.[25] It has been described as a 'corollary' of military necessity.[26] In essence, distinction prohibits attacks against civilians and civilian objects, but at the same time it is silent with respect to attacks against enemy combatants,[27] the inference being that this is lawful under IHL insofar as they are not *hors de combat*.

The presumption that combatants may be attacked stems as far back as the inception of military necessity itself. In the Lieber Code, parties were permitted, in accordance with military necessity, to pursue 'all direct destruction of life or limb of "armed" enemies'.[28] Similarly, it is stated in the preamble to the Saint Petersburg Declaration that in pursuing the legitimate aim of weakening the enemy's military force, 'it is sufficient to disable the greatest possible number of men'.[29]

Combatant status is therefore synonymous with the military necessity to render them *hors de combat*. As will be discussed below, 'fighter' status, which is similarly synonymous with military necessity, has emerged within the IHL applicable to NIAC.

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[21] Gabriella Blum, 'The Fog of Victory' (2013) 24 *The European Journal of International Law* 391, 395.

[22] Artur Malantowicz, 'Civil War in Syria and the "New Wars" Debate' (2013) 5 *Amsterdam Law Forum* 52: ('wars were predominantly fought due to geopolitical and ideological reasoning and their ultimate goal was to defeat an enemy in the battlefield, gain its territory, and thereby strengthen the state's power').

[23] Nobuo Hayashi, 'Military Necessity as Normative Indifference' (2013) 44 *Georgetown Journal of International Law* 675, 683–85.

[24] United States Military Tribunal at Nuremberg, *The Krupp Trial*, Case No 58, 17 November 1947–30 June 1948 (1949) *Law Reports of Trials of War Criminals*, Vol X, 138–39.

[25] Another is the principle of proportionality. While this principle is also problematic in contemporary armed conflicts, a discussion of proportionality is omitted from this article because it suffers from a problem that is rather distinct from the forthcoming discussion. As will be discussed below, distinction may permit superfluous violence in armed conflict. The problem with proportionality stems from its malleability and, consequently, its susceptibility being influenced by factors that may not be strictly relevant to military victory: Jonathan F Keiler, 'The End of Proportionality' (2009) 39 *Strategic Studies Institute* 53.

[26] Stefan Oeter, 'Collateral Damages – Military Necessity and the Right to Life' in Christian Tomuschat, Evelyne Lagrange and Stefan Oeter (eds), *The Right to Life* (Martinus Nijhoff 2010) 167, 169.

[27] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I), art 51(2) and (3), art 52(1).

[28] Instructions for the Government Armies of the US in the Field, prepared by Francis Lieber, promulgated as General Order No 100 by President Lincoln, 24 April 1863 (Lieber Code), art 15.

[29] Saint Petersburg Declaration (n 20) Preamble.

2.2. MILITARY NECESSITY IN NON-INTERNATIONAL ARMED CONFLICT

It is well known that the *lex scripta* of applicable IHL to NIAC is limited in quality and quantity. It may be questioned whether Common Article 3, which applies to all NIAC, includes any substantive norms regulating the conduct of hostilities at all. Paragraph 1 refers to the humane treatment of persons who are not, or are no longer, taking an active party in hostilities,[30] while paragraph 2 relates to the collection and care of the wounded and sick.[31]

Accordingly, Common Article 3 has been described as a 'bill of rights' for victims of armed conflict.[32] Some scholars have opined that Common Article 3 has only a humanitarian purpose and does not give credence to considerations of military necessity.[33] Most notably, the ICJ opined in *Nicaragua* that Common Article 3 embodies the 'elementary considerations of humanity'.[34]

What this means, however, is that the IHL that applies to NIAC grants more latitude to states than in international armed conflict under treaty law. Insofar as prohibitions are lacking, states are relatively free to choose the means and methods of warfare as far as IHL is concerned.[35] In light of this apparent vacuum in the regulation of NIAC, there has been a push towards doing away with the dichotomy between international armed conflict and NIAC.[36] The result has been the

[30] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (entry into force 21 October 1950) 75 UNTS 85; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (entry into force 21 October 1950) 75 UNTS 85; Geneva Convention (III) relative to the Treatment of Prisoners of War (entry into force 21 October 1950) 75 UNTS 135; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287, Common Article 3(1): 'Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed "hors de combat" by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples'.

[31] ibid, Common Article 3(2): 'The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict'.

[32] Cecilie Hellestveit, 'The Geneva Conventions and the Dichotomy between International and Non-International Armed Conflict: Curse or Blessing for the "Principle of Humanity"?' in Larsen, Cooper and Nystuen (n 16) 86.

[33] Françoise J Hampson, 'Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law' (2011) 87 *International Law Studies Series* 187, 194.

[34] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits Judgment [1986] ICJ Rep 14, [218].

[35] Kevin Jon Heller, 'The Use and Abuse of Analogy in IHL' in Jens David Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (Cambridge University Press 2016) 232, 239.

[36] ICTY, *Prosecutor v Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-I-AR72, Appeals Chamber, 2 October 1995, [119] ('Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is

application of rules relating to international armed conflict to NIAC through customary international law. Save for a handful of rules, notably those relating to the notion of 'prisoners of war', the International Committee of the Red Cross (ICRC) has opined that an overwhelming majority of IHL norms apply to NIAC as a matter of customary international law.[37] Out of the 161 rules of customary law identified by the ICRC, only 12 were deemed to apply exclusively to international armed conflict.[38] The principle of distinction, while applying as a matter of treaty law under Additional Protocol II,[39] now exists as customary law and is applicable to all NIAC,[40] even those that do not fulfil the Protocol's stringent preconditions for application.[41]

Moreover, the content of distinction in NIAC became somewhat analogous to that in international armed conflict with the introduction of the 'quasi-combatant' or 'fighter'. This has filled an apparent gap in treaty-based IHL. While Additional Protocol I clearly separates 'combatants' from civilians,[42] no corresponding provision exists in the little treaty law that applies to NIAC. This lack of combatant status can be interpreted as an indication that everyone is a civilian and therefore immune from attack unless they directly participate in hostilities,[43] but this has proved to be problematic. The temporal scope of the notion of direct participation in hostilities creates a 'revolving door' of protection.[44] Civilians lose protection from direct attack only for such time as they directly participate in hostilities,[45] which means they regain immunity from attack once they disengage from the conduct in question.[46]

Hence the introduction of status-based targeting within the law of NIAC through the creation of a quasi-combatant status. The US Law of War Manual stipulates that 'individuals who are formally or functionally part of a non-state armed group that is engaged in hostilities may be

inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife'); Emily Crawford, 'Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-International Armed Conflicts' (2007) 20 *Leiden Journal of International Law* 441; James G Steward, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict' (2003) 85 *International Review of the Red Cross* 313; Michael W Reisman and James Silk, 'Which Law Applies to the Afghan Conflict?' (1988) 82 *The American Journal of International Law* 459.

[37] See generally Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, *Vol I: Rules* (ICRC and Cambridge University Press 2005, revised 2009) (ICRC Study).

[38] Jean-Marie Henckaerts and Els Debuf, 'The ICRC and the Clarification of Customary International Humanitarian Law' in Brian D Lepard, *Reexamining Customary International Law* (Cambridge University Press 2017) 161, 167.

