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Recommended Citation

Jonathan Horowitz, *Reaffirming the Role of Human Rights in a Time of "Global" Armed Conflict*, 30 Emory Int'l L. Rev. Recent Dev. 2041 (2015).

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REAFFIRMING THE ROLE OF HUMAN RIGHTS IN A TIME OF “GLOBAL” ARMED CONFLICT

*Jonathan Horowitz**

ABSTRACT

A notion that there exists under international law the possibility of a “global” or “transnational” non-international armed conflict (or “global NIAC”) rests on the assertion that a state that is party to a NIAC may use the law of armed conflict (LOAC) to target an enemy fighter anywhere he or she goes in the world. If true, a global NIAC may permit a state to lawfully drop a bomb on an enemy fighter who sits for a coffee in the middle of a peaceful city, say London, Rabat, or Hong Kong. Amongst a series of concerns this Essay highlights, a global NIAC would also permit, under the LOAC principle of proportionality, incidental civilian harm and destruction of civilian property. A global NIAC makes war omnipresent and forever looming. These consequences are unsettling and require a serious evaluation to determine if international law does in fact permit such an expansive understanding of war. Utilizing the public international law of interstate use of force, human rights, and LOAC, this Essay concludes that the concept of a global NIAC cannot exist without there being a violation of international law, although notably the violation that this Essay focuses on is that of the territorial state rather than the attacking state. This does not mean that a state cannot respond to attacks and threats from non-state groups abroad. It means that concepts other than a global NIAC must be relied upon to justify extraterritorial use of force.

* Legal Officer, Open Society Justice Initiative, jonathan.horowitz@opensocietyfoundations.org. This Essay was written in the author’s personal capacity and appeared in a longer version in *THEORETICAL BOUNDARIES OF ARMED CONFLICT AND HUMAN RIGHTS* (Jens David Ohlin ed., forthcoming). The author thanks Ralph Mamiya, Naz Modirzadeh, Jens David Ohlin, Andrea Prasow, Christopher Rogers, and Gabor Rona for their comments and Harshani Dharmadasa and Alex Porter for their research assistance. All errors remain his own.

INTRODUCTION

This Essay assesses the impact that international human rights law has on the legality of what has been called a global non-international armed conflict (“global NIAC”). A global NIAC is based on the premise that a state that is party to a NIAC may use the law of armed conflict (LOAC, also known as international humanitarian law) to target an enemy fighter with lethal force anywhere he or she goes in the world. John O. Brennan, when serving as Assistant to the United States President for Homeland Security and Counterterrorism, articulated the notion of a global NIAC when he stated that the United States was in an armed conflict with al-Qa’ida, the Taliban, and associated forces and “[t]here is nothing in international law that . . . prohibits us from using lethal force against our enemies outside of an active battlefield, at least when the country involved consents or is unable or unwilling to take action against the threat.”¹

Here, to better demonstrate what a global NIAC permits, is a hypothetical:

The state of Arcadia is engaged in a NIAC with a rebel group on the territory of Desmonda. A rebel sub-commander boards a plane in Desmonda and travels to Franconia, which is a country that is not engaged in any armed conflict and is located thousands of miles from Arcadia and Desmonda.

In Franconia, the sub-commander plans to meet with various arms dealers and will determine from which of them he will purchase dozens of rocket propelled grenades, hundreds of AK-47s, and components for improvised explosive devises. The sub-commander plans to use those weapons in his armed conflict with Arcadia. Franconia’s intelligence service learns that the sub-commander is within its territory and informs Arcadia. Arcadia, in turn, asks for Franconia’s consent to target the sub-commander using lethal force

¹ John O. Brennan, Assistant to the President for Homeland Sec. and Counterterrorism, Speech at Woodrow Wilson International Center on the Ethics and Efficacy of the President’s Counterterrorism Strategy, Washington, D.C. (Apr. 30, 2012), <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>; see also Memorandum from David J. Barron, Acting Assistant Att’y Gen., to Eric H. Holder Jr., Att’y Gen., on Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi 24 (July 16, 2010), <http://fas.org/irp/agency/doj/olc/aulaqi.pdf> (“[T]he contemplated DoD operation would occur in Yemen, a location that is far from the most active theater of combat between the United States and al-Qaida. That does not affect our conclusion, however, that the combination of facts present here would make the DoD operation in Yemen part of the non-international armed conflict with al-Qaida.”). For another articulation of a global NIAC, see generally Kenneth Anderson, *Targeted Killing and Drone Warfare: How We Came to Debate Whether There is a ‘Legal Geography of War,’* in FUTURE CHALLENGES IN NATIONAL SECURITY AND LAW (Peter Berkowitz ed., 2011).

due to Arcadia's determination that he is a legally targetable individual under LOAC.

Franconia agrees to Arcadia's request. Five days later Arcadia kills the sub-commander with a missile fired from one of its armed unmanned aerial vehicles. This takes place a few days before the sub-commander's meeting with the first arms dealer he was scheduled to meet.

Due to falling debris from a nearby building caused by the attack, a family of three Franconians was killed. Arcadia knew of their presence and the risk posed by falling debris, but determined, in accordance with the principle of proportionality, that the three lost lives would be outweighed by the military advantage gained by killing the sub-commander.

The far-reaching consequences of a global NIAC are obvious from this scenario. As the International Committee of the Red Cross (ICRC) put it, such a paradigm “would mean that the whole world is potentially a battlefield and that people moving around the world could be legitimate targets under international humanitarian law wherever they might be.”² A global NIAC permits a state to claim it is lawful to drop a bomb on an enemy fighter who sits for a coffee in the middle of a peaceful city, say London, Rabat, or Hong Kong. The global NIAC paradigm also permits the LOAC rules of proportionality to apply. This would make permissible incidental civilian harm and destruction of civilian property if it did not outweigh the military advantage anticipated. A global NIAC would even permit the attacking state to invite other states into its NIAC to carry out attacks on its behalf through the doctrine of collective self-defense.