[39] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II), art 13(2).

[40] ICRC Study (n 37) 5–8.

[41] Additional Protocol II (n 39) art 1(1).

[42] Additional Protocol I (n 27) arts 44, 50(1).

[43] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 359.

[44] Hays W Parks, 'Air War and the Law of War' (1990) 32 *The Air Force Law Review* 1, 118–20.

[45] Additional Protocol I (n 27) art 51(3); Additional Protocol II (n 39) art 13(2) and (3).

[46] The High Court of Israel recognised this problem in the *Targeted Killings* case and opined that there is a difference between civilians who directly participate in hostilities sporadically and those who commit a chain of hostilities with short rests in between: HCJ 769/02 *Public Committee Against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v Israel and Others* ILDC 597 (IL 2006) [2006], para 39 (*Targeted Killings*).

made the object of attack'.[47] The International Criminal Tribunal for the former Yugoslavia (ICTY) has opined that civilian protection does not apply to members of organised armed groups.[48] Even the ICRC has taken the position that it would be illogical to allow a non-state armed group to have its entire military apparatus as part of the civilian population.[49] Accordingly, it defines civilians as persons who are neither members of state armed forces nor organised armed groups of a party to the conflict.[50] The military necessity to use lethal force has therefore been embedded in this quasi-combatant status in NIAC. As will be discussed in the following section, however, this is problematic in that such status has the potential to justify lethal force that is not strictly necessary owing to the actual aims or objectives of the armed conflict.

3. Superfluous Violence under International Humanitarian Law

Distinction, especially the status-based delineation of legitimate human targets, is problematic in many contemporary armed conflicts. This becomes apparent once the rule is appraised through the lens of military necessity. The rationale for status-based targeting, especially the 'legitimate aim' described above, does not reflect what is actually necessary in all armed conflicts.

A consequence is that the violence justified by the principle of military necessity under IHL may be, in fact, superfluous. These observations are true, albeit to different degrees, with respect to both international armed conflict and NIAC. Superfluity is tolerable, however, if the *jus ad bellum* applies and continues to apply throughout the armed conflict. Put simply, there is a division of labour between IHL and the *jus ad bellum*, the latter being capable of tailoring the limits of lawful violence to the actual purpose of the conflict. As will be argued in Section 4, however, superfluous violence under IHL is an urgent issue when the *jus ad bellum* does not apply, as is the case in internal NIAC.

3.1. Military Necessity and Superfluous Violence

One of the central arguments of this article is that IHL may permit unnecessary levels of violence in armed conflict. Examining the principle of distinction from the perspective of military necessity, as will be demonstrated below, reveals why this may be the case. It should be noted, however, that the observation that IHL may permit superfluous violence is not novel.

The ICRC has observed the potential for superfluous violence, and has attempted to introduce a 'capture before kill' rule into IHL to offset this issue. Echoing the 'Pictet Maxim',[51] Part IX of

[47] US Department of Defense Law of War Manual, June 2015, 218, para 5.8.3.
[48] ICTY, *Prosecutor v Galić*, Judgment, IT-98-29-T, Trial Chamber I, 5 December 2003, [47] ('For the purpose of the protection of victims of armed conflict, the term "civilian" is defined negatively as anyone who is not a member of the armed forces or of an organized military group belonging to a party to the conflict').
[49] Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009) 28.
[50] ibid 36.
[51] Jean Pictet, *Development and Principles of International Humanitarian Law* (Martinus Nijhoff 1985) 75–76 ('If we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by

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the ICRC's *Interpretive Guidance* stipulates that 'it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force'.[52] Scholars also have recognised the potential for superfluity. Hill-Cawthorne, for instance, has argued that where killing is unnecessary because of the availability of injury or capture, these lesser means must be employed to avoid a violation of IHRL.[53] In this sense, he operationalises the 'capture before kill' rule under IHRL, the difference from the ICRC being that the grounds for the illegality of militarily unnecessary killing would be IHRL as opposed to the 'principle of humanity'.

There has been a lively reaction in academia to the ICRC's opinion, with numerous supporters[54] and sceptics on both sides.[55] One of the fundamental issues in this debate is whether military necessity requires the attacking party to choose the least harmful means to weaken the enemy's military force. An appraisal of this debate is neither necessary nor possible given the scope of this article. It is important to note, however, that even if it could be argued that there is a least harmful means dimension of military necessity, states will not be obligated to choose means that increase risk,[56] are more costly, or less effective.[57]

Aside from the controversy surrounding the status of the capture before kill rule under IHL, such a rule is insufficient insofar as it is concerned only with whether lethal force is always a necessary *means* to armed conflict. As the *Interpretive Guidance* makes clear, the ICRC assumes that every combatant or fighter may be rendered *hors de combat*.[58] Again, the assumption is that their status alone is sufficient to trigger the presumption that their destruction contributes to the aims of armed conflict. The issue that the ICRC is addressing is limited to whether killing is always a necessary *means* for that purpose.

The problem is more fundamental. Superfluity also stems from a gap between the purported legitimate aims that underpin IHL and the actual aims of the party to an armed conflict. Moreover, superfluity also becomes apparent when comparing IHL with the legitimate purpose of armed conflict as governed by the *jus ad bellum*. The question is whether rendering every enemy combatant or 'quasi-combatant' *hors de combat* will necessarily contribute to the actual objective of the armed conflict.

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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').

[52] Melzer (n 49) 82.

[53] Hill-Cawthorne (n 9) 242–45.

[54] Nils Melzer, 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' (2010) 42 *New York University Journal of International Law and Politics* 831, 896–913; Ryan Goodman, 'The Power to Kill or Capture Enemy Combatants' (2013) 24 *European Journal of International Law* 819.

[55] See, eg, W Hays Parks, 'Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect' (2010) 42 *New York University Journal of International Law and Politics* 770; Michael N Schmitt, 'Wound, Capture, or Kill: A Reply to Ryan Goodman's "The Power to Kill or Capture Enemy Combatants"' (2013) 24 *European Journal of International Law* 855.

[56] Melzer (n 49) 81.

[57] US Law of War Manual (n 47) 51 para 2.2.

[58] Melzer (n 49) 80, fn 218, citing Saint Petersburg Declaration (n 20) Preamble.

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The importance of examining the aims of armed conflict cannot be overstated. As McDougal and Feliciano argue:[59]

> Military purposes are not fixed constants; they are, at least in broad outline, determined and controlled by the character and scope of the political purposes of the belligerent … the narrower or broader the scope of political objectives characterized as permissible, the narrower or broader will be the legitimate military purposes, and as legitimate military purposes are narrowed, the quantum of violence necessary for their achievement, and hence, in general principle, lawful, tends to diminish.

Delineating the overall goals of armed conflict is thus a requisite step towards identifying legitimate military purposes, and ultimately the degrees and types of violence that can be justified.[60]

That said, apart from weakening the enemy's military, IHL is completely indifferent to the overall purpose of the conflict.[61] This may be for good reason.[62] A problem arises, however, when the logic of attrition does not reflect the actual objectives of belligerents.

The goals of contemporary armed conflict often require warring parties to seek comprehensive political change,[63] and therefore political dimensions of the conflict have a greater impact on what is deemed 'necessary' in war.[64] As a result, the prudence of a military operation is often measured in relation to its ability to directly influence the overall purpose of the armed conflict.[65] Commanders then plan and choose operations that 'are designed to produce political, military, economic, social, infrastructural, cyber, and information effects that contribute directly to achieving the strategic objectives'.[66] This effects-based doctrine dictates that wars are most efficiently executed if the belligerent can achieve its overall goals without having to destroy the enemy's military.[67]

In some instances this may even necessitate benevolence towards targets that belong to the military apparatus of the enemy.[68] According to the Counter-Insurgency Doctrine of the US, which applied to the insurgency in Afghanistan, '[a]n operation that kills five insurgents is

[59] Myres S McDougal and Florentino P Feliciano, *Law and Minimum World Public Order* (Yale University Press 1961) 75, fn 183.
[60] ibid 75.
[61] Schabas (n 14) 607.
[62] ibid. Without going into too much detail, the indifference of IHL to the overall purpose of armed conflict is generally thought of as a feature rather than a defect of the regime. Put simply, this is to maximise humanitarian protection. Such agnosticism precludes protection under IHL from being prejudiced by the overall 'justness' of the armed conflict. See also Sloane (n 13).
[63] Blum (n 21) 400–01.
[64] ibid 393.
[65] US Department of Defense, Department of the Air Force, Basic Doctrine, Doctrine Document 1, 17 November 2003, 18 ('A vital part of the new approach to warfare is the emerging arena of effects-based operations (EBO). A further step away from annihilation or attrition warfare, EBO explicitly and logically links the effects of individual tactical actions directly to desired military and political outcomes'); Janina Dill, 'The 21st Century Belligerent's Trilemma' (2015) 26 *European Journal of International Law* 83, 93.
[66] US Department of Defense, Air Force Doctrine Document 3-70, 'Strategic Attack', 12 June 2007 (last reviewed 1 November 2011) 6.
[67] Dill (n 65) 93.
[68] Blum (n 21) 393.

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counterproductive' if the collateral damage raises animosity towards the US and leads to the recruitment of more insurgents.[69] Moreover, the doctrine advises the capture over killing of legal targets on the same grounds.[70] In light of this evolution in warfare, scholars have questioned whether killing as many enemy soldiers as possible actually contributes to the overall purpose of contemporary armed conflict.[71]

What this reveals is that as the aims of contemporary armed conflict have changed, so have the degrees of violence that actually help belligerents to attain their objectives. IHL, however, treats all conflicts in a uniform manner by presuming that weakening the enemy's military force is conducive to fulfilling the aim of the conflict. The violence that is built into IHL may not only be superfluous, but it may even be counterproductive.[72] As will be discussed below, the superfluous violence within IHL becomes even more apparent when comparing this body of law with the *jus ad bellum*.

3.2. THE ROLE OF THE *JUS AD BELLUM* IN TEMPERING SUPERFLUITY

The use of force is prohibited under international law save for instances of self-defence and Security Council authorisation under Chapter VII.[73] These exceptions to the prohibition of force fall under the *jus ad bellum*; they 'distinguish between the permissible and impermissible resort to coercion', and constrain the overall objectives and purposes of war.[74]

The following will focus primarily on the law of self-defence. The principles that belong to this body of law require that conflicts are relatively limited in scope. Consequently, comparing the *jus ad bellum* with IHL fulfils two crucial functions. First, it further demonstrates the superfluity within IHL. Second, and more importantly, it reveals the potential for the *jus ad bellum* to temper the superfluous violence that is built into IHL.

The 'legitimate purpose' of an armed conflict in self-defence is limited to 'promptly repelling and terminating highly intense initiating coercion against "territorial integrity" or "political independence"' of a state.[75] Moreover, force must be necessary for and proportionate to repelling such coercion, otherwise known as an armed attack or aggression.[76] The necessity criterion[77] requires a state to use force as a last resort, meaning that the victim state cannot respond with force if there are non-forceful means of defending itself.[78] In the *Oil Platforms* case, for example, the ICJ could not find that the use of force by the US was necessary because, inter alia, it did not

[69] US Headquarters Department of the Army, Counterinsurgency, FM 3-24, December 2006, 1–141.
[70] ibid 1–128.
[71] Blum (n 21) 417.
[72] ibid 415–17.
[73] Charter of the United Nations (entered into force 24 October 1945) UNTS XVI (UN Charter), arts 51 and 42.
[74] McDougal and Feliciano (n 59) 527.
[75] ibid 528.
[76] UN Charter (n 73) art 51.
[77] *Nicaragua v US* (n 34) [194].
[78] David Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?'(2005) 16 *European Journal of International Law* 171, 187.

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attempt to resolve the issue by complaints regarding military activities on the platforms.[79] Further constraints are imposed by the principle of proportionality. It has been argued that this element has two functions: not only does it dictate whether the use of force is warranted to begin with, but it also 'determines the intensity and magnitude of military action' in response to an armed attack.[80]

What is interesting is that these principles may apply to the same subject matter of IHL, but come to different conclusions. This is especially the case if the *jus ad bellum* continues to apply throughout the conflict, and not just the legality of the use of force in the first place.[81] A recent, albeit controversial, development in the law of self-defence is particularly noteworthy in this regard.

The doctrine of 'naked' self-defence is a theory that has developed in light of the difficulty in delineating the geographical scope of armed conflict. Within the context of the 'global' war on terror, issues arose in justifying strikes against terrorist targets that had left the 'hot' theatre of war and ventured into areas where the application of IHL was questionable.[82]

The purpose of naked self-defence is therefore to justify drone strikes against targets even when IHL does not apply.[83] According to this theory, self-defence governs the resort to armed force and 'the execution of specific operations'.[84] This is, of course, a striking departure from traditional conceptions of the *jus ad bellum*. Even if this body of law applies throughout the armed conflict, it is difficult to find other examples of self-defence being invoked for each individual strike. That the *jus ad bellum* governs target selection is an encroachment into matters that are ordinarily governed by IHL.[85]

While naked self-defence appears to modify traditional conceptions of the *jus ad bellum*, Anderson argues that it is supported by US state practice. In particular, he cites statements made by Legal Adviser to the Obama Administration, Harold Hongju Koh, who asserted that drone strikes against individual targets are legal when they are engaged in armed conflict *or*

[79] *Case concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, Counterclaims, Judgment [2003] ICJ Rep 200, [76].
[80] Enzo Cannizzaro, 'Contextualizing Proportionality *Jus ad Bellum* and *Jus in Bello* in the Lebanese War' (2006) 88 *International Review of the Red Cross* 779, 781; Kretzmer (n 78) 188; Sloane (n 13) 52.
[81] While this position is not universally accepted, it finds support in academia and practice: Christopher Greenwood, 'The Relationship between the *Ius ad Bellum* and *Ius in Bello'* (1983) 9 *Review of International Studies* 221; for an alternate view, see Yoram Dinstein, *War, Aggression, and Self-Defense* (4th edn, Cambridge University Press 2005) 237.
[82] The examples raised by Anderson include the movement of targets from Afghanistan to 'safe havens' such as Pakistan, Yemen and Somalia: Kenneth Anderson, 'Targeted Killings and Drone Warfare: How We Came to Debate Whether There is a "Legal Geography of War"' in Peter Berkowitz (ed), *Future Challenges in National Security and Law* (Hoover Institution Press 2011) 17.
[83] ibid 8.
[84] Geoffrey S Corn, 'Self-Defense Targeting: Blurring the Line between the *Jus ad Bellum* and the *Jus in Bello'* (2012) 88 *International Law Studies Series* 57, 58.
[85] ibid.