From a historical and political perspective, the notion of a global NIAC brings to an end the view that war, as Yoram Dinstein put it, “would appear every once in a while, leave death and devastation in its wake, and temporarily pass away to return at a later date.”³ Instead, a global NIAC makes war omnipresent and forever looming—both geographically and temporally. The notion of a global NIAC has other consequences. It creates a “backdoor” that allows Franconia to escape its human rights obligations. Take, for example, a

² Interview with Peter Maurer, President of the Int'l Comm. of the Red Cross, *The Use of Armed Drones Must Comply with Laws* (May 10, 2013), <http://www.icrc.org/eng/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm>.

³ YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 76 (5th ed. 2012); *see also* Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. A/68/382, ¶ 16 (Sept. 13, 2013).

situation where Franconia, which is not a party to a NIAC, wishes to kill someone on its territory who is participating in a NIAC with Arcadia. Under the rules of a global NIAC, Franconia could subvert its human rights obligations by requesting Arcadia to carry out the killing. A global NIAC can also put an attacking state in direct competition with the territorial state's domestic laws. If Franconia permitted an Arcadia agent to kill someone in a manner that is unlawful under Franconia's domestic law, that Arcadia agent could be held criminally liable. Franconia agents involved in the operation could also be exposed to criminal liability for allowing Arcadia to break its domestic laws. Additionally, Franconia would be liable for allowing Arcadia to breach its international human rights obligations.

These series of consequences are unsettling and require a serious evaluation to determine if international law does in fact provide for a regime that permits for such an expansive understanding of war. This is not to say that practitioners and scholars have failed to put forward strong arguments that undercut claims that global NIACs exist.⁴ But this Essay makes a contribution to this literature by utilizing the public international law of interstate use of force, human rights, and LOAC to uniquely demonstrate that the concept of a global NIAC cannot be carried out in compliance with international law. This Essay reaches this conclusion by focusing primarily on the international legal obligations of the state in which the attack is occurring (e.g., the territorial state) rather than the obligations of the attacking state.

Parts I, II, and III of this Essay set out in greater detail the public international law of interstate use of force, human rights law, and LOAC. This review is necessary for assessing, as is done in Part IV, their relationship to one another. What can be concluded from this assessment is that a global NIAC is not able to exist without there being a breach of international law. In recognition of the needs of states to protect themselves and their populations

⁴ See, e.g., Yoram Dinstein, *Concluding Remarks on Non-International Armed Conflicts*, 88 INT'L L. STUD. 399, 400 (2012); Noam Lubell & Nathan Derejko, *A Global Battlefield? Drones and the Geographical Scope of Armed Conflict*, 11 J. INT'L CRIM. JUST. 65, 87 (2013); Interview with Peter Maurer, *supra* note 2; Rogier Bartels, *Guest Post: Bartels—Temporal Scope of Application of IHL: When do Non-International Armed Conflicts End? Part 1*, OPINIO JURIS (Feb. 17, 2014), <http://opiniojuris.org/2014/02/18/guest-post-bartels-temporal-scope-application-ihl-non-international-armed-conflicts-end-part-1/>; Jelena Pejic, *Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications*, INT'L COMMITTEE RED CROSS (May 7, 2015), <https://www.icrc.org/en/document/jelena-pejic-extraterritorial-targeting-means-armed-drones-some-legal-implications>; Gabor Rona, *Debate (Round 1): The 'Lutte' Against Terrorism*, JUST SECURITY (Sept. 30, 2013), <http://justsecurity.org/1378/lutte-terrorism/>.

from attack, Part IV also describes ways that states can respond to attacks and threats from non-state groups while complying with international law.

I. SOVEREIGNTY AND CONSENT-BASED USE OF FORCE

In our assessment of the legality of a global NIAC under international law, it is important to first consider under what circumstances a state is legally permitted to use force in another state. The general rule is found in Article 2(4) of the Charter of the United Nations (U.N.), which requires states to refrain 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 Purposes of the United Nations.”⁵ It follows that a lethal attack on one state’s territory by another state engages Article 2(4).⁶

There are, however, three clear exceptions to Article 2(4). The first exception is Article 39 of the U.N. Charter, which is of limited concern to this Essay. It permits the Security Council to sanction the use of force or other measures when it makes a determination of the existence of a “threat to the peace, breach of the peace, or act of aggression.”⁷ The second exception to Article 2(4) is found in Article 51, which recognizes the inherent right that states have to use force against another state in self-defense (including in collective self-defense) of an armed attack.⁸ Article 51 is important to the discussion of a global NIAC because it requires any state that uses force in the name of the *jus in bello* to also consider whether that use of force is in compliance with the separate rules of state sovereignty.⁹

⁵ U.N. Charter art. 2, ¶ 4.

⁶ The content of Article 2(4)—the prohibition on the use of force—has, by some, been regarded as a peremptory norm (a rule *jus cogens*) and others as reflecting customary international law. See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1984 I.C.J. 392, at 615 (Nov. 26) (dissenting opinion of Schwebel, J.); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987); Oliver Dörr & Albrecht Randelzhofer, *Article 2(4)*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 231 (Bruno Simma et al. eds., 3d ed., 2012). For additional discussion for and against regarding Article 2(4) as reflecting a rule *jus cogens*, see generally James A. Green, *Questioning the Peremptory Status of the Prohibition of the Use of Force*, 32 MICH. J. INT’L L. 215 (2011).

⁷ U.N. Charter arts. 39, 41–42.

⁸ U.N. Charter art. 51.

⁹ See Lubell & Derejko, *supra* note 4, at 80; Michael N. Schmitt, *Charting the Legal Geography of Non-International Armed Conflict*, 90 INT’L L. STUD. 1, 17 (2014). See also Jeh Charles Johnson, Gen. Counsel of the Dep’t of Defense, Speech at Yale Law School: National Security Law, Lawyers and Lawyering in the Obama Administration (Feb. 22, 2012), <http://www.cfr.org/defense-and-security/jeh-johnsons-speech-national-security-law-lawyers-lawyering-obama-administration/p27448>. This Essay does not address the myriad of issues associated with Article 51, many of which have been covered in detail elsewhere. See, e.g., DINSTEIN, *supra* note 3; Dapo Akande & Thomas Liefländer, *Clarifying Necessity, Imminence, and*

The third exception to Article 2(4), which is most important to this Essay, is that international law permits an attacking state to use force on the territory of another state when the territorial state provides its consent.¹⁰ Consent, when considered in this context, has been said to effectively wash away the sovereignty issues described above.¹¹

Less discussed in the literature on consent, but relevant to examining the legality of a global NIAC under international law, is the situation where the territorial state consents to the attacking state's wish to conduct LOAC targeting operations when the territorial state is not in an armed conflict with the attacking state's targets. While the territorial state may be willing to grant its consent, the question remains: what obligations and rights shape this consent?

While the rules for operationalizing consent under international law are largely unclear and what exists often lacks precision,¹² general principles exist. One is that the state is entitled to place limits on the consent it grants. This reflects the core nature of sovereignty. A second principle is that the

Proportionality in the Law of Self-Defense, 107 AM. J. INT'L L. 563 (2013); Ashley Deeks, *Consent to the Use of Force and International Law Supremacy*, 45 HARV. INT'L L.J. 2, 33 (2013) [hereinafter Deeks, *Consent to the Use of Force and International Law Supremacy*]; Dire Tladi, *The Nonconsenting Innocent State: The Problem with Bethlehem's Principle 12*, 107 AM. J. INT'L L. 570 (2013).

¹⁰ For discussions on the role of consent-based military assistance in the context of armed conflict interventions, see, for example, John Lawrence Hargrove, *Intervention by Invitation and the Politics of the New World Order*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER (Lori F. Damrosch & David J. Scheffer eds., 1991); Rein Mullerson, *Intervention by Invitation*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER (Lori F. Damrosch & David J. Scheffer eds., 1991); Eliav Lieblich, *Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements*, 29 B.U. INT'L L.J. 337 (2011); David Wippman, *Military Intervention, Regional Organizations, and Host-State Consent*, 7 DUKE J. COMP. & INT'L L. 209 (1996). See also IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 309 (7th ed. 2008).

¹¹ See *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, [2001] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/56/10/2001, art. 20 [hereinafter *Draft Articles on State Responsibility*]. This is not to say intervention through consent is without its problems. There have been numerous examples where a foreign state asserted that it gained consent on either false or very shaky grounds. See, e.g., Wippman, *supra* note 10, at 211. For a discussion on specific rules that could be applied to giving and obtaining consent, see Deeks, *Consent to the Use of Force and International Law Supremacy*, *supra* note 9; Hargrove, *supra* note 10, at 116–18.

¹² Deeks, *Consent to the Use of Force and International Law Supremacy*, *supra* note 9, at 16 (“If consent to the use of force remains a complicated proposition for scholars, it also remains one for states, which have been imprecise or silent about their views.”); see also Hargrove, *supra* note 10, at 114–18. See generally Mullerson, *supra* note 10.

consenting state holds the right to withdraw its consent.¹³ A third general principle is that states cannot enter into agreements that conflict with a peremptory norm of international law (*jus cogens*).¹⁴

A fourth general principle that appears to apply to consent is that a state may not allow another state to do what the consenting state is not permitted to do.¹⁵ It is this last issue that goes to the question that the rest of this Essay will address: Can the territorial state permit the attacking state to kill someone if the territorial state is not allowed to kill that same person?

II. HUMAN RIGHTS OBLIGATIONS OF THE TERRITORIAL STATE

While it may be a foregone conclusion that a state may permit another state to conduct activities on its territory, there remains the question of what other sources of international law must the territorial state—which in our scenario is not in an armed conflict with the targeted individual—take under consideration when determining whether it should permit another state to carry out lethal targeting operations on its soil.

The International Covenant on Civil and Political Rights (ICCPR) and the three major regional human rights treaties—the African Charter on Human and

¹³ Lieblich, *supra* note 10, at 374; see Vienna Convention on the Law of Treaties art. 60, *opened for signature*, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention]; *Draft Articles on State Responsibility*, *supra* note 11, art. 20.

¹⁴ For example, two states may never agree to form a “torture pact” or a “slavery pact” in which the territorial state allows another state to commit acts of torture or slavery on its territory due to the *jus cogens* status of the prohibitions against torture and slavery. See, e.g., Vienna Convention, *supra* note 13, art. 53; Int’l Law Comm’n, Rep. of the Study Group of the Int’l Law Comm’n on its Fifty-Eighth Session, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, U.N. Doc A/CN.4/L.702, at 20–21, (July 18, 2006); Lieblich, *supra* note 10, at 364.

¹⁵ Hargrove, *supra* note 10, at 121; Ashley Deeks, *Drone Strikes in Pakistan: Consent and Obfuscation?*, LAWFARE (Mar. 7, 2013), <http://www.lawfareblog.com/2013/03/drone-strikes-in-pakistan-consent-and-obfuscation/>. See also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16, at 264 (Jun. 21) (dissenting opinion of Fitzmaurice, J.) (referring to “*nemo dare potest quod ipse non habet*, or (the corollary) *nemo accipere potest id quod ipse donator nunquam habuit*” as an “elementary yet fundamental principle of law” and an “incontestable legal principle”); see also Lighthouses Case (Fr. v. Greece), 1934 P.C.I.J. (ser. A/B) No. 62, at 49–50 (Mar. 17) (separate opinion of Sefériadès, J.) (referring to “[*n*]emo dat quod non habet” as a general principle of law); Situation in the Democratic Republic of Congo, ICC-01/04-455, Judgment, ¶ 24 n.28 (Feb. 18, 2008) (“The OPCD refers to the principle of *nemo plus iuris ad alium transferre potest quam ipse habet* (one may not transfer more legal rights than one has), which is considered to be a general principle of international law.”); MAARTEN BOS, A METHODOLOGY OF INTERNATIONAL LAW 5, 73, 277 (1984); Deeks, *Consent to the Use of Force and International Law Supremacy*, *supra* note 9, at 33 (“[I]nternational law should recognize consent as a legal basis for using force only where a state’s consent authorizes actions the state itself could lawfully undertake.”).

Peoples' Rights (ACHPR), European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and American Convention on Human Rights (ACHR)—all prohibit the unlawful and arbitrary deprivation of life.¹⁶ Article 6 of the ICCPR reads, for example, “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”¹⁷

All four treaties assign this right non-derogable status, which means there are no circumstances in which the state may limit the right beyond the limits that the treaty expressly states.¹⁸ These treaties and their case law also make it clear that a territorial state has the responsibility to respect and protect the right to life of an individual when that individual is located on its territory. There is, therefore, little doubt that a state's human rights obligations are engaged when another state carries out a lethal targeting operation on its territory. What exactly those obligations are is, however, a separate issue, which we will now discuss.