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the strike is justified by self-defence.[86] In other words, IHL and the *jus ad bellum* were regarded as two mutually exclusive justifications for the use of force.

This reveals the potential for the *jus ad bellum* to impose restrictive standards when compared with IHL. In particular, naked self-defence against individual targets could be invoked only when there is an actual or imminent threat of an armed attack.[87] Without delving into the controversies surrounding the question of 'imminence' with respect to non-state actors,[88] the point here is that simply belonging to the military apparatus of a non-state armed group would not be sufficient to justify targeting under 'naked' self-defence. Accordingly, a threat-based analysis of targets during armed conflict, as advocated by scholars such as Blum and Medina,[89] would be required under the *jus ad bellum*.

This overlap between the subject matter of IHL and the *jus ad bellum* demonstrates the potential for the latter to put a cap on superfluity. It should be mentioned, however, that this was not the intention of the US or of Anderson. Again, IHL and the law of self-defence were seen as two alternatives to justify drone strikes, even in areas where the former does not apply. However, once self-defence is extended under *lex lata* to apply to such operational considerations it is difficult to argue that every attack against a fighter is lawful under international law. While the position of the US may have been that naked self-defence determinations are not required where IHL applies, this is clearly a mistaken interpretation of the law. Conventional wisdom holds that IHL and the *jus ad bellum* are completely independent, meaning that a given use of force must be lawful under both the *jus ad bellum* and IHL.[90] In other words, IHL – or, more specifically, the existence of an armed conflict within the territorial state – cannot justify deviations from the former. Thus, where both bodies of law apply, attacks against non-state actors would have to be lawful under IHL as well as the *jus ad bellum*. In attempting to justify targeting on the basis of both the *jus ad bellum* and IHL, the US has opened the door for the former to put a cap on the latter.

Other examples illustrate the potential for the *jus ad bellum* to temper superfluity which are less controversial than the doctrine of naked self-defence. The conflict between the UK and Argentina over the Falkland Islands is but one. Evidence for continuing application of the *jus ad bellum* can be seen from the UK's justification for sinking the Argentinian warship *General Belgrano*. As noted by Greenwood, the justification for attacking it was based entirely

[86] Harold Hongju Koh, 'The Obama Administration and International Law', Keynote Speech, Annual Meeting of the American Society of International Law', Washington (DC), 25 March 2010, https://2009-2017.state.gov/s/l/releases/remarks/139119.htm.

[87] The controversy surrounding whether a non-state armed group is capable of an 'armed attack' for the purposes of triggering self-defence is also noted.

[88] See generally Daniel Bethlehem, 'Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106 *American Journal of International Law* 770.

[89] Gabriella Blum, 'The Dispensable Lives of Soldiers' (2010) 2 *Journal of Legal Analysis* 69; Barak Medina, 'Regulating Anti-Terror Warfare through the Individual Dangerousness Doctrine: Theory and the Israeli Supreme Court Jurisprudence' (2013), available at SSRN: https://ssrn.com/abstract=2259158.

[90] Sloane (n 13) 50.

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on the law of self-defence notwithstanding the fact that the conflict over the Falkland Islands had already been under way for weeks.[91]

This example also shows that legal targets under IHL may be unlawful under the *jus ad bellum*. The conflict over the Falkland Islands between the UK and Argentina was significantly limited. In light of the requirements of necessity and proportionality, Greenwood argues that targets would have to have been relevant to the limited aim of the conflict, which, from the UK's perspective, was to retake the Falkland Islands.[92] Accordingly, it is unclear whether sinking *General Belgrano* was legal notwithstanding the unequivocal legality of striking the vessel under IHL.[93]

Another illustrative example of the disparity between these two bodies of law can be found in the First Gulf War. During the Iraqi invasion and attempted annexation of Kuwait, the Security Council authorised 'all necessary means' to enforce sanctions under previous resolutions, and to restore international peace and security.[94] Within this context, retreating Iraqi soldiers were bombed in February 1991. According to Dinstein, these targets constituted legitimate military objectives under IHL notwithstanding their retreat.[95] After all, they were part of the military apparatus of Iraq, and IHL assumes that they would regroup and therefore reconstitute a threat.[96] It is far less clear, however, that such conduct would be legal in light of the limited mandate to restore the territorial integrity and political independence of Kuwait; nor is it equivocal that it would satisfy the requirements of necessity and proportionality under the law of self-defence.

4. Problems with Applying the Permissive Function of Military Necessity in the Absence of a *Jus ad Bellum*

Superfluity is problematic in international armed conflict as well as NIAC. However, at least with respect to conflicts that are subject to the *jus ad bellum*, there is a semblance of solace in the deterrence and avenues for redress for violations of this body of law. Moreover, it may be possible to argue that all violence that is unlawful under the *jus ad bellum* is a violation of the right to life irrespective of whether it is in accordance with IHL.[97] These options simply do not exist in internal NIAC. The *jus ad bellum* does not apply to these traditional 'civil war'-type NIACs for the simple fact that this body of law regulates the use of force between sovereign states.[98]

This ought to be reason enough to abandon the *lex specialis* approach where legality under IHL equates with legality under IHRL. Such an approach is to import superfluous violence

[91] Greenwood (n 81) 224.
[92] ibid.
[93] ibid.
[94] UNSC Res 678 (29 November 1990), UN Doc S/RES/678, para 2.
[95] Yoram Dinstein, *The Conduct of Hostilities in International Armed Conflict* (Cambridge University Press 2004) 94.
[96] ibid.
[97] Tom Dannenbaum, 'Why Have We Criminalized Aggressive War?' (2017) 126 *Yale Law Journal* 1242, 1275.
[98] UN Charter (n 73) art 2(4) ('All Members shall refrain in their *international relations* from the threat or use of force against the territorial integrity or political independence of any *State*, or in any other manner inconsistent with the Purpose of the United Nations' (emphasis added)).

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into IHRL. As this section will argue, however, superfluity is exacerbated in internal NIAC. If military necessity is to have a permissive impact on IHRL whenever the target qualifies as a fighter, this creates an incentive for states to escalate violence.

4.1. INCENTIVES TO APPLY MILITARY NECESSITY AND EXPAND THE NOTION OF 'QUASI-COMBATANT'

In the absence of the *jus ad bellum*, permitting IHL to supersede the norms under IHRL in internal NIAC would result in zero constraints on the overall purpose of the armed conflict aside from weakening the enemy. This is particularly troublesome in light of the incentives that states have to escalate violence in these conflicts.

The incentives for escalation arise out of discrepancies between IHL and IHRL standards. For instance, the legality of targeting combatants based on their status under IHL is unheard of under IHRL.[99] Moreover, IHRL requires that states spend a significant amount of time, money, and energy on training and equipping their personnel for non-lethal applications of force so as to minimise situations in which lethal force will become necessary in the first place.[100] Applying IHL standards would allow states to bypass these obligations under IHRL that are onerous by design.[101] Kretzmer has described the Israeli declaration that the violence that erupted in the West Bank and Gaza in 2000 was 'an armed conflict short of war' as an attempt to free the Israeli authorities of IHRL constraints.[102] Although this was related to occupied territory and therefore not strictly relevant to the present discussion, the point here is that this logic could 'easily guide any State faced with internal conflict'.[103]

This is especially problematic given that non-state parties to the conflict are liable to domestic prosecution irrespective of whether they have acted in accordance with international law.[104] This legal asymmetry 'may encourage States to jump from a law-enforcement to armed conflict model, since in doing so they change the rules of engagement without paying the price owed in international armed conflicts' – that is, the granting of combatant privilege and prisoner of war status.[105]

It is noteworthy that this is in stark contrast to when military necessity was first introduced in the Lieber Code of 1863.[106] States were required to recognise the belligerency of the non-state

[99] David Kretzmer, 'Rethinking the Application of IHL in Non-International Armed Conflicts' (2009) 42 *Israel Law Review* 8, 23–31.
[100] ECtHR, *McCann and Others v United Kingdom*, App No 18984/91, 27 September 1995, paras 202–14; ECtHR, *Hamiyet Kaplan and Others v Turkey*, App No 36749/97, 13 September 2005, paras 49–54; ECtHR, *Güleç v Turkey*, App No 54/1997/838/1044, 27 July 1998, para 71; see also Office of the High Commissioner for Human Rights (OHCHR), Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (27 August–7 September 1990), UN Doc A/CONF.144/28/Rev.1, provision 2.
[101] Kretzmer (n 99) 25.
[102] ibid 22.
[103] ibid 23.
[104] ibid 36.
[105] ibid 35–36.
[106] Lieber Code (n 28).

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group if the state wished to, among other things, detain members of the rebel army without concrete proof of the risk that they posed to the state.[107] Thus, there was a trade-off where states could access the permissive functions of military necessity only after it granted the same prerogatives to its non-state adversary. Currently, Additional Protocol II, should it apply, merely encourages states to grant amnesty to persons who have participated in armed conflict, but the language of this provision clearly suggests that states are not obligated to do so.[108] In fact, granting privilege to non-state armed groups has been 'unthinkable' for obvious reasons stemming from the desire of states to maintain their monopoly on violence.[109]

The incentives to apply IHL are particularly dangerous considering the ambiguity surrounding who and what constitute legitimate targets. If the 'status' of the target under IHL is used to justify deviations from IHRL norms, as the *lex specialis* principle suggests, or if status were synonymous with a derogative effect of military necessity, states would have an interest in expanding the category of persons who belong to the enemy's military force. A problem that is endemic in conflicts involving non-state armed groups is that it is unclear as to who actually belongs to the 'military force' of the enemy. It was mentioned earlier that states have adopted an approach in NIAC that is similar to that in international armed conflict for targeting purposes. While there is a growing consensus that 'quasi-combatants' exist as a category under the law applicable to NIAC,[110] there is persisting controversy regarding who actually qualifies as such. The *Interpretive Guidance* has made strides towards a potential solution by providing that a civilian who continuously participates directly in hostilities is functionally equivalent to a combatant.[111] However, the definition has come under heavy criticism for being under-inclusive, unclear and, as a result, unrealistic.[112] Thus, while there may be a shared understanding between states and organisations such as the ICRC that membership of an organised armed group deprives that person of protection as a civilian, the question as to what constitutes membership remains unsettled.

In addition to this legal uncertainty, the reality is that members of non-state armed groups are difficult to identify as a matter of fact. Non-state parties to a NIAC are rarely made up of formally

[107] Jens David Ohlin, 'The Combatant's Privilege in Asymmetric and Covert Conflicts' (2015) 40 *Yale Journal of International Law* 337, 359.
[108] Additional Protocol II (n 39) art 6(5) ('At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained').
[109] Geoffrey S Corn, 'Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors' (2011) 22 *Stanford Law and Policy Review* 253.
[110] Melzer (n 49) 71–73; Michael Bothe, Karl J Partsch and Waldemar A Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (2nd edn, Martinus Nijhoff 2013) 773–74; *Targeted Killings* (n 46) para 39; ICTR, *Prosecutor v Rutaganda*, Judgment, ICTR-96-3-T, Trial Chamber I, 6 December 1999, [101].
[111] Melzer (n 49) 31–36.
[112] William J Fenrick, 'ICRC Guidance on the Direct Participation in Hostilities' (2009) 12 *Yearbook of International Humanitarian Law* 287; Kenneth Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities Interpretive Guidance"' (2010) 42 *New York University Journal of International Law and Politics* 641; Geoffrey Corn and Chris Jenks, 'Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflicts' (2011) 33 *University of Pennsylvania Journal of International Law* 313, 339–40.

integrated individuals, with the exception of a handful of organised armed groups.[113] To the disadvantage of state parties to NIAC, members of non-state groups purposefully integrate themselves into the civilian population to avoid detection and even shield themselves from attack.[114] While the law applicable to international armed conflict incentivises separation from the civilian population by making it a condition for protection from domestic prosecution per combatant privilege,[115] a similar mechanism does not exist in NIAC. Such factual ambiguities may be taken advantage of by states. The US, for instance, has been criticised for its use of post facto justifications for targeted killings.[116] One critique is that at one point US officials counted any military-aged male to be killed as a combatant unless there was evidence found to overturn this presumption, so as to skew data relating to collateral damage.[117] While this was not related to whether the US could employ force under IHL in lieu of IHRL, it demonstrates the difficulty in relying on status to determine whether resorting to force under IHL rules was indeed justified by military necessity.

4.2. THE THRESHOLD OF NON-INTERNATIONAL ARMED CONFLICT AS ONLY A PARTIALLY MITIGATING FACTOR

There is a potential mitigating factor in NIAC, but it only goes so far. Unlike international armed conflicts, which do not have a requisite threshold of violence to trigger applicable IHL,[118] NIACs exist only after certain degrees of organisation of the armed groups and intensity of violence have been met.[119] As the ICTY Trial Chamber made clear, this is for the purpose of 'distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law'.[120] The jurisprudence of the ICTY suggests that the test envisages strikingly high degrees of both organisation and intensity of violence.[121] Additional Protocol II posits an even higher threshold for application by requiring the

[113] Sivakumaran (n 43) 360.
[114] Robin Geiß, 'Asymmetric Conflict Structures' (2006) 88 *International Review of the Red Cross* 757, 762–64.
[115] Geneva Convention (III) (n 30) art 4(2); Additional Protocol I (n 27) art 44(3).
[116] Kristina Benson, '"Kill 'Em and Sort it out Later:" Signature Drone Strikes and International Humanitarian Law' (2014) 27 *Pacific McGeorge Global Business and Development Law* 17, 20–21.
[117] WJ Hennigan, 'White House to Finally Reveal Civilian Deaths from U.S. Drone Attacks', *Los Angeles Times*, 27 June 2016, http://www.latimes.com/world/middleeast/la-fg-obama-drone-casualties-20160627-snap-story.html; Scott Shane, 'Drone Strikes Reveal Uncomfortable Truth: U.S. is Often Unsure about Who Will Die', *The New York Times*, 23 April 2015, https://www.nytimes.com/2015/04/24/world/asia/drone-strikes-reveal-uncomfortable-truth-us-is-often-unsure-about-who-will-die.html?mcubz=0.
[118] ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press 2016) (Updated Commentary), para 236.
[119] ICTY, *Prosecutor v Tadić*, Opinion and Judgment, IT-94-1-T, Trial Chamber, 7 May 1997, [562].
[120] ibid.
[121] See, eg, ICTY, *Prosecutor v Haradinaj and Others*, Judgment, IT-04-84-T, Trial Chamber I, 3 April 2008, [33]–[56]; ICTY, *Prosecutor v Limaj and Others*, Judgment, IT-03-66-T, Trial Chamber II, 30 November 2005, [34]–[63].