A. “Unlawful” and “Arbitrary” Under Human Rights Law

Human rights law is adamant that the state must not be permitted to kill as a general rule. But states were also adamant that human rights law needed to

¹⁶ While the European Convention for the Protection of Human Rights and Fundamental Freedoms does not use the term “arbitrary,” the European Court of Human Rights has routinely referred to a prohibition on arbitrary deprivation of life.

¹⁷ International Covenant on Civil and Political Rights art. 6, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]. Language on the right to life can be found in the following regional treaties: African Charter on Human and Peoples' Rights art. 4, *opened for signature* Jun. 27, 1981, 1520 U.N.T.S. 217, 21 I.L.M. 58, 59, at 245 (entered into force Oct. 21, 1986) [hereinafter ACHPR] (“Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.”); American Convention on Human Rights art. 4, *opened for signature* Nov. 21, 1969, 1144 U.N.T.S. 143, 9 I.L.M. 99 (entered into force Jul. 18, 1978) [hereinafter ACHR] (“Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.”); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5 (entered into force Sept. 3, 1953) [hereinafter ECHR] (“1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (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 quelling a riot or insurrection.”).

¹⁸ See ACHR, *supra* note 17, art. 27; ICCPR, *supra* note 17, art. 4, ¶2. The ECHR permits “[n]o derogation from Article 2, except in respect of deaths resulting from lawful acts of war.” ECHR, *supra* note 17, art. 15, ¶2. The ACHPR has no derogation clause, thus Article 4 cannot be derogated from.

account for special exceptions. Two clear examples were the death penalty¹⁹ and—more relevant to this Essay—a state agent’s ability to use lethal force in the name of self-defense or to protect others.²⁰ As a result, human rights treaty law does not prohibit *all* deprivation of life; it prohibits *unlawful* and *arbitrary* deprivation of life. These terms make clear that a state must have in place adequate regulations for when deprivation of life is permissible and that any deprivation of life that takes place outside the law is prohibited.²¹

International human rights law also dictates that when force is used to take a life, it must have been absolutely necessary and strictly proportionate.²² In simplest terms, lethal targeting—that is to say, the suppression of an enemy using lethal force as a means of first resort—is strictly prohibited under international human rights law due, in large part, to the rules of necessity and proportionality. Some of the clearest elaborations on these human rights rules are found in the U.N. Code of Conduct for Law Enforcement Officials (“Code of Conduct”) and the U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (“Basic Principles”). Both have the status of soft law but have been regarded by human rights tribunals as providing instructive interpretation.²³ The Basic Principles explain the notion of necessity this way:

Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent

¹⁹ See, e.g., ACHR, *supra* note 17, art. 4, ¶¶ 2–6; ICCPR, *supra* note 17, art. 6, ¶¶ 2, 4–5. Both conventions acknowledge the rights of states to impose the death penalty, but regulate its application.

²⁰ See, e.g., ECHR, *supra* note 17, art. 2, ¶ 2.

²¹ For the ECtHR’s interpretation of “arbitrary,” see *Şimşek and Others v. Turkey*, Eur. Ct. H.R., ¶ 104 (2005) (“As the text of Article 2 itself shows, the use of lethal force by police officers may be justified in certain circumstances. Nonetheless, Article 2 does not grant a *carte blanche*. It goes without saying that a balance must be struck between the aim pursued and the means employed to achieve it. Unregulated and arbitrary action by State officials is incompatible with effective respect for human rights. This means that, as well as being authorised under national law, police operations must be sufficiently regulated by it, within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force.”) (internal quotations omitted). For a discussion in the context of arbitrary detention, see *Bozano v. France*, Eur. Ct. H.R., ¶ 54 (1986).

²² *Nachova and Others v. Bulgaria*, Eur. Ct. H.R., ¶ 94 (2005). For summaries of European Court of Human Rights case law on excessive use of force, see *Factsheet—Right to Life*, EUROPEAN CT. HUM. RTS. (June 2013), http://www.echr.coe.int/Documents/FS_Life_ENG.pdf.

²³ *Gabriel Shumba v. Republic of Zimbabwe*, Communication 288/2004, African Commission on Human and Peoples’ Rights [Af. Comm’n H.P.R.], ¶ 136 (May 2, 2012) (the African Commission on Human and Peoples’ Rights cited the Code of Conduct for Law Enforcement Officials and the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials as “international jurisprudence” that has “shed some light in the interpretation of the right to life”). See also *Giuliani and Gaggio v. Italy*, Eur. Ct. H.R., ¶ 209 (2011); *Şimşek and Others*, *supra* note 21, ¶¶ 91–92.

threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.²⁴

The Basic Principles explain the proportionality requirement in this manner:

Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall: (a) [e]xercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved; (b) [m]inimize damage and injury, and respect and preserve human life.²⁵

Notwithstanding the strict prohibitions on the deprivation of life, there are exceptional moments when the prohibition must be reinterpreted through the rules of a more specialized legal regime, namely in times of armed conflict through LOAC. These rules are discussed below, but suffice it to say here that while understandings of the relationship between human rights law and LOAC are important for determining the international legal obligations of a state that is party to an armed conflict, they are of limited relevance to this Essay since the “clash” of human rights law and LOAC we are dealing with does not pertain to the actions of a single state, but pertains to a clash of legal norms between two states.

B. Scope of the Prohibition on the Unlawful and Arbitrary Deprivation of Life

The negative and positive obligations that human rights law place on states is a second component of the prohibition on the unlawful and arbitrary deprivation of life that is important to consider in our discussion of a global NIAC. Negative obligations require the state to refrain from the commission of human rights abuses against people on its territory. In simplest terms, the state is prohibited from carrying out such acts as unlawful and arbitrary killings, torture, rape, slavery, denial of due process, and other abuses. Positive obligations meanwhile require the state to ensure, through legislative, judicial, administrative, educative, and other appropriate measures, the protection of individuals from human rights abuses, be it by the state, another state, or

²⁴ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, U.N. Doc. A/CONF.144/28/Rev. 1, art. 9 (Aug. 27, 1990).