non-state armed group to exercise such control over part of a state's territory 'as to enable them to carry out sustained and concerted military operations'.[122]

The high threshold of violence required to trigger a NIAC ensures that IHL applies to conditions that are extraordinary compared with peacetime conditions. Moreover, given that the threshold of violence requires a bilateral exchange of intense fighting between the armed group and the state,[123] it would be difficult for a state to unilaterally invoke military necessity to justify deviations from peacetime rules. There would need to be hostilities carried out by the non-state adversary as well. As a consequence, it could be argued that the threshold of NIAC functions as the *jus ad bellum* in internal NIAC. As Dannenbaum suggests, states may not engage in hostilities with their own population unless they are responding to an internal threat – that is, the formation of a non-state insurgent group.[124] In the absence of such a threat, hostilities may qualify as a widespread or systematic attack against a civilian population; crimes against humanity may therefore be the domestic equivalent of the crime of aggression.[125]

The threshold of NIAC is certainly a mitigating factor. It is submitted, however, that it is unsatisfactory. There is still the danger that a state could be the party to initiate violence only to be freed of its IHRL constraints as a consequence. Practice has shown that a state may instigate the formation of an armed opposition and, as a consequence, the application IHL. Non-violent protests in Syria started in March 2011, only to be met with lethal suppression tactics by the government and associated forces. This included the firing of live rounds into crowds, sniper fire and the use of tanks by May of the same year.[126] It was not until August 2011 that armed opposition towards the government formed in response to the suppression, leading to the escalation of violence and the existence of a NIAC.[127]

Admittedly, it is difficult to infer from these facts alone that violence was escalated by Syria with the specific intention of triggering the application of IHL's permissive standards. What this does show, however, is that the permissive impact of military necessity being triggered by a high threshold of violence could incentivise states to do just that. Rather than insist on the exhaustion of non-forcible measures, as is the function of 'necessity' under the *jus ad bellum*,[128] the intensity criterion of NIAC rewards states for escalating violence past the threshold.

This is difficult to accept when, as the Syrian example suggests, the armed opposition formed in response to violence initiated by the government. At the same time, it would be unwise to deny the existence of a NIAC and the protective application of IHL in such cases. This warrants rethinking the permissive function of military necessity. If we are to accept the well-argued

[122] Additional Protocol II (n 39) art 1(1).
[123] Adil Ahmad Haque, 'Triggers and Thresholds of Non-International Armed Conflict', *Just Security*, 29 September 2016, https://www.justsecurity.org/33222/triggers-thresholds-non-international-armed-conflict.
[124] Dannenbaum (n 97) 1272.
[125] ibid.
[126] Louise Arimatsu and Mohbuba Choudhury, 'The Legal Classification of the Armed Conflict in Syria, Yemen, and Libya', Chatham House, March 2014, 7–8, https://www.chathamhouse.org/sites/files/chathamhouse/home/chatham/public_html/sites/default/files/20140300ClassificationConflictsArimatsuChoudhury1.pdf.
[127] ibid 8.
[128] See Section 3.2.

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analogy proposed by Hill-Cawthorne – whereby military necessity is akin to 'necessity' within the law of state responsibility, and thereby acts as a circumstance precluding wrongfulness under IHRL[129] – caveats to the application of necessity should also be accepted. Under Article 25(2)(b) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, necessity cannot be invoked as a circumstance precluding wrongfulness by a state that has contributed to the state of necessity.[130] The same ought to be said with regard to military necessity and states that are responsible for triggering hostilities in the first place. To accept the permissive function of military necessity whenever the objective criteria for a NIAC exist, as is the case with the *lex specialis* approach, completely misses this nuance, to the detriment of human rights protection.

Another problem is that once the threshold of NIAC has been met, IHL applies as though the same levels of necessity exist throughout the armed conflict. The final stages of the protracted and intense NIAC between the Sri Lankan government and the Liberation Tigers of Tamil Eelam (LTTE) help to demonstrate this point. By April 2009 the LTTE had almost completely collapsed after losing territory to the Sri Lankan government.[131] In light of its successive defeats, the LTTE sought a diplomatic solution, appealing to India to assist in creating a truce with the Sri Lankan government.[132] Violence could have been de-escalated here. However, in May of the same year the government succeeded in demolishing the LTTE. In the end, the government trapped the leadership of the armed group in Nandikadal by land and sea, ultimately killing them.[133]

It is questionable whether the necessity to use lethal force continued, especially after the LTTE's attempt to sue for peace. The same question applies to the geographical area where the killings took place in light of the government's apparent control around Nandikadal. These inquiries, however, are completely foreign to IHL once an armed conflict exists. As mentioned above, IHL is designed to accommodate the necessities that arise out of all stages of the most intense armed conflicts, and confers upon belligerents the ability to act accordingly.[134] Crucially, there is no mechanism within IHL to incentivise pacification. On the contrary, states may have an interest in prolonging violence to avoid the return of onerous IHRL obligations.

Some of these issues may be addressed from the perspective of the geographic and temporal scope of application of IHL. It could be argued, for instance, that the armed conflict in Sri Lanka ended prior to the killing of the leadership, and thus peacetime rules should have applied in full. This is indeed an attractive position, but it is not one that is universally accepted. According to the ICTY, IHL applies to the entire territory of the state involved in the NIAC, and until a peaceful settlement is achieved.[135] This standard is strikingly formal but it is not without merit. The

[129] Hill-Cawthorne (n 9) 232–34.
[130] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), Report of the ILC, 53rd session [2001] 2 *Yearbook of the International Law Commission*, UN Doc A/56/10, art 25(2)(b).
[131] KM de Silva, *Sri Lanka and the Defeat of the LTTE* (Vijitha Yapa 2012) 192.
[132] ibid 195.
[133] ibid 196.
[134] *The Krupp Trial* (n 24) 138–39.
[135] *Prosecutor v Tadić* (n 36) [70] ('International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case

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ICTY adopted this standard to protect persons who are affected by the armed conflict but are geographically or temporally removed from the areas of hostilities.[136] Thus, as opined by the ICRC, the rules of engagement in these geographical and temporal 'pockets of peace' must be determined with reference to the relationship between IHL and IHRL,[137] rather than IHL's scope of application.

In sum, the reference to necessity arising out of armed conflict to rationalise the relationship between IHL and IHRL may be convincing in principle, but it is highly problematic depending on how it is applied. Most concerning is the blanket assumption that military necessity exists wherever IHL applies, and wherever combatants may find themselves. For the reasons stated above, the formal application of IHL through the existence of an armed conflict, and the notion of fighters, lead to significant problems if they are to unleash the permissive functions of military necessity. Such a framework incentivises escalation and, once an armed conflict exists, it would justify superfluous levels of armed violence, the necessity of which is difficult to assess because of the vague definitions of the enemy's 'military' under the IHL applicable in NIAC. A better understanding of a necessity-based relationship between IHL and IHRL would be one that relies on the actual exigencies on the ground as opposed to these formal triggers. As will be discussed, the IHRL system under the ECHR,[138] including the derogations clause, provides mechanisms to ensure that the permissive function of military necessity is actually warranted by a state of necessity.

5. Tempering Superfluity through the Parallel Application of IHL and IHRL

This section explores the potential for IHRL to play a similar role to the *jus ad bellum* by constraining the legitimate aims of internal NIAC. To do so, however, the *lex specialis* approach, which subordinates IHRL to the permissive function of military necessity, must be abandoned. While the following framework still accepts the permissive function of military necessity in general, it is far more limited. To be more specific, the application of military necessity is not taken for granted in armed conflict; rather it is dependent on the inadequacies of 'necessity' that ordinarily applies under IHRL.

The legitimate aims posited by IHRL instruments could restrict the overall purpose of the conflict. The most explicit references to legitimate aims can be found in Article 2(2) of the ECHR: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose

of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there').

[136] ibid.

[137] ICRS, Updated Commentary (n 118) para 461.

[138] European Convention on Human Rights and Fundamental Freedoms (entered into force 3 September 1953) 213 UNTS 222.

of quelling a riot or insurrection.[139] The other human rights instruments – the International Covenant on Civil and Political Rights (ICCPR),[140] the American Convention on Human Rights[141] and the African Charter,[142] – do not stipulate the legitimate aims of killing as does the ECHR; rather they prohibit 'arbitrary' deprivations of life. That being said, the grounds under the ECHR would most likely be sufficient to justify a deprivation of life under these conventions that prohibit 'arbitrary' killing.[143]

Under IHRL, these aims are subject to proportionality, which requires that the killing of the intended target of violence does not outweigh the objective of the lethal force.[144] This has been construed to mean that the aim of using lethal force cannot go beyond protecting life and limb.[145]

It may be argued that this is far too stringent in armed conflict, but this concern could be mitigated if states were allowed to 'ratchet up'[146] from a baseline level of necessity that exists during peacetime. That said, whether relatively permissive standards of necessity apply should depend on the inadequacy or inappropriateness of necessity under IHRL that normally applies outside armed conflict.

As a possible example of this approach, the jurisprudence of the European Court of Human Rights (ECtHR) in relation to the hostage situation in the Dubrovka theatre has demonstrated the willingness of human rights courts to loosen the stringent 'necessity' requirements under IHRL to a degree. According to the Court, the 'absolute necessity' standard[147] – which requires all non-lethal means to be exhausted before using lethal force – 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'.[148] This does not mean, however, that the legitimate aims for the deprivation of life under IHRL are affected. The Court in *Finogenov*, while loosening the necessity standard for *means*, did so on

[139] ibid art 2(2).
[140] International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171, art 6(1).
[141] American Convention on Human Rights, Pact of San José, Costa Rica (entered into force 18 July 1978) 1144 UNTS 143, art 4.
[142] African Charter on Human and Peoples' Rights (entered into force 21 October 1986) 1520 UNTS 217, art 4.
[143] Manfred Nowak, *U.N. Convention on Civil and Political Rights: CCPR Commentary* (NP Engel 1993) 111.
[144] UNGA, Note by the Secretary-General, Extrajudicial, Summary or Arbitrary Executions (5 September 2006), UN Doc A/61/311, para 42 ('Proportionality deals with the question of how much force might be permissible. More precisely, the criterion of proportionality between the force used and the legitimate objective for which it is used requires that the escalation of force be broken off when the consequences for the suspect of applying a higher level of force would "outweigh" the value of the objective').
[145] ibid para 44 ('The fundamental question is of proportionality between the objectively anticipatable likelihood that failing to incapacitate the individual would result in the deaths of others'); HRC, Draft General Comment No 36 (n 3) para 18; Philip Alston, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (28 May 2010), UN Doc A/HRC/14/24Add.6, para 32.
[146] See also Francisco Forrest Martin, 'Using International Human Rights Law for Establishing a Unified Use of Force Rule in the Law of Armed Conflict' (2001) 64 *Saskatchewan Law Review* 347.
[147] ECHR (n 138) art 2(2); ECtHR, *McCann and Others v United Kingdom* (n 100) para 194.
[148] ECtHR, *Finogenov and Others v Russia*, App nos 18299/03 and 27311/03, 20 December 2011, para 211.

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the premise that Russia was pursuing the aforementioned legitimate aims under Article 2(2) of the ECHR, namely the 'defence of any person from unlawful violence'.[149]

This provides a model for regulating the use of force by states engaged in a NIAC. When and if absolute necessity proves to be overly stringent during armed conflict, it may be appropriate to import the necessary means portion of military necessity. Accordingly, a state would be permitted to choose the cheapest, fastest, most effective and least risky means[150] to pursue the legitimate aims of depriving life as stipulated by IHRL. It must be emphasised, however, that the application of the necessary means aspect of military necessity should not be presumed to apply throughout an armed conflict. Rather, in accordance with the ECtHR's dictum in *Finogenov*, an analysis of the inadequacy of 'absolute necessity' must be undertaken before loosening this standard. These determinations of the appropriateness of IHRL standards are, in the author's view, the most appropriate means for determining whether military necessity exists in the first place.

5.1. The Legitimate Aims of High-Intensity Non-International Armed Conflict

Another important example of ECtHR case law can be found in *Isayeva and Others v Russia*. This case is particularly relevant because it sheds light on the application of IHRL to what was ostensibly a NIAC, or at least a situation that closely resembled an armed conflict, in the Russian Federation.[151] Moreover, it illustrates the potential for the ECtHR to accommodate high-intensity armed conflicts.

The case before the ECtHR arose out of the bombing of a convoy by the Russian forces that resulted in numerous civilian casualties.[152] According to the government's submissions, these measures were carried out with the legitimate aim of protecting persons from unlawful violence under Article 2(2)(a) of the ECHR,[153] as the attack was initiated after Russian planes were fired upon with large-calibre infantry weapons.[154]

What is interesting about this case is that the Court shed light on what it would accept as being part of the legitimate aim of quelling insurgencies under Article 2(2)(c):[155]

> The Court accepts that the situation that existed in Chechnya at the relevant time called for exceptional measures on behalf of the State in order to regain control over the Republic and to suppress the illegal armed insurgency. These measures could presumably include employment of military aviation equipped with heavy combat weapons.

[149] ibid para 218.
[150] US Law of War Manual (n 47) 51, para 2.2.
[151] Schabas (n 14) 605.
[152] ECtHR, *Isayeva, Yusupova and Bazyeva v Russia*, App nos 57947/00, 57948/00 and 57949/00, 24 February 2005, para 11.
[153] ibid para 160.
[154] ibid para 28.
[155] ibid para 178.