²⁵ *Id.* art. 5, ¶¶ a–b.

private individuals or entities.²⁶ For a finding of a positive obligation violation, the European Court of Human Rights (ECtHR or “the Court”) said that the state must have known or ought to have known “of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.”²⁷ Relatedly, international human rights law prohibits a state to consent to—effectively enabling—another state’s human rights abuses on its territory. This was demonstrated in *El-Masri v. Former Yugoslav Republic of Macedonia*, where the ECtHR found Macedonia in violation of the ECHR for permitting the United States to carry out torture and an illegal detention and transfer on its territory.²⁸ In that case the Court noted, a state “must be regarded as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities.”²⁹

It is quite likely then that the Court would not only find a territorial state at fault for permitting an unlawful and arbitrary killing by a foreign state to take place on its territory, but it might also determine that the actual consent agreement was itself a violation of the Convention. This is indicated by various decisions that have found violations based on faulty regulatory systems and operational planning that permitted, or at least failed to prevent, human rights abuses. In *McCann v. United Kingdom*, for example, a case relating to the United Kingdom’s use of lethal force against an alleged terrorist threat, the Court outlined that a state’s obligations on the use of force applied not only to when force is used, but also to pre-operation stages, noting that, “in determining whether the force used was compatible with Article 2 (art. 2), the Court must carefully scrutinize . . . whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force.”³⁰ Similarly, in *Giuliani and Gaggio v. Italy*, the ECtHR looked at Italy’s use of force regulatory system to determine if there was an Article 2 violation: “The primary duty on the State to secure the right to life entails, in particular, putting in place an appropriate legal and administrative framework defining the limited circumstances in which law-

²⁶ See Human Rights Committee, General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc CCPR/C/21/Rev.1/Add. 13, ¶¶ 6–8 (Mar. 29, 2004).

²⁷ *Osman v. United Kingdom*, Eur. Ct. H.R., ¶ 116 (1998).

²⁸ See *El-Masri v. Former Yugoslav Republic of Macedonia*, Eur. Ct. H.R., ¶ 204 (2012).

²⁹ *Id.* ¶ 206.

³⁰ *McCann and Others v. United Kingdom*, Eur. Ct. H.R., ¶ 194 (1995).

enforcement officers may use force and firearms, in the light of the relevant international standards.”³¹ Indeed, when viewed as part of a pre-operation stage or as the regulatory system under which an attack was subject, a granting of consent that allows a foreign state to kill as a means of first resort on a host state’s territory would seem to run contrary to the Court’s jurisprudence on how a state must secure the right to life.

III. RELATIONSHIP BETWEEN THE TERRITORIAL STATE’S HUMAN RIGHTS OBLIGATIONS AND LOAC

Whereas human rights law applies to states in times of peace and armed conflict (and the times in between), LOAC targeting rules and privileges apply only to a state that is engaged in an armed conflict.³² There are, generally speaking, two legal classifications of armed conflict.³³ One is international armed conflict (IAC), which exists when two or more states are engaged in an armed conflict with one another.³⁴ There is also non-international armed conflict, which takes place between a state actor (or actors) and a non-state armed group (or groups), or between two or more non-state armed groups.

LOAC targeting rules and privileges immediately flow once an armed conflict exists. A considerable amount of scholarly attention has been given to the issue of what constitutes a NIAC and the nature of a NIAC’s geographic scope. What is important to our discussion now is the fact that a state may only

³¹ *Giuliani and Gaggio*, *supra* note 23, ¶ 209.

³² Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, arts. 2, 3, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, arts. 2, 3, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 2, 3, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 2, 3, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Common Article 2 and Common Article 3].

³³ Despite there being two legal classifications of armed conflicts, all IACs and all NIACs are not the same. For a discussion on armed conflict typologies, see, for example, Sylvain Vité, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INT’L REV. RED CROSS 69 (2009).

³⁴ With respect to the applicability of LOAC in international armed conflict, Common Article 2 states that, “[t]he Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.” Common Article 2, *supra* note 32. Additional Protocol I to the Geneva Conventions also notes that the rules apply in “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right to self-determination.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 1(4), Jun. 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

consider using its LOAC targeting privileges against those fighters who are engaged in that state's armed conflict. This is true even when there are other states involved in other armed conflicts all on the same territory.

A second aspect of LOAC that is important to our discussion is that LOAC provides more permissible rules for how and when a state may kill compared to "ordinary" human rights law. This is relevant to our discussion because it reveals a significant tension between the territorial state's human rights obligations and the attacking state's targeting privileges under LOAC. This tension can be described as follows: A territorial state that is not a party to the attacking state's so-called global NIAC has obligations to prevent the arbitrary deprivation of life as a matter strictly of human rights law, whereas the attacking state is seeking the consent of the territorial state to take life under the more permissible rules of LOAC.

The tension between the attacking state's claim to LOAC targeting privileges and the territorial state's human rights obligations is largely a result of LOAC having no principles of necessity and proportionality analogous to those found in ordinary human rights law.³⁵ LOAC, thus, does contain a rule of necessity (commonly referred to as "military necessity"), but it relates to the fighting force's necessity to destroy its adversary. For example, under LOAC, a military force may attack, with lethal force, a non-state fighter who is planning to destroy the military's communications towers while putting no person's safety directly or immediately at risk. Similarly, LOAC may permit the killing of an enemy as they sleep in their barracks, something that ordinary human rights law would never permit a state to do. This concept of "military necessity," when applied to armed conflict targeting rules, is radically dissimilar to the concept of "necessity" under ordinary human rights law, which is tested against an imminent risk to life or serious injury. As Corn concluded, "armed conflict triggers authority to employ force in a manner that would rarely (if ever) be tolerated in peacetime."³⁶

LOAC also has no analogous definition of proportionality as it exists under ordinary human rights law. The rule of proportionality in LOAC—one of LOAC's core principles—is of an entirely different nature, one that regulates

³⁵ Geoffrey F. Corn, *Self-Defense Targeting: Blurring the Line Between the Jus ad Bellum and the Jus in Bello*, 88 INT'L L. STUD. 57, 68 (2012) ("Like peacetime self-defense, jus ad bellum self-defense justifies a State's use of deadly military force only as a measure of last resort.")