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This suggests that the regime is malleable enough to accommodate necessities arising out of high-intensity NIAC, perhaps even those reaching the threshold of Additional Protocol II. That said, this interpretation of Article 2(2)(c) was demonstrably more restrictive and concrete than weakening the enemy's military force.

What is even more interesting about this passage, however, is that notwithstanding the Court's acceptance of these aims and their application to the situation in Chechnya, it did not assess the legality of the attack in light of the aim of regaining territory to quell an insurgency. This is perhaps owing to Russia's neglect to classify the situation as an insurgency, or even a state of emergency.[156] Thus, in accordance with Russia's own submissions, the Court proceeded to assess the legality of the attack in light of Article 2(2)(a).[157]

This may be interpreted as requiring a state to proactively articulate its own aims during armed conflict, insofar as they fall within the confines of the legitimate aims within IHRL. Such an approach could prevent states from publicly denying the existence of an armed conflict and the application of IHL, only to escape violations of IHRL if a court finds that an armed conflict existed as a matter of fact. In order to argue that a measure was for the purpose of quelling an insurgency, for instance, a state would have to convince a court that this was actually the case. Naturally, this is more difficult to achieve if the state has never acknowledged the insurgency to begin with.

5.2. TAILORING THE LEGITIMATE AIMS OF HIGH-INTENSITY NIAC THROUGH DEROGATIONS

The option for states to derogate is designed specifically to accommodate heightened states of necessity. Under the ECHR system, derogations from the right to life may be undertaken in armed conflict:[158]

> In time of war or other public emergency threatening the life of the nation any High Contracting party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided the measures are not inconsistent with other obligations under international law.

Paragraph 2 of Article 15 provides that derogations from the right to life may be permissible if they result from 'lawful acts of war'.[159] Granted, the option to derogate from the right to life is available only under the European system. The ICCPR, for instance, has no comparable clause. However, it is submitted that the justifications for derogating under the ECHR may provide sufficient justification for deprivation of life under Article 6 as it could preclude determinations of arbitrariness. The crucial difference with the *lex specialis* approach would be that the state must

[156] Schabas (n 14) 605.
[157] *Isayeva, Yusupova and Bazyeva v Russia* (n 152) para 182.
[158] ECHR (n 138) art 15(1).
[159] ibid art 15(2).

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explicitly address the existence of an armed conflict, and then further explain why the deprivations of life are 'strictly required by the exigencies of the situation'.[160]

States are given a significant degree of latitude in determining whether to derogate, and what to pursue once the procedure has been invoked. This is indeed reflected in the jurisprudence of the ECtHR when it opined that states are 'in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it'.[161] This is especially true during armed conflict. It is well established that questions relating to whether an action was militarily necessary should not to be judged post facto, inside the peaceful confines of a courtroom; what matters is whether the commander made an attempt in good faith to ascertain what was necessary given the prevailing circumstances at the time.[162]

The point, however, is that the state must define and justify its aims based on what is actually necessary. It is noteworthy that even the derogations clause under the ECHR does not endorse a blanket acceptance of IHL standards derogating over IHRL. To the author's knowledge there is no jurisprudence to date relating to derogations in situations of war under the European system. However, the case law relating to derogations based on public emergency demonstrates that even if a state derogates, there is a mechanism to temper superfluity in that derogations are justified only in light of the facts on the ground. States must prove that the ordinary laws would have been insufficient for meeting the dangers caused by the necessities arising at the time.[163]

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It is easy to see how the ECtHR model could play a role in tempering superfluity. A state that does not derogate, but strives to abide by both IHL and IHRL standards, will need to actively articulate the facts on the ground that made the application of 'absolute necessity' inappropriate in situations of armed conflict. It is important to note that the burden will often be on the state.[164] Consequently, temporal and geographical pockets of an armed conflict that do not depart from peacetime as a matter of fact will continue to be governed by the stringent rules that best reflect the level of necessity that actually exists.

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[160] ibid.

[161] ECtHR, *Ireland v United Kingdom*, App no 5310/71, 18 January 1978), para 207.

[162] US Military Tribunal at Nuremberg, *The Hostages Trial: Trial of Wilhelm List and Others*, Case No 47, Judgment, 8 July 1947–19 February 1948 (1949) *Law Reports of Trials of War Criminals*, Vol VIII, 34, 68–69 ('We are not called upon to determine whether urgent military necessity for the devastation and destruction in the province of Finmark actually existed. We are concerned with the question whether the defendant at the time of its occurrence acted within the limits of honest judgment on the basis of the conditions prevailing at the time. The course of a military operation by the enemy is loaded with uncertainties, such as the numerical strength of the enemy, the quality of his equipment, his fighting spirit, the efficiency and daring of his commanders, and the uncertainty of his intentions').

[163] *Ireland v United Kingdom* (n 161) para 212.

[164] ECtHR, *Hugh Jordan v United Kingdom*, App no 24746/94, 4 August 2001, para 103 ('Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as for example in the case of persons within their control or custody, strong presumptions of fact will arise in respect of injuries and death which occur. Indeed the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation').

Even when a state derogates, the inadequacies of the peacetime rules must be proved rather than assumed. Through these derogations the legitimate purpose of the conflict could be tailored to pacifying the exigencies that warrant the derogation in the first place. These aims will become apparent before the commencement of military operations and it becomes possible to adjudge which targets were necessary for that purpose. States would therefore be judged by their own standards that they set prior to relying on military necessity, balancing the law applicable to internal NIAC between apology and utopia.

Some may point to what appears to be a critical weakness in this approach, stemming from the state-centric nature of human rights obligations. Even if it were accepted that non-state armed groups that control territory have obligations under IHRL,[165] many non-state parties to NIAC do not fulfil this requirement. Consequently, it could be argued that this framework asymmetrically adds obligations on the part of the state. In NIAC, however, the protection afforded under IHL may apply equally to both the state and non-state parties to the conflict, but the permissive functions of military necessity were never applied equally to begin with. Even if members of non-state armed groups abide by IHL, they are nonetheless open to domestic prosecution.[166] At the time of writing, all aims of non-state armed groups are illegitimate, save for the extremely limited grounds under Article 1(4) of Additional Protocol I.[167]

6. CONCLUSION

The notion that the necessities that arise out of armed conflict justify deviations from stringent standards under IHRL is a convincing one. However, the formal mode of application through categories under IHL, such as the 'combatant', is problematic because it may justify violence beyond what is actually necessary in contemporary armed conflict. Thus, rather than taking for granted that combatant and quasi-combatant status is synonymous with the necessity to use lethal force, this article has examined means to temper the dangers of superfluous violence. When it applies, the *jus ad bellum* has the capacity to play this role by constraining the overall purposes of the armed conflict. Military necessity is therefore only one aspect of a broader system governing resort to armed force. In internal NIAC military necessity will apply in a vacuum if IHL justifies deviations from IHRL across the board. For these reasons it is necessary to rethink the permissive impact of military necessity on IHRL.

[165] OHCHR, *International Legal Protection of Human Rights in Armed Conflict*, HR/PUB/11/01 (United Nations 2011) 24.
[166] See generally Tom Ruys, 'The Syrian Civil War and the Achilles' Heel of the Law of Non-International Armed Conflict' (2014) 50 *Stanford Journal of International Law* 247.
[167] Additional Protocol I (n 27) art 1(4).

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