³⁶ *Id.*

the relationship between military advantage and incidental civilian harm.³⁷ LOAC permits a degree of incidental harm to civilian and civilian property as a consequence of an attack against a military objective. Thus, warring parties are prohibited only from carrying out “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”³⁸ Ordinary human rights law, in contrast, uses the term “proportionality” most often to regulate the amount of force that can be used against the threat itself as well as to assess whether it was justifiable for bystanders to be harmed.³⁹

IV. THE LEGAL IMPERMISSIBILITY OF A “GLOBAL NIAC” AND LEGALLY PERMISSIBLE ALTERNATIVES

A. *The Impermissible Global NIAC*

We will now turn to an evaluation of whether a global NIAC can be legally permissible.

For the proponents of a global NIAC who believe that an attacking state does not require the consent of the territorial state to target its enemy, this Essay has shown that such a claim incorrectly places LOAC (and the attacking state’s national interests) above one of the most basic principles of international law, namely the prohibition on the use of force against another state. A “no-consent global NIAC” is, therefore, directly at odds with the requirement under international law that each time a state in a NIAC wishes to cross an international border to use force anew it must press the proverbial “start over” button and reassess the rules of applicable international law. This requires the state to ask the question: Does the U.N. Security Council, the

³⁷ See, e.g., *id.* at 70–72.

³⁸ Additional Protocol I, *supra* note 34, art. 51(5)(b). This is an accepted rule of customary international law in both NIACs and IACs. For supporting materials, see JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, RULES 46–47 (2005).

³⁹ See, e.g., *Şimşek and Others*, *supra* note 21, ¶ 108 (“The Court repeats that the use of force may be justified under Article 2 § 2(c), in cases where the action is taken for the purpose of quelling a riot or insurrection. However in the instant case, the submissions of the applicants and the decision of the Trabzon Assize Court show that, in order to disperse the crowd, officers shot directly at the demonstrators without first having recourse to less life-threatening methods, such as tear gas, water cannons or rubber bullets. In this connection, the Court observes that Turkish legislation allows police officers to use firearms only in limited and special circumstances. However, it appears that this principle was not applied during the Gazi and Ümraniye incidents.”).

doctrine of self-defense, or the territorial state's consent permit me to use force? The wrong question to ask first is: Am I in an armed conflict?

Several scholars and experts have recognized the need for taking a holistic approach to evaluating extraterritorial use of force. Michael Schmitt has noted that "other bodies of international law may well limit where operations attendant to such conflict may be conducted."⁴⁰ Sean Murphy also took into consideration all relevant parts of international law when he assessed the legality of U.S. operations from Afghanistan into Pakistan.⁴¹ Christof Heyns, the U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions, similarly agrees that a proper assessment of the lawfulness of extraterritorial use of force can only be accomplished in such a holistic and comprehensive manner.⁴²

For those who believe that consent is required in a global NIAC, the question then turns to whether international law permits the territorial state to allow the attacking state to target an enemy who is (1) within the territorial state's borders and (2) is not in an armed conflict with the territorial state. Dehn answered this question in the following manner: "The international human rights obligations of a territorial state should be understood to place constraints [on] the use of force by an attacking state, particularly when the territorial state consents to the attacks but is not party to an armed conflict with the relevant non-state actor."⁴³ Heyns has also added his voice to those who recognize that human rights law may have limiting factors on a geographically unconstrained application of LOAC.⁴⁴

⁴⁰ Schmitt, *supra* note 9, at 19. See generally Michael N. Schmitt, *Guest Post: A Step in the Wrong Direction: The EU Parliament's Drone Resolution*, JUST SECURITY (Mar. 7, 2014), <http://justsecurity.org/7926/step-wrong-direction-eu-parliaments-drone-resolution-schmitt/>.

⁴¹ See generally Sean D. Murphy, *The International Legality of US Military Cross-Border Operations from Afghanistan into Pakistan*, 85 INT'L L. STUD. 109 (2009).

⁴² Heyns, *supra* note 3, ¶ 24; see also Resolution on the Use of Armed Drones, EUR. PARL. DOC. RSP 2567, ¶ E-F (Feb. 27, 2014) ("E. whereas drone strikes outside a declared war by a state on the territory of another state without the consent of the latter or of the UN Security Council constitute a violation of international law and of the territorial integrity and sovereignty of that country; F. whereas international human rights law prohibits arbitrary killings in any situation; whereas international humanitarian law does not permit the targeted killing of persons who are located in non-belligerent states.").

⁴³ John C. Dehn, *Targeted Killing, Human Rights and Ungoverned Spaces: Considering Territorial States Human Rights Obligations*, 54 HARV. INT'L L.J. 84, 90 (2012). For a similar discussion on the relationship between human rights obligations and consent, see generally Rijing Ernie Gao, *Between a Rock and a Hard Place: Tensions Between the U.S.-ROK Status of Forces Agreement and the Duty to Ensure Individual Rights Under the ICCPR*, 33 FORDHAM INT'L L.J. 585, 590 (2009).

⁴⁴ Heyns, *supra* note 3, ¶ 38.

These conclusions, in the author's view, give proper deference to the territorial state's human rights obligations when it is not a party to the same armed conflict as the attacking state. The conclusions are also in keeping with the legal principle that one may not transfer more legal rights than one has.⁴⁵ Under this principle a territorial state (Franconia) cannot permit the attacking state (Arcadia) to target an individual whom the territorial state is not in an armed conflict with. Whereas Arcadia may claim that it can rely on LOAC rules because it is in an armed conflict with its target, Franconia cannot make a similar claim because it is in no such armed conflict with that same target. Franconia does not have the legal authority to permit Arcadia to conduct LOAC targeting operations on its territory because Franconia has no LOAC rights to "give away."

In assessing the relationship between the attacking state's claim to LOAC targeting privileges and the territorial state's obligations under human rights law, it is also important to recall that we are being presented with a competition between those things that a state claims it has the *authority* to do, and those things that a state is *required* to do. LOAC grants a state the permission to target its enemies, but it leaves it up to the state to choose whether it wants to do so or not. To put it bluntly, LOAC does not require a state at war to kill. It merely allows it to do so. Laurie Blank points out, "[m]ilitary necessity is . . . a principle of authority: the authority to use force to accomplish strategic and national security goals."⁴⁶ This is in contrast to human rights law, which requires the state to respect the prohibition on the arbitrary deprivation of life. This includes the negative obligation not to carry out an arbitrary deprivation of life and the positive obligation to prevent an arbitrary deprivation of life. In determining the relationship between *privileges* and *obligations*, it would seem logical that it is the obligations that take priority, however unfortunate that may be for the attacking state.⁴⁷

B. *Issues of Normative Conflict*

All this being said, is not uncommon for a single state to enter into competing legal agreements. In the case before us, these competing legal

⁴⁵ See *supra* note 15 and accompanying text.

⁴⁶ Laurie R. Blank, *Debates and Dichotomies: Exploring the Presumptions Underlying Contentions About the Geography of Armed Conflict*, 16 Y.B. INT'L HUMANITARIAN L. 297, 305 (2013).

⁴⁷ For a discussion on how this issue is resolved in a single-state scenario, see Marko Milanović, *Norm Conflict in International Law: Whither Human Rights?*, 20 DUKE J. COMP. & INT'L L. 69, 72 (2009). See also Wilfred Jenks, *The Conflict of Law-Making Treaties*, 30 BRIT. Y.B. INT'L L. 401, 451 (1953).

agreements (the territorial state's human rights treaty and its subsequent bilateral agreement with the attacking state) give rise to an apparent norm conflict. Therefore, it is necessary to consider what international law says about such situations.⁴⁸

As noted above, states cannot enter into agreements that violate peremptory norms, which would include such human rights violations as torture and slavery. Additionally, Article 41 of the Vienna Convention on the Law of Treaties (VCLT), which addresses agreements that states can make to modify multilateral treaties between certain but not all parties, does not pertain to the modification of "a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole."⁴⁹ Certainly, the protections afforded to the non-derogable right to life in international and regional human rights treaties would appear to be a major component of the object and purpose of regional and international human rights treaties.⁵⁰ Therefore, a state party to the ICCPR could not opt out of its Article 6 obligations in order to enter into an agreement that allows a foreign state to kill someone on its territory.

Human rights obligations are afforded special protection in other ways. Agreements with a humanitarian character receive special protections under Article 60 of the VCLT that guard them from being terminated by a bilateral agreement that is not of a humanitarian character.⁵¹ The Human Rights Committee also has found situations where the ICCPR prevails when a state

⁴⁸ This topic has received significant scholarly and judicial attention. *See, e.g.*, 1 THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY 774–75 (Olivier Corten & Pierre Klein eds., 2011); Isabel Feichtner, *The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests*, 20 EUR. J. INT'L L. 615, 618 (2009); Jenks, *supra* note 47, at 451–52; Ralf Michaels & Joost Pauwelyn, *Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law*, 22 DUKE J. COMP. & INT'L L. 349, 351–52 (2012); Milanović, *supra* note 47.

⁴⁹ Vienna Convention, *supra* note 13, art. 41.

⁵⁰ *See, e.g.*, Human Rights Committee, General Comment 24, Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6, ¶ 10 (1994) (explaining that a reservation to the prohibition on the right to life would offend against the object and purpose of the Covenant both because of its non-derogable status and its status as a peremptory norm).

⁵¹ Alexander Orakhelashvili, *Article 30 (1969)*, in 1 THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY 793 (Olivier Corten & Pierre Klein eds., 2011 ed.). *See also* Thomas Giegerich, *Article 60. Termination or Suspension of the Operation of a Treaty as a Consequence of its Breach*, in THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY 1045–47 (Oliver Dörr & Kirsten Schmalenbach eds., 2012 ed.).

finds itself in a situation of conflicting norms.⁵² The ECtHR has taken a similar approach when the issue has arisen with respect to extradition agreements between states⁵³ and state agreements with international organizations.⁵⁴ A consequence—indeed the purpose—of the Court’s rulings on this issue was to ensure that states did not evade their ECHR responsibilities by allowing another entity do what the consenting state itself was prohibited from doing.⁵⁵

What can be concluded from the above is that public international law may not resolve in its entirety the problem of conflicting international norms, but there appears to be a strong resistance, reflected through the content of the VCLT and judicial practice, that states that enter into agreements that conflict with their human rights treaty obligations, be it through their own actions or through the powers they bestow upon others, can be found to be in breach of those human rights obligations. If this is the case, then a bilateral agreement that allows the attacking state to carry out LOAC targeting would not invalidate the territorial state’s human rights obligations, nor would priority be given to the bilateral agreement. Instead, the territorial state’s consent to the LOAC operation would be a violation of its human rights obligations if the territorial state were not in an armed conflict with the targeted individual. It is therefore hard to imagine how a global NIAC can be made permissible under international law if the territorial state’s consent is necessarily a breach of its obligations under international human rights law.

C. *Legally Permissible Alternatives*

This Essay, while concluding that a consent-based global NIAC is made impermissible under international law by the territorial state’s human rights obligations, does not seek to challenge other rules under international law that

⁵² *Kindler v. Canada*, CCPR/C/48/D/470/1991, View Concerning Communication No. 470/1991, ¶¶ 13.1–2 (Human Rights Comm. Nov. 11, 1993).

⁵³ *See generally* *Soering v. United Kingdom*, Eur. Ct. H.R. (1989).

⁵⁴ *See generally* *Matthews v. United Kingdom*, Eur. Ct. H.R. (1999). *Al-Saadoon and Mufdhi v. United Kingdom*, Eur. Ct. H.R., ¶ 128 (2010) (“[T]he obligation under Article 3 of the Convention not to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture or inhuman or degrading treatment or punishment was held to override the United Kingdom’s obligations under the Extradition Treaty it had concluded with the United States in 1972.”).

⁵⁵ *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, Eur. Ct. H.R., ¶ 154 (2005). Antonios Tzanakopoulos noted that this type of argumentation “could be seen as an implementation of the maxim *nemo plus juris transferre potest quam ipse habet*. One may not circumvent limitations on the exercise of power by conferring the power to someone else.” Antonios Tzanakopoulos, *Kadi and the Solange Argument in International Law*, EJIL: TALK! BLOG (Jan. 15, 2013), <http://www.ejiltalk.org/kadi-and-the-solange-argument-in-international-law-2/>.

permit a state to defend itself from a non-state group acting abroad. It is quite possible, in fact, that many of the actions that a state may wish to undertake under the banner of a global NIAC could be taken through other legally permissible use-of-force frameworks.

The distinction between using a legally permissible framework or a legally impermissible framework is critically important even if the material difference is negligible. This is because the concept of a global NIAC stands for something far greater than the consequences of any single lethal attack or group of lethal attacks that a state may wish to carry out. A global NIAC, if it were to be legally permissible, would permit a state to engage in a never-ending war in which human rights law would be sidelined and the more permissible LOAC targeting rules would be routinely applied without geographic constraint. What comes with this is a legal framework that dramatically expands a state's use of force beyond what international law had envisaged to date. This is most acutely seen by the global NIAC's assertion that LOAC rules can apply nearly everywhere, despite their generally intended use for scenarios where a state is under such threat, that the normal machinery of law enforcement and due process guarantees is not enough to defeat a well-organized enemy that has the resources and capabilities to jeopardize the security of the state.

To better illustrate alternatives to a global NIAC, below are several legal avenues permissible under international law that states may use to defend themselves from violent non-state groups:

- *Territorial State Action.* The attacking state, instead of carrying out an operation, may ask the territorial state to take action. This has to be done within the confines of the law, and might result in, *inter alia*, the territorial state detaining, arresting, prosecuting, or extraditing the targeted individual. In exceptional circumstances, the use of force, including lethal force, may result lawfully when done proportionately and out of necessity, as those terms are defined under human rights law. It is not beyond the realm of possibility that situations could arise where the territorial state could derogate from its human rights treaty obligations, thereby allowing it to carry out a more "robust" law enforcement operation. But such derogation can be made only in so far as the

derogation is within the bounds of what is permissible under relevant international law.⁵⁶

- *Consent-Based Armed Conflict.* In instances where the territorial state is engaged in a NIAC with the same individual(s) who the foreign state wishes to target, the territorial state may request the foreign state to join its armed conflict. The territorial state may also accept offers of a foreign state's armed support to the armed conflict. Under these conditions, the foreign state may find itself becoming a party to the territorial state's armed conflict and, implicitly, be permitted to rely on LOAC targeting rules.
- *Inherent Right to Self-Defense.* Some have argued that a state that is the object of an armed attack by a non-state group may claim an inherent right to self-defense. This right would exist regardless of the territorial state's consent. Important to the invocation of self-defense, but not discussed in this Essay, is both a consideration of what constitutes an "armed attack" and what amount and type of force is permitted when a claim of self-defense is made.⁵⁷
- *U.N. Security Council Authorization.* An attacking state may seek and obtain Security Council authorization to respond with force to an armed attack by a non-state group.⁵⁸
- *"Law Enforcement" Consent.* A territorial state may allow another state to use force on its territory provided that the consent only permits the attacking state to operate within the confines of the law, in particular, international human rights law. To do this, the consent agreement must, amongst a myriad of issues, recognize that there is a prioritization of capture over kill and, therefore, the consent agreement would necessarily have to include a detailed detention scheme. It is not beyond the realm of possibility that situations could arise where the territorial state could derogate from its human rights treaty

⁵⁶ See generally *A. and Others v. United Kingdom*, Eur. Ct. H.R., ¶¶ 173–90 (2009); Human Rights Committee, General Comment 29, States of Emergency (Article 4), U.N. Doc CCPR/C/21/Rev.1/Add.11, ¶ 1 (2001).

⁵⁷ The author recognizes that there is debate over whether a state can invoke a right to self-defense under Article 51 in response to an attack by a non-state group. The U.N. Security Council seems to have determined that it can, having passed resolutions that recognize the right to self-defense in the context of non-state terrorist attacks. See S.C. Res. 1368, pmbl (Sept. 12, 2001) ("Recognizing the inherent right of individual or collective self-defence in accordance with the Charter"). See also S.C. Res. 1373, pmbl (Sept. 28, 2001) ("Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001)"). For further discussion, see John Cerone, *Misplaced Reliance on the "Law of War,"* 14 NEW ENG. J. INT'L & COMP. L. 57, 59–60 (2007).

⁵⁸ DINSTEIN, *supra* note 3, at 308.

obligations, thereby allowing the territorial state to permit the attacking state to conduct a more “robust” law enforcement operation. But such derogations can be made only in so far as the derogation is within the bounds of what is permissible under relevant international law.⁵⁹

- *Emergence of Armed Conflict.* It is conceivable that any of the scenarios above could develop into a NIAC where the full breadth of applicable LOAC comes into force (alongside applicable international human rights law). For this to occur the threshold for a NIAC would have to be reached and LOAC’s permissive targeting rules would then apply between the relevant parties and individuals.

CONCLUSION

This Essay analyzes the public international law of interstate use of force, human rights law, and LOAC to demonstrate that the concept of a global NIAC cannot exist without there being a violation of international law. Notably, the violation that this Essay focuses on is that of the territorial state rather than the attacking state. As demonstrated, human rights law creates a legal barrier that prevents LOAC from jumping from one state to another, which is the defining characteristic of a global NIAC. This does not mean, as this Essay explains, that states cannot respond to attacks and threats from non-state groups while complying with international law. It means that advocates of a global NIAC must use other sources of international law to justify the extraterritorial use of force that they think a global NIAC makes legally possible.

Whether states will take such action to render the concept of a global NIAC extinct is a different matter. It would require nothing less than the territorial state respecting its human rights obligations and asserting its sovereignty within the extremely politicized and highly insecure sphere of terrorism, counterterrorism, and armed conflict. This is a particularly tall order for a territorial state when the request comes from an attacking state that has considerable military, political, and economic resources to provide or withhold. To ensure the territorial state complies with international law will require a sustained focus and intensified discussions on the legal obligations of the territorial state and will have to include holding the territorial state accountable for its breach of international law. It is equally important that

⁵⁹ See generally *supra* note 56 and accompanying text.

territorial states and attacking states utilize and strengthen the various lawful means outlined in this Essay to address non-state actors. Not to do so threatens to make the global NIAC the default framework that states use to address the real (and sometimes not so real) threats that non-state actors pose